



**International covenant
on civil and
political rights**

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HUMAN RIGHTS COMMITTEE

Seventy- fourth session

18 March – 5 April 2002

DECISION

Communication No. 803/1998

Submitted by: Mr. Rupert Althammer et al. (represented by counsel,
Mr. Alexander H. E. Morawa)

Alleged victims: The authors

State Party: Austria

Date of communication: 10 December 1996 (initial submission)

Document references: Special Rapporteur's rule 91 decision, transmitted to
the State party on 26 January 1998 (not issued in
document form)

Date of adoption of decision 21 March 2002

[ANNEX]

* Made public by decision of the Human Rights Committee.

ANNEX

**DECISION OF THE HUMAN RIGHTS COMMITTEE UNDER THE OPTIONAL
PROTOCOL TO THE INTERNATIONAL COVENANT
ON CIVIL AND POLITICAL RIGHTS
Seventy-fourth session**

concerning

Communication No. 803/1998**

Submitted by: Mr. Rupert Althammer et al. (represented by counsel,
Mr. Alexander H. E. Morawa)

Alleged victims: The authors

State Party: Austria

Date of communication: 10 December 1996 (initial submission)

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

Meeting on: 21 March 2002,

Adopts the following:

****** 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. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Patrick Vella and Mr. Maxwell Yalden.

The text of one individual opinion signed by Committee member Mr. Eckart Klein is appended to the present document.

Decision on admissibility

1. The authors of the communication are Mr. Rupert Althammer and 15 other Austrian citizens residing in Austria, most of them in Salzburg. They claim to be victims of a violation of Austria of article 26 of the Covenant. The authors are represented by counsel.

The facts as submitted by the author

2.1 The authors worked at the Social Insurance Board in Salzburg (Salzburger Gebietskrankenkasse) and retired before 1 January 1994. Counsel states that they receive retirement benefits under the relevant schemes of the Regulations of Service for Employees of the Social Insurance Board (Dienstordnung A für die Angestellten bei den Sozialversicherungsträgern). The pensions of the authors comprised of payments through the public pension fund (ASVG-Pension) and additional payments from the Social Insurance Board. While the payments through the public pension fund were adapted to economic development through an annual multiplier (Rentenanpassungsfaktor), pursuant to the General Social Security Law (Allgemeines Sozialversicherungsgesetz-ASVG), the payments from the Social Insurance Board were linked to the development of salaries of active employees as provided for in the Regulations.

2.2 On 1 January 1994, an amendment to the Regulations came into effect. Pursuant to the new Regulation the future adjustment of pensions from the Social Insurance Board were linked to the annual multiplier valid for payments by the public pension fund.

2.3 On 22 August 1994, the authors initiated a lawsuit against the Salzburg Regional Social Insurance Board, seeking a declaratory judgment that retirement benefits were due in an amount adjusted pursuant to the Regulation in its pre-January 1994 version, instead of the amended version, as well as compensation for their financial losses. According to the authors, they suffer considerable loss of income because of the change in Regulation. They submitted that under the new Regulations, the difference of income between active and retired employees would rise up to 340 per cent per annum in the years 1994 to 1997.

2.4 On 11 January 1995, the District Court (Landesgericht Salzburg) dismissed the authors' claim. On 24 October 1995, the authors' appeal was rejected by the Higher Court of Appeal (Oberlandesgericht Linz). On 12 December 1995, the authors appealed to the Supreme Court (Oberster Gerichtshof), which dismissed the appeal on 27 March 1996. It is submitted that no further domestic remedies are available.

2.5 On behalf of the authors, Counsel filed an application to the European Commission of Human Rights, alleging a breach of article 1 (right to property) of Protocol N° 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.¹ Subsequent to the entry into force of Protocol No. 11 to the European Convention on Human Rights, the case was transmitted to the European Court of Human Rights. On 12 January 2001, a committee of three judges declared the application inadmissible.²

The complaint

3.1 Counsel claims that the authors are victims of a breach of article 26 of the Covenant. He submits that they paid contributions to the pension scheme of the Regional Social Security Board and are, therefore, entitled to benefits under that scheme pursuant to the specific rules set forth in the Regulation.

3.2 Counsel explains that Regional Social Security Boards are public law institutions and that the Regulation is a legislative decree (Verordnung) regulating almost all employment related matters of the Board, inter alia the amount of retirement benefits and their calculation, including increase or periodical adjustment. Counsel submits that many similarities exist between occupational pension schemes (Betriebsrenten) offered by private employers and the scheme based on the Regulation. However, the Regulation can be changed, unilaterally, by legislative decree of the State party.

3.3 Counsel emphasizes that the pension scheme in question is not at all related to the general pension scheme as part of the social security system under the General Social Security Law, but only applicable to employees of the Regional Social Security Boards. Counsel explains that under the General Social Security Law every employee in Austria contributes to the public pension fund a fixed percentage of his income, up to a maximum amount of calculation (Höchstbeitragsgrundlage). The amount paid under this scheme is adjusted by an annual multiplier taking into account inflation, interest rates, household expenses etc. This scheme is meant to provide the general basic insurance coverage for retirement.

3.4 The scheme under the Regulation is a separate system of additional insurance. Employees contribute a certain percentage of their total income, i.e. including the amount exceeding the maximum amount of calculation. The scheme is employment related and, therefore, based upon an essentially contractual relationship between employees and the Board. Counsel states that the two pension schemes have not much in common as they have different purposes, are calculated differently, reach different groups of people, and are based on different ideas. Therefore, the decision to adjust the benefits to which the authors are entitled by the Regulation by applying the criteria of the General Social Security Law violates the principle of equality, as two entirely different factual patterns are treated equally.

3.5 Counsel further argues that, although their pension scheme is similar to private occupational pension schemes, the latter are not interfered with, thus constituting a separate violation of the right to equality.

3.6 Moreover, counsel argues that if a private employer would interfere with the pension scheme by modifying the calculation of adjustments, employees would have a remedy available for breach of contract. However, in the case of the authors, as the Regulation is a legislative decree and their employer a semi-public entity, no remedy exists. Only in case of a breach of the constitution could the courts intervene. According to counsel, this is a further violation of the authors' right to equality.

3.7 Counsel refers to the earlier communication No. 608/1995, *Franz Nahlik v Austria*, regarding a previous amendment to the Regulation that the Committee declared inadmissible on 22 July 1996, and warn of the cumulative effect of step-by-step interference.

The State party's observations

4.1 In submissions of 22 July 1998, 2 June, and 23 August 1999, the State party argues that the Regulations of Service for Employees of the Social Insurance Board, as far as it regulates the relationship of the Insurance Boards and its retired employees, is not a decree, but a collective agreement. As a collective agreement, the Regulation is concluded between the Association of Social Insurance Institutions and the trade union, the latter representing the interests of private employees. The State party claims that there is no possibility of interference in the decision-making process, and that accordingly the State party cannot be held responsible for a possible breach of article 26 of the Covenant that results from the collective agreement.

4.2 The State party explains that the General Social Security Law provides for individual contracts on conditions for employment, income and pension. The scope of individual contracts is limited by the collective agreements, which may regulate, *inter alia*, changes in the pensions of former employees. The parties to collective agreements are only limited by legal prohibitions and public policy, when changing provisions of collective agreements. As far as the collective agreements do not regulate the scope of individual contracts, their provisions are legally binding on those concerned, including former employees. This part of collective agreements is a source *sui generis* of private law.

4.3 The State party submits that a decision of the European Court would have examined the same issues and facts under, mainly, the same legal aspects.

4.4 The State party argues further that the amendment of the Regulation does not have negative consequences on the authors. While the amendment may lead to a situation where the authors' pensions rise less than the income of active employees, the State party refutes an excessive reduction of their pension as a result of the amendment. The State party submits that between 1975 and 1995 in nine years, at least, the pension adjustment factor under the General Insurance Law was, in fact, higher than the rise of the salaries of employees of the Board.

4.5 The State party claims that it can only be held responsible for violations of the Covenant that have occurred and not for future events. At the moment, no significant gap between the development of the salaries of active employees of the Board and the calculation of pensions could be established.

4.6 Furthermore, the State party claims that there is an objective reason for the different development of the salaries of active employees and pensions, since retired employees do not have to contribute to unemployment or pension insurance, and their health insurance contributions are reduced. The State party refutes that the former employees of the board are treated differently than former employees receiving pensions under an occupational pension

scheme since both are guided by the same basic rules leaving a margin of appreciation when regulating the details of the schemes.

Authors' comments

5.1 Counsel requests the Committee to reject the State party's submission of 2 June and 23 August 1999, because the deadline fixed by the Committee had expired.

5.2 Counsel claims that even though the application to the European Commission of Human Rights concern the same persons and facts, they raise entirely different issues. The present case claims rights that are exclusively protected by either the Covenant (right to substantive equality) or by the European Convention (right to property). No case law exists that would support that the European Court of Human Rights would deliberately extend its investigation into issues excluded from the application.

5.3 Counsel submits that the authors do not claim discrimination in the adverse effect of the amended Regulation, but in its application. Therefore, the monetary disadvantage as a result of the discrimination is not relevant. Counsel submits tables on the overall effect of the amendments to the Regulation on the pension from 1994 to 1999 of one of the authors. It appears from these calculations that the difference caused by the amended Regulation in the Regulation-based part of the monthly pension benefits was 0.17 per cent in 1994 and gradually developed to 3.5 per cent in 1999. The latter figure corresponds to a 2.1 per cent lower level in the resulting overall pension in 1999, compared to how the benefits would have developed without the amendment. After the amendment, there was a 8.2 per cent rise in overall pension benefits between 1994 and 1999.

5.4 Counsel claims that the reasons for the amendments submitted by the State party were not the reasons considered by the partners of the collective agreement. Furthermore, counsel argues that the different burden of contributions of active employees and pensioners is already reflected in that pensioners receive only 80 per cent of their last salary.

Issues and proceedings before the Committee

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the case is admissible under the Optional Protocol to the Covenant. 6.2. The Committee notes that according to the author the multiplier effect is now applied both to payments from the public pension fund and to the additional pension from the Social Insurance Board. The authors have failed to demonstrate that the change brought about in the computation of their pension rights is discriminatory or otherwise possibly falls within the ambit of article 26 of the Covenant. The authors, therefore, have failed to substantiate, for the purposes of admissibility, a claim under article 26 of the Covenant.

6.3 In light of the conclusion reached above, the Committee need not address the issue whether the reservation by the State party to article 5, paragraph 2, of the Optional Protocol precludes the examination of the communication by the Committee due to being the same matter that the European Court of Human Rights declared inadmissible on 12 January 2001.

7. 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 State party and to the author.

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

Notes

¹ Application No. 34314/96.

² The reasoning reads, in its relevant part, as follows: "In so far as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of rights and freedoms set out in the Convention or its Protocols."

Appendix

Individual Opinion by Committee Member, Mr. Eckart Klein

According to my view the Committee should have examined the issue whether the reservation declared by the State party precludes the consideration of the communication by the Committee (see paras. 4.3, 6.3) before addressing the question of substantiation of the claim under article 2 of the Optional Protocol (para. 6.2). The reason is that the reservation, if applicable, excludes the competence of the Committee to consider the communication. Only such consideration would open the way to assess the issue of substantiation, be it for purposes of admissibility or merits.

[Signed] Eckart Klein

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