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International Covenant on Civil and Political Rights

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Human Rights Committee

Communication No. 1789/2008

Decision adopted by the Committee at its 104th session, 12 to 30 March 2012

Submitted by:	G.E. (not represented by counsel)
Alleged victim:	The author
State party:	Germany
Date of communication:	17 March 2008 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 27 May 2008 (not issued in document form)
Date of adoption of decision:	26 March 2012
Subject matter:	Discrimination based on age
Procedural issues:	Exhaustion of domestic remedies/Reservations entered into by the State party
Substantive issues:	Discrimination under article 26 of the Covenant
Articles of the Covenant:	26, 17
Articles of the Optional Protocol:	5

Annex

Decision of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights (104th session)

concerning

Communication No. 1789/2008*

Submitted by:	G.E. (not represented by counsel)
Alleged victim:	The author
State party:	Germany
Date of communication:	17 March 2008 (initial submission)

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

Meeting on 26 March 2012,

Adopts the following:

Decision on admissibility

1. The author of the communication, dated 17 March 2008, is Mr. G.E., a German national born in 1935. He complains of violations by Germany of articles 1, 2, 26 and 17 of the Covenant. The Covenant and the Optional Protocol thereto entered into force for Germany on 23 March 1976 and 25 November 1993 respectively.[1] The author is not represented by counsel.

* The following members of the Committee participated in the examination of the present communication: Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Marat Sarsembayev, Mr. Krister Thelin and Ms. Margo Waterval.
The texts of two individual opinions by Committee members, Mr. Gerald L. Neuman, Mr. Yuji Iwasawa, Mr. Michael O'Flaherty, Sir Nigel Rodley and Mr. Fabian Omar Salvioli are appended to the text of the present decision.
Pursuant to rule 91 of the Committee's rules of procedure, Committee member Mr. Walter Kaelin did not participate in the adoption of the present decision.

[1] Upon ratification of the Optional Protocol, the State party entered the following reservation: "The Federal Republic of Germany formulates a reservation concerning article 5 paragraph 2 (a) to the effect that the competence of the Committee shall not apply to communications: (a) which have already been considered under another procedure of international investigation or settlement, or (b) by means of which a violation of rights is reprimanded having its origin in events occurring prior to the entry into force of the Optional Protocol for the Federal Republic of Germany; (c) by means of which a violation of article 26 of the [said Covenant] is reprimanded, if and insofar as the reprimanded violation refers to rights other than those guaranteed under the aforementioned Covenant."

The facts as presented by the author

2.1 The author is a physician, who was licensed as a specialist in internal medicine and provided medical services as a "panel doctor".[2] He was put on the panel in 1973 by the Licensing Board of North Baden for an indefinite period of time.

2.2 On 31 March 2003, his licence was revoked pursuant to Section 95(7), Book V, of the Social Code (*Sozialgesetzbuch*), which states, in the relevant part:

> "The licence of a panel doctor shall terminate upon the death, the effective date of a resignation or the move of the licensed party away from the district of his/her licensed domicile. Moreover, as of 1 January 1999, the licence shall terminate effective the end of the calendar quarter in which the panel doctor completes 68 years of age."

2.3 The author claims that by this law, doctors are in effect banned from their profession and dispossessed of their income once they reach the age of 68. The provisions of the law do not provide for any compensation for the damages suffered by those concerned.

2.4 Patients covered by private insurance may still be treated by doctors over 68 years of age. Moreover, doctors licensed before 1 May 1999 are entitled to work as panel doctors for at least 20 years, with the result that a 54-year-old doctor licensed in 1992 may work until 2012, i.e. until he is 74 years old.

2.5 On 11 February 2002, the author lodged an application to the Karlsruhe Social Court (*Karlsruhe Sozialgericht*) for provisional relief, which was dismissed as inadmissible on 3 April 2002, since the author had not yet been affected by the provision of the law he challenged. The author did not appeal the decision to the Federal Social Court. The author argues that similar cases had already been rejected by that Court and that there was no real chance of obtaining a correction of the provision by this court in time before the revocation of his licence.

2.6 He challenged the legality of the provision of Section 95(7) with the Federal Constitutional Court on 12 July 2002. The author claims that this was a "permissible" legal alternative. In August 2002, the Federal Constitutional Court rejected the author's constitutional complaint as inadmissible. The decision of the Federal Constitutional Court was not subject to appeal.

The complaint

3. The author states that Section 95(7) of the Social Code violates article 26 of the Covenant, as it discriminates on grounds of age. He also claims that his rights under article 17 of the Covenant have been violated, as the law constitutes arbitrary or unlawful interference with his privacy.[3] He states that the law is neither justified nor necessary with respect to public welfare.

[2] Panel doctors in Germany enter into a contract with public health insurance companies to provide services to patients who have medical insurance paid by the Government. Under this scheme, so-called "panel doctors" provide services and get paid for treating clients who are covered by public health insurance.

[3] The author also alleges violations of articles 1 and 2 of the Covenant, but presents no arguments to support his claims.

State party's observations on admissibility

4.1 On 23 September 2008, the State party submitted its comments on the admissibility of the complaint. The State party challenged the admissibility of the communication on two grounds: its reservation to the Optional Protocol and non-exhaustion of domestic remedies.

4.2 The State party considers letter (c) of its reservation to the Optional Protocol to be applicable to the present communication. By this reservation, the State party submits, the Committee shall not be competent for communications "by means of which a violation of article 26 of the [said Covenant] is reprimanded, if and insofar as the reprimanded violation refers to rights other than those guaranteed under the aforementioned Covenant." The complainant basically claims that his right to freely exercise or choose an occupation has been violated. The State party submits that these rights are not protected by the Covenant. Consequently, a complaint based on the alleged violation of article 26 with respect to those rights is inadmissible due to the German reservation.

4.3 Regarding the claim under article 17 (not covered by the reservation), the State party submits that article 17 (1) and (2) of the Covenant protects privacy and family rights. The State party contends that these rights are not affected in the present case, and that the author really wants to obtain protection for his right to freely choose an occupation. As these are not protected by the Covenant, the State party considers the communication inadmissible under article 3 of the Optional Protocol.

4.4 The State Party also challenges the admissibility of the communication based on non-exhaustion of domestic remedies. The State submits that the author's application to the Karlsruhe Social Court for provisional relief was rejected as inadmissible. The court considered that at the time the complaint was filed, there was no need for relief. The State party claims that the author failed to file an admissible appeal to this decision or begin legal proceedings on the merits, and that the author's claim was thus never examined on its merits. Therefore, the State party argues, the author failed to exhaust domestic remedies within the meaning of article 5, paragraph 2(b) of the Optional Protocol.

Author's comments on the State party's submission

5.1 In his comments dated 25 October 2008, the author submits that the State party's argument that it has entered into a reservation under article 26 of the Covenant is invalidated by the fact that the Covenant was ratified by Germany in 1973, and thus creates obligations on behalf of the State party to apply the provisions of the Covenant. The author submits that when the State party adopts a law, it must ensure that the law is non-discriminatory.

5.2 As to the State party's claim that he has not exhausted all available domestic remedies, the author submits that all "realistic" domestic remedies were exhausted. The author submits that the complaint which he filed with Karlsruhe Social Court on 11 February 2002 was dismissed on 3 April 2002. The author submits that the date of the withdrawal of his licence was set on 31 March 2003, and therefore he did not have sufficient time to file any further complaints with social courts. The author also claims that various social courts have repeatedly issued decisions rejecting claims similar to that submitted by the author. Therefore, the author submits, he used a "permissible" legal alternative and filed his complaint directly with Germany's Federal Constitutional Court on 12 July 2002.

5.3 The author submits that there was no point in using social courts any further, because all national courts in Germany had come to the conclusion that this provision of Section 95(7) was legal and in conformity with national and supranational law. The author also submits that the provision of Section 95(7) violates European law, but claims that individuals are barred from bringing complaints with the European Court of Justice.

5.4 The author submits that on 12 October 2008, the German parliament repealed the statutory age limit imposed on the panel doctors by the provision of Section 95(7). The author argues that this provision was abolished because it served no public welfare interests and no community purpose.

