



International Covenant on Civil and Political Rights

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Human Rights Committee

Decision adopted by the Committee under the Optional Protocol, concerning communication No. 2744/2016**, ***

<i>Communication submitted by:</i>	B.A.E.W. and E.M.W. (represented by counsels, Shane H. Brady and Petr Muzny)
<i>Alleged victims:</i>	The authors
<i>State party:</i>	Sweden
<i>Date of communication:</i>	26 February 2016 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 2 March 2016 (not issued in document form)
<i>Date of adoption of decision:</i>	23 July 2020
<i>Subject matter:</i>	Discrimination on the ground of religion; fair hearing; oral hearing; freedom to manifest one's religion
<i>Procedural issues:</i>	Same matter not having been and not being examined under another procedure of international investigation or settlement; non-exhaustion of domestic remedies; level of substantiation of claims
<i>Substantive issues:</i>	Discrimination; freedom of religion; fair trial rights
<i>Articles of the Covenant:</i>	14, 18 and 26
<i>Articles of the Optional Protocol:</i>	2, 3 and 5 (2) (a) and (b)

1.1 The authors are B.A.E.W. and E.M.W., nationals of Sweden born in 1933 and 1934, respectively. They claim that the State party has violated their rights under articles 14, 18 and 26 of the Covenant. The Optional Protocol entered into force for the State party on 6 December 1971. The authors are represented by counsel.

* Reissued for technical reasons on 7 December 2020.

** Adopted by the Committee at its 129th session (29 June–24 July 2020).

*** The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Yadh Ben Achour, Arif Bulkan, Ahmed Amin Fathalla, Furuya Shuichi, Bamariam Koita, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Yuval Shany, Hélène Tigroudja, Andreas Zimmermann and Gentian Zyberi.



1.2 On 16 May 2016, the State party submitted its observations on admissibility and asked the Committee to consider the admissibility of the communication separately from its merits. On 19 June 2017, the Committee, acting through its Special Rapporteur on new communications and interim measures, decided to refuse the State party's request.

Facts as submitted by the authors

2.1 The authors are elderly members of a religious order known as the Worldwide Order of Special Full-Time Servants of Jehovah's Witnesses. In 1970, they began their religious service as members of the Order in a community similar to a monastery, known as "Bethel", located in Sweden. The Order is an unincorporated international association of Jehovah's Witnesses who are consecrated individuals and religious ministers and who have made a commitment to serve in a special, full-time capacity. The members of the Order perform religious duties in Bethel facilities worldwide or they serve in other religious capacities. They vowed to abstain from secular employment. All members of the Order have taken a religious vow of obedience and poverty in which they agreed to receive no compensation for the religious services they provide to the Order.¹ The authors used to perform various tasks at Bethel, including performing administrative work and other tasks such as caring for the small mail room and sorting religious literature.

2.2 In order to help care for their physical needs, the Order provides the authors with a small monthly allowance, room and board. The financial assistance provided by the Order is not based on achievement. Each member of the Order receives the same support for their basic needs even if they are no longer able to perform any religious services.

2.3 In 2012, the authors challenged the tax assessments issued by the Tax Agency for the period 2005–2011, requiring them to pay an income tax on the financial assistance they had received from the Order during the time period in question. On 12 June 2012, the Administrative Court rejected the authors' appeal. Without setting out the reasons, the Court concluded that the facts of the authors' case were almost identical to those of another case decided by the Council for Advance Tax Rulings of Sweden on 10 May 2011. The authors' appeal to the Administrative Court of Appeal was rejected on 12 December 2012. On 25 June 2013, the Supreme Administrative Court refused their request for leave to appeal.

2.4 In 2013, in a separate set of proceedings, the authors challenged their 2012 tax assessment, because the financial allowance provided to them by the Order, in the amount of 86,871 Swedish kronor in respect of B.A.E.W. and 84,334 Swedish kronor in respect of E.M.W.,² was taxed as income at a rate of 32.6 per cent. The authors were not given the opportunity to present their case orally and the Tax Agency dismissed the complaint of B.A.E.W. and E.M.W. on 29 August 2013 and 2 October 2013, respectively. The authors appealed these decisions and requested an oral hearing. Their requests for an oral hearing were dismissed on 31 January 2014. On 24 April 2014, the Administrative Court dismissed their appeals, concluding that the cases were almost identical to the authors' earlier claims challenging the 2005–2011 tax assessments, which were eventually rejected by the authorities. The authors filed for appeal and again requested an oral hearing. On 30 September 2014, the Administrative Court of Appeal refused the authors' requests for an oral hearing and the appeals in their entirety, stating that the cases were principally identical to a separate case (*M.A. v. the Swedish Tax Agency*), for which the Council for Advance Tax Rulings had issued a decision on 10 May 2011.³ On 9 January 2015, the authors' requests for leave to appeal were refused by the Supreme Administrative Court.

¹ In Sweden, the Order is administered by the registered religious organization *Jehovas Vittnen* (Jehovah's Witnesses). Only a tiny fraction of Jehovah's Witnesses are members of the Order. In 2012, out of 22,000 Jehovah's Witnesses, only 75 were members of the Order living at the Bethel.

² Equivalent to approximately \$10,155 and \$9,858 on 17 December 2015.

³ The authors refer to *M.A. v. the Swedish Tax Agency*, decision No. 123-10/D, dated 10 May 2011.

Complaint

3.1 The authors claim that the State party has violated their rights under articles 14, 18 and 26 of the Covenant by obliging them to pay an income tax on their modest monthly allowance provided by the Order.

3.2 Regarding their claims under article 26 of the Covenant, they submit that the State party has long exempted members of other religious orders from paying an income tax on the financial support received from their respective orders. This exemption is based on the fact that members of those orders are not to be considered employees as they do not serve for pecuniary gain. Taking into account the realities of their situation, the domestic authorities should not have presumed their membership with the Order to be based on an employment relationship. The authors claim that, on one side, the State party violated article 26 of the Covenant insofar as it refused to apply to them the same exemption it applies to other religious orders, without providing any justification for the differential treatment. On the other side, the authors claim a violation of article 26 because the State party failed to treat the authors differently from those persons whose situation is significantly different – that is, persons who took up secular employment in the pursuit of pecuniary gain.

