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Human Rights Committee

Communication No. 2014/2010

Decision adopted by the Committee at its 109th session (14 October – 1 November 2013)

Submitted by:	D.J. (not represented by counsel)
Alleged victim:	The author
State party:	Lithuania
Date of communication:	2 April 2010 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 7 December 2010 (not issued in document form)
Date of adoption of decision:	28 October 2013
Subject matter:	Competition to access to the State's Service
Substantive issues:	Effective remedy; access to court; access, on general terms of equality, to public service
Procedural issues:	Incompatibility with the provisions of the Covenant; failure to substantiate allegations,
Articles of the Covenant:	2, paragraphs 2 and 3; 14, paragraph 1; and 25, paragraph c)
Articles of the Optional Protocol:	2 and 3
	[Annex]

Annex

Decision of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights (109th session)

concerning

Communication No. 2014/2010*

Submitted by:	D.J. (not represented by counsel)
Alleged victim:	The author
State party:	Lithuania
Date of communication:	2 April 2010 (initial submission)

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

Meeting on 28 October 2013,

Adopts the following:

Decision on admissibility

1.1 The author of the communication is Mr D.J., Lithuanian national, born on 1 January 1979. He claims that his rights under articles 14, paragraph 1; and 25, paragraph c), alone and in conjunction of article 2, paragraph 3 of Covenant, were violated by Lithuania. The author is not represented by counsel.

1.2 On 22 February 2011, the Committee, acting through its Special Rapporteur on New Communications and Interim Measures, decided to examine the admissibility of the communication separately from the merits.

Facts as presented by the author

2.1 In 2006, the author applied for a position of civil servant in the Department of Cultural Heritage of the Ministry of Culture. Under the *Procedure for Admission to the Position of State Servant*, the candidates to the post had to sit for a written and an oral examination. The author received the maximum score at the written test, 10 points and 8.6 points at the oral exam. Another candidate was selected for the post.

2.2 On 24 April 2006, the author filed a complaint to the Vilnius Regional Administrative Court against the decision of the Admission Commission to select another

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kaelin, Ms. Zonke Zanele Majodina, Mr. Kheshoe Parsad Matadeen, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabian Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval.

candidate. He contested the result of the selection process and requested to be recognized as the successful candidate, and to be provided compensation for the wages that he did not receive, and for non-pecuniary damage. As the *Procedure for Admission into the Position of a State Servant's* regulations, approved by the Government's Resolution No. 966, did not require recording the oral exam, the author claimed that he did not have the possibility to prove that he was unfairly evaluated at his oral exam. Further, he also requested the Court to apply to the Constitutional Court to examine whether the *Procedure for Admission* as well as the *Inventory Schedule of the Procedure for Organisation of Competitions to the Position of State Servant,* limited the right to judicial defence by not requiring the recording of the oral examinations. He claimed that access to court should be not only formal, but real, that is, the person must have the possibility to prove and to contest the violation of his rights or legitimate interests in court.

2.3 On 2 November 2006, the Vilnus Regional Administrative Court rejected the author's complaint and stated that it had not been proven that the evaluation of the author's oral examination by the Admission Commission was unfair. In the absence of unlawful action, no compensation could be awarded. The Court also rejected the author's request to apply to the Constitutional Court. The author appealed the Court's decision to the Supreme Administrative Court.

2.4 On 1 June 2007, the Supreme Administrative Court suspended its consideration of the case and applied to the Constitutional Court with a request to examine the constitutionality of the *Procedure for Admission* and the *Inventory Schedule,* to the extent that they did not establish the requirement to record the oral examination. The Supreme Administrative Court stressed that the absence of such requirement might limit the right of a person to de facto judicial defence and put in question the compliance with the principle of transparency enshrined in article 3, paragraph 1 of the Law on State Service.

2.5 On 22 January 2008, the Constitutional Court found that the *Procedure for Admission* and the *Inventory Schedule,* to the extent that they did not establish the requirement to record the questions asked by the members of the Admission Commission during the oral examination and the answers given by the aspirants, were in conflict with articles 30, paragraph 1 (right to access to court), and 33, paragraph 1 (right to enter on equal terms in the State service), and the principles of transparency of the State service enshrined in the Constitution. The Court stated that the reasoning of the decision to reject a candidate must be clear and accessible to the institutions and courts called to decide on disputes. On 2 April 2008, as a consequence of the ruling, the requirement to record the oral examination was introduced in the State party's legislation.

2.6 On 13 March 2008, the Supreme Administrative Court rejected the author's appeal and stated that despite the decision of the Constitutional Court of 22 January 2008, there was no evidence that the Admission Commission had acted in a partial or unfair manner. The Court also rejected the author's request for non-pecuniary damage. The decisions by the Supreme Administrative Court are final and not subject to appeal.

The complaint

3.1 The author claims a violation by Lithuania of his rights under articles 14, paragraph 1; and 25, paragraph c), alone and in conjunction with article 2, paragraph 3 of Covenant.

3.2 The author argues that the administrative proceedings which he undertook fall under the definition of a suit at law. Referring to the Committee's General Comment No. 32[1] and

[1] Para. 16.

its jurisprudence[2], the author maintains that if the termination of employment of a civil servant falls under the definition of a suit at law as set forth in article 14, paragraph 1, of the Covenant, the admission to the position of a civil servant should also fall under that concept. In the absence of a statutory requirement to record the oral examinations of the evaluations to access to the position of State servant, the author did not have any possibility to prove in court that the Admission Commission's evaluations were unfair. Thus, his right to access to court was only formal and not real and resulted on the violation of article 14, paragraph 1.

3.3 The author further submits that the Supreme Administrative Court did not provide any reasons when rejecting his request for recovery of non-pecuniary damage. It only stated that there was no reason to state that the author has suffered non-pecuniary damage.

3.4 The Supreme Administrative Court found the evaluations of his oral examination were fair and did not raise doubts about the fairness of the Admission Commission. However, the Supreme Administrative Court failed to consider that no evidence could be adduced. Its decision was therefore clearly arbitrary and amounted to manifest error and denial of justice.

3.5 The author further submits that as domestic legislation did not establish the requirement to record the course of the oral examination and that, in practice, there was no an effective judicial review mechanism for the admission process to public service, his rights under article 25, paragraph c), read alone and in conjunction with article 2, paragraph 3, of the Covenant have been violated.

State party's observations on admissibility

4.1 On 7 February 2011, the State party submitted its observations on the admissibility of the communication and requested the Committee to examine it separately from the merits, pursuant to rule 97, paragraph 3 of the Committee's rules of procedure. It also requested the Committee to declare the communication inadmissible under articles 2 and 3 of the Optional Protocol, as the author's allegations are incompatible with the provisions of the Covenant and not sufficiently substantiated.

4.2 As to the facts related to the communication, the State party notes that on 27 March 2009, the author applied for reopening of the proceedings before the Supreme Administrative Court under article 153, paragraph 2 of the Law on Administrative Procedure. On 27 March 2009, the Supreme Administrative Court dismissed the author application, finding that there were no grounds indicated by the author for reopening the case.

