HUMAN RIGHTS COMMITTEE

Schlosser v. Czech Republic

Communication No 670/1995 **

21 October 1998

CCPR/C/64/D/670/1995*

ADMISSIBILITY

Submitted by: Ruediger Schlosser (represented by Leewog and Grones, a law firm in Mayen, Germany)

Victim: The author

State party: Czech Republic

Date of communication: 5 October 1995

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

Meeting on 21 October 1998

Adopts the following:

Decision on admissibility

1. The author of the communication is Ruediger Schlosser, a German citizen residing in Tretow, Germany (Province of Brandenburg, former German Democratic Republic). Mr. Schlosser claims to be a victim of violations of articles 12, 14, 26 and 27 of the International Covenant on Civil and Political Rights by the Czech Republic. He is represented by Leewog and Grones, a law firm in Mayen, Germany. The Covenant entered into force for Czechoslovakia on 23 March 1976, the Optional Protocol on 12 June 1991. [1]

The facts as submitted by the author

2.1 Mr. Schlosser was born a citizen of Czechoslovakia on 7 June 1932 in Aussig (today Usti nad Labem), in what was then known as Sudetenland. This territory had been part of the Austrian Empire until November 1918, when it became part of the new State of

Czechoslovakia. In October 1938, the territory became part of Germany by virtue of the Munich Agreement, and at the end of the Second World War in May 1945 it was restored to Czechoslovakia. Since 1 January 1993 it forms part of the Czech Republic.

2.2 The author states that in 1945 he as well as his parents were deprived of Czechoslovak citizenship by virtue of the Benes Decree No. 33 of 2 August 1945 on the Determination of Czechoslovak citizenship of persons belonging to the German and Hungarian Ethnic Groups.

2.3 Mr. Schlosser and his family were subjected to collective exile, together with other members of the German ethnic group of Aussig, who were expelled to Saxonia in the then Soviet occupation zone of Germany on 20 July 1945. He claims that this expulsion was in violation of international law, since it was based on ethnic and linguistic discrimination. Mr. Schlosser's father Franz, who died in 1967, was an antifascist and member of the Social Democratic party. He had been a businessman in the construction industry and owned two houses and several pieces of real estate, which were confiscated by virtue of Benes Decrees No. 12/1945 of 21 June 1945 and No. 108/1945 of 25 October 1945. The author submits the text of the decrees and a copy of the relevant pages from the registry book of Chabarovice, Usti nad Labem, which show that the property was confiscated pursuant to the Benes Decrees.

The complaint

3.1 The author complains of a continued violation of his rights to enter his own country, to equality before the courts, to non-discrimination and to the enjoyment of minority rights. The continuing violation has been renewed by the judgement of 8 March 1995 of the Constitutional Court of the Czech Republic, which reaffirms the continued validity of the Benes Decrees, which were applied to the author and his family. The validity of the Benes Decrees has been repeatedly confirmed by Czech authorities, including the Czech Prime Minister, Vaclav Klaus, on 23 August 1995.

3.2 Mr. Schlosser claims that over the past decades he has been deprived of the right enunciated in article 12, paragraph 4, of the Covenant, that is to return to his homeland and settle there, where his parents and grandparents were born and where his ancestors are buried. Moreover, he claims that he has been deprived of the right to exercise his cultural rights, in community with other members of the German ethnic group, to worship in the churches of his ancestors and to live in the land where he was born and where he grew up. In this context he also invokes the right to return enunciated by the United Nations Security Council with regard to expellees and refugees from Bosnia, Croatia and Serbia (Security Council Resolutions Nos. 941/1994, 947/1994, 981/1995 and 1009/1995).

3.3 With regard to the exercise of his minority rights in his homeland, Mr. Schlosser points out that no State is allowed to frustrate the exercise of the rights of its subjects by depriving them of citizenship and expelling them.