Further comments by the author

6. By letter dated 4 February 2010, the author further submits that on 12 January 2010, the European Court of Justice issued a judgment on the statutory age limit contained in the provision of Section 95(7). In that judgment, the European Court of Justice decided that the provision in question was not compatible with European Community law.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

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

7.3 The Committee notes the State party's argument contesting the Committee's competence in this case due to paragraph (c) of its reservation to the Optional Protocol, which provides that the competence of the Committee "shall not apply to communications by means of which a violation of article 26 of the [said Covenant] is reprimanded, if and insofar as the reprimanded violation refers to rights other than those guaranteed under the aforementioned Covenant." The State party, in its submission, construes the claim by the author as basically referring to an alleged violation of his right to choose or exercise an occupation, which is indeed not covered by the Covenant on Civil and Political Rights. The Committee, however, considers the present communication as related to an alleged violation of the autonomous rights to equality and non-discrimination enshrined in article 26 of the Covenant. The Committee is thus not precluded from proceeding to examine whether the admissibility requirements have been met.

7.4 With regard to the requirement laid down in article 5, paragraph 2 (b), of the Optional Protocol, the Committee takes note of the State party's argument that the author has failed to exhaust domestic remedies. The author argues that he did not have enough time to appeal the initial decision of the Karlsruhe Social Court before the revocation of his licence. The author also argues that because there were several other decisions with negative outcomes, there was no real chance to obtain a positive judgment on Section 95(7) of the contested law. The author further argues that he challenged the legality of the provision of Section 95(7) with the Federal Constitutional Court, on 12 July 2002, which rejected it as inadmissible in August 2002 on the basis that the relevant legislation was not yet applicable to the author. The Committee notes from the information before it that the author's application for provisional relief was declared inadmissible by the Karlsruhe Social Court as it was presented before the author was affected by the law in question, and that the author failed to file, after the above-mentioned decision of the Federal Constitutional Court, an admissible application to the courts for provisional relief or to begin legal proceedings on the merits. The Committee recalls that in the pursuit of domestic remedies, an author must show due diligence and comply with the requirements of the

procedure.[4] The Committee also recalls its jurisprudence that mere doubts about the effectiveness of available remedies do not absolve an author from availing himself of them.[5] Accordingly, the requirements of article 5, paragraph 2(b), of the Optional Protocol have not been met in this respect.

8. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 5, paragraph 2 (b) 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 to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

[4] See communication No. 433/1990, *A.P.A. v. Spain*, decision of inadmissibility of 25 March 1994, para. 6.3; communication No. 982/2001, *Bhullar* v. *Canada*, decision of inadmissibility of 31 October 2006, para. 7.3.

[5] See, *inter alia*, communication No. 550/1993, *Robert Faurisson* v. *France*, Views adopted 8 November 1996, para. 4.3; communication No. 727/1996, *Paraga* v. *Croatia*, Views adopted 4 April 2001, para. 5.5.

Appendix

Individual Opinion of Committee member Mr. Gerald L. Neuman, joined by members Mr. Michael O'Flaherty, Sir Nigel Rodley and Mr. Yuji Iwasawa (concurring)

I agree with the Committee that the author's communication is inadmissible for lack of exhaustion of domestic remedies. That finding provides a sufficient basis for resolving the case. The majority nonetheless takes the occasion, in paragraph 7.3 of its decision, to address one of the State party's reservations to the Optional Protocol, and gives the reservation an untenable interpretation. I cannot join in that portion of the decision.

Part (c) of Germany's reservation to the Optional Protocol denies the competence of the Committee with respect to communications "by means of which a violation of article 26 of the [Covenant] is reprimanded, if and insofar as the reprimanded violation refers to rights other than those guaranteed under the aforementioned Covenant." From its language and its context, it is clear that this reservation purports to limit the Committee's competence over article 26 claims to situations in which an author alleges discrimination with respect to some other right contained in the Covenant, in a provision other than article 26 itself. Thus, the reservation would reduce the Committee's competence to cases where article 26 serves an "accessory" function,[1] similar to the function of the non-discrimination norm in article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

I fully agree with the majority's position that the rights to equality and non-discrimination enshrined in article 26 of the Covenant are autonomous, not merely accessory. The Committee correctly held long ago, in the well-known cases of *Broeks* and *Zwaan-de Vries*,[2] that discrimination on the basis of sex with regard to pension rights implicated article 26 of the Covenant, despite the fact that the Covenant on Civil and Political Rights does not guarantee any independent right to a pension.

The Federal Republic of Germany did not make a reservation to article 26 when it ratified the Covenant, and therefore is substantively bound by the full meaning of article 26. When, however, Germany ratified the Optional Protocol to the Covenant in 1993, it sought to prevent communications based on this autonomous character of Article 26 from being brought before the Committee, by articulating the reservation quoted above.

