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

DECISION

Communication No. 1062/2002

Submitted by:	Mr. Stanislav Šmídek (not represented by counsel)
Alleged victim:	The author
State party:	The Czech Republic
Date of communication:	20 October 1996 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 15 March 2002 (not issued in document form)
Date of adoption of Decision:	25 July 2006

* Made public by decision of the Human Rights Committee.

Substantive issues: Discrimination, effective remedy, access to public service, protection of honour

Procedural issues: none

Articles of the Covenant: 2, paragraph 3 (b), 17, 25 (c) and 26

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

[ANNEX]

ANNEX

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

Eighty-seventh session

concerning

Communication No. 1062/2002*

Submitted by:	Mr. Stanislav Šmídek (not represented by counsel)
Alleged victim:	The author
State party:	The Czech Republic
Date of communication:	20 October 1996 (initial submission)

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

Meeting on 25 July 2006

Adopts the following:

DECISION ON ADMISSIBILITY

1. The author of the communication is Stanislav Šmídek, a Czech citizen, born in April 1937 in Šlapanice, Czech Republic. He claims to be a victim of a violation by the Czech Republic[1] of articles 2, paragraph 3 (b), 17, and 25 (c), read in conjunction with article 26, of the International Covenant on Civil and Political Rights (the Covenant). He is not represented by counsel.

Factual background

2.1 After the Soviet occupation of Czechoslovakia in 1968, the author, who had publicly opposed the occupation, was forced to leave the Prosecutor's department where he was

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

[1] The Covenant was ratified by Czechoslovakia in December 1975 and the Optional Protocol in March 1991.The Czech and Slovak Federal Republic ceased to exist on 31 December 1992. On 22 February 1993, the Czech Republic notified its succession to the Covenant and the Optional Protocol.

employed, and to work in the road construction industry. In 1989, he was removed from his position as Head of the Sokolov Labour Office, after having called for the moral condemnation of leaders of the former communist regime. The author's communication relates to two issues:

2.2 The first set of events giving rise to the author's communication relate to his application for positions in the judicial sector. On 29 June 1993, he applied for a judicial position at the Pilsen Regional Court (Regional Court). Unlike other candidates, who were accepted on the condition of passing an exam similar to one already passed by the author at an earlier stage, the author was required to undergo an additional personality test, designed to assess his psychological suitability for judicial office. According to the author, this test was conducted by an expert "whose connections with the former communist regime could not be excluded". On 2 September 1993, based on the results of the test, the author's application was dismissed. When the author expressed doubts about the objectivity of the test, he was informed by the Ministry of Justice that the results of the test were not the sole and decisive criterion for an appointment, but a secondary factor in the selection process.

2.3 On 10 September 1993, the author applied for a position with the Regional Prosecutor of Pilsen. His application was dismissed on 24 March 1994, with reference to the unsatisfactory results of his personality test. On 7 April 1994, the author filed a constitutional complaint claiming that the dismissal of his job application by the Regional Prosecutor violated article 26, paragraph 2, of the Charter of Fundamental Rights and Freedoms, according to which the conditions and restrictions for certain professions and activities may be defined by law. He claimed that his application was rejected on the ground of non-compliance with a condition not defined by the relevant law (Public Prosecutor Act No. 283/1993) but by an individual legal act of the Minister of Justice.

2.4 On 6 September 1994, the author's constitutional complaint was dismissed on procedural grounds. The Constitutional Court noted that according to Section 72, paragraph 1 (a), of Constitutional Act No. 182/1993, constitutional complaints may only be lodged by persons who claim that their constitutional rights or freedoms have been violated as a result of an interference by a public authority. It considered, however, that the rejection of a job application does not constitute "interference by a public authority", even if the potential employer is the State. It concluded that the rejection of the job application was not an act which could be challenged by a constitutional complaint under Act 182/1993.

