UNITED
NATIONS

CCPR

International covenant on civil and political rights

Distr.
RESTRICTED*

CCPR/C/91/D/1533/2006
14 December 2007

Original: ENGLISH

HUMAN RIGHTS COMMITTEE
Ninety-first session
15 October – 2 November 2007

VIEWS

Communication No. 1533/2006

Submitted by:	Mr. Zdenek and Mrs. Milada Ondracka (represented by counsel, Mr. James R. Shaules)
Alleged victim:	The authors
State Party:	The Czech Republic
Date of communication:	17 April 2006 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 4 December 2006 (not issued in document form)
Date of adoption of Views:	31October 2007

* Made public by decision of the Human Rights Committee.

Subject matter: Discrimination on the basis of citizenship with respect to restitution of property

Procedural issue: Abuse of the right of submission

Substantive issues: Equality before the law; equal protection of the law

Article of the Covenant: 26

Article of the Optional Protocol: 3

On 31 October 2007, the Human Rights Committee adopted the annexed text as the Committee's Views, under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1533/2006.

[ANNEX]

ANNEX

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights

Ninety-first session

concerning

Communication No. 1533/2006[*]

Submitted by:	Mr. Zdenek and Mrs. Mi lada Ondracka (represented by counsel, Mr. James R. Shaules)
Alleged victim:	The authors
State Party:	The Czech Republic
Date of communication:	17 April 2006 (initial submission)

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

Meeting on 31 October 2007,

Having concluded its consideration of communication No. 1533/2006, submitted to the Human Rights Committee by Mr. Zdenek and Mrs. Milada Ondracka, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

[*] The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwa rlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glélé Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sánchez -Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

A dissenting opinion signed by Committee member Mr. Abdelfattah Amor is appended to the text of the present Views.

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The authors of the communication (dated 17 April and 14 August 2006) are Mr. Zdenek Ondracka and Mrs. Milada Ondracka, United States and Czech Republic citizens, born in 1929 and 1933, respectively, in the former Czechoslovakia, currently residing in the United States. They claim to be victims of a violation by the Czech Republic of article 26 of the International Covenant on Civil and Political Rights (the Covenant). They are represented by a counsel, Mr. James R. Shaules.

1.2 The Optional Protocol to the International Covenant on Civil and Political Rights (Optional Protocol) entered into force for Czech Republic on 22 February 1993.

Facts as presented by the author

2.1 During the communist regime, the authors purchased a vacant plot of land in Uherske Hradiste, Czech Republic, where they built their home with the financial and physical assistance of the family. Due to political repression of the communist regime, the authors, using Czechoslovak passports, left Czechoslovakia in 1981 for a twenty-one day long vacation in Bulgaria and Yugoslavia from where they did not return by the required date. Subsequently, and without the authorisation of the public authorities, they emigrated to the United States. In 1982, a Czechoslovak court sentenced them *in absentia* to three years imprisonment and confiscation of their property for abandoning the country. In 1988, the authors obtained United States citizenship. By virtue of a Naturalisation Treaty between the United States and Czechoslovakia from 1928, they lost their Czechoslovakian citizenship.

2.2 In 1991, Act No. 87/1991 on Extra-judicial Rehabilitation was adopted by the Czech Government, spelling out the conditions for recovery of property for persons whose property had been confiscated under the Communist rule. Under the Act, in order to claim entitlement to recover of his or her property, a person claiming restitution of the property had to be, *inter alia*, (a) a Czech-Slovak citizen, and (b) a permanent resident in the Czech Republic. These requirements had to be fulfilled during the time period in which restitution claims could be filed, between 1 April and 1 October 1991. A judgment of the Czech Constitutional Court of 12 July 1994 (No. 164/1994) annulled the condition of permanent residence and established a new time-frame for the submission or restitution claims by persons who had thereby become entitled persons, running from 1 November 1994 to 1 May 1995.