4.3 As to the author's claim concerning article 25, paragraph c) of the Covenant, the State party submits that the requirements for the State's service position were not discriminatory but uniform for all aspirants to the post. The author had not disputed that the criteria of selection were unreasonable or that the procedure of admission was discriminatory nor had he submitted any argument or evidence in this regard. All aspirants followed the same procedure of competition under the same conditions, namely, they had all been through written and oral exams and none of the latter had been recorded. Likewise, it was not disputed that the criteria of selection had been unreasonable. The State party recalls the Committee's jurisprudence according to which article 25, paragraph c) does not entitle every citizen to obtain guaranteed employment in the public service, but rather to

[2] The communication refers to communication No. 441/1990, *Casanovas v. France*, Views adopted on 19 July 1994, para. 5.2

access public service on general terms of equality[3]. As regards the author's allegation that the lack of statutory requirement to record the verbal part of the examination resulted in his inability to prove before the courts that the results of the competition had been unfair, the State party submits that this allegation is not relevant to the right protected under article 25, paragraph c). Therefore, the author failed to substantiate his allegation that the admission procedure was in any way discriminatory within the terms of article 2, paragraph 1 of the Covenant. In the circumstances, the author's allegations go beyond the scope of this provision and are therefore incompatible *ratione materiae* with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

4.4 The author has failed to justify why the results of the competition had to be reversed in his favour. His allegations are simple statements of subjective self-evaluation, without any objective evidence that his oral examination was undervalued. Furthermore, the author was able to appeal before two administrative courts. Both instances assessed the author's application and evidence and did not find that the Admission Commission was arbitrary or its decision would have been unfair. The mere fact that the courts' decisions were not in favour of the author do not demonstrate that these judicial decisions had been groundless or arbitrary. The author cannot therefore claim that he has not been provided with an effective remedy under article 2, paragraph 3 of the Covenant[4]. Thus, this claim should be declared inadmissible for failure to substantiate.

4.5 As to the author's claim under article 14, paragraph 1 of the Covenant, the State party maintains that according to the Committee's jurisprudence neither the procedure of appointing State servants, nor the related administrative proceedings, like the ones addressed in the present communication, fall within the scope of a determination of rights and obligations in a suit at law within the meaning of article 14, paragraph 1. Therefore, the claim should be declared inadmissible *ratione materiae* under article 3 of the Optional Protocol.

4.6 Should the Committee consider otherwise, this claim is unsubstantiated and should be declared inadmissible pursuant to article 2 of the Optional Protocol. Although there was no statutory requirement to record the course of the oral examination, the author could have provided other evidence, such as witnesses' statements or written material. Moreover, even if the law would have provided for the requirement to record the oral examination, it would have been only one piece of evidence for the court to be examined and assessed but not necessarily the decisive one. Domestic courts thoroughly examined all the author's claims and evidence and the circumstances of the case. The Supreme Administrative Court took the Constitutional Court's finding into consideration while examining the author's application. However, it concluded that there was no evidence in the case that would cause doubts as to impartiality of the members of the Admission Commission or suspicions as to the arbitrariness of the evaluation of the aspirants. Against this background, it found that the Constitutional Court's findings had no essential influence in the author's case and that there was no causal link between them and the allegedly suffered damage.

4.7 The author did not submit any arguments as to the alleged arbitrariness and unfairness of the Supreme Administrative Court in its decision of 13 March 2008. Moreover, these allegations were brought by the author in his request for reopening the proceeding and thoroughly examined and dismissed by the Supreme Administrative Court in its decision of 27 March 2009. In all these applications as well as in his communication

[3] The State party refers to the communication No. 552/1993, *Kall v. Poland*, Views adopted on 14 July 1997.

[4] The State party refers to the Committee's jurisprudence concerning communication No. 971/2001, *Kazantzis v. Cyprus*, decision on admissibility adopted on 7 August 2003.

before the Committee the author has repeated the same allegations. Nevertheless, he has failed to submit objective arguments in this regard. Consequently, the State party submits that the author's allegation as to article 14, paragraph 1 is unsubstantiated and should be declared inadmissible pursuant to article 2 of the Optional Protocol.

Author's comments to the State party's observations

5.1 On 3 March, 29 April and 3 October 2011, the author submitted comments and claimed that his communication also revealed a violation of article 2, paragraph 2, alone and read in conjunction with articles 2, paragraph 3; 14, paragraph 1; and 25, paragraph c), of the Covenant.

5.2 The author reiterates his claims and states that a statutory requirement to record the oral examination was necessary to give effect to the rights recognized in articles 2, paragraph 3; 14, paragraph 1; and 25, paragraph c), of the Covenant.

5.3 The Constitutional Court found that the *Procedure for Admission into the Position of a State's Servant* was in conflict with article 30, paragraph 1 and 109, paragraph 1, of the Constitution. Moreover, it also ruled that the imperative of equal conditions when entering the State service implied objective and impartial assessment of those who entered into the service and that the lack of record of the oral examination created preconditions for the right to access on equal terms to the public service. The author asserted that as in his case this information was not available, the Vilnus Regional Administrative Court was not in a position to decide his complaint against the decision of the Admission Commission. The lack of records of the oral examination deprived the author of the possibility to adduce any evidence in order to challenge the fairness of the evaluation. Further, it made it impossible to prove unfairness of the oral examination (*probation diabolica*) and impeded the court to verify it. Therefore, in practice, there was no effective remedy to protect his rights under articles 2, paragraph 3; 14, paragraph 1; and 25, paragraph c) of the Covenant.

5.4 With reference to his claims under article 2, paragraph 3, alone and in conjunction with article 25, the author submits that there was no evidence that the aspirant winner was more qualified than him. However, in practice, he had no means to challenge it. As result, he had no effective remedy to bring a judicial claim concerning the fairness of the oral examination. Further, despite the Constitutional Court's decision, the Supreme Administrative Court arbitrarily rejected his application because it considered that he failed to submit evidence as to the unfairness of the evaluation without providing any additional explanation, which amounted to a manifest error and denial of justice. The author submitted that he was undervalued at the oral examination and the aspirant winner of the competition overvalued. Therefore, he was treated unequally in relation to a person less qualified than him[5]. He also held that his claim was sufficiently substantiated and that the burden of proof may be regarded as resting on the State party to provide a satisfactory and convincing explanation. The author disagrees with the evaluation of 9, 8, and 7 points given to him by the members of the Admission Commission, which he considers too low. However, the Supreme Administrative Court could not verify the fairness of the evaluation.

5.5 The author reiterated that his communication fell under the scope of article 14, paragraph 1 of the Covenant. As by law he was able to apply to court in order to contest the

[5] The author provided a translation in English of the marks record concerning the four aspirants in the examination. The Admission Commission was formed of 6 members, each of them giving a mark. The author's oral examination was given: 9, 9, 9, 7, 8, and 8, respectively. In the written examination he obtained 10/10. The applicant selected for the post was given in the oral examination 8, 10, 10, 10, 9, and 9 points. In the written examination this person also obtained 10/10. [The author's submission does not provide any further detail or documentation concerning the claim of unequal treatment.]

competition's results it should be presumed that the rights and protection enshrined in this article were applicable to his case. In addition, his application was not limited to contest the result of the completion to access to the State's service, but also requested for compensation of non-pecuniary damage. In this regard, the author holds that the right to compensation for illegal actions clearly fall within the definition of "a suit at law" under article 14, paragraph 1 of the Covenant. Since a judicial body was entrusted with the review of an administrative decision concerning the admission into the civil service, the proceeding should respect the guarantees of a fair trial as set forth in article 14, paragraph 1. The author also reiterated that in practice there was no other possible evidence to be provided, as suggested by the State party. The possibility to submit written material was only abstract and not even the State party specified what kind of documentation he could submit. Likewise, he could not submit witnesses as in the oral examination's room were present only the aspirant and the members of the Commission. The requirement of a fair trial also supposes that a court will give reasons for its judgment. However, the Supreme Administrative Court did not give any reasons when rejecting his application for compensation of non-pecuniary damage. Moreover, the Supreme Administrative Court's decision failed to take into account the link between the Constitutional Court's findings and his application, and to provide a reasonable explanation as to the rejection of his application. As a result, its decision was arbitrary and amounted to manifest error and denial of justice.

