



# International Covenant on Civil and Political Rights

Advance unedited version

Distr.: General  
19 April 2017

Original: English

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## Human Rights Committee

### Decision adopted by the Committee under the Optional Protocol, concerning communication No. 2088/2011\* \*\*

<i>Submitted by:</i>	B. H. (not represented)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Austria
<i>Date of communication:</i>	14 February 2005
<i>Document references:</i>	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 19 August 2011 (not issued in a document form)
<i>Date of adoption of decision :</i>	28 March 2017
<i>Subject matter:</i>	Right to a public hearing by a competent, independent and impartial tribunal established by law
<i>Procedural issues:</i>	Exhaustion of available domestic remedies, abuse of the right of submission of communication
<i>Substantive issues:</i>	Right of access to an independent and impartial tribunal, to a public oral hearing and to a fair trial
<i>Article of the Covenant:</i>	14
<i>Articles of the Optional Protocol:</i>	3 and 5 (2)(a) and (b)

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\* Adopted by the Committee at its 119th session (6 March-29 March 2017).

\*\* The following members of the Committee participated in the examination of the communication: Tania Maria Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Sarah Cleveland, Ahmed Amin Fathalla, Olivier de Frouville, Christof Heyns, Yuji Iwasawa, Bamariam Koita, Marcia V. J. Kran, Duncan Mahumuza Laki, Photini Pazartzis, Mauro Politi, Jose Manuel Santos Pais, Anja Seibert-Fohr, Yuval Shany, and Margo Waterval.

### **Decision on inadmissibility**

1.1 The author of the communication is Mr. B. H., an Austrian national, born in 1951. He claims to be a victim of a violation by Austria of article 14 of the International Covenant on Civil and Political Rights (the Covenant), as the Administrative Court of Austria reportedly did not guarantee him the right to a fair trial against a decision of the Austrian Public Employment Service, by which it temporarily withdrew an unemployment benefit from the author, following the disputed refusal of a job offer. He submits his complaint on his own behalf. The Optional Protocol entered into force for the State Party on 10 March 1988; upon ratification, the State party made a reservation on its article 5 (2)(a).

1.2 The author submitted his initial communication on 14 February 2005 in German. Therefore, it could not be initially registered. The author re-submitted his complaint to the Committee in English on 4 July 2011, and it was registered on 18 August 2011.

### **The facts as presented by the author**

2.1 In 1996, the author was receiving an unemployment benefit of 400 Austrian schillings (41 USD) per day from the Austrian Public Employment Service (AMS). According to a collective agreement,<sup>1</sup> this benefit was conditioned by the fact that the author should accept any suitable and paid job when offered. The author inquired from the Chamber of Labour what salary he could expect from his potential employers. In a letter dated of 12 August 1996, the Chamber replied that he could expect 24,580 Austrian schillings per month (2,553 USD).

2.2 On 2 September 1996, the author received a letter from the AMS advising him that the Stelzer Company had a job opportunity for which he had to apply. On 6 September, he was interviewed by his potential employer, Mr. J.S. During this interview, he was allegedly asked for his previous earnings, and he answered that he had received 40,000 Austrian schillings (4154 USD). On 12 September, the author was informed by phone that he had not been selected for the position, but did not receive any further explanation.

2.3 On 16 September, the company informed the AMS that it had rejected the author's application because his salary expectations were excessive, adding that he had required a salary of 40,000 Austrian schillings.

2.4 On the same day, an AMS employee called Mr. J.S., who reiterated that the amount of 40,000 Austrian schillings had been presented by the author as a condition for him to accept a job opportunity.

2.5 On 20 September 1996, the author indicated to the AMS that the amount he had talked about during his interview with Mr. J.S. concerned his previous earnings, which he had never presented as a condition for accepting employment.

2.6 On 1 October 1996, the author was advised by the AMS that he would cease to receive an unemployment benefit as he had refused a suitable job opportunity that had been proposed to him by the Stelzer Company, informing him that he had the possibility to appeal this decision in writing to the AMS' regional office.

2.7 On 14 October 1996, the author appealed the decision of the AMS, reiterating his previous allegation regarding his previous salary. He added that, according to the information given by the Chamber of Labour on 12 August 1996, the salary and commissions proposed by Mr. J.S. were under the minimum amount established by the collective agreement and that, therefore, there was no obligation for him to accept the job.

2.8 On 23 October 1996, an AMS employee called the head of the company Stelzer, who confirmed that the amount of 40,000 Austrian shillings had been presented by the author as

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<sup>1</sup> There is no precise information about this collective agreement.

a condition. Mr. J.S. added that the company would have been ready to pay the difference between the salary which was proposed, and the minimum amount established by the collective agreement.

2.9 Mr. J.S. reiterated his previous statements in a letter dated 26 May 1997, addressed to the AMS.

2.10 By a letter dated 8 August 1997 addressed to the author, the AMS confirmed the decision to withdraw his unemployment benefit from 16 September 1996 to 27 October 1996, as he had refused a suitable job due to his excessive wage demand.

2.11 On 19 September 1997, the author filed a complaint with the Administrative Court, arguing that the AMS had taken its decision based on incorrect facts. He also requested a hearing before the Court.

2.12 On 3 July 2002, his complaint was rejected by the Court as unfounded. The Court noted that it was not required to assess the rightness and accuracy of the evidence given by the AMS as the considerations contained therein were “conclusive”, as required by Article 45, paragraph 2, of the General Administrative Procedures Act. The Court also refused to hold a hearing, saying that it would not serve to clarify the case.

2.13 The author filed a complaint against the decision of the Administrative Court before the European Court of Human Rights.<sup>2</sup> On 2 May 2003, the First Chamber of the Court declared his complaint inadmissible for non-exhaustion of domestic remedies.<sup>3</sup> Thus, the author considers that his complaint has been rejected on procedural grounds and has not been examined by another mechanism of international settlement on the merits.

### **The complaint**

3.1 The author submits that, by refusing to hold a public oral hearing, on the basis that it would not serve to clarify the situation, the Administrative Court deprived him of his procedural rights, as he was not able to defend himself and could not examine the witnesses against him.

3.2 The author also claims that Austria has violated his right to access a tribunal, as laid down by article 14, paragraph 1, of the Covenant. He thus considers that the Administrative Court based its decision on evidence provided by the AMS, an administrative and not judicial authority, without considering the correctness of the information. Therefore, by denying a substantive review and assessment of the evidence, the Administrative Court prevented him from having access to an independent tribunal that would review factual evidence.

3.3 The author further claims that, by ignoring his arguments, the Administrative Court deprived him of a fair trial.

3.4 He also considers that the submission of his case to the Austrian Constitutional Court would be ineffective as this Court is not able to assess evidence and to examine the rightness and accuracy of the decisions of other courts and that he therefore has exhausted all available and effective domestic remedies.

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<sup>2</sup> The date of the author’s application to the European Court is not indicated.

<sup>3</sup> The European Court determined “that the domestic remedies, for purposes of art. 35, paragraph 1, of the European Convention, have not been exhausted, as the author failed to invoke the allegations submitted to the European Court in an appeal before the competent Austrian courts, and failed to raise his claims in accordance with the applicable requirements of the national procedural laws.”.

### **State party's observations on admissibility**

4.1 On 18 October 2011, the State party provided its observations on admissibility. It submits that the Wiener Neustadt Employment Office (*Arbeitsmarktservice*), by its decision of 1 October 1996, withdrew from the author the entitlement to unemployment benefits from 16 September 1996 until 27 October 1996, in application of paragraph 10 of the Unemployment Insurance Act (*Arbeitslosenversicherungsgesetz*), because the author had declined an employment offer by the Employment Office. The last instance decision at the domestic level was issued by the Administrative Court (*Verwaltungsgerichtshof*), which dismissed the author's appeal on 3 July 2002. In May 2003, the European Court declared the author's application inadmissible for failure to exhaust domestic remedies.