3.3 The authors acknowledge that States parties are not obliged to provide particular pecuniary benefits to their citizens; however, once benefits are granted, they must be provided in a non-discriminatory manner. Relying on the dissenting opinion in the case of *M.A. v. the Swedish Tax Agency*, the authors argue that according to the well-established practice of the Tax Agency, which is in line with the relevant provisions of domestic law, any income originating in a community similar to a monastery must be exempt from taxation. As pointed out in the dissenting opinion, the similarities between the authors' Order and other tax-exempted communities are evident. In this regard, the authors reiterate that all who serve at Bethel receive the same allowances, which are not dependent on the nature of the members' assignments, and they continue to receive those allowances even if they cannot carry out their daily tasks anymore.

3.4 In addition, the authors submit that the State party also exempted members of the European Volunteer Service from their tax payment obligation, because the Tax Agency decided that the monthly allowance (115 euros), room and board provided to more than 250 volunteers of the European Volunteer Service, who work full-time for at least one year for a not-for-profit organization in Sweden, are not subject to taxation. The authors submit that for the purposes of this communication, there is no difference between the situation of the volunteers of the European Volunteer Service and their own. Nonetheless, the authors have been treated differently.

3.5 Regarding their claims under article 18 of the Covenant, the authors submit that being labelled as employees who are working for pecuniary gain is deeply offensive to their religious beliefs. It denigrates the lifelong commitment they made to forego pecuniary gain and to live their lives in the service of their God, Jehovah. Such an interference was neither prescribed by law nor necessary in a democratic society. In this respect, it is argued that in order to satisfy the "prescribed by law" criterion, the law must, among other things, be formulated with sufficient precision as to enable citizens to regulate their conduct and to foresee, to a degree that is reasonable in the circumstances, the consequences that a given action may entail.⁴ Chapter 10, section 1 and chapter 11, section 1 of the Income Tax Act, however, do not meet this criterion as they leave the door open for conflicting interpretations as demonstrated by the dissenting opinion in the case of *M.A. v. the Swedish Tax Agency*. The authors further submit that an international consensus concerning the non-employment nature of the relationship between the members and the Order already appears to exist.⁵ In

⁴ The authors make reference to several judgments of the European Court of Human Rights. See, inter alia, *Association Les Témoins de Jéhovah v. France* (application No. 8916/05), judgment of 30 June 2011, para. 66 (in French); *Maestri v. Italy* (application No. 39748/98), judgment of 17 February 2004, para. 30.

⁵ The authors indicate that the European Court of Human Rights concluded that Jehovah's Witnesses who had carried out religious service at the Bethel community centre were not employees of the centre but unpaid volunteers and that they did not work there for material gain (application No. 8916/05, judgment of 30 June 2011).

addition, the imposed tax burden is disproportionate and it has a detrimental effect on the manifestation of the authors' religious beliefs in the light of the fact that members of other religious orders are exempt from tax payment on the financial assistance provided to them.

3.6 Relying on article 14 of the Covenant, the authors recall that the right to a fair hearing encompasses the right to a reasoned decision. Nevertheless, the Administrative Court of Appeal summarily rejected their appeal and failed to address any of their arguments, including their discrimination claim. The case of *M.A. v. the Swedish Tax Agency*, which the Administrative Court seemed to rely on, should not have been applied to their case. The applicant in the referenced case was said to have engaged in some kind of outreach work. The authors' situation, however, differs substantially from that of the applicant owing to their advanced age. On 9 January 2015, the Supreme Administrative Court refused to grant leave to appeal without setting out the reasons for its decision, even though the failure of the lower courts to reason their decisions and address the authors' claims was undoubtedly a "gross omission or gross mistake" that should have benefited from a review by the Supreme Administrative Court.

3.7 Lastly, relying on the Committee's jurisprudence, the authors recall that the principle of the equality of arms requires courts to grant motions aimed at the production of evidence.⁶ Their repeated requests for an oral hearing were nonetheless rejected.

State party's observations on admissibility

4.1 In a note verbale dated 16 May 2016, the State party requested the Committee to declare the communication inadmissible under article 5 (2) (a) of the Covenant, since the same matter had been examined under another procedure of international investigation or settlement. In this respect, the State party underlines that it has made a declaration upon the ratification of the Optional Protocol according to which the Committee shall not consider any communication from an individual unless it has ascertained that the same matter is not being examined or has not been examined under another procedure of international investigation or settlement.

4.2 As regards the facts of the case, the State party underlines that on 20 December 2013 the authors were 2 of the 115 members of the Order who jointly filed an application with the European Court of Human Rights, challenging their tax assessments for the period 2004–2011. On 16 September 2014, the European Court, sitting as a Committee of three judges, declared the application inadmissible as the application did not disclose any appearance of a violation of the rights and freedoms set out in the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) or the Protocols thereto.

4.3 On 6 July 2015, the authors lodged another application with the European Court. On 1 October 2015, they were informed that the Court, sitting in a single-judge formation, found that the admissibility criteria set out in articles 34 and 35 of the European Convention on Human Rights had not been met.

4.4 The State party submits that in their communication to the Committee, the authors have alleged that their rights under articles 14, 18 and 26 of the Covenant were violated. In their 2015 application to the European Court of Human Rights, the authors invoked articles 6, 9 and 14 of the European Convention on Human Rights. The State party notes that the articles on which the authors are relying in their present communication coincide with the claims they brought before the European Court under the respective articles of the Convention. Furthermore, the State party observes that the authors do not contest that their 2015 application to the European Court and the present communication to the Committee concern the same facts and issues. Accordingly, in the State party's view, the present communication relates to the same matter as the 2015 application previously lodged by the authors with the European Court, within the meaning of article 5 (2) (a) of the Optional Protocol.

⁶ *Jansen-Gielen v. The Netherlands* (CCPR/C/71/D/846/1999), para. 8.2.