2.5 The second set of events relate to the alleged defamation of the author while he was the Head of the Sokolov Labour Office. On 31 August 1992, a complainant (JD) sent a letter to the Minister of Labour and Social Affairs, which contained allegedly defamatory information and false accusations, and called for the author's removal from his post. On the basis of this letter, the Labour Ministry conducted an inquiry at the author's office, but did not find any serious failings that would justify his removal. JD allegedly acted on the basis of information obtained from another person (TK), who published several articles in the regional press about the author's performance in his post. TK omitted to mention, in his articles, that the Labour Ministry inspectors found no serious shortcomings with the author's work. Consequently, when the author was removed at a later date, the public mistakenly assumed that his removal was due to the results of the inquiry.

2.6 The author initiated two sets of proceedings: an action for protection of his rights, and criminal proceedings against JD and TK. In the first set of proceedings, the author filed an action for the protection of his rights with the Regional Court on 20 May 1993. He requested the Court to order JD and TK to refrain from violating his right to protection of honour and reputation by spreading defamatory information about his work. On 6 June 1994, the Regional Court dismissed the author's action, on the ground that neither of the two defendants had violated the author's personal rights, because their statements did not contain any false, misleading or defamatory information. The author's honour had thus not been harmed.

2.7 On 29 February 1996, the Prague High Court (High Court) upheld the judgment of the Regional Court. It changed the decision on costs and ordered the author to refund the legal costs of the defendants. On 19 May 1996, the author brought criminal charges against the members of the court's panel for abuse of public authority under Section 158, paragraph 1(a) and (c), of the Criminal Code. He claimed that they committed a crime by refusing to categorise JD's and TK's actions as wrongful interference with his personal rights.

2.8 On 4 July 1996, the District Court in Sokolov ordered the execution of the High Court judgment of 29 February 1996 and ordered the attachment of the author's wages. By resolution of 13 August 1996, the Regional Court dismissed the author's appeal of this order. On 23 February 1999, the Supreme Court rejected the author's petition for review of the resolution. It considered that the petition did not come under any of the grounds for appellate review defined by law and that the decision against which it was directed could not be challenged by means of this extraordinary remedy. The Supreme Court also rejected the author's claim that the conditions for admissibility of petitions for appellate review as defined in Sections 238 (a) and 239 of the Code of Civil Procedure were inconsistent with the fundamental rights and freedoms safeguarded by international instruments binding on the State party.

2.9 On 23 September 1996, the author applied for a rehearing of his action for the protection of his personal rights and appealed against the 4 July 1996 order which authorised the execution of the High Court judgment. The Regional Court dismissed his claims on 13 November 1996, on the ground that the courts are bound by final judgments and cannot review them.

2.10 On 8 December 1996, the author filed another constitutional complaint, requesting the Constitutional Court to overrule the judgments of the High Court, the Regional Court and the District Court in Sokolov, claiming that they violated his right to a fair trial because the courts allegedly refused to take into account his final motions, did not thoroughly examine the case and sufficiently substantiate their decisions. He was asked to choose a legal counsel, which he refused to do because he was a member of the Bar Association. On 6 January 1997, the Court informed the author that, according to Constitutional Court Opinion ÚS-st-1/96, every party to Constitutional Court proceedings, regardless of professional qualifications, must be represented by legal counsel. On 10 January 1997, the author sent the power of attorney for his legal counsel. However, on 14 January, this lawyer informed the Court that she had not agreed to represent the author. Since he failed to provide proper powers of attorney within the prescribed time-limit, the Constitutional Court rejected the author's complaint.

2.11 In relation to the second set of proceedings, the author filed criminal charges against JD and TK on 26 July 1996, arguing that their actions constituted libel, under Section 206 of the

Criminal Code. The criminal proceedings were discontinued on 24 September 1996, on the ground that there were no reasons to believe that libel had been committed. The author's complaint against this decision was dismissed by the District Prosecutor of Sokolov on 31 December 1996, on the grounds that he did not properly substantiate his claims that the information spread by JD and TK was false, misleading and defamatory, and that there was no evidence that their actions could seriously harm the author's reputation.