2.3 In 1991, pursuant to Act No. 119/90, by a decision of a Czech court (No. Rt 177/91 – 4), the authors were rehabilitated and consequences of the convicting judgment annulled. On 31 October 1995, the authors sought the restitution of their confiscated property before the District Court in Uherske Hradiste. This court rejected their restitution claim on 4 February 1998 (No. 5C 224/95 – 29) on the ground that they did not fulfil the citizenship requirement during the period in which the new restitution claims could be made (which ended on 1 May 1995). The authors did not appeal the rejection of their restitution claim because they were advised that it would be a futile attempt to appeal the court's decision. The reason for this was because the Constitutional Court of the Czech Republic had already issued a decision (Pl. US 33/96-41, Exhibit K) upholding the constitutionality of the discriminatory application of paragraph 1 of the Act No. 87/1991 in a case with a substantially identical fact pattern, as well as the decision of the same

court in case No. 185/1997 stating that it conside rs the requirement of citizenship for restitution to be reasonable. The authors thus claim to have exhausted all domestic remedies which were available and effective.

The complaint

3. The authors claim to be victims of a violation of article 26 of the Covenant, as the citizenship requirement of the Act No. 87/1991 constitutes unlawful discrimination. They invoke the jurisprudence of the Committee in the cases of *Adam v. Czech Republic, Blazek v. Czech Republic, Marik v. Czech Republic and Kriz v. Czech Republic,* in which the Committee found a violation of article 26 by the State party.

The State party's submission on the admissibility and merits of the communication

4.1 On 1 June 2007, the State party commented on the admissibility and merits of the communication. It challenged the admissibility of the communication on the ground that it constitutes an abuse of the right of submission of communications within the meaning of article 3 of the Optional Protocol. It invokes the Committee's jurisprudence, in particular in *Gobin v. Mauritius*.[1] In the present case, the State party argues that the authors petitioned the Committee on 17 April 2006, 8 years and 2 months after the judgment of the District Court in Uherske Hradiste of 4 February 1998, without offering any explanation for this time lapse.

4.2 The State party recalls that the author only obtained Czech citizenship on 23 June 2000. It argues that the authors were not subjected to a differential treatment, but that they were treated in the same way as all other persons who failed to meet the citizenship requirement by 1 October 1991, as provided for in the Act No. 87/1991. Since the authors only acquired Czech Republic citizenship on 23 June 2000, they failed to satisfy this condition. According to the State party, this is the established interpretation of this Act, followed also by the Supreme Court.

4.3 The State party further refers to its earlier submissions in similar cases, and indicates that its restitution laws, including Act No. 87/1991, were p art of two -fold efforts: to mitigate the consequences of injustices committed during the Communist rule, on one hand, and to carry out a comprehensive economic reform with the objective of introducing a well -functioning market economy, on the other. Since it was not possible to redress all injustices committed earlier, the restrictive preconditions were put in place, including that of citizenship, its main objective being to incite owners to take good care of the property in the process of privatisation. Ac cording to the State party, the citizenship requirement has always been in conformity with the Czech Republic's constitutional order by both the Parliament and the Constitutional Court.

4.4 Finally, the State party underlines that Act No. 87/1991, in ad dition to the citizenship requirement, set out other conditions that had to be met by claimants for them to be successful with their restitution claims. In particular, one of the conditions laid down in the section 5, subsection 2, of this Act was that the person entitled had to call upon the liable person to return the property within six months of the entry into force of the Act, i.e. until 1 October 1991, otherwise the claim would expire. The State party argues that the authors failed to do so, but rather that they brought their claim directly before the District Court on 31 October 1995, after

[1] Communication No. 787/1997; inadmissibility decision of 16 July 2001, para. 6.3;

the expiration of the one -year time-limit set forth in the section 5, subsection 4 of this Act, providing that should the liable person reject the request made acc ording the subsection 2, the entitled person may bring its claims before the court within one year, i.e. until 1 April 1992.

Authors' comments to the State party's observations

5.1 On 29 August 2007, the authors commented on the State party's response. R egarding the argument that the submission of their communication amounts to an abuse of the right of submission, the applicants assert that the delay was due to the fact that their lawyer in the Czech Republic failed to inform them about the possibility to seek a remedy before the Committee In fact, after the Czech court ruled against their claim for restitution in 1998 the lawyer recommended that they should abandon the case. The authors, who were 78 and 74 years old respectively and do not have legal tr aining, only learned about the Committee's jurisprudence regarding restitution of property through internet, in 2005. On 30 March 2006 they wrote to the Committee, who requested them to submit additional information. Immediately afterwards, they hired a lawyer in the United States to bring the case before the Committee.

5.2 The authors reiterate that in view of the Committee's clear jurisprudence on the subject matter of the case, there was a violation of article 26 by the State party.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 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 communication is admissible under the Optional Protocol to the Covenant.

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

6.3 With respect to the requirement of exhaustion of domestic remedies, the Committee notes that the State party has not contested the authors' argument that in their case there are no available and effective domestic remedies. In this context, the Committee recalls that only such remedies have to be exhausted which are both available and effective. The applicable law on confiscated property does not allow for the restoration or compensation to the authors. After the judgment of the District Cou rt in Uherske Hradiste of 4 February 1998 which rejected the authors' restitution claim, there was no effective or truly available remedy for the authors to pursue within the Czech legal system. By decision No. 185/1997, the Constitutional Court of the Czech Republic confirmed that it considers the requirement of citizenship for restitution to be reasonable.[2] In this regard, the Committee reiterates that when the highest domestic court has

[2] *"The International Covenant on Civil and Political Rights stipulates the principle of equality in its Article 2, para 1 and its Article 26. The right to equality stipulated in Article 2 is of the accessory nature; e.g. it applies only in conjunction with another right enshrined in the Covenant. The Covenant does not contain the right to property. Article 26 stipulates the equality before the law and the prohibition of discrimination. Citizenship is not listed among the*

ruled on the matter in dispute, thereby eliminating any prospect tha t a remedy before the domestic court may succeed, the author is not obliged to exhaust domestic remedies for the purposes of the Optional Protocol. [3] Therefore, the Committee considers that the authors have sufficiently substantiated that it would have been futile for them to challenge the judgment in their case.

6.4 The Committee has noted the State party's argument that the communication should be considered inadmissible as constituting an abuse of the right to submit communications under article 3 of th e Optional Protocol, in view of the excessive delay in submitting the communication to the Committee. The State party asserts that the authors waited eight years and two months after the date of the District Court judgment before submitting their complaint to the Committee. The Committee reiterates that the Optional Protocol does not establish any deadline for the submission of communications, and that the period of time elapsing before doing so, other than in exceptional cases, does not in itself constitut e an abuse of the right to submit a communication. In the instant case, where the authors had been advised by their lawyer to abandon the case in 1998 and only learned about the Committee's jurisprudence on restitution of property in 2005, the Committee do es not consider the eight-year delay as an abuse of the right of submission.[4] It therefore decides that the communication is admissible in as far as it appears to raise issues under article 26 of the Covenant.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

7.2 The issue before the Committee is whether the applicati on to the authors of Act no. 87/1991 amounted to discrimination, in violation of article 26 of the Covenant. The Committee reiterates its jurisprudence that not all differentiations in treatment can be deemed to be discriminatory under article 26. A differ entiation which is compatible with the provisions of the Covenant and is based on objective and reasonable grounds does not amount to prohibited discrimination within the meaning of article 26.[5]

---

demonstrative enumeration of the grounds on which discrimination is prohibited. The Human Rights Committee repeatedly admitted differentiation based on reasonable and objective criteria. The Constitutional Court considers the consequences of Article 11 para 2 of the Charter of Fundamental Rights and Freedoms ***(2)*** *as well as the objectives of the restitution legislation and also the legislation concerning the citizenship as being such reasonable and objective criteria."*

[3] Communication No. 1095/2002, Bernardino Gomariz Valera v. Spain, Views of 22 July 2005, para. 6.4.

[4] See Communication No. 1305/2004, *Victor Villamon Ventura v. Spain* , Views of 31 October 2006, para. 6.4, Communication No. 1101/2002, *Alba Cabriada v. Spain*, Views of 1 Novemb er 2004, para. 6.3;

[5] See Communication No. 182/1984, *Zwaan-de Vries v. The Netherlands*, Views adopted on 9 April 1987, paragraph 13;

7.3 The Committee recalls its Views in the cases of *Adam, B lazek, Marik, Kriz* , and *Gratzinger*[6] where it held that article 26 had been violated. Taking into account that the State party itself is responsible for the departure of the authors from the former Czechoslovakia in seeking refuge in another country, where they eventually established permanent residence and obtained that country's citizenship, the Committee considers that it would be incompatible with the Covenant to require the authors to meet the condition of Czech citizenship for the restitution of their property or alternatively for its compensation.