5.6 With regard to the claims under article 2, paragraph 2, alone and in conjunction with articles 2, paragraph 3; 14, paragraph 1; and 25, paragraph c), the State party failed to undertake the necessary steps to adopt the regulations to give effect to the rights recognized in the Covenant.

5.7 As to the claim of violation of article 2, paragraph 3, alone and in conjunction with article 25, paragraph c), the author claimed that he was not provided with an effective remedy, since the Supreme Administrative Court itself recognized that it could not verify the fairness of the evaluation and the Constitutional Court stated that the *Procedure for Admission* applicable when the author participated in the competition was in conflict with article 30, paragraph 1 of the Constitution about right to access to the court.

5.8 On 8 October 2012, the author informed the Committee that in examining a different case, in which he appealed against the result of the oral examination of the competition to the position of chief specialist of legal and personnel department in the State Territorial Planning and Construction Inspectorate of the Ministry of Environment, on 20 September 2012, the Supreme Administrative Court granted him 1000 Litas as compensation for non-pecuniary damage pursuant to article 6.250 (2) of the Civil Code, in particular due to the considerable length of the administrative proceeding. Further, the Supreme Administrative Court stated that the lack of record of the course of the verbal examination should be *treated as a violation of the author's right to appeal an administrative procedure against the result of the oral examination* and that it *could also be evaluated as certain violation of the [author's] right to effective judicial defence.* Accordingly, the Court endorsed the allegations submitted in his communication before the Committee.

State party's additional observations on admissibility

6.1 On 23 January 2013, the State party provided further observations on the admissibility of the communication. As regards the author's allegation under article 25, paragraph c), the State party maintained that such a right is always connected with the prohibition of discrimination on any of the grounds set out in article 2, paragraph 1 of the Covenant. However, the author had not provided any evidence of discrimination. Furthermore, article 25, paragraph c) does not entitle every citizen to obtain guaranteed employment in the public service, but to rather to access public services on general terms of equality. The author's allegations are solely based on his personal opinion that he should

have been appointed to the state service position instead of the actual winner of the competition. The State party recalled the Committee's jurisprudence that it is generally for the courts of the States parties to the Covenant to assess facts and evidence or the application of domestic legislation, unless it can be ascertained that the assessment was clearly arbitrary or amounted to denial of justice. The author's allegations that lack of record of the oral examination part of the competition resulted in his inability to prove before courts that the results of the competition had been unfair, were not relevant to the right to have access, on general terms of equality, to public service, in the sense of article 25, paragraph c) of the Covenant. This part of the author's communication is therefore incompatible with the provisions of the Covenant and should be declared inadmissible *ratione materiae* under article 3 of the Optional Protocol.

6.2 With regard to the Supreme Administrative Court's decision of 20 September 2012, it was based on different circumstances. Should the author consider that this decision is inconsistent with the established case law of the Court and have relevance to the assessment of facts giving rise within the present communication, he has the possibility to request for reopening of the proceedings invoking one of the grounds provided for by article 153, paragraph 2 of the Law on Administrative Procedure, such as the necessity to ensure the formation of a uniform case law of administrative courts.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 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 case is admissible under the Optional Protocol to the Covenant.

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

7.3 The Committee takes note of the author's claims that within the competition for the position of state servant of the Department of Cultural Heritage, the Admission Commission undervalued his oral examination and overvalued the aspirant winner's one; that although the law provided for a possibility to contest this result and he complained to the administrative courts, in practice he had no access to courts, since the latter were unable to verify the fairness of the evaluation made by the Admission Commission due to the absence of a statutory requirement to record the oral examinations in the *Procedure for Admission into the Position of a State Servant's*. Further, the Supreme Administrative Court's decision of 13 March 2008, failed to take into account the link between his complaint and the Constitutional Court's decision of 22 January 2008 that found that the *Procedure for Admission* and *the Inventory Schedule*, to the extent that they did not establish the requirement to record the oral examinations, were in conflict with the right to access to court and the right to enter on equal terms in the State service, enshrined in the State party's Constitution, as the reasoning of the decision to reject a candidate must be clear and accessible to the institutions and courts called to decide on disputes. Accordingly, by dismissing the case the Supreme Administrative Court acted in a manner that amounted to manifest error and denial of justice.