3.4 Mr. Schlosser specifically complains of the denial of equality before the courts, in violation of article 14, and of discrimination, in violation of article 26. He points out that the

enforced expatriation in 1945, the expropriations and the expulsions were carried out in a collective way, and were not based on conduct but rather on status. All members of the German minority, including Social Democrats and other antifascists were expelled and their property was confiscated, just because they were German; none of them were given the opportunity of having their rights determined by a court of law. In this context he refers to the policy of ethnic cleansing in the former Yugoslavia, which has been recognized to be in violation of international law. He also refers to the Nazi expatriation and expropriation of German Jews, which were arbitrary and discriminatory. He points out that while Nazi laws have been abrogated and restitution or compensation has been effected for Nazi crimes, neither Czechoslovakia nor the Czech Republic has offered restitution or compensation to the expatriated, expropriated and expelled German minority.

3.5 Mr. Schlosser notes that by virtue of Law No. 87/1991 Czech citizens with Czech residence may obtain restitution or compensation for properties that were confiscated by the Government of Czechoslovakia in the period from 1948 to 1989. Mr. Schlosser and his family do not qualify for compensation under this law, because their properties were confiscated in 1945, and because they lost their Czech citizenship as a result of Benes Decree No. 33 and their residence because of their expulsion. Moreover, he points out that whereas there is a restitution and compensation law for Czechs, none has been enacted to allow any form of restitution or compensation for the German minority. This is said to constitute a violation of article 26 of the Covenant.

3.6 With regard to the application of the Covenant to the facts of his case, Mr. Schlosser points out that although the Benes Decrees date back to 1945 and 1946, they have continuing effects which in themselves constitute violations of the Covenant. In particular, the deprivation of Czech citizenship has continuing effects and prevents him and members of his family from returning to the Czech Republic except as tourists. Current Czech law does not provide a right for former Czech citizens of German ethnic origin to return and settle there. Moreover, the Benes Decrees were reaffirmed in the judgment of the Czech Constitutional Court of 8 March 1995. The discriminatory law on restitution of 1991 also falls within the period of application of the Covenant and the Optional Protocol to the Czech Republic.

3.7 As to the requirement of exhaustion of domestic remedies, the author states that not only does Czech legislation not establish a recourse for persons in his situation, but, moreover, as long as the discriminatory Benes Decrees are held to be valid and constitutional, any appeal against them is futile. In this context the author refers to a recent challenge of the Benes Decrees, which an ethnic German resident in the Czech Republic brought before the Constitutional Court of the Czech Republic. On 8 March 1995 the Court ruled that the Benes Decrees were valid and constitutional. Therefore, no suitable and effective remedies exist in the Czech Republic.

State party's observations on admissibility

4.1 By submission of 15 February 1996, the State party notes that the author is a German citizen residing in Germany. At the time of submission of the communication, he was not

a citizen nor a resident of the Czech Republic and thus did not hold any legally relevant status in the territory of the Czech republic.

4.2 The State party recalls that Decree No. 33 of 2 August 1945, through which the author was deprived of his Czechoslovak citizenship, contained provisions enabling restoration of Czechoslovak citizenship. Applications for restoration of citizenship were to be lodged with the appropriate authority within six months of the decree being issued. Since the author and his family did not avail themselves of this opportunity to have their citizenship restored to them, the State party submits that domestic remedies have not been exhausted.

4.3 The State party challenges the author's argument that he and his family did not have any real opportunity to oppose their removal from Czechoslovakia. The State party argues that the author and his family left the country not due to coercion but by their own choice. Since they were still Czechslovakian citizens at the time they left the country, they could have made use of the remedies available to all nationals. They also failed to exhaust domestic remedies against the deprivation of their citizenship. With reference to the principle *ignoratia legis neminem excusat*, the State party maintains that the legal status of the author and his family changed due to omission on their part and that the possible objection that they were not informed about the appropriate legislation is irrelevant.

4.4 With regard to the expropriation of his family's property, and the ensuing alleged violation of his Covenant rights, the State party points out that it has only been bound by the Covenant since its entry into force in 1976, and argues that the Covenant can thus not be applied to events that occurred in 1945-1946. With regard to the author's argument that the Constitutional Court's judgement of 8 March 1995 reaffirms the violations of the past, and makes any appeal to the Courts futile, the State party points out that following the said judgement decree No. 108/1945 no longer operates as a constitutional regulation and that the compatibility of the decree with higher laws (such as the Constitution and the Covenant) can thus be challenged before the courts. In this context, the State party points out that Constitutional Law No.2/1993 (Charter of Fundamental Rights and Freedoms) contains a prohibition of any form of discrimination. The State party therefore challenges the author's statement that exhaustion of domestic remedies would be futile. According to the State party, the author's statement demonstrates ignorance of Czech law and is incorrect.

4.5 The State party submits that international treaties on human rights and fundamental freedoms binding on the Czech Republic are immediately applicable and superior to law. The State party explains that its Constitutional Court has the power to nullify laws or regulations if it determines that they are unconstitutional. Anyone who claims that his or her rights have been violated by a decision of a public authority may submit a motion for review of the legality of such decision.

4.6 With regard to the author's argument that the violation of his rights continues under the existing Czech legislation, the State party claims that the author could have, on the basis of the direct applicability of the Covenant in Czech legislation, brought action before the Czech courts. Moreover, the State party denies that the author's rights were ever violated and consequently the alleged violations cannot continue at present either.

4.7 In conclusion, the State party requests the Committee to declare the communication inadmissible on the grounds that the author has failed to exhaust domestic remedies, and on the ground that the alleged violations occurred before the entry into force of the Covenant and the Optional Protocol thereto.

Author's comments

5.1 In his comments on the State party's submission, counsel recalls that it is not the author's fault that he is no longer a Czech citizen nor has residence in the Czech Republic because he was stripped of his citizenship and was expelled by the State party.

5.2 Counsel argues that the State party is likewise estopped from claiming that the author or his family could have regained his citizenship pursuant to an application. Counsel recalls that at the time the author and his family, despite the fact that they were members of the Social Democratic Party and anti-fascists, were already expelled by the State party (July 1945) which had also confiscated all of their property, as a result of which they were totally destitute. As a consequence, the remedies existing in 1945 were in practice not available to the author and his family, nor to most Germans. Counsel submits that if the State party contends that persons in the situation of the author could have availed themselves of effective domestic remedies, it should provide examples of those who did so successfully.

5.3 The author points out that at the time of the expulsion of his family, they were treated as total outlaws. Thousands of Germans were detained in camps. According to the author, not only was a complaint to the Czech authorities futile, but in many cases when people did complain, they were subjected to physical abuse.

5.4 The author acknowledges that the Covenant entered into force for Czechoslovakia only in 1976. However, he contends that the restitution legislation of 1991 is discriminatory, because it excludes restitution for the German minority. Furthermore, he argues that the Constitutional Court's decision of 8 March 1995, which confirmed the continuing validity of the Benes Decrees, is a confirmation of a past violation and thus brings the communication within the applicability of the Covenant and the Optional Protocol. Counsel refers to the Committee's Views in case No. 516/1992 (Simunek v. Czech Republic), where the Committee held that confiscations that occurred in the period prior to the entry into force of the Covenant and Optional Protocol may nevertheless be the subject of a communication before the Committee if the effects of the confiscations have continued or if the legislation intended to remedy the confiscations is discriminatory.

5.5 With regard to the Constitutional Court's statement that decree No. 108/1945 no longer had a constitutive character, the author submits that this is a statement of fact, since the confiscations had been completed and the Germans had no possibility to contest them. With regard to the State party's statement that the Constitutional Court has the power to repeal laws or their provisions if they are inconsistent with the Constitution or with an international human rights treaty, counsel submits that the Constitutional Court was requested to repeal the Benes decrees as being discriminatory but instead confirmed their constitutionality in its judgement of 8 March 1995. Following this judgement, no effective remedy is available to

the author, as it would be futile to challenge the legality of the decrees again.