4.5 Regarding the issue of whether the European Court of Human Rights has examined the 2015 application for the purposes of article 5 (2) (a) of the Optional Protocol, the State party submits that it contests the authors' claim that their 2015 application has not been examined by the European Court. The State party recalls that the Committee has already held in earlier cases that, where the European Court has based a decision of inadmissibility not solely on procedural grounds, but on reasons that involve even a limited consideration of the merits of the case, the same matter has been examined within the meaning of the respective reservations to article 5 (2) (a) of the Optional Protocol.⁷

4.6 The State party argues that according to rule 47 of the Rules of the European Court of Human Rights, the submission of an incomplete application may result in that application not being examined by the European Court except in limited instances. It is apparent that, had the authors indeed failed to fulfil any of the formal requirements set out in rule 47, their 2015 application might not have been registered or considered by the European Court at all. It follows that their application must have complied with the basic formal requirements mentioned therein.

4.7 Furthermore, there is nothing in the authors' communication to the Committee indicating that their 2015 application to the European Court did not fulfil the criteria in article 34 of the European Convention on Human Rights. Nor did they substantiate that it was the inadmissibility grounds set out in article 35 (1) of the Convention that had been applied by the European Court in their case. On the contrary, it appears that, in their 2015 application to the European Court, the authors properly demonstrated that they had exhausted domestic remedies and that they had complied with the six-month time limit. Furthermore, the State party notes that the 2015 application was not anonymous.

4.8 Regarding the inadmissibility ground set out in article 35 (2) (b) of the European Convention on Human Rights, the State party underlines that even though there was an earlier application submitted by the authors to the European Court of Human Rights, the 2013 application and the 2015 application relate to different domestic tax assessments and judicial proceedings. Therefore, there is nothing before the Committee to conclude that the European Court declared the authors' 2015 application inadmissible for having examined the same matter in their 2013 application for the purposes of article 35 (2) (b) of the Convention. Should the Committee come to a different conclusion, the authors submit that their 2013 application should be considered to relate not only to the same matter as their 2015 application but also as their present application to the Committee. In such a case, given the wording of the decision of the European Court concerning the 2013 application, explicitly stating that the application did not disclose any appearance of a violation of the rights and freedoms set out in the Convention and the Protocols thereto, the present communication should also be declared inadmissible under article 5 (2) (a) of the Optional Protocol.

4.9 Having excluded the application of the majority of inadmissibility grounds that could have been applied in the authors' case, the State party further argues that the remaining inadmissibility grounds set out in articles 35 (3) (a) and (b) of the European Convention on Human Rights must involve to a certain degree an examination of the merits of the case. It is therefore evident that there has been an examination of the merits of the authors' case by another international investigation or settlement.

Authors' comments on the State party's observations on admissibility

5.1 On 11 August 2016, the authors submitted their comments on the State party's observations on admissibility. The authors agree with the State party's conclusion that their 2013 application to the European Court of Human Rights differs from their 2015 application and from their present communication to the Committee as regards the facts of the case and the claims raised therein. They further agree that the present communication to the Committee and their 2015 application to the European Court raise the same legal and factual issues and can be considered to be the same matter for the purposes of article 5 (2) (a) of the Optional Protocol. On the other hand, the authors dispute that there has been an examination

⁷ The authors refer to the cases of *Puertas v. Spain* (CCPR/C/107/D/1945/2010), para. 7.3; and *Mahabir v. Austria* (CCPR/C/82/D/944/2000), para. 8.3.

by the European Court of the merits of their 2015 application. In this regard, the authors submit that even in cases where the European Court did not find any appearance of violation of the rights and freedoms guaranteed by the European Convention on Human Rights and the Protocols thereto, the Committee concluded that the limited reasoning in the succinct terms of the Court's letter did not allow the Committee to assume that the examination had included sufficient consideration of the merits.⁸

5.2 Regarding the authors' 2015 application, the authors note that it was decided in a single-judge formation and the decision unequivocally states that the European Court of Human Rights found that the admissibility criteria set out in articles 34 and 35 of the European Convention on Human Rights had not been met. This case is therefore to be distinguished from other cases where the Committee has found that the inadmissibility decision of the European Court precluded it from examining the complaint. The authors note that the State party's arguments are nothing but mere speculation about what could have been the exact ground for the European Court's inadmissibility decision. With regard also to the threshold established by the Committee in *Puertas v. Spain* in terms of what constitutes a sufficient consideration of the case for the purposes of article 5 (2) (a) of the Optional Protocol, the authors conclude that there is nothing before the Committee to conclude that the European Court addressed the merits of their 2015 application and invite the Committee to declare their communication admissible.

State party's additional observations

6.1 In a note verbale dated 22 February 2018, the State party partially reiterated and partially supplemented its arguments relating to the admissibility of the complaint, and it submitted its observations on the merits.

6.2 The State party describes the relevant domestic laws⁹ and procedures and provides information regarding the applicable jurisprudence of the domestic authorities. It submits that for the purposes of the challenged tax payment obligation, the term "employment" (*tjänst*)¹⁰ means a position, assignment or other income-generating activity of a permanent or temporary nature. Wages, fees, remuneration of expenses, pensions, benefits and all other income received from employment are to be declared as income, unless otherwise provided for in the domestic legislation. Gifts, education grants or grants for purposes other than education are tax-exempt as long as they do not constitute remuneration for work and are not paid periodically.

6.3 The State party underlines that there is no provision in Swedish law guaranteeing a general tax exemption for members of certain religious communities. It adds that there may be some older decisions of lower courts in which it was ruled that remuneration received by members of certain religious communities was not subject to taxation. Nevertheless, there is only one recent decision dealing with the matter that has been delivered by the Supreme Administrative Court, which now serves as precedent. This decision upheld the advance ruling of the Council for Advance Tax Rulings establishing that the applicant, who was a member of the Order and worked in the Bethel facility, should declare his allowance (free housing, meals and payments) as income from employment.¹¹

6.4 In this regard, the State party explains that the Council for Advance Tax Rulings functions similarly to a court. The Council issues binding advance rulings on tax matters, should that be important for a particular case or for the uniform interpretation or application of the law. The advance ruling is binding on the Swedish Tax Agency and on the general administrative court, if the person applying for the ruling so requests. However, if an advance

⁸ *Puertas v. Spain* (CCPR/C/107/D/1945/2010), para. 7.3.