4.2 Referring to the rule 96 (c) of the rules of procedure of the Committee, the State party claims that the author's communication may constitute an abuse of the right of submission. In its view, this rule may be of relevance for the author's case, even if it is to be applied only for communications received after 1 January 2012. The State party recalls that the Administrative Court's ruling (last instance decision) was issued on 3 July 2002. On 2 May 2003, the author's application was declared inadmissible by the European Court of Human Rights. Accordingly, the time limit laid down in rule 96 (c) of the rules of procedure (5 years from the exhaustion of domestic remedies or, where applicable, 3 years from the conclusion of another procedure of international investigation or settlement) have been transgressed considerably. Even if assumed that the author submitted his communication to the Committee in 2005, he failed to provide any reasons for its late submission. The State party further submits that it is in the interest of legal certainty that the alleged violations of the Covenant are examined within a reasonable time and as early as possible, and that domestic decisions are not indefinitely subject to an examination on the basis of the rights guaranteed under the Covenant. Otherwise, such an examination would sometimes be impossible simply because of a lapse of time, for example where – as a matter of routine – the relevant files have been destroyed in the meantime.

4.3 The State party has moreover challenged the admissibility of the communication on the ground that the "same matter" has already been examined by the European Court of Human Rights, with respect to the author's claim under article 14, paragraph 1, of the Covenant, referring to the Committee's rules of procedure (rule 96 e)). The State party further submits that the author failed to exhaust all available domestic remedies, recalling that the author's application lodged with the European Court was declared inadmissible, because he had only partially exhausted the legal remedies available at the national level. It submits that the author would have been free to file a complaint before the Constitutional Court (*Verfassungsgerichtshof*), on account of an alleged violation of his right of access to a tribunal, requesting the Court to set aside the decision of the Administrative Court. He could have also requested an oral hearing before the Constitutional Court. The State party thus considers the author's communication inadmissible.

### **Author's comments on the State party's observations**

5.1 On 2 November 2011, the author refutes the State party's argument that his communication constitutes an abuse of the right of submission. He recalls that the decision of the Administrative Court was issued on 3 July 2002, and his application was declared inadmissible by the European Court on 2 May 2003. He submitted the communication to the Committee on 14 February 2005, therefore he complied with the time limits set out in rule 96 (c) of rules of procedure.

5.2 As to the exhaustion of domestic remedies, the author submits that an application to the Constitutional Courts against the decision of the Employment Service is not effective and has no reasonable prospect of success. The Court examines only the constitutionality of

the decision, but not the correctness and accuracy of the evidence. According to its case law,<sup>4</sup> an administrative official is not required to give reasons for his decision concerning the conclusiveness and credibility of one's testimony. The author reiterates that his communication concerns the proceedings before the Administrative Court, and claims that there are no domestic remedies against the refusal of the Administrative Court to conduct a hearing and to examine the rightness and accuracy of the Employment Service's decision. Accordingly, he claims to have exhausted all available domestic remedies in Austria.

### **State party's observations on the merits**

6.1 On 20 February 2012, the State party submitted new observations on the admissibility of the communication, reiterating that it was registered only in 2011 under the reference number 2088/2011 and that, as concluded by the European Court of Human Rights in its inadmissibility decision of 2 May 2003, the author has failed to exhaust all available domestic remedies.

6.2 Referring to article 144, paragraph 1, of the Austrian Federal Constitutional Act, the State party claims that all activities of an administrative authority affecting or determining an individual legal relationship are also subject to the review of the Constitutional Court, particularly where the applicant alleges an infringement of constitutional right.

6.3 The State party submits that the Constitutional Court holds oral hearings, and that the author could have requested an oral hearing in his complaint to the Constitutional Court. In its view, the author would have been free to assert the alleged violations at least in substance before the Constitutional Court, as also required pursuant to article 2 of the Optional Protocol.