7.4 The Committee also takes note of the State party's arguments that neither the procedure of appointing State's servants nor the related administrative proceedings fall within the scope of a determination of rights and obligations in a suit law within the meaning of article 14, paragraph 1 of the Covenant; that the criteria of selection of the person suitable for the State's service position or the procedure of admission (the competition) itself was not discriminatory and that its reasonableness was not disputed by

the author; that the author did not provide any direct or indirect evidence that his oral examination was undervalued in favour of other aspirant; and that his claims as well as the material and evidence submitted to its courts were thoroughly examined, by the Vilnius Regional Administrative Court and the Supreme Administrative Court which did not find evidence of partially by the Admission Commission or unfairness in the evaluations of the aspirants to the public service position. The Committee takes note of the State party's argument that article 25, paragraph c) of the Covenant does not entitle every citizen to obtain guaranteed employment in the public service, but rather to access public service on general terms of equality. Against this background, the mere fact that the courts' decisions were not in favour of the author do not demonstrate that these decisions were groundless or arbitrary.

7.5 The Committee notes that the allegations made under articles 14, paragraph 1 and 25, paragraph c), alone and in conjunction with article 2, paragraph 3 relate mainly to the evaluation of the facts and evidence made by Vilnius Regional Administrative Court and the Supreme Administrative Court. The Committee recalls its jurisprudence, according to which it is incumbent on the courts of States parties to evaluate the facts and evidence in each specific case, or the application of domestic legislation, unless it can be shown that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice.[6] The Committee has studied the materials submitted by the parties, including the Constitutional Court's decision regarding the constitutionality of the *Procedure for Admission* and the *Inventory Schedule*. Notwithstanding the Constitutional Court's finding regarding the unconstitutionality of the *Procedure for Admission* and the *Inventory Schedule*, as applied to the author, the Committee is not in a position, on the basis of the materials at its disposal, to conclude that, in deciding the author's case, the Administrative Courts acted arbitrarily or that their decision entailed a manifest error or denial of justice. The Committee considers, therefore, that the author has failed to sufficiently substantiate his claim of a violation of articles14, paragraph 1 and 25, paragraph c), alone and in conjunction with article 2, paragraph 3, and that these allegations are therefore inadmissible under article 2 of the Optional Protocol.

7.6 The Committee also takes note of the author's allegation under article 2, paragraph 2, that the State party failed to adopt timely measures to guarantee that the *Procedure for Admission into the Position of a State Servant* requires to record the oral examinations of the aspirants. The Committee recalls its jurisprudence in this connection, which indicates that the provisions of article 2 of the Covenant, which lay down general obligations for States parties, cannot, in and of themselves, give rise to a claim in a communication under the Optional Protocol[7]. The Committee therefore considers that the author's contentions in this regard are inadmissible under article 2 of the Optional Protocol.

8. The Committee therefore decides:

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

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

[6] See communication No. 1616/2007, *Manzano and Others v. Colombia*, decision adopted on 19 March 2010, para. 6.4., and communication No. 1622/2007, *L.D.L.P. v. Spain*, decision adopted on 26 July 2011, para. 6.3.

[7] See communication No. 1834/2008, *A.P. v. Ukraine*, decision adopted on 23 July 2012, para. 8.5; and communication No. 1887/2009, *Juan Peirano Basso v. Uruguay*, Views adopted on 19 October 2010, para. 9.4.

[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.]