⁹ Chapters 8, 10 and 11 of the Income Tax Act of Sweden of 1999, which entered into force on 1 January 2000.

¹⁰ It is noted that the Swedish word *tjänst* is translated as "employment" in English, but that in Swedish it has a broader meaning, which according to the Swedish National Encyclopedia includes "action that is of use to someone else".

¹¹ The decision underlines that if remuneration was provided on the basis of "preaching activity" instead of some kind of work performed within the community's "household", the allowance remained taxable, as it had been under the rules of the old tax system of Sweden.

ruling has been upheld by the Supreme Administrative Court, such a ruling will be binding in the same manner as any other precedent decided by the Supreme Administrative Court, even in the absence of a request to that effect.

6.5 With regard to the procedural rules, it is submitted that procedures in the administrative courts are to be in writing. An oral hearing may take place if it is deemed advantageous for the investigation or promotes the expeditious determination of the case. Furthermore, an oral hearing is to be held in the Administrative Court or the Administrative Court of Appeal if the following conditions are met: the individual bringing the action so requests; the hearing is not unnecessary; and there are no special reasons for not doing so.¹²

6.6 As regards the facts of the case, the State party submits that in 2013, the authors, together with other members of the Order, lodged an application with the Chancellor of Justice in Sweden.¹³ They claimed that their tax assessments for the period 2005–2011 violated articles 6, 9 and 14 of the European Convention on Human Rights and article 1 of Protocol No. 1 to the Convention. On 14 January 2014, the petition was rejected, explicitly ruling that the authors' tax payment obligation did not amount to a violation of the Convention.

6.7 As regards the admissibility of the communication, the State party reiterates its arguments of 16 May 2016. In addition, it argues that the complaint should be deemed inadmissible for lack of sufficient substantiation for the reasons set out in its submission addressing the merits of the case.

6.8 It is further argued that to the extent that the complaint is based on the authors' claim concerning their inability to work due to their physical constraints, the complaint must be declared inadmissible for non-exhaustion of domestic remedies as this claim was not brought before the domestic authorities.

6.9 As regards the authors' claims under article 14 of the Covenant, the State party contends that the authors failed to argue before the domestic courts that they considered the trials to be unfair or to contravene the principle of equality of arms on account of the rejection of their request for an oral hearing. Consequently, this part of the communication should also be declared inadmissible.

6.10 In any event, their claims under article 14 of the Covenant should also be declared inadmissible for being incompatible *ratione materiae* with the provisions of the Covenant. In this respect, the State party argues that tax disputes cannot be considered to relate to a determination of rights and obligations in a suit at law, especially in the present case because the domestic proceedings did not involve a penalty, such as a tax surcharge, or concern the determination of a criminal charge. The concept of a "suit at law" encompasses judicial procedures aimed at determining rights and obligations pertaining to the areas of contract, property and torts in the area of private law, and the equivalent notions in the area of administrative law.¹⁴ Although the English versions of article 14 (1) of the Covenant and article 6 (1) of the European Convention on Human Rights differ somewhat, the French versions similarly stress the civil nature of the rights and obligations in question. Furthermore, the Committee has already held that the wording and scope of article 14 (1) of the Covenant coincides with that of article 6 (1) of the Convention.¹⁵ It is therefore of relevance that according to the case law of the European Court of Human Rights, tax disputes fall outside the scope of article 6 (1) of the Convention.¹⁶

¹² Section 9 of the Administrative Court Procedure Act of Sweden.

¹³ The Chancellor of Justice has the power, as the Government's general legal representative, to receive complaints and claims for damages directed against Sweden. The decision of the Chancellor is binding on the State and may not be appealed. However, in case of a negative decision, the claimant is not prevented from instituting civil proceedings for damages before the ordinary courts.

¹⁴ Human Rights Committee, general comment No. 32 (2007), para. 16.

¹⁵ *Kollar v. Austria* (CCPR/C/78/D/989/2001), para. 8.6; and *Pronina v. France* (CCPR/C/111/D/2390/2014), para. 4.4.

¹⁶ European Court of Human Rights, *Ferrazzini v. Italy* (application No. 44759/98), judgment of 12 July 2001, para. 29.

6.11 As regard the merits of the complaint, the State party contests that the authors have been discriminated against on the ground of their religion in comparison to similarly situated members of other religious orders. It reiterates that there is no legal basis for an exemption from taxation for the member of any religious orders. The decisive issue is whether remuneration is to be regarded as income from employment for the purposes of the relevant provisions of the Income Tax Act. In this regard, the State party does not contest the information provided by the authors that the Swedish Tax Agency stated in a position paper to the Council for Advance Tax Rulings that the Agency maintained a practice that free housing, free meals and pocket money were exempt from taxation when provided to persons living in what could be characterized as a community similar to a monastery. The Tax Agency's position paper was based on three rulings of lower courts, issued in 1957, 1968 and 1986, to which the authors also refer. These rulings, however, date back to a period preceding the tax reform of 1990 and the entry into force of the Income Tax Act on 1 January 2000.

6.12 The State party emphasizes that until the advance ruling of the Council for Advance Tax Rulings, which was upheld by the Supreme Administrative Court in a decision of 30 April 2012, there had not been any authoritative decision interpreting the law applicable to the authors' case. These precedent rulings, however, do not allow for an exemption from taxation levied on allowances provided to persons living in communities similar to monasteries. Apart from those very old cases, the authors failed to demonstrate that there was a more recent decision on the same matter by domestic courts other than that of the Supreme Administrative Court. Accordingly, they failed to show that there were comparable cases in which the exemption had been granted. In this regard, the State party notes that, without further evidence, it cannot accept the authors' assertion that members of the Orders listed in appendix 45 to the communication have been exempt from taxation.

6.13 As regards the criteria that seem to have been vital in the assessment of what qualifies as employment in the precedent decision, the State party highlights the following elements: the applicant's pledge towards the Order, the type and quantity of work performed, the place where the work is carried out and the target group. In carrying out this assessment, it was established that the applicant, through the vow given when he became a member of the Order, had committed himself to be at the Order's disposal to carry out various tasks on a full-time basis and to accept and receive benefits of the kind described. Furthermore, he worked on a full-time basis at the Bethel facility with tasks of a legal or other nature; participated regularly in the activities of the congregation in the city of Örebro, to which he was assigned by the Order; and undertook work that included spreading the religious message of the community to the public. Having examined all these criteria, the Council for Advance Tax Rulings reasonably concluded that the applicant could not be considered to be on an equal footing with those who receive some sort of support within a household and who are therefore exempt from taxation.

6.14 In the authors' cases, the Administrative Court of Appeal established that the circumstances of their cases were largely identical with those of the precedent case. According to the Court, the authors had not, however, explained in what way their work and achievements were different from those addressed in the advance ruling. To the contrary, the authors themselves stated in their appeals that the courts were to examine a situation identical with the one covered by the precedent ruling of the Council for Advance Tax Rulings. The State party stresses that the authors, in their communication to the Committee, failed to demonstrate that these criteria were discriminatory by proving that they had been applied only to members of the Order.

6.15 In addition, the State party notes the authors' claim that they have been discriminated against as compared with volunteers of the European Volunteer Service, whose support is exempt from taxation. In this respect, the State party submits that volunteers of the Service are differently situated than members of the Order.¹⁷ With regard to the substantially different

¹⁷ The European Volunteer Service programme is within the framework of the Youth in Action Programme of the European Union. The objective of the European Volunteer Service programme is to provide young people, for a limited period of time, with non-formal, intercultural and educational experiences that promote their integration and active participation in society, in order to enhance their employability and give them opportunities to show solidarity with others.

situation of this group of persons, the State party submits that there has been no discrimination against the authors.

6.16 With regard to the authors' claim that they have been treated similarly to people working for pecuniary gain even though their situation is different, the State party underlines that pecuniary gain is not a necessary constituent part of the definition of income. As long as this applies to all groups of persons, the Covenant cannot reasonably be interpreted in a way so as to require States parties to exempt income from taxation on account of the lack of the element of pecuniary gain. The question of what constitutes income concerns the application of domestic law, which cannot be reviewed by the Committee unless it has been clearly arbitrary or amounted to a manifest error or denial of justice. As this is clearly not the case, the State party is of the position that there has been no violation of article 26 of the Covenant.

6.17 As concerns the authors' claims under article 18 of the Covenant, the State party contests that the financial burden imposed on the authors may impair their right to manifest their religion. The State party recalls the jurisprudence of the European Court of Human Rights establishing that article 9 of the European Convention on Human Rights does not guarantee a different tax status for churches or their members compared with other taxpayers. Furthermore, as there is no consensus at the European level concerning tax matters in the context of churches or religious communities, and this issue is closely linked to the history and traditions of European Union member States, they should therefore benefit from a particularly wide margin of appreciation. The only exception would be when a fiscal measure has had the effect of cutting off a religious association's vital resources and therefore has threatened the association's durability.¹⁸

6.18 In the present case, the authors have not demonstrated that the payment of income tax has had any effect on their right to manifest their religion. Should the Committee come to a different conclusion, the State party maintains that the interference was prescribed by law and was necessary to protect public safety, order, health and the fundamental rights and freedoms of others. In this regard, the State party reiterates that the relevant laws are neutral and must be considered to have been formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly, especially considering that the definition of "employment" does not imply that the allowance in question should be exempt from taxation. Furthermore, the tax system exists to benefit the population as a whole, as it provides funds for the health-care system, the law enforcement agencies and the judicial system. Given the relatively small amount of tax levied on the authors, the interference must also be regarded as proportionate.

6.19 As regards the authors' claim under article 14 (1) of the Covenant, the State party recalls that the cited article should not be interpreted as requiring States parties to address in detail all arguments advanced by a party, and the need to ensure the effective operation of the judiciary may allow courts, especially the highest courts, to merely endorse the reasons set out in the lower court's decision in dismissing an appeal in the interest of timely case management.¹⁹

6.20 In the present case, the State party is of the view that the challenged decisions provided sufficient reasoning. The decisions recount the facts of the case as well as the authors' claims and the reasons for the conclusion reached. By referring to the decision of the Council for Advance Tax Rulings that was upheld by the Supreme Administrative Court, the Administrative Court of Appeal made it clear to the authors why their allowance had been subject to taxation. The authors' claims were thoroughly examined and comprehensively elucidated in the referenced decision of the Council for Advance Tax Rulings, and that decision was accessible to the authors, who were represented by counsel. The authors, however, as pointed out in the decision, failed to describe in what way their case had differed from the one examined by the Council for Advance Tax Rulings. The Administrative Court of Appeal also addressed the authors' claims concerning the alleged violations of the European Convention on Human Rights by referring to and concurring with the decision of

¹⁸ European Court of Human Rights, *Association Les Témoins de Jéhovah v. France* (application No. 8916/05), para. 53 (in French).

¹⁹ *Verlinden v. Netherlands* (CCPR/C/88/D/1187/2003), para. 7.7.

the Chancellor of Justice delivered earlier in their case, which provided an extended reasoning. Similarly, the Administrative Court, by referring to an earlier judgment of the Administrative Court of Appeal, also based its decision on that of the Council for Advance Tax Rulings.

6.21 Regarding the authors' claim that they were not afforded an oral hearing, the State party recalls that it is in principle beyond the competence of the Committee to determine whether domestic tribunals properly evaluate the relevance of newly requested evidence. Furthermore, both parties submitted their evidence in writing. The authors did not request to present oral evidence in their appeal to the Administrative Court. They first mentioned this in a written statement to the Administrative Court of Appeal, and they first explained the reasons for such a request in their motion to the Supreme Administrative Court. However, granting their motion was dependent on the Supreme Administrative Court's granting leave to appeal. In any case, the State party maintains that all information could be equally well presented in writing. In addition, the issue brought before the domestic courts was not a matter of fact but of law. In its decision denying the authors' request for an oral hearing, the Administrative Court of Appeal explained that there was no disagreement between the parties concerning the character of the existence at the Bethel establishment or what membership of the Order involves, but instead concerned whether the compensation was taxable or not. Since this issue is of a legal character, the Administrative Court of Appeal rightly concluded that an oral hearing could not have contributed to the determination of the case. In this respect, the State party underlines that the shared position of the domestic courts has not been arbitrary, nor does it amount to a manifest error or denial of justice.

6.22 In the light of the foregoing, the State party concludes that, should the authors' claims be considered admissible, they do not reveal a violation of their rights under articles 14, 18 and 26 of the Covenant.

Further submissions

From the authors

7.1 On 19 June 2018, the authors replied to the State party's observations. The authors first reflect on the assertions of the State party concerning the applicable laws and put an emphasis on the provision establishing that for an income to be considered taxable as income from employment, it must be remuneration for performance. They further highlight that it is not disputed by the State party that none of the indicators of an employee-employer relationship are present in their case – i.e., there is no expectation of pecuniary gain, no payment based on achievement and no right to demand remuneration of any sort. Bearing in mind the State party's own statement that there could be cases sufficiently similar to those warranting an exemption from taxation according to common sense – e.g., support within a household – it should be evident that it is exactly the authors' case that should fall within this category on account of their advanced age and the restraints that come with it.

7.2 In response to the newly raised admissibility arguments in the State party's observations, the authors submit that their advanced age was well-known to the State party, and it should be clear that owing to this circumstance, they could no longer engage in any employment activity. They repeatedly requested an oral hearing to provide details about their circumstances, but they were unsuccessful. Therefore, any alleged lack in the evidentiary record is attributable to the State party's failure to guarantee the authors' right to an oral hearing. As a result, the authors contest the State party's argument that they have not brought their claims regarding their advanced age before the domestic authorities.

7.3 With regard to the State party's claim that the authors have failed to complain about the violation of their fair trial rights at the domestic level, the authors insist that they submitted several requests for an oral hearing and consistently argued that the way in which the proceedings were conducted had denied them of their right to a fair judicial hearing.

7.4 They further refute that their complaint under article 14 (1) is incompatible *ratione materiae* with the provisions of the Covenant. In response to the State party's arguments, they submit that the European Court of Human Rights has further developed its jurisprudence since *Ferrazzini v. Italy*, and ruled that a tax dispute may be admissible under the civil head

of article 6 of the European Convention on Human Rights if it can be characterized as one relating to social benefits.²⁰ More importantly, article 14 (1) of the Covenant is worded differently from article 6 of the Convention. In relation to the first sentence of the former, which reads “All persons shall be equal before the courts and tribunals”, the Committee explained that the guarantee not only applies to courts and tribunals addressed in the second sentence of article 14 (1), but must also be respected whenever domestic law entrusts a judicial body with a judicial task.²¹ Since the State party assigned administrative courts to deal with tax-related matters, this guarantee remains applicable in the authors’ case. Furthermore, even though they acknowledge that the right to access a court or tribunal as provided for by the second sentence of article 14 (1) does not apply where domestic law does not grant any entitlement to the person concerned,²² their case concerns the determination of their entitlement to an existing tax exemption that is granted by the State party to members of other religious orders. The State party’s objections to admissibility should therefore be rejected.

7.5 Regarding their claims under article 26 of the Covenant, the authors submit that they did submit court decisions supporting their claim that, for many years, the Tax Agency exempted members of other religious orders from taxation on the financial support they receive from their respective orders. It lies with the State party to prove that there has been a change in that practice after 1990. The evidence they provided to the domestic courts and to the Committee in appendix 45, which is based on publicly available tax information, is certainly proof to the contrary.

7.6 The authors reiterate that the domestic courts failed to provide justification for the differential treatment. The fact that the courts merely made reference to another case, without explaining why they considered the two cases to be identical, does not live up to the guarantees enshrined in article 26 of the Covenant. This comparison is especially problematic because the domestic courts seem to have reached their conclusion on the basis of their assessment that the applicant in the referenced case had engaged in some outreach work. However, this apparently decisive factor was never argued to be present in the authors’ case.

7.7 The authors also contest the State party’s observations under article 18 of the Covenant. They question the relevance of the cases of the European Court of Human Rights cited by the State party as they seem to concern the adverse effect of an otherwise valid piece of tax legislation. In the present case, however, they are challenging the discriminatory refusal of the application of an existing tax privilege granted to members of other religious orders and to volunteers of the European Volunteer Service. The European Court has already held that the member State’s refusal to provide the authors with a tax privilege, while granting it to members of other religious orders, goes to the freedom to manifest one’s religion.²³

7.8 The authors maintain that the domestic courts’ decisions summarily rejecting their claim and the absence of an oral hearing throughout the domestic proceedings violate their fair trial rights, including their right to equality of arms and a reasoned decision.

From the State party

8. In a note verbale dated 22 February 2019, the State party reiterates that no identifiable profit-making purpose is necessary for an activity to be considered employment, and as a result, the income originating in it remains taxable. The State party further reiterates its arguments concerning non-exhaustion of domestic remedies on account of the authors’ failure to indicate their age and their inability to work throughout the domestic proceedings. In any case, these claims seem to concern the application of domestic law, which falls within the competence of national courts. With regard to the issue of whether the complaint is compatible *ratione materiae* with the provisions of the Covenant, the State party argues that even if one accepts that the first sentence of article 14 (1) covers proceedings of

²⁰ European Court of Human Rights, *Niedzwiecki v. Germany (no. 2)* (application No. 12852/08), judgment of 1 April 2010, paras. 31–32.

²¹ Human Rights Committee, general comment No. 32, para. 24.

²² *Ibid.*, paras. 16–17.