6.4 The State party contends that the author's allegation that the Administrative Tribunal was not an independent tribunal could have been asserted before the Constitutional Court. It submits that the State party's legal system affords for appeal, in accordance with article 6 of the European Convention on Human Rights, as well as the right of access to an independent and impartial tribunal, to a public oral hearing and to a fair trial, in accordance with article 14 of the Covenant. The State party claims that the author could also have asserted that the challenged decision had been issued arbitrarily. In this connection, he could have invoked the constitutionally guaranteed right to equality of all citizens before the law, referring for example to a repeatedly incorrect assessment of the legal situation, to the failure to conduct an investigation on a decisive point, to the failure to conduct a proper investigation at all, or to neglecting some submissions by the parties.<sup>5</sup> The State party considers that the authority acts arbitrarily in particular if it justifies its decision on the basis of arguments that do not have explanatory value.<sup>6</sup> The relevant considerations underlying the decision must emanate from the reasoning of the decision, since it is the only way to enable the Constitutional Court's control, indispensable in a State adhering to the rule of law.<sup>7</sup> Since the author has failed to address the Constitutional Court, the present communication should be held inadmissible. If the Committee considered the communication admissible, it should declare it without merits.

6.5 As concerns the alleged violation resulting from the failure to hold a hearing before the Administrative Court, the State party claims that it guarantees to the parties to the claims under the Unemployment Insurance Act a public and oral hearing, as it falls within the scope of civil claims and obligations under article 14 of the Covenant. However, in line

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<sup>4</sup> The author refers to the Constitutional Court decision ref. no. VfSlg.11.965/1989.

<sup>5</sup> Reference is made to the constant case law in that regard by the Austrian Constitutional Court (e.g. VfSlg. 15.451/1999, 15.743/2000, 16/354/2001 and 16.383/2001).

<sup>6</sup> See e.g. the Constitutional Court decisions ref. no. VfSlg. 13.302/1992, VfSlg. 14421/1996, and 15.743/2000.

<sup>7</sup> See e.g. the Constitutional Court decisions ref. no. VfSlg. 17/901/2006, and 18.000/2006.

with the Committee's jurisprudence, the requirement of a public hearing does not apply without restriction to all appellate proceedings, for example, if the proceedings can be determined on the basis of written submissions.<sup>8</sup> As regards the claims of a wrongful assumption by the Administrative Court that a further clarification of the matter was not to be expected from an oral discussion, the State party recalls that the author submitted to the Administrative Court that the challenged authority did not correctly establish the true facts and had been relying on an incorrect weighing of evidence for its findings.

6.6 The State party notes the argument of the author that the reasons given by the challenged authority as to why it had attributed greater credibility to the statements of a particular witness (the author's potential employer – Mr. J.S.) than to his statements were not objectively justified, and that in the absence of a formal hearing, he had had no opportunity to ask the witness J.S. questions about the content of the job interview. However, the State party considers that the only issue in dispute was the question of whether the author – as noted by the challenged authority – had actually demanded a salary in the amount of ATS 40.000 during that interview. It emanates from the documents before the Administrative Court that the witness expressly stated on two occasions, both in the first-instance proceedings and in his submission forwarded in the course of the appellate proceedings, that the author had demanded a salary of ATS 40.000 as a condition for accepting the job. These statements seemed credible to the challenged authority because the company of the witness had informed the Western Neustadt Regional Office that they urgently needed someone and would have employed the author subject to their conditions had he agreed. Since the author had already earned a salary of over ATS 40.000, it did not seem unreasonable to the challenged authority that he again wanted to earn such a salary.

6.7 Within the framework of its reviewing role on the basis of the written submissions, the Administrative Court could not consider the weighing of evidence inconclusive. A further clarification of the matter was therefore not to be expected from an oral hearing. The State party further notes that the author's complaint that he could not have been expected to accept the job offered to him, since the company of the witness merely stated that it would pay a fixed amount of ATS 10.000 gross, plus a commission. The State party indicates that the company's statement before the first instance authority that it would pay the difference up to the salary guaranteed under the collective agreement showed the company's readiness to find a solution to the disputed remuneration. This option was not mentioned to the author during the job interview.