2.12 The author filed a petition to the District Prosecutor of Sokolov requesting the Minister of Justice to lodge a complaint against a violation of law and requested the criminal proceedings to be continued. The author's petition was referred for review to the Regional Prosecutor of Pilsen who, on 18 April 1997, affirmed the 31 December 1996 decision. The author sent two new petitions to the Minister of Justice, which were referred to the Senior Prosecutor of Prague and then to the Regional Prosecutor of Pilsen, who discontinued the case on 14 October 1997, on the grounds that the petitions did not reveal any new facts. The author then requested the Senior Prosecutor of Prague to examine the legality of the 18 April 1997 decision of the Regional Prosecutor of Pilsen. On 5 January 1998, the Senior Prosecutor of Prague concluded that no errors were found in the challenged decision and that it was correct.

The complaint

3.1 The author claims to be a victim of a violation of article 25 (c), read in conjunction with article 26, of the Covenant, because the Regional Court and Regional Prosecutor of Pilsen rejected his job application by reference to the unsatisfactory results of his personality test, thereby violating his right to access to public service on general terms of equality. He claims that the law does not define any psychological criteria for the post concerned, and that other job applicants with the same qualifications were not required to undergo similar tests.

3.2 The author further claims that the decision of the Constitutional Court of 6 September 1994, which rejected his constitutional complaint against the decision of the Regional Prosecutor of Pilsen turning down his job application, violated his right to an effective remedy under article 2, paragraph 3 (b), because the Constitutional Court did not categorise the disputed decision as an "interference by a public authority", thereby preventing him from challenging it by means of a constitutional complaint.

3.3 The author contends that the ordinary courts handling his action for the protection of personal rights violated his right to an effective remedy under article 2, paragraph 3 (b), of the Covenant, and his right to protection against unlawful attacks on his honour and reputation safeguarded by article 17 of the Covenant, because they did not consider his request that the actions of JD and TK should be classified as libel under Section 206 of the Criminal Code.

3.4 The author claims that the Constitutional Court, by rejecting his complaint on the ground of lack of legal representation, violated his right to an effective remedy under article 2, paragraph 3 (b), of the Covenant, because he was a member of the Bar Association.

3.5 Finally, the author contends that the Supreme Court decision of 23 February 1999, in dismissing his petition for appellate review of the Regional Court's resolution of 13 August 1996, violated his right to an effective remedy under article 2, paragraph 3 (b), because the

decision was unlawful and the criteria for admissibility of appellate review petitions as defined in the Code of Civil Procedure were inconsistent with international instruments binding on the State party.

State party's submission on the admissibility and merits of the communication

4.1 On 17 October 2002, the State party commented on the admissibility and merits of the communication. On the facts, and with regard to the author's job application, the State party points out that the author did not pass the judiciary exams and had never previously served as a judge. Consequently, the President of the Regional Court decided to take him on as a trainee judge. For this purpose, the author underwent a personality test, in accordance with the Justice Minister's instruction No.125/1992-Inst, and on the basis of which he was found to be incapable of serving as a judge.

4.2 With regard to the first claim, the State party challenges the admissibility of this part of the communication. The State party notes that the basic criteria for submission of constitutional complaints were not fulfilled by the constitutional complaint of 7 April 1994, with the result that the Constitutional Court could not effectively examine the author's complaint. It follows that this remedy cannot be considered effectively exhausted. Furthermore, the claim of discrimination was not raised in the constitutional complaint, and no domestic remedies have been exhausted in regard of this claim. Keeping in mind the legal background of the author, the State party concludes that the author has not exhausted domestic remedies on this part of the communication, and that it should be declared inadmissible.

4.3 In addition, the State party argues that the communication is manifestly ill-founded. It refers to the Committee's General Comment No. 25 and its jurisprudence[2] and recalls that for the purposes of the Covenant, not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective, and if the aim is to achieve a purpose which is legitimate under the Covenant.

4.4 The State party asserts that article 25 cannot be understood as establishing a right to unlimited access to any public service post, but merely as a right to apply for appointment to public service positions on general terms of equality. The purpose of the statutory criteria for appointment is to guarantee consistent performance standards for persons holding such posts, *not* to establish the employer's obligation to appoint anyone who meets the criteria. Article 25 of the Covenant grants employers, including public authorities, the freedom to choose whether they will accept or reject a job application, even if it meets all the statutory criteria. However, article 26 requires that any distinctions leading to the rejection of applications for public service positions must pursue a legitimate purpose and be based on objective and reasonable criteria.