²³ European Court of Human Rights, *Magyar Keresztény Mennonita Egyház and Others v. Hungary* (application No. 70945/11 et al.), judgment of 8 April 2014, paras. 92 and 94.

administrative courts, the claims raised by the authors do not fall within the scope of the protection enshrined therein, which is primarily about equality before courts. As regards the second sentence of article 14 (1), the State party stresses that the domestic proceedings did not concern the authors' entitlement to an existing tax exemption, so these claims remain incompatible *ratione materiae* with the provisions of the Covenant. Concerning the merits of the case, the State party underlines that it is the law and the courts' jurisprudence that should be of relevance when assessing the authors' request to be exempted from taxation. The law and jurisprudence do not, however, imply that an exemption of a general nature exists. The appendices submitted by the authors contain unsupported statements. Even assuming that some religious orders do have members who were exempted from taxation, these may be sporadic cases that are the result of individual assessments based on the objective criteria of the law. The State party further submits that the authors' newly raised claim – that is, that their alleged differential treatment may impair the image of the Order, therefore resulting in the impairment of their right to manifest their religion – does not raise a separate issue under article 18 of the Covenant.

Issues and proceedings before the Committee

Consideration of admissibility

9.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 97 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

9.2 The Committee notes that the authors have submitted two applications to the European Court of Human Rights, which declared them inadmissible in 2013 and 2015. The Committee observes that the authors' 2013 application to the European Court concerned the authors' tax assessment for the period 2004–2011 and the related domestic proceedings. These concerns, however, do not constitute a part of the present examination by the Committee as per the explicit request of the authors. Accordingly, the Committee will limit this part of its consideration to the authors' 2015 application to the European Court. The Committee recalls that the State party entered a reservation to article 5 (2) (a) of the Covenant to preclude the Committee from examining communications that have been previously considered by another international body. On the other hand, however, the Committee recalls its constant jurisprudence that where a complaint to another international instance, such as the European Court of Human Rights, was dismissed on procedural grounds without examination of the merits, it could not be said to have been "examined", so as to exclude the Committee's competence.²⁴

9.3 In the present case, the authors' 2015 application to the European Court of Human Rights was rejected in a single-judge formation on 1 October 2015 as the admissibility criteria set out in articles 34 and 35 of the European Convention on Human Rights were found not to have been met. In this respect, the Committee notes the State party's argument that there is nothing in the authors' communication to the Committee indicating that their 2015 application to the European Court did not fulfil the purely formal criteria set out in articles 34 and 35 (1) and (2) of the Convention. Furthermore, the remaining inadmissibility grounds set out in articles 35 (3) (a) and (b) of the Convention must involve, to a certain degree, an examination of the merits of the case. According to the State party, it is therefore evident that there has been an examination of the merits of the authors' case by another international investigation or settlement. The Committee recalls that when the European Court bases a declaration of inadmissibility not solely on procedural grounds but also on reasons that include a certain consideration of the merits of the case, then the same matter should be deemed to have been "examined" within the meaning of the respective reservations to article 5 (2) (a) of the Optional Protocol. However, in the particular circumstances of this case, the limited reasoning contained in the succinct terms of the Court's letter does not allow the Committee to assume that the examination included sufficient consideration of the merits in accordance with the information provided to the Committee by both the authors and the State

²⁴ *Alzery v. Sweden* (CCPR/C/88/D/1416/2005), para. 8.1.

party. Consequently, the Committee considers that there is no obstacle to examining the present communication under article 5 (2) (a) of the Optional Protocol.²⁵

9.4 The Committee also notes that domestic remedies have been exhausted, as required under article 5 (2) (b) of the Optional Protocol. In this respect, the Committee rejects the State party's objections to the admissibility of the authors' complaint, namely that the authors had failed to raise at the domestic level the issue of their inability to work because of their age, and had also failed to challenge the refusal of their request for an oral hearing as a violation of the principle of equality of arms. The Committee considers that the authors' claims under articles 14 (1), 18 and 26 of the Covenant seem to have been raised at least in substance.

9.5 Furthermore, the Committee notes the authors' claims under article 14 (1) of the Covenant that the decisions of the domestic authorities were not duly reasoned and that, in spite of their repeated requests, they were not allowed to adduce their arguments at an oral hearing. The Committee is mindful of the State party's position that this part of the authors' complaint should be declared inadmissible for being incompatible *ratione materiae* with the provisions of the Covenant.

9.6 The Committee recalls that article 14 of the Covenant is of a particularly complex nature, combining various guarantees with different scopes of application. The first sentence of paragraph 1 sets out a general guarantee of equality before courts and tribunals that applies regardless of the nature of proceedings before such bodies. The right to equality before courts and tribunals, in general terms, guarantees, in addition to the principles mentioned in the second sentence of article 14 (1), those of equal access and equality of arms, and ensures that the parties to the proceedings in question are treated without any discrimination.²⁶

9.7 In addition, with regard to the authors' claims insofar as they have been presented under the second sentence of article 14 (1) of the Covenant, the Committee recalls that the right to a fair and public hearing by a competent, independent and impartial tribunal is guaranteed in cases regarding the determination of criminal charges against individuals or of their rights and obligations in a suit at law. The concept of determination of rights and obligations "in a suit at law" encompasses (a) judicial procedures aimed at determining rights and obligations pertaining to the areas of contract, property and torts in the area of private law, as well as (b) equivalent notions in the area of administrative law such as the termination of employment of civil servants for other than disciplinary reasons, the determination of social security benefits or the pension rights of soldiers, or procedures regarding the use of public land or the taking of private property. In addition, it may (c) cover other procedures which, however, must be assessed on a case-by-case basis in the light of the nature of the right in question.²⁷

9.8 In applying these principles to the present case, the Committee observes the State party's argument that tax disputes cannot be considered to relate to a determination of rights and obligations in a suit at law. In this respect, the Committee does not deem it necessary to determine in the present case whether or not matters relating to the imposition of taxes are rights or obligations in a suit at law as, in any event, the authors' claims are not sufficiently substantiated for the purposes of article 2 of the Optional Protocol. As to the authors' claims about the insufficient reasoning in the domestic decisions, the Committee is mindful of the State party's argument that the domestic decisions recount the facts of the case and the authors' claims, and that they also contain the reasons for the conclusion reached by the authorities by referring to other relevant decisions that had been accessible to the authors. As to the authors' claim that they were not given the opportunity to argue their case orally, the Committee notes the State party's position that both parties could submit their evidence in writing and that the Administrative Court of Appeal concluded that, given the legal nature of the issue before it, an oral hearing could not have contributed to the determination of the case. The Committee further observes that it seems to be common ground that a criminal charge was not an issue, and the Committee does not perceive any criminal connotation in the present

²⁵ *Puertas v. Spain* (CCPR/C/107/D/1945/2010), para. 7.3.