The Committee maintains in paragraph 7.3 of its decision that the reservation does not apply to the author's claim of age discrimination, because the author's claim asserts a violation of the autonomous rights to equality and non-discrimination enshrined in article 26. This interpretation not only contradicts the clear meaning of the reservation, but appears to deprive the reservation of any content whatsoever. Every claim of discrimination, including those in *Broeks* and *Zwaan-de Vries*, can be described as relating to the autonomous right enshrined in article 26.

I do not see how such a nullifying interpretation can be justified. To the contrary, the reservation (if permissible) would exclude the author's claim of age discrimination from the Committee's competence precisely because the claim is autonomous and not accessory

[1] See, for example, the State party's argument in communication No. 1115/2002, *Petersen v. Germany*, decision on admissibility adopted on 1 April 2004, para. 4.2.

[2] Communication No. 172/1984, *Broeks v. the Netherlands*, Views adopted on 9 April 1987; Communication No. 182/1984, *Zwaan-de Vries v. the Netherlands*, Views adopted on 9 April 1987.

– that is what the reservation means. Germany's reservation might be impermissible, but the majority does not address that question, construing the reservation instead as inapplicable to the author's claim, on grounds that would render it inapplicable to every claim.

I will not explore the permissibility of the reservation here, because I do not see sufficient reason to reach that question, given that the communication is already inadmissible on grounds of lack of exhaustion of domestic remedies. In several prior decisions, the Committee has declined to address this reservation, finding the respective authors' claims inadmissible due to lack of exhaustion,[3] or even to lack of substantiation.[4] That course could have been followed here, with regard to both the interpretation and the permissibility of the reservation. Instead, the majority has addressed the question of interpretation, and given an unconvincing answer. Having responded to the majority's interpretation, I would postpone analysis of the more difficult question of the permissibility of the reservation until a communication is presented that genuinely requires it.

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

[3] Communication No. 1188/2003, *Riedl-Riedenstein v. Germany*, decision on admissibility adopted on 2 November 2004, para. 7.2

[4] See ibid. para. 7.3; communication No. 1516/2006, *Schmidl v. Germany*, decision on admissibility adopted on 31 October 2007, para. 6.2; communication No. 1292/2004, *Radosevic v. Germany*, decision on admissibility adopted on 22 July 2005, para. 7.2; communication No. 1115/2002, *Petersen v. Germany*, decision of inadmissibility of 1 April 2004, paras. 6.8-6.9.

Individual opinion by Committee member Mr. Fabían Omar Salvioli

1. I am not satisfied with the way in which the Committee has handled the *E. v. Germany* case (communication No. 1789/2008). The Committee has found the complaint inadmissible on the grounds of non-exhaustion of domestic remedies without first having resolved the issue of its competence, which is called into question by the State party on the basis of its reservation to the Optional Protocol.

2. A logical and ordered approach to an individual communication would imply that issues of competence be resolved first if, as in the case in question, they arise. Only when the Committee has declared itself competent may it proceed to the consideration of other questions of admissibility that might be the subject of preliminary objections (such as duplication, the failure to exhaust domestic remedies, wrongful use of the right to submit communications, and so on). Once it has found a matter admissible, the Committee may then go on to consider the merits. In exceptional circumstances, in the light of the nature of a case the Committee may need to examine some aspect of admissibility and the merits at the same time (for example, when a State argues that domestic remedies have not been exhausted and the complaint is based on a denial of justice) but, in any event, the matter of competence must be resolved first.

3. In its decision on the *E. v. Germany* case, the Human Rights Committee concludes (and I agree) that domestic remedies have not been exhausted and points out that article 26 of the Covenant enshrines the stand-alone rights to equality and non-discrimination, in conformity with its admirable and well-established position that the scope of article 26 is not limited to the rights covered by the Covenant.

4. I cannot, however, agree with the line of reasoning that appears at the end of paragraph 7.3 of the decision, in which the Committee concludes that there is no connection between subparagraph (c) of Germany's reservation, formulated when it ratified the Optional Protocol, and the author's complaint, for the reason that the communication refers exclusively to a possible violation of his stand-alone rights to equality and non-discrimination.