4.5 On the merits of the claim under article 25, the State party argues that the fact that the author's job applications were rejected by reference to the unsatisfactory results of his personality test cannot be understood as restricting his right of access to his country's public

[2] Communications No.359/1990, *Sprenger v. The Netherlands*, Views adopted on 31 March 1992, paragraph 7.4; No. 172/1984, *Broeks v. The Netherlands*, Views adopted on 9 April 1987, and No. No.182/1984, *Zwaan-de Vries v. The Netherlands,* Views adopted on 9 April 1987.

service, despite the fact that no psychological suitability criteria are explicitly mentioned in the relevant laws. The posts of a judge or prosecutor represent a highly significant social mission, associated with decisions on rights and duties, interferences with personal integrity and protection of the public interest. It is vital to ensure that such posts are held by people who not only possess the necessary qualifications and good moral character, but whose mental stability guarantees the proper exercise of their functions. Psychological suitability is thus an objective and reasonable criterion pursuing a legitimate aim. Its application to the author's case did not violate his right to access to public service under article 25 of the Covenant.

4.6 On the merits of the claim under article 26, the State party notes that the author's contention that other applicants were exempted from the personality test is not specific, and that it is unclear *which* applicants were exempted and under what circumstances. It points out that according to section 4 of the Justice Minister's Instruction No.125/92-Inst. concerning the training of trainee judges, every applicant for appointment as a trainee judge must undergo a personality test, and no exemptions are permitted. Since the author had never previously served as a judge, his psychological suitability had to be tested in accordance with this Instruction. He thus received the same treatment as any other applicant for a trainee judge position. He thus was not discriminated against.

4.7 The State party indicates that established practice requires all applicants for trainee prosecutor positions to undergo a personality test. After the trainee has completed the training period and passed the qualifying examination, he may be appointed as a prosecutor. Although the author had previously passed the qualifying examination, his situation was particular when he applied for a position in 1993, due to the fact that he had not worked at a prosecutor's office since 1968, and not taken a personality test, as required by the practice established in the meantime. Accordingly, the Regional Prosecuting Attorney decided to include him in the same selection process as other candidates, in order to make sure that he fulfilled the requirements. This decision cannot be understood as discriminating against the author. The State party concludes that there was no violation of articles 25 and 26 of the Covenant, and that the communication is manifestly ill-founded.

4.8 With regard to the second claim, relating to the decision of the Constitutional Court of 6 September 1994, the State party emphasises that Section 72, paragraph 1 (a), of Constitutional Court Act No.182/1993 provides that a constitutional complaint may be lodged by a natural person who claims that his/her fundamental rights of freedoms safeguarded by a constitutional act has been violated as a result of a final decision in proceedings to which he/she was a party, or a measure or other interference by a public authority. The decision of the Regional Prosecutor of Pilsen does not fall into any of these categories, because he did not exercise his powers as defined in article 80, paragraph 1, of the Constitution and specified in Act No.283/1993. He merely considered whether he should accept the author's application and enter into an employment relationship with him. Legally, both parties of the labour law relationship are equal, as is provided by the Labour Code, and the contract is a private one. As a result, the Regional Prosecutor's decision was not a decision impacting on the author's rights and duties and he did not act as a public authority in rejecting the job application. This decision can therefore not constitute a breach of the author's constitutional rights challengeable by a constitutional complaint under Section 72, paragraph 1 (a), of Act No.182/1993. For the State party, this claim is manifestly ill-founded.

4.9 With regard to the third claim, relating to the manner in which the courts handled the issue of the protection of the author's rights, the State party submits that the author in fact requests the review of the judgement and the interpretation of domestic legislation by national courts and authorities taking part in the investigation. It considers that this part of the communication should therefore be declared inadmissible. On the merits, it indicates that on the one hand, the author filed a civil action in the Regional Court and High Court. As a result, his case was heard by civil divisions of these courts, which could not classify the actions as a crime. The State party submits that the Regional Court and the High Court found that the author had not substantiated his claims that JD was disseminating false, misleading or defamatory information about him; he was merely exercising his right to petition. With regard to TK, both courts considered that his articles did not contain false or misleading information. In addition, he did not intend to damage the author's reputation. It indicates that the competent public authorities thoroughly analysed the author's claims and concluded that JD's and TK's actions did not violate the author's personal rights. On the other hand, the criminal charges were dismissed as non-substantiated at the investigation phase. The case was therefore not taken to court. The State party concludes that the public authorities did not violate the author's right to an effective remedy under article 2, paragraph 3 (b), of the Covenant, and that this claim is manifestly ill-founded.