7.4 The Committee considers that the principle established in the above cases also applies in the case of the authors of the present communication, and that the application by the domestic courts of the citizenship requirement violated their rights under article 26 of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of article 26 of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, including compensation if the property cannot be returned. The Committee reiterates that th e State party should review its legislation to ensure that all persons enjoy both equality before the law and equal protection of the law.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognised the competence of the Committee to determine whether there has been a violation of the Covenant or not, and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognised in the Covenant and to provide an effective and enforceable remedy in case that a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's views.

[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.]

[6] Communication No. 586/1994, *Adam v. Czech Republic* , Views adopted on 23 July 1996, paragraph 12.6; Communication No. 857/1999, *Blazek v. Czech Republic*, Views adopted on 12 July 2001, paragraph 5.8; Communication No. 945/2000, *Marik v. Czech Republic* , Views adopted on 26 July 2005, paragraph 6.4; Communication No. 1054/2002, *Kriz v. Czech Republic*, Views adopted on 1 Novemb er 2005, paragraph 7.3; Communication 1463/2006, *Gratzinger v. Czech Republic,* Views adopted on 25 October 2007, paragraph 7.5.

APPENDIX

Dissenting opinion by Mr. Abdelfattah Amor

Eight years and two months after they exhausted all available effective remedies, the authors submitted a communication to the Committee. In the opinion of the Committee and contrary to the State party's contention, this delay does not constitute an abuse of the right of submission. The communication is therefore declared admissible.

I do not share the Committee's assessment, which leads me to make three observations.

First, while it is true that the Optional Protoc ol does not establish any deadline for the submission of communications, article 3 of the Optional Protocol states that the Committee "shall consider inadmissible any communication ... which it considers to be an abuse of the right of submission of such co mmunications". Clearly, the Protocol, without deciding the question of the time lapse between the exhaustion of available effective domestic remedies and the submission of communications, invites the Committee to consider cases of abuses the assessment of which is part of its mandate. This means that, not only is the Committee not prohibited from establishing deadlines for the submission of communications, it is positively invited to do so. And the Committee has done so on many occasions, within the framewo rk of its jurisprudence, as will be indicated below. I believe that the Committee, which has control over its rules of procedure, which is basically a set of regulations, can establish precise and formal rules concerning the question of time limits, both w ith regard to the exhaustion of domestic remedies and to the conclusion of the procedure of international investigation or settlement by a body other than the Committee. It is advisable that the Committee do so as soon as possible.

It is a question of int erest to complainants, who will receive clear and timely instructions concerning their rights and the limitations on those rights.

It is a question of legal guarantees, which cannot continue to be unreasonably exposed to uncertainties, and it is no accide nt that the admissibility of procedures is subject, both in domestic law and very often in international law, to deadlines and time limits. In this regard, it is useful to recall that the deadline for the submission of applications to the European Court of Human Rights is six months following the exhaustion of domestic remedies.

Lastly, it is a question that concerns the credibility of the Committee itself, access to which cannot be left to temporal and personal equations that conjugate the past - even the remote past - in the present perfect and the objectivization of the right, if not in a subjective manner then at least in a highly relative manner. It is time to rationalize this aspect of the Committee's procedure, and time to put aside hesitation and establish the necessary consistency.

Secondly, in the framework of its jurisprudence, the Committee has been faced with the question of deadlines in connection with the abuse of the right of submission.

In communication No. 1076/2002, Kasper and Sopanen v. Finland, the Committee, after noting that the authors had submitted their communication one year after the European Commission on Human Rights declared their application inadmissible ratione temporis, considered that, in the particular circumstances of th e case, that "it is not

possible to consider the time that passed before the communication was filed was so unreasonable as to make the complaint an abuse of the right of submission".

In communication No. 1101/2002, Alba Cabriada v. Spain, the Committee considered that the period of time that elapsed before the submission of the communication (in this case, two and a half years), "other than in exceptional cases, does not of itself constitute an abuse of the right to submit a communication". The Committee added that "neither has the State party duly substantiated why it considers that a delay of more than two years would be excessive in this case".

