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HUMAN RIGHTS COMMITTEE  
Sixty-fifth session  
22 March - 9 April 1999

VIEWS

Communication N° 716/1996

<u>Submitted by:</u>	Dietmar Pauger
<u>Alleged victim:</u>	The author
<u>State party:</u>	Austria
<u>Date of communication:</u>	22 January 1996
<u>Prior decisions:</u>	CCPR/C/60/D/716/1996 (Decision on admissibility, dated 9 July 1997)
<u>Date of adoption of Views:</u>	25 March 1999

On 25 March 1999, the Human Rights Committee adopted its Views, under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 716/1996. The text of the Views is appended to the present document.

[ANNEX]

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\* Made public by decision of the Human Rights Committee.  
Views716



ANNEX

VIEWS OF THE HUMAN RIGHTS COMMITTEE UNDER ARTICLE 5, PARAGRAPH 4,  
OF THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT  
ON CIVIL AND POLITICAL RIGHTS  
- Sixty-fifth session -

concerning

Communication N° 716/1996

Submitted by: Dietmar Pauger  
Victim: The author  
State party: Austria  
Date of communication: 22 January 1996  
Date of decision  
on admissibility: 9 July 1997

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

Meeting on 25 March 1999

Having concluded its consideration of communication No.716/1996 submitted to the Human Rights Committee by Mr. Dietmar Pauger under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

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\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Lord Colville, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski, Mr. Maxwell Yalden, Mr. Abdallah Zakhia.

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Dietmar Pauger, an Austrian citizen and widower of a former school teacher in the Austrian civil service. He claims to be a victim of a violation by Austria of article 26 of the International Covenant on Civil and Political Rights. The present communication is a follow-up to a previous complaint the author had submitted to the Human Rights Committee for consideration under the Optional Protocol.

The facts as submitted by the author

2.1 The author's first wife, a school teacher in the State party's civil service in the region of Styria (Steiermark), died on 23 June 1984. With effect of November 1985, the author was entitled to a widower's pension, which was calculated on the basis of the transitional provisions of the Eighth Amendment to the Austrian Pensions Act (Pensionsgesetz). Until January 1995, this Amendment only provided for a reduced widower's pension, amounting to two thirds of the full pension entitlement. Widows, however, were entitled to the full pension.

2.2 The author initiated proceedings with a view to securing a full widower's pension; before the State party's Constitutional Court, he contended that the provisions of the Eighth Amendment to the Austrian Pensions Act were discriminatory and, therefore, unconstitutional. The Constitutional Court ruled that the transitional provisions reflected continuing changes in society with respect to the principle of equality of sexes and dismissed the author's appeal on 3 October 1989.

2.3 The author subsequently submitted a communication to the Human Rights Committee, alleging a violation of article 26 of the Covenant<sup>1</sup>. On 30 March 1992, the Committee found that the award of a reduced widower's pension to the author, calculated on the basis of the transitional provisions of the Eighth Amendment to the Pensions Act, constituted unlawful discrimination on the grounds of sex, in violation of article 26 of the Covenant. According to the author, the State party's authorities have failed to readjust and re-calculate his pension entitlements, in spite of the findings of the Committee of 30 March 1992.

2.4 On 4 October 1991, the author remarried. Under Section 21 of the Austrian Pensions Act, Mr. Pauger was entitled to a one-time lump-sum payment (Abfindungszahlungen) in the amount of 70 monthly pension payments to which he was entitled at the time of his re-marriage, and which replaced his previous pension entitlements. The Styria Regional Education Board (Landesschulrat) accordingly commuted the author's entitlement to a widower's pension and awarded a lump-sum payment of AS 423,059, calculated on the basis of his reduced pension entitlements.

2.5 On 8 November 1991, Mr. Pauger appealed against the decision of the Styria Regional Education Board, arguing that the calculation of the lump-sum should be based on his full pension entitlement. On 9 January 1992, the regional government of Styria dismissed the appeal.

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<sup>1</sup>Communication No. 415/1990.

2.6 The author further appealed this decision to the Supreme Administrative Court (Verwaltungsgerichtshof) of Austria. On 28 September 1993, the Court found that the one-time lump-sum payment had to be considered as a single payment of the monthly instalments the applicant would receive in the years following his remarriage. As the author would have been entitled to a full pension from 1 January 1995 onwards, the 70 monthly instalments had to be calculated differently depending on the dates of reference. Those instalments corresponding to pension payments before 1 January 1995 had to be calculated on the basis of reduced pension entitlements, and the remainder on the basis of full pension entitlements. In January 1994, the lump-sum payment was recalculated by the Styria Regional Education Board on the basis of the criteria laid down by the Supreme Administrative Court, and raised to AS 500,612.