4.10 On the fourth claim[3], the State party argues that the author is in fact requesting the review of the interpretation of the domestic legislation by a national court, and that the communication should be declared inadmissible in this respect. On the merits, it indicates that under Section 30 of Constitutional Act No.182/1993, a natural person who is party to Constitutional Court proceedings must be represented legally. In addition, according to the Constitutional Court's settled jurisprudence on legal representation, this requirement also applies to members of the Bar Association. The author's constitutional complaint did not meet this condition. The author was duly informed of the defect and granted an extension of the deadline to fulfil the condition, which he failed to do. In view of the importance of Constitutional Court proceedings, the purpose of mandatory legal representation is to ensure the proper defence of the rights of all parties by qualified lawyers and to guarantee a more objective view of the situation of individual parties to the case. Nothing prevented the author from choosing a qualified counsel within the time-limits granted by the Constitutional Court. The State party concludes that the Constitutional Court did not violate the author's right to an effective remedy under article 2, paragraph 3 (b), of the Covenant.

4.11 On the fifth claim[4], the State party reiterates that the author requests the review of a judgement imposed by national courts and of the interpretation of domestic law by national courts. This part of the communication should be declared inadmissible. On the merits, the State party contends that the author's subjective view has no bearing on the objective validity of the grounds for appellate review. The Supreme Court examined the admissibility of the author's petition for appellate review and found that the case did not come under any of the grounds open for appellate review. It explicitly rejected the author's claim that the conditions for admissibility of appellate review petitions are inconsistent with international instruments binding on the State party. Accordingly, the Supreme Court's decision of 23 February 1999 did not violate the author's right to an effective remedy. The State party notes that in addition the author could have

[3] See above paragraph 3.4
[4] See above paragraph 3.5

filed a constitutional complaint against this decision and thus failed to exhaust domestic remedies in this respect.

Author's comments

5.1 On 4 February 2003, the author commented on the State party's submissions. He claims that he *has* exhausted domestic remedies, as he brought a case concerning discrimination in the workplace and a case concerning the protection of personal honour and reputation before the Constitutional Court. To support his claim, he refers to decisions II ÚS 56/94 and I ÚS 341/96 of the Constitutional Court.

5.2 The author reiterates his claims that he was discriminated against in connection with his job applications, because he was required to undergo personality tests, when other applicants, who like the author had taken their legal examinations under the old system, were not required to do so. He reiterates that his rights to legal protection and fair trial were infringed when he was not granted support in his appeal for protection of his personal honour.

Additional observations by the State party and the author

6.1 On 22 May 2003, the State party submitted additional observations on admissibility. On the claim under article 26, it reiterates that the author failed to prove *which* applicants had been exempted from the duty to undergo a psychological examination, and for which positions they had applied, and *when* and under *what* circumstances they had been exempted. It is therefore impossible for the Government to reply to this claim, notwithstanding the fact that the relevant regulations do not allow for exemptions.

6.2 With reference to the author's allegation that the national authorities did not deal with his claim of non-objectivity of the tests, the State party argues that the Ministry of Justice responded to this objection on 22 December 1993. The author did not raise any further objections with regard to the objectivity of the tests, in particular in his constitutional complaint. This claim should therefore be declared inadmissible for non-exhaustion of domestic remedies.

6.3 On the exhaustion of domestic remedies, the State party reiterates that although the author brought his cases to the Constitutional Court, they were rejected as inadmissible, and that it had therefore not dealt with the merits of the case.

7.1 On 17 January 2005, the author commented on the State party's additional observations. He indicates that in 1993, after he was considered incapable of performing the function of public prosecutor or judge after the unsuccessful personality tests, Dr. Š. and Dr. K. were granted positions in the civil-legal department of the County court without having taken personality tests. The author acknowledges that at that moment, he had not worked in the area of criminal law for twenty years, had not studied the numerous post-revolutionary amendments, and therefore needed training. He claims, however, that this was abused in such a manner that he was qualified as a legal clerk, so that he could be subjected to personality tests. As he had recently undergone tests for risk professions and completed them successfully, he agreed to take the personality tests.

7.2 The author argues that when he received the results of the tests, he raised the issue of their objectivity with the authorities, including in article 2 of his constitutional complaint of 7 April 1994.

8.1 On 18 October 2005, the State party commented on the author's further submission. On the claim of discrimination in the selection of application for employment in the judiciary and the author's new information on other applicants (Dr. Š. And Dr. K.), it submits that the District Court has no record of a written application by the author for a position as a judge in that Court, and that he was therefore not in the same situation as Dr. Š. And Dr. K., who did lodge such an application and were subsequently accepted as employees of the District Court. The State party adds a detailed account on the difference of situations of the author and the other applicants, who had both already previously served as judges (one of them for 15 years), and argues that the difference in treatment is justified in different situations, and that in any case the differential treatment was based on objective and reasonable grounds. The State party concludes that there was no unjustified discrimination of the author within the meaning of article 26.

8.2 With regard to the author's application for a position as prosecutor, the State party acknowledges that the author passed the final tests for judicial trainees in 1966, and that he worked as a state prosecutor from 1 September 1966 to 31 March 1970. However, the State party considers that the chief prosecutor's decision to subject him to a personality test was justified. The author only held the position of prosecutor for 3 and half years, and 23 years passed between the moment he started working on a different position and the date of his new application. Because the chief prosecutor considered that the author's professional experience did not provide sufficient guarantees that he would perform the work properly, he decided to subject the author to the identical admission process as all the other candidates. This included a personality test. Exempting the author from the test would have constituted an unjustified advantage in his favour, to the detriment of the other candidates. Finally the State party reiterates that the author has not provided any information on applicants who were accepted without undergoing the personality tests. The State party concludes that there was no discrimination against the author.

9.1 On 28 December 2005 and 16 January 2006, the author commented on the State party's submission. He indicates that in 1989, the Attorney General sought to appoint him as chief prosecutor in Sokolov, without subjecting him to a personality test. He was not appointed because he had to undergo an eye operation. In 1993, when he was removed from the post of Director of Sokolov Labour Office, he applied for a position as a judge. Approximately one month after Dr. K. had been appointed as a judge in the Sokolov District Court, the author contacted the presiding judge of that court, who informed him that the civil section of the District Court already had a sufficient number of judges, and who advised him to apply to the Regional Court in Pilsen instead.

9.2 The author reiterates that applicants for the positions as a judge or prosecutor, who, like him, formerly completed a judicial or attorney examination and held a legal position, were accepted in the judiciary without any requirement of a personality test. The author reaffirms that, apart from himself, no other applicants from the same category as himself had to take personality tests. He explains that he cannot consult documents relating to personnel issues of judges appointed after 1 January 1993, to examine whether they indeed underwent a personality test. However, it is public knowledge that many judges were exempted from the test.

9.3 The author indicates that he did not wish to work at the Regional Court of Pilsen, but that he applied for a position at the District Court, like Dr. Š. and Dr. K. The State party's argument that he worked in a different profession for 23 years is misleading, as most of that time he worked as a company lawyer, and acquired extensive experience in economic, financial, administrative, civil, labour and housing law. Acquired experience and examinations for any profession in the fields of advocacy, judiciary or prosecution are mutually recognised. As a result, candidates from one branch would not need to undergo another examination and personality test if they seek to move to one of the other branches.

10. On 19 June 2006, the State party commented on the author's observations and reiterated its previous submissions.

Issues and proceedings before the Committee

Consideration of admissibility

11.1 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 to the Covenant.

11.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for purposes of article 5, paragraph 2 (a), of the Optional Protocol.

11.3 With regard to the first claim of a violation of the right to access public service without discrimination, under article 25 (c), read in conjunction with article 26, the Committee has noted the State party's contention that the author has not exhausted domestic remedies on this claim. However, it also notes that the author claims to have raised this issue in his constitutional complaint of 7 April 1994[5]. The fact that the complaint was not considered by the Constitutional Court on the merits does not in itself preclude the Committee from examining the communication. The State party has not provided information about other remedies the author could have availed himself of. In addition, it has not submitted any translation of the complaint or the judgment of the Constitutional Court, which would have allowed the Committee to consider if the claim had indeed been raised by the author as he claims. Accordingly the Committee considers that the author has exhausted domestic remedies in respect of this claim, and that it is not precluded from considering this part of the communication pursuant to article 5, paragraph 2 (b), of the Optional Protocol.

11.4 The Committee recalls that article 25(c) of the Covenant confers a right of access, on general terms of equality, to public service, and thus, in principle, the claim falls within the scope of this provision in this respect[6]. With respect to the author's application for a position as a judge in the Regional Court, the Committee considers, however, that it does not appear that the author's situation, on the one hand, and the situation of Dr.Š. and Dr. K. on the other hand, were

[5] See paragraph 5.1 above
[6] See Communication No. 972/2001, *George Kazantzis v. Cyprus*, Decision on admissibility of 7 August 2003, paragraph 6.4

similar, and that they should have received the same treatment. It notes, in particular, that the latter had both previously served as judges at the time of the application, while the author himself had not. The Committee therefore finds that the author has failed to substantiate, for purposes of admissibility, his claim relating to the application to a position as a judge.

11.5 With respect to the author's application for a position as a prosecutor, the Committee notes that the author previously passed the necessary tests for serving as a prosecutor, and actually held that position. It therefore considers that his situation was different in comparison with other applicants, who would never have held such a position. However, the author has not demonstrated that any applicants in the same position as himself were exempted from the personality test. The Committee finds that the author has failed to substantiate this claim for purposes of admissibility. It concludes that the author's claims under article 25 (c), read together with article 26, of the Covenant are inadmissible under article 2 of the Optional Protocol.

11.6 On the author's second and fourth claims that he was denied the right to an effective remedy because the Constitutional Court declared his complaints inadmissible, the Committee recalls its jurisprudence[7] that article 2 is of an accessory character and can only be invoked in conjunction with claims of a violation of another substantive right protected by the Covenant. The Committee observes that the claim that the author did not receive an effective remedy although he failed to fulfil the conditions of legal representation is not linked to a claim of violation of any other right of the Convention. On the claim of a violation of article 2, paragraph 3, read together with articles 25 and 26, the Committee recalls its jurisprudence[8] that article 2, paragraph 3, requires that in addition to effective protection of Covenant rights, States parties must ensure that individuals have accessible, effective and enforceable remedies to vindicate those rights. The Committee further recalls that this article only provides protection to alleged victims if their claims are sufficiently well-founded to be arguable under the Covenant. Considering that the author of the present communication has failed to substantiate, for purposes of admissibility, his claims under articles 25 and 26, his allegation of a violation of article 2 of the Covenant is also inadmissible under article 2 of the Optional Protocol.

11.7 On the author's third and fifth claims in relation to the findings of the domestic courts on his claims of defamation, the Committee reiterates its jurisprudence that it is not an appellate court and that it is generally for the courts of States parties to the Covenant to evaluate facts and evidence in a particular case, unless it can be ascertained that it is clearly arbitrary or amounts to a denial of justice[9]. The Committee considers that the author has failed to substantiate, for purposes of admissibility, any such exceptional elements in his own case. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

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[7] See Communication No. 275/1988, *S.E. v. Argentina*, Decision on admissibility of 26 March 1990, paragraph 5.3

[8] See Communication No. 972/2001, *George Kazantzis v. Cyprus*, Decision on admissibility of 7 August 2003, paragraph 6.6

[9] See Communication No. 541/1993, Errol Simms v. Jamaica, Decision of 3 April 1995, paragraph 6.2

12. The Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That this decision shall be communicated to the author and to the State party.

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