In a third communication, where the delay was three years and five months (communication No. 1445/2006, Polacková and Polacek v. the Czech Republic), the Committee declared the communication admissible on the grounds that the delay was not "so unreasonable as to amount to an abuse of the right of submission".

On the other hand, some communications have exceeded the time limit that the Committee considers reasonable, and have been considered inadmissible. This has occurred in a number of cases.

In communication No. 1434/2005, Fillacier v. France, the Committee noted that the Council of State had handed down its ruling on 8 June 1990, over 15 years before the communication was submitted to the Committee, and considered that such a long delay amounted to an abuse of the right of submission. It decided that "the communication is inadmissible under article 3 of the Optional Protocol ...".

In communication No. 1452/2006, Chytil v. the Czech Republic, the Committee, after noting that the author "waited for nearly ten years before bringing his claims to the Committee", stated that it "regards the delay to be so unreasonable and excessive as to amount to an abuse of the right of submission, and declares the communication inadmissible pursuant to article 3 of the Optional Protocol".

Lastly, in communication No. 787/1997, Gobin v. Mauritius, the Committee considered that "submitting the communication after such a time lapse [five years] should be regarded as an abuse of the right of submission, which renders the communication inadmissible under article 3 of the Optional Protocol".

It will be noted that time lapses of 15, 10 and 5 years were considered by the Committee to be unreasonable and excessive and were deemed to constitute an abuse of the right of submission, resulting in inadmissibility. On the other hand, in the Committee's view, time lapses of three years and five months, two years and one year are neither unreasonable nor excessive and therefore do not constitute an abuse of the right of submission and do not pose an obstacle to admissibility.

However, in the present case (Ondracka), the Committee "does not consider the eight-year delay as an abuse of the right of submission. It therefore decides that the communication is admissible".

Thirdly, the Committee rightly considers that, in cases where the time lapse between the exhaustion of available effective remedies and the submission of the communication is justified, abuse of the right of submission cannot be invoked. The lack of an explanation does not pose an obstacle to admissibility when the State party does not cooperate, as was the case in communication No. 1134/2002, Fongum Gorji-Dinka v. Cameroon, where there was a 12-year delay. The justification is essentially based on the explanation provided by the author of the communication.

In the Chytil case, the author "has not explained or justified why he waited for nearly ten years before bringing his claims to the Committee". The same reproach - lack of an explanation - is indicated in the Gobin and Fillacier cases. In the latter two cases, and also in the Fongum Gorji-Dinka case, the Committee states that the explanation must be convincing, which was not the case in every instance where an abuse of the right of submission was found. The Committee does not provide an a priori definition of what makes an explanation convincing. However, its consideration of the facts and of the elements adduced in support of admissibility leads it to form an opinion with regard to whether or not an explanation is convincing. However, the Committee is on very slippery ground here and is not free from subjective and variable assessments, so much so that some could say that, in the Committee's eyes, a delay of eight years and two months is less than a delay of five years. Thus, in the Gobin case, the explanation provided by the author was based on the discovery by his son in the course of his law studies, of the procedure for submitting individual complaints to the Committee. In the present communication (Ondracka), the Committee considers that there was no abuse of the right of submission and declares the communication admissible since "the authors had been advised by their lawyer to abandon the case in 1998 and only learned about the Committee's jurisprudence on restitution of property in 2005". A strange explanation! Who gives the Committee the right to evaluate advice given by lawyers? Who decides that the discovery of the Committee's jurisprudence is a convincing argument?

There will always be sincere and well-intentioned people who discover, in the near or distant future, the Committee's jurisprudence. In short, no one is supposed to be aware of the law, and no one is supposed to be aware of the Committee's jurisprudence ... until a person discovers that it can be used to support his or her interests. The Committee will decide. And it has decided in this case; in a strange way ... a way in which objectivity and reasonableness are, in my view, far from evident. In other words, it is imperative that the Committee steer clear of questionable assessments and avoid inconsistencies by establishing - as is its right - formal and clear rules regarding time limits for submitting communications.

(Signed): Abdelfattah Amor

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