6.8 In regard to the company's statement on remuneration, the Administrative Court was able to reply in its ruling that the author could have raised any (subjective) doubts he might have had about a remuneration during the job interview. Even if a salary offer were (objectively) incomplete or doubtful in relation to the collective agreement, it would be for the unemployed (before refusing the job) to ask pertinent questions to get a clear picture of the situation. The salary offered to the author during the interview contained an unspecified commission in addition to a fixed amount. In the absence of further indications in that respect, the State party submits that the author was not in condition to conclude that the potential employer did not even want to pay him the minimum salary under the collective agreement, in case of lower commission earnings.

6.9 As it was evident from the complaint and the files submitted to the Administrative Court and the assessment by the intervening administrative authorities that a further clarification of the matter was not to be expected from an oral discussion, the Court could abstain from holding an oral hearing in the light of an efficient conduct of the proceedings,

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<sup>8</sup> The State party refers to communications No. 301/1988, *R.M. v. Finland*, para. 6.4; No. 215/1986, *G.A. van Meurs v. the Netherlands*, para. 7.1; No. 789/1997, *Bryhn v. Norway*, para. 7.2. See also General Comment No. 32 relating to article 14 of the Covenant of 23 August 2007, para. 28.

pursuant to article 39, paragraph 2 (6)), of the Administrative Court Act, without violating the author's rights guaranteed by article 14, paragraph 1, of the Covenant.

6.10 As regards the alleged refusal to examine the correctness of facts and evidence relevant for the decision of the Administrative Court, and the alleged failure to consider the individual complaints, the State party submits that the Committee is not a "fourth instance". It recalls that the establishment of the facts, weighing of evidence and interpretation of national legislation is a matter for the States, unless there is an apparent arbitrariness, error or denial of justice.<sup>9</sup>

6.11 Furthermore, the State party submits that according to section 41, paragraph 1, of the Administrative Court Act, the Administrative Court's reviewing role is restricted in respect of the facts, as the court shall carry out its examination "on the basis of the facts found by the challenged authority". In case of an emanating procedural defect, the Court shall merely set aside the challenged decision, but it cannot take a decision on the merits. Hence, the Administrative Court cannot conduct proceedings for taking further evidence.

6.12 The State party also contends that the weighing of evidence by the challenged authority is subject to the full review by the Administrative Court. It has to determine whether the facts have been sufficiently established, and whether the considerations for the weighing of evidence are conclusive - i.e. whether they comply with the rules of reasonable evaluation and general human experience, or the experience of our daily lives. The Administrative Court is not entitled to assess the correctness of the challenged authority's weighing of evidence, which has passed the test under these aspects.

6.13 In the author's case, the Administrative Court examined in detail the weighing of evidence by the challenged authority and the author's arguments against it, point by point. The State party indicates that the considerations underlying the reasoning of its ruling comprise eight pages in that respect.<sup>10</sup> The Administrative Court held in that ruling that the challenged authority comprehensively considered the contradictory statements of the author and the witness J.S., in accordance with the above case law (para 6.4), weighing all the evidence. By no means can it be said that the Administrative Court did not consider the author's submissions. Despite the limited scope of review by the Administrative Court as described above, the court and its procedures comply with the institutional guarantees of article 14 of the Covenant and it represents a competent, independent, impartial tribunal established by law within the meaning of article 14 of the Covenant.

6.14 The State party requests the Committee to declare the present communication inadmissible under article 3 of the Optional Protocol to the Covenant. If it considered the communication to be admissible, it should conclude that there has been no violation of the author's rights under article 14 of the Covenant.

#### **Author's comments on the State party's observations**

7.1 On 27 March 2012, the author submitted his comments on the State party's observations, alleging that he has exhausted the domestic remedies available to him. He claims that the application to the Constitutional Court would be ineffective, and that it had no reasonable prospect of success. He submits that an application to the Constitutional

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<sup>9</sup> The State party refers to Communications No. 1188/2003, *Riedl-Riedenstein et al. v. Germany*, para. 7.3; No. 886/1999, *Bondarenko v. Belarus*, para. 9.3; No. 1138/2002, *Arenz et al. v. Germany*, admissibility decision, para. 8.6; No. 1454/2006, *Lederbauer v. Austria*, para. 7.4, wherein the Committee recalled that it is generally for the courts of States parties to the Covenant to review the facts and evidence, or the application of domestic legislation, in a particular case, unless it can be shown that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice.