2.7 Not satisfied with this solution, the author filed a complaint with the European Commission of Human Rights<sup>2</sup>. By decision of 9 January 1995, the European Commission held that the author's application concerned essentially the same issues as his previous communication under the Optional Protocol to the Human Rights Committee, namely discrimination, both in as much as his claim to a widower's pension and the applicability of the transitional provisions of the Eighth Amendment to his pension entitlements was concerned. The Commission concluded that the "same matter" had already been submitted to (and decided by) another procedure of international investigation or settlement, and dismissed the author's application pursuant to article 27, paragraph 1(b), of the European Convention on Human Rights and Fundamental Freedoms.

2.8 On the requirement of exhaustion of domestic remedies, the author explains that he did not apply to the Constitutional Court for redress, because he considered that such an action would inevitably fail in the light of the Constitutional Court's decision on essentially the same matter of 3 October 1989. He therefore submits that all available domestic remedies have been exhausted.

2.9 As to the reservation to article 5, paragraph 2(a), of the Optional Protocol entered by Austria upon ratification of the Protocol, pursuant to which the Committee is precluded from considering a communication if the same matter has been examined by the European Commission on Human Rights, Mr. Pauer contends that his case was declared inadmissible on the ground that the Commission considered that it lacked competence to examine the matter, and that in contrast to other cases, the alleged violations of the European Convention were not even considered by the Commission. He argues that the Commission's decision to declare his case inadmissible cannot be regarded as an "examination" of the "same matter", within the meaning of the reservation to article 5, paragraph 2(a), of the Optional Protocol entered by Austria, and that the Human Rights Committee is not precluded from considering his case.

#### The complaint

3. It is submitted that the lump-sum payment of AS 500,612 finally awarded by the Styria Regional Education Board is AS 133, 976 less than would be a lump-sum

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<sup>2</sup>Application No. 24872/94.

payment calculated on the basis of full pension entitlements a widow would be able to claim. The author contends that this constitutes sex-based discrimination against him, in violation of article 26 of the Covenant.

State party's admissibility observations and author's comments

4.1 By a submission of 11 October 1996, the State party invokes its reservation to article 5, paragraph 2(a), of the Optional Protocol, pursuant to which the Committee may only consider a communication if it has ascertained that the same matter has not been examined by the European Commission of Human Rights. In the instant case, it is said to be clear that the European Commission was seized of the "same matter".

4.2 The State party rejects the author's view that since the European Commission did not deal with the merits of his claim and declared his case inadmissible on the ground that the Human Rights Committee had already examined the "same matter", the complaint had not been "examined" and that the reservation accordingly does not apply. The State party explains that "the purpose of the reservation is to ensure that where the European Commission has been seized of a matter, whatever the Commission's decision may have been, the UN Human Rights Committee cannot be seized of the same matter. The reasons why the reservation was entered were (a) to avoid subjecting the European Commission to review by another international organ and (b) to avoid the emergence of diverging case-law of different international organs. These aims of the reservation refer to all types of decisions issued by the European Commission".

4.3 It is noted that in its January 1995 decision, the European Commission examined the case with reference to the Human Rights Committee's Views of 30 March 1992 and found that the author's communication to the Human Rights Committee and his case before the Commission essentially concerned the same issue. Austria therefore concludes that the reservation to article 5, paragraph 2(a), of the Optional Protocol applies, and that the Committee has no jurisdiction to consider the present case.

4.4 Subsidiarily, the State party argues that the case constitutes an abuse of the right of submission within the meaning of article 3 of the Optional Protocol: the legal issue is the same as that in two previous cases examined by two international instances of investigation or settlement and has already been settled.

5.1 In his comments, the author considers that the Committee's Views of March 1992 only decided his case up to that moment in time and did not give the State party a right to violate his rights under the Covenant thereafter. Therefore, it must be admissible to introduce a new communication alleging sex-based discrimination since March 1992. And if this (new) complaint is deemed inadmissible under the European Convention of Human Rights by the European Commission, then the Human Rights Committee should be allowed to consider the complaint - otherwise, no international instance would be competent. Mr. Pauger thus contends that his communication should be deemed admissible.

5.2 The author further argues that the Austrian reservation to article 5, paragraph 2(a), of the Optional Protocol does not apply in his case, because the European Commission merely declared his complaint inadmissible, without examining the merits of his claims. To his mind, the aims of the Austrian

reservation advanced by the State party - to avoid subjecting the European Commission to review by another international body and to avoid the emergence of diverging case-law of different international bodies - would not be contradicted if the Human Rights Committee declared his complaint admissible.

5.3 According to the author, the European Commission's ratio decidendi of 9 January 1995 has no relevance to his case before the Committee. He further disagrees with the Commission's opinion that the present communication concerns the "same matter" as that already examined by the Committee in the Views of March 1992, given that the present communication is based on facts which occurred since that date.

5.4 The author refutes the contention that his complaint is an abuse of the right of submission. Rather, he argues, it is the State party which has abused its authority, since it took no measures to remedy the violation of article 26 found by the Committee. On the contrary, some Government officials publicly disavowed the Committee's Views, which makes it necessary, in the author's opinion, to examine the matter once again.

#### The Committee's admissibility decision

6.1 At its 60th session, the Committee considered the admissibility of the communication.

6.2 The Committee noted the author's argument that a further complaint to the Constitutional Court of Austria would be futile in his situation, as the Constitutional Court had already adjudicated on basically the same issue in its judgment of 3 October 1989. The State party had not challenged the author's argument in this respect. The Committee concluded that the requirements of article 5, paragraph 2(b), of the Optional Protocol had been met.

6.3 With respect to the author's claim under article 26, the Committee noted that the author's complaint submitted to the European Commission on Human Rights was based on the same events and facts as the complaint he now submitted under the Optional Protocol. It recalled that in respect of article 5, paragraph 2(a), of the Optional Protocol, Austria entered the following reservation upon ratification: "The Republic of Austria ratifies the Optional Protocol ... on the understanding that, further to the provisions of article 5(2) of the Protocol, the Committee ... shall not consider any communication from an individual unless it has ascertained that the same matter has not been examined by the European Commission of Human Rights established by the European Convention for the Protection of Human Rights and Fundamental Freedoms".

6.4 In the instant case, the Committee was seized of the "same matter" as the European Commission had been. As to whether the European Commission had "examined" the matter, the Committee began by noting that the Commission declared the author's complaint inadmissible on the basis of article 27, paragraph 1(b), of the European Convention, because it considered in turn to be seized of the "same matter" as had been before the Human Rights Committee in the author's first complaint to the Committee (communication No. 415/1990). The Committee observed that the European Commission had declared the author's application inadmissible on procedural grounds, without examining in any way the merits of the author's claim. In so doing, it had acknowledged that there were

some differences in the author's first application to the Human Rights Committee and his subsequent application to the European Commission, but that the two cases concerned "essentially the same issue". On this basis, the Committee considered that the European Commission did not "examine" the author's complaint, since it declared it inadmissible on procedural grounds, which related to the earlier examination of the same issue by the Human Rights Committee.

6.5 In the light of the above considerations, the Committee was of the opinion that it was not precluded by the Austrian reservation to article 5, paragraph 2(a), of the Optional Protocol, from considering the present communication.

7. On 9 July 1997, the Human Rights Committee therefore decided that the communication was admissible in so far as it appeared to raise issues under article 26 of the Covenant.

#### State party's submission on the merits and the author's comments

8. By submission of 19 February 1998, the State party submits that the legal rules originally relevant to the author's case were transitional provisions which have ceased to be operative, so that by now the equal status of widows and widowers in the provisions of Austrian pension law applicable to the author's case is fully established.

9. In his comments, the author states that the State party's submission has no relevance to his complaint. Furthermore, he challenges the State party's submission as factually incorrect, since equal treatment only exists for those pensions that have their origin in a date after 1 January 1995. For pensions originating before, unequal treatment continues according to the author, since the Constitutional Court has allowed a more beneficiary pension for women on the basis of legitimate expectation.

#### Examination of the merits

10.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

10.2 The question before the Committee is whether the basis of calculation of the lump-sum payment which the author received under the Pension Act is discriminatory. The lump-sum payment, consisting of 70 monthly instalments, was calculated partly, i.e. until 31 December 1994, on the basis of the reduced pension. The Committee upholds its views concerning communication No. 415/1990, that these reduced pension benefits for widowers are discriminatory on the ground of sex. Consequently, the reduced lump-sum payment received by the author is likewise in violation of article 26 of the Covenant, since the author was denied a full payment on equal footing with widows.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights, is of the view that the facts before it disclose a violation of article 26 of the Covenant.

12. Under article 2, paragraph 3(a), of the Covenant, the State party is under the obligation to provide Mr. Pauger with an effective remedy, and in particular to provide him with a lump-sum payment calculated on the basis of full pension benefits, without discrimination. The State party is under an obligation to take measures to prevent similar violations.

13. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within ninety days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to translate and publish the Committee's Views.

[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.]