5.6 With regard to the State party's claim that domestic remedies are available to the author at present, counsel requests the State party to indicate precisely, in the circumstances of the author's case, what procedure would be available to him and to give examples of successful use of this procedure by others. In this connection, counsel refers to the Committee's jurisprudence that it is not sufficient for a State party to list the legislation in question, but that a State party should explain how an author can avail himself of the legislation in his concrete situation.

5.7 Finally, counsel argues that if indeed the Covenant is superior to Czech law, then the State party is under an obligation to correct the discrimination to which the author and his family were subjected in 1945 and all the consequences emanating therefrom. According to counsel, there is no indication that the State party is prepared to do so. On the contrary, counsel claims that recent statements by high officials in the State party's Government, announcing the privatization of formerly confiscated German property, show that there is no willingness on the part of the State party to give any relief to the author or anyone in a similar situation.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 With regard to the author's claim under article 12, paragraph 4, of the covenant, the Committee notes that the deprivation of his citizenship was based on Benes' decree No. 33. Although the Constitutional Court in the Czech Republic declared Benes' decree No. 108, authorizing the confiscation of properties belonging to ethnic Germans, constitutional, the Court was never called upon to decide the constitutionally of decree No. 33. The Committee also notes that, following the Court's judgment of 8 March 1995, the Benes' decrees have lost their constitutional status. The compatibility of decree No. 33 with higher laws, including the Covenant which has been incorporated in Czech national law, can thus be challenged before the courts in the Czech Republic. The Committee considers that under article 5, paragraph 2 (b), of the Optional Protocol, the author should bring his claim first before the domestic courts before the Committee is in a position to examine his communication. This claim is thus inadmissible for non-exhaustion of domestic remedies.

6.3 The Committee likewise considers that the author has failed to substantiate, for purposes of admissibility, his claim under article 27 of the Covenant. This part of the communication is thus inadmissible under article 2 of the Optional Protocol.

6.4 The author has further claimed violations of articles 14 and 26, because, whereas a law has been enacted to provide compensation to Czech citizens for properties confiscated in the period from 1948 to 1989, no compensation law has been enacted for ethnic Germans for properties confiscated in 1945 and 1946 following the Benes decrees.

6.5 The Committee has consistently held that not every distinction or differentiation in treatment amounts to discrimination within the meaning of articles 2 and 26. The Committee considers that in the present case, legislation adopted after the fall of the Communist regime in Czechoslovakia to compensate victims of that regime does not appear to be prima facie discriminatory within the meaning of article 26 merely because, as the author contends, it does not compensate the victims of injustices committed in the period before the communist regime[2]. The Committee considers that the author has failed to substantiate, for purposes of admissibility, his claim that he is a victim of violations of articles 14 and 26 in this regard. This part of the communication is thus inadmissible under article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) that the communication is inadmissible;

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

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*The following members of the Committee participated in the examination of the communication: Mr. Prafullachandra N. Bhagwati, Mr. Th. Buergenthal, Lord Colville, Mr. Omran El Shafei, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. J. Prado Vallejo, Mr. Martin Scheinin, Mr. R. Wieruszewski, and Mr. Maxwell Yalden.

**The text of an individual opinion signed by Committee members E.Klein and C.Medina Quiroga is appended to the present document.

1/ The Czech and Slovak Federal Republic ceased to exist on 31 December 1992. On 22 February 1993, the Czech Republic notified its succession to the Covenant and the Optional Protocol.

2/ See the Committee's decision declaring inadmissible communication No. 643/1995, (Drobek v. Slovakia), 14 July 1997.

[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 Committeee's annual report to the General Assembly.]

Appendix

Individual Opinion by Committee members Cecilia Medina Quiroga and Eckart Klein (partly dissenting)

To our regret we cannot follow the Committee's decision that the communication is also inadmissible as far as the author claims that he is a victim of a violation of article 26 of the Covenant, because the Law No. 87/1991 would deliberately discriminate against him for ethnical reasons (See para. 3.5). For the reasons given in our Individual Opinion in Communication No. 643/1995, (Drobek v. Slovakia) we think that the Committee should have declared the communication admissible in this regard.

Cecilia Medina Quiroga (signed)

Eckart Klein (signed)