<sup>10</sup> The ruling of 3 July 2002, no. 97/08/0536, page 8 *et seq.* has been annexed to the initial complaint.

Court against the proceeding and decision of the Administrative Court is not possible in Austria, despite article 144 of the Federal Constitutional Act.<sup>11</sup>

7.2 The author argues that the Administrative Court should have applied the right to a fair trial by conducting a hearing and deciding over the facts of his case. By not doing so, the Court violated the obligations emanating from article 14 of the Covenant. He also claims that the Covenant has no constitutional value in Austria, and that the laws that would incorporate the Covenant into the domestic law have not been adopted until 2012, in particular as regards the application of article 14 of the Covenant in the area of unemployment insurance. In this regard, the author refers to the concluding observations of the Committee of 2007, which noted that the Covenant is not directly applicable in the State party, and that there is no corresponding domestic remedy in Austria.<sup>12</sup>

7.3 The author claims that simple mistakes in the proceedings and incorrect weighing of evidence and false finding of facts are not coming within the constitutional sphere according to the case law of the Constitutional Court.<sup>13</sup>

7.4 The author adds that a complaint to the Administrative Court was the appropriate remedy, and that it required a public hearing, pursuant to article 39, paragraphs 1 and 2, of the Administrative Court Act, and in accordance with the international law. He reiterates that there is no remedy against the decision of the Administrative Court to refuse conducting a hearing, examining the lawfulness and accuracy of the decision of the Employment Service, and to disregard important submissions by a party. The author refers to a judgement of the European Court in *Fischer v. Austria*, wherein it reportedly concluded that the refusal by the Administrative Court to hold an oral hearing amounted to a violation of article 6, paragraph 1, of the European Convention.<sup>14</sup> Subsequent to that judgment, article 39 of the Administrative Court Act was modified, effective from 1 September 1997, to ensure compliance with article 6, paragraph 1, of the European Convention. Although the author submitted his complaint to the Administrative Court on 19 September 1997, the Court reportedly did not respect the new legal provision and wrongly cited, in its decision of 3 July 2002, article 39 of the Administrative Court Act, in the version effective before 1 September 1997.<sup>15</sup>

7.5 The author further reiterates that the State party violated article 14 of the Covenant because the Administrative Court disregarded important facts, and it did not declare any exceptional circumstances that might have justified dispensing with an oral hearing. The

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<sup>11</sup> Article 144 (1): “The Constitutional Court pronounces itself on complaints about decisions by administrative authorities including the independent administrative tribunals.”

<sup>12</sup> See the Concluding observations of the Human Rights Committee on Austria (CCPR/C/AUT/CO/4), of 30 October 2007, para. 6.

<sup>13</sup> See the Constitutional Court judgements (VfSlg. 11.965/1989) that ‘considerations of an authority made for an evaluation of evidence only constitute an arbitrary conduct by the authority, if they are in contradiction with general life experience or with the rules of logical thinking. Only in this case – according to the constant case law of the Constitutional Court – should be supposed under constitutional law an important gross offense against procedural law, and that for an administrative authority, there exists no obligation to give (precise) reasons for his decision concerning the conclusiveness and credibility of the testimony of a person’. In the second decision of the Constitutional Court (VfSlg. 11.126) stated ‘that if the complainant accuses an administrative authority that she have isolated parts of his pleading stringed together and made only a fictitious weighing of evidence and – contrary to the files – asserted that he would be asked in the hearing to designate all reasons of conscience, that pleading contains only the reproach of mistakes in the proceeding not coming within the constitutional sphere’.