²⁶ Human Rights Committee, general comment No. 32, paras. 7–8 and 13–14.

²⁷ *Ibid.*, para. 16.

case, which could have required stronger guarantees. In the light of these circumstances, the Committee considers that nothing has been brought before it to allow it to conclude that the authors had not been provided the same procedural rights as the opponent party or that similar cases are not dealt with in similar proceedings, or that the domestic proceedings had otherwise infringed their right to equality before the courts. The authors' claims under article 14 (1) are therefore inadmissible under article 2 of the Optional Protocol.

9.9 With regard to article 26 of the Covenant, the Committee notes the authors' argument that even though the State party has long exempted members of other religious orders from paying an income tax on the financial support received from their respective orders, their request for exemption has been denied. They argue that this exemption is based on the fact that members of those orders are not to be considered employees as they do not serve for pecuniary gain. Despite the realities of their situation, especially their advanced age, their membership with the Order had been presumed to be based on an employment relationship.

9.10 On the other hand, the Committee takes note of the State party's observations asserting that there is no provision in Swedish law guaranteeing a general tax exemption status for members of certain religious communities. Apart from a few sporadic cases dating back to an era before the tax reform of 1990 had occurred, there is in fact no jurisprudence that would indicate that members of orders other than that of the authors should be exempt from taxation as a general rule. Although no evidence has been put forward in this regard, the State party acknowledges that there may be a few cases where such an exemption has been granted, but these decisions must have been based on individual assessments in compliance with the objective criteria of the law.

9.11 In the consideration of the present case, the Committee recalls that article 26 prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties with regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory.²⁸ On the other hand, not every differentiation of treatment will constitute discrimination.²⁹

9.12 In the present case, the Committee observes that the impugned law does not prescribe for the exemption of certain individuals from taxation on the basis of their religion. Even though it has already been established that a violation of article 26 may result from the discriminatory effect of a rule or measure that is neutral at face value or without intent to discriminate,³⁰ in the circumstances of the present case, the Committee notes that the relevant laws affect all individuals equally, including members of other religious organizations. In this respect, the Committee observes that the authors are basing their discrimination claim on court cases dating back to 1957, 1968 and 1986, which all long precede the tax reform of 1990 and the entry into force of the Income Tax Act on 1 January 2000 that served as a basis for the domestic proceedings in their case. The Committee further considers that taking into account the specificities of the European Volunteer Service programme, it has not been substantiated that volunteers of the European Volunteer Service are similarly situated to members of the Order for the purposes of its examination under article 26 of the Covenant.

9.13 Furthermore, in the Committee's view, determining whether the situation of those subjected to and exempt from taxation is de facto the same or different basically requires an assessment of the facts, in particular, whether a certain kind of remuneration is to be regarded as income from employment for the purposes of the relevant provisions of the Income Tax Act, which is a matter for the domestic courts.

9.14 At this juncture, the Committee recalls that it is generally for the organs of States parties to the Covenant to review and evaluate facts and evidence, unless it can be established that such evaluation was clearly arbitrary or otherwise amounted to a denial of justice. In such circumstances and in view of the fact that nothing has been brought before it to conclude otherwise, the Committee considers that the authors failed to demonstrate that, as regards

²⁸ Human Rights Committee, general comment No. 18 (1989), para. 12.

²⁹ *Ibid.*, para. 13.

³⁰ *Prince v. South Africa* (CCPR/C/91/D/1474/2006), para. 7.5.

their eligibility to tax exemption under the relevant laws, the evaluation of the domestic authorities was clearly arbitrary or otherwise amounted to a denial of justice in a way constituting differential treatment contrary to article 26 of the Covenant.

9.15 The Committee thus declares this part of the communication inadmissible for lack of substantiation as per article 2 of the Optional Protocol.

9.16 The Committee further notes the authors' claim that their alleged differential treatment could impair the image of the Order, therefore resulting in the impairment of their right to manifest their religion under article 18 of the Covenant. The Committee also notes the authors' claim that the imposed tax burden, irrespective of its discriminatory nature, is disproportionate, and that it has a detrimental effect on the manifestation of their religious beliefs. The Committee notes that the State party rejects these claims primarily because they do not raise a separate issue under article 18 of the Covenant, and because even if there had been an interference, this was prescribed by law, pursued a legitimate aim and was proportionate to the aim pursued.

9.17 In the assessment of these claims, the Committee first recalls its jurisprudence, applicable *mutatis mutandis* to the present case, establishing that the Covenant does not oblige States parties to fund schools that are established on a religious basis. However, if a State party chooses to provide public funding to religious schools, it should make this funding available without discrimination.³¹ Similarly, the Committee considers that the Covenant does not oblige States parties to grant tax exemptions on a religious basis. Therefore, and in the light of the fact that the authors' discrimination claims were found not to have been sufficiently substantiated under article 26 of the Covenant, and further considering that it has not been demonstrated how the authors' tax payment obligation interfered with their right to manifest their religion, the Committee considers that the authors' claims lack sufficient substantiation under article 18 of the Covenant.

9.18 The Committee is further mindful of the authors' claim that labelling them as employees working for pecuniary gain is deeply offensive to their religious beliefs. In that regard, the Committee observes that the authors failed to show how the secular, legal categorization of their allowance that applied to everyone affected them adversely or caused them disadvantage to an extent that impaired their right to manifest their religion.

10. The Committee therefore decides:

- (a) That the communication is inadmissible under articles 2, 3 and 5 (2) (a) of the Optional Protocol;
- (b) That the present decision shall be transmitted to the State party and to the authors.

³¹ *Waldman v. Canada* (CCPR/C/67/D/694/1996), para. 10.6.