5. The paragraph of the reservation in question states that the competence of the Committee shall not apply to communications by means of which a violation of article 26 of the Covenant is reprimanded, if and insofar as the reprimanded violation refers to rights other than those guaranteed under the aforementioned Covenant. It cannot be denied that Mr. G. E.'s complaint refers to a possible violation of article 26 of the International Covenant on Civil and Political Rights resulting from alleged acts of discrimination on the basis of age arising from the application of Section 95 (7) of the Social Code, which in the author's view renders it difficult or impossible for him to work as a doctor.

6. The right to work and other workplace rights are not covered by the International Covenant on Civil and Political Rights (except for the right of everyone to form and join trade unions for the protection of his interests[1]); for that reason, the argument put forward by Mr. G. E. in the communication under consideration is directly related to the reservation formulated by the State party on ratifying the Optional Protocol. The Committee resolved the matter of its competence using an unconvincing line of argument and avoiding what it should have done, which was to consider the case in the light of whether or not Germany's reservation was valid.

[1] Article 22 of the International Covenant on Civil and Political Rights.

7. The Committee's first competence with regard to individual communications is its "competence with respect to its competence", whereby an international body is deemed competent to decide whether or not it is competent. In my view, therefore, it would not have been right either on the one hand to find that subparagraph (c) of Germany's reservation applies to Mr. G.E.'s case (which is correct though for a different reason from that put forward by the Committee in paragraph 7.3 of its decision) but on the other hand to decide not to examine the validity or otherwise of the reservation simply because the domestic remedies had not been exhausted. The first issue of admissibility to be resolved is that of the Committee's competence, and all the more so when that competence is questioned by the State.

8. It is clear that Germany, through its observations on the G.E. case, calls into question the competence of the Committee, and expressly cites its reservation in doing so, as is recognized in paragraph 4.2 of the decision. Addressing other matters of admissibility ahead of the competence issue may well offer a less thorny path, but runs counter to the legal logic that should guide an international protection body like the Human Rights Committee.

9. The third subparagraph of Germany's reservation states clearly that the competence of the Committee shall not apply to communications "by means of which a violation of article 26 [...] is reprimanded, if and insofar as the reprimanded violation refers to rights other than those guaranteed under the aforementioned Covenant".

10. The subparagraph in question constitutes a reservation that directly affects a provision of the Covenant, namely article 26. However, at the time the State ratified the Covenant, in 1973, it formulated no reservation to the aforementioned article. Under article 19 of the Vienna Convention on the Law of Treaties (1969), a State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation.

11. Only in 1993, when it ratified the Optional Protocol, did Germany formulate the reservation in question, which refers to article 26 of the Covenant in the third subparagraph. The Committee, after considering the fifth periodic report of Germany, stated in its concluding observations that it "regrets that Germany maintains its reservations, in particular regarding article 15, paragraph 1, of the Covenant, a non-derogable right, and those made when the Optional Protocol was ratified by the State party which partially limits the competence of the Committee with respect to article 26 of the Covenant."[2]

12. In the instant case, the Committee should have declared itself competent to resolve the matter, but not for the reasons set forth in the last part of paragraph 7.3 of the Views. The competence of the Committee in this case rests on two arguments. Firstly, subparagraph (c) of the German reservation has no validity, as it constitutes a reservation to article 26 of the International Covenant on Civil and Political Rights that was made not when it should have been, at the time of ratification, but 20 years subsequently. A careful reading of the reservation leads one to conclude that it refers in fact not only to the competence of the Committee but also to the actual content of article 26, which it aims to circumscribe.

13. Secondly, the Committee's competence to deal with this case rests on the complementary argument that the reservation in question is also incompatible with the substance of the Protocol, and is thus equally invalid, since it attempts to oblige the Committee to interpret the article, which touches on a fundamental tenet of international

[2] Human Rights Committee: concluding observations to the fifth periodic report of Germany, adopted on 30 March 2004 (CCPR/CO/80/DEU, para. 10). The State party was invited to consider withdrawing its reservations.

human rights law (nothing less than the principles of equal protection of the law and non-discrimination) in a manner that is restrictive and contrary to the Committee's understanding.

14. Only once the issue of the Committee's competence had been resolved on the grounds of the non-validity of subparagraph (c) of Germany's reservation, should the Committee have proceeded to conclude that the complaint filed by Mr. G. E. was inadmissible because of his failure to exhaust all domestic remedies.

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