<sup>14</sup> See the European Court of Human Rights, *Fischer v. Austria* (Application no. 16922/90) judgement of 26 April 1995), para. 44 [<http://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-57916%22%5D%7D>]

<sup>15</sup> See the Administrative Court decision of 3 July 2002, pages 12 and 13.



author considers that such hearing would have enabled him and his counsel to examine the witness J.S. and the issue of a requested salary.<sup>16</sup>

7.6 The author concludes that the violation of article 14 of the Covenant also rests in the fact that article 41, paragraph 1, of the Administrative Court Act, restricts the reviewing role of the Administrative Courts in respect of the facts. He therefore considers that the claims under the Unemployment Insurance Act cannot be independently assessed.

## Issues and proceedings before the Committee

### *Consideration of admissibility*

8.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

8.2 The State party has challenged the admissibility of the author's claims under article 14 on the ground that his communication represents an abuse of the right of submission, pursuant to article 3 of the Optional Protocol. The State party held that the author submitted his communication in 2011, while the last available remedy was exhausted on 3 July 2002, and his complaint to the European Court of Human Rights was declared inadmissible for non-exhaustion of domestic remedies on 2 May 2003. As the communication to the Committee was submitted in German on 14 February 2005, and at the request of the Committee, dated 9 June 2011, submitted in English on 4 July 2011, the Committee considers that it is not precluded from considering the author's communication by article 3 of the Optional Protocol, as his communication was submitted less than two years from the decision of the European Court of Human Rights.

8.3 The Committee notes that the State party has moreover challenged the admissibility of the communication on the ground that the "same matter" has already been examined by the European Court of Human Rights, with respect to the author's claim under article 14, paragraph 1, of the Covenant.

8.4 The Committee observes that, when ratifying the Optional Protocol and recognizing the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction, the State party made the following reservation, with reference to article 5, paragraph 2(a) of the Optional Protocol: "On the understanding that, further to the provisions of article 5 (2) of the Protocol, the Committee provided for in Article 28 of the Covenant shall not consider any communication from an individual unless it has been ascertained that the same matter has not been examined by the European Commission on Human Rights established by the European Convention for the Protection of Human Rights and Fundamental Freedoms."

8.5 The Committee recalls its jurisprudence that the inadmissibility decision amounts to an "examination", for the purpose of article 5, paragraph 2(a), of the Optional Protocol, when it entailed at least the implicit consideration of the merits of a complaint.<sup>17</sup> However, the author's complaint was declared inadmissible by the European Court due to the non-exhaustion of domestic remedies. The Committee thus does not consider itself precluded from examining the author's claim under article 14 of the Covenant, pursuant to article 5, paragraph 2(a), of the Optional Protocol.

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<sup>16</sup> The author submits that, further to his request of 12 August 1996, the Chamber of Labour in Vienna informed him that he would be entitled to a salary of ATS 25,480 under the collective agreement. According to this, it should not have been taken as a fact that the complainant, a month later in the course of the interview suddenly demanded an unrealistic level of ATS 40.000 gross per month.

<sup>17</sup> See Communication No. 1396/2005, *Jesús Rivera Fernández v. Spain*, Decision on Admissibility of 28 October 2005, para. 6.2.

8.6 As regards the requirement of exhaustion of all available domestic remedies, the Committee notes that the author has not availed himself of a constitutional complaint, as he has considered that such complaint against the decision of the Administrative Court would be ineffective in his case. The Committee also observes that according to the State party, the author could have filed a complaint before the Constitutional Court on account of an alleged violation of his right of access to a tribunal and the right to equality before the law. In the present case, the Committee observes that the author has not invoked the allegation that he later submitted to the Committee before the competent Austrian courts, and that he did not substantiate his allegations of a perceived ineffectiveness of a constitutional complaint, with respect to his right of access to a tribunal and to a public hearing. In this connection, while the author disagrees with the assessments by the State party as concerns the effectiveness of domestic remedies available against the decisions of Administrative Courts in Austria, he does not make any reference to previous jurisprudence or otherwise substantiate his allegation that such remedy for the right of access to a tribunal would be ineffective in his case. The Committee therefore concludes that his communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

9. The Committee therefore decides:

(a) That the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol;

(b) That the decision be transmitted to the State party and to the author.

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