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International Covenant on Civil and Political Rights

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Views

Communication No. 1615/2007

Submitted by:	Bohuslav Zavrel (not represented by counsel)
Alleged victim:	The author
State party:	The Czech Republic
Date of communication:	12 March 2006 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 13 November 2007 (not issued in document form)
Date of adoption of Views:	27 July 2010

* Made public by decision of the Human Rights Committee.

Subject matter:	Discrimination on the basis of citizenship with respect to restitution of property
Procedural issues:	Non-exhaustion of domestic remedies, admissibility *ratione materiae*, admissibility *ratione temporis*, abuse of the right of submission
Substantive issues:	Equality before the law; equal protection of the law without any discrimination
Article of the Covenant:	26
Articles of the Optional Protocol:	2, 3, 5 paragraph (2) (b)

On 27 July 2010, 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. 1615/2007.

[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-ninth session)

concerning

Communication No. 1615/2007**

Submitted by:	Bohuslav Zavrel (not represented by counsel)
Alleged victim:	The author
State party:	The Czech Republic
Date of communication:	12 March 2006 (initial submission)

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

Meeting on 27 July 2010,

Having concluded its consideration of communication No. 1615/2007, submitted to the Human Rights Committee by Mr. Bohuslav Zavrel 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:

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

1. The author of the communication is Mr. Bohuslav Zavrel, a naturalized American citizen residing in the State of New York, United States of America, born in Kurim, former Czechoslovakia, on 3 January 1920. He claims to be a victim of a violation by the Czech Republic of article 26 of the International Covenant on Civil and Political Rights.[1] He is not represented.

** The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Mahjoub El Haiba, Mr. Yuji Iwasawa, Ms. Helen Keller, Ms. Zonke Zanele Majodina, Ms. Iulia Motoc, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Mr. Fabián Omar Salvioli, and Mr. Krister Thelin.

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

[1] The Optional Protocol entered into force for the Czech Republic on 1 January 1993, as a consequence of the Czech Republic's notification of succession of the international obligation of Czechoslovakia, which had ratified the Optional Protocol in March 1991.

Factual background

2.1 The author states that he left Czechoslovakia with his wife for political reasons in 1970 and fled to Yugoslavia, then obtained political asylum in Italy. They lived in Switzerland briefly, before emigrating to the United States, where they have since lived. In 1982, he obtained United States citizenship and lost his Czechoslovak citizenship.[2]

2.2 As he left former Czechoslovakia without permission,[3] the author was sentenced *in abstentia*[4] to a jail term, and to the confiscation of his property, including his family home located in Hybesova Street 40, in Kurim, and an orchard of 0.40 hectares, which he owned with his late wife. The author estimates his property to be worth US$ 300,000 today.

2.3 Following the enactment of Act No. 119/1990,[5] the author was rehabilitated and his sentence was quashed. He then filed an action for restitution of his property, but the District Court of Brno-venkov rejected his claim on 16 September 1992, on the basis of Act No. 87/1991, which requires claimants to be Czech citizens, and have permanent residence in the Czech Republic. He did not appeal this decision.

2.4 It transpires from the file that the author initiated new judicial proceedings in 2005, claiming a declaration of title before the District Court of Brno-venkov, based on the fact that he was the legal owner of one half in moiety of the family house in Kurim, the building parcel on which the house was standing, and the garden. In his claim, the author requested the Court to declare that his wife, who had died in February 2002, was the owner of the other half in moiety of the above properties as at the day of her demise. The author substantiated his action by claiming that further to his rehabilitation under Act No. 119/1990, his ownership title had been restored, and by seeking a declaration of title on the basis of general principles of Czech property law. The District Court of Brno-venkov rejected the action on 8 June 2005, and the Regional Court of Brno rejected the appeal on 10 October 2006, on the ground that civil law actions for property restitution after rehabilitation under law 119/1990 could not be undertaken so as to circumvent applicable restitution legislation (i.e. Act No. 87/1991). On 28 December 2006, the author lodged an appeal before the Constitutional Court, which was dismissed as manifestly ill-founded on 5 April 2007.[6] He was notified of this decision by his Czech lawyer on 17 April 2007.

The complaint

3. The author alleges that he is a victim of discrimination, and argues that the requirement of citizenship for restitution of his property under Act No. 87/1991 is in violation of article 26 of the Covenant.

[2] On the basis of the United States – Czechoslovakia bilateral Naturalization Treaty of 16 July 1928, art. I.

[3] Reports indicate that in the former Czechoslovakia, those attempting to leave the country without authorization were subject, inter alia, to imprisonment.

[4] The author does not specify by which instance he was sentenced.

[5] Act No. 119/1990 Coll. on Judicial Rehabilitation rendered null and void all sentences handed down by Communist courts for political reasons. Persons whose property had been confiscated were, under section 23.2 of the Act, eligible to recover their property, subject to conditions to be spelled out in a separate restitution law.

[6] The Court rejected the appeal on the ground that it would only contradict the judgement of prior instances where a decision violated protected basic human rights and freedoms, which had not been the author's case.

State party's observations on admissibility and merits

4.1 In its submission of 13 May 2008, the State party addresses the facts, the admissibility and the merits of the communication. It notes that the author engaged in two separate judicial paths between 1992 and 2007. First, along with his wife, he engaged in restitution proceedings before the District Court of Brno-venkov against four defendants[7] who had obtained titles over his property after the author left Czechoslovakia. The Court rejected the claim on 16 September 1992 on the basis of Act No. 87/1991, which required that the authors be Czech citizens and permanent residents of the Czech Republic at the time of the entry into force of the law (1 April 1991), or, at the latest, at the moment of the expiry of the statutory time limit to make a restitution (1 October 1991). The author failed to meet this requirement. The State party adds that the District Court of Brno-venkov, in the same judgement, further ruled that notwithstanding the citizenship requirement, the author's action was in any event doomed to failure, since he failed to prove that he duly served the various defendants with a request for the surrender of the property within the period in which Act No. 87/1991 was in force. This judgement was not contested by any domestic remedy available, and became final on 25 November 1992. According to the State party, the author did not exhaust domestic remedies with regard to the restitution proceedings.

4.2 The State party further contends that author's communication should be declared inadmissible on the ground that it constitutes an abuse of the right to submit a communication, within the meaning of article 3 of the Optional Protocol. It notes that the last domestic decision against which the delay must be assessed is the decision of the District Court of Brno-venkov of 16 September 1992. Thus, more than 13 years elapsed before the author submitted his initial petition to the Committee on 12 March 2006. In the absence of any reasonable justification, the Committee should consider such delay to be abusive. To support its claim, the State party invokes, inter alia, the Committee's decisions in communications No. 1434/2005, *Fillacier v. France*, No. 787/1997 *Gobin v. Mauritius*, and No. 1452/2006 *Chytil v. The Czech Republic*.

4.3 The State party further claims that the communication should be declared inadmissible *ratione temporis* by the Committee, the author's property having been forfeited a long time before the entry into force of the Covenant and the Optional Protocol for the Czechoslovak Socialist Republic.[8]

4.4 The State party adds that to the extent that it relates to proceedings for declaration of ownership title on the basis of civil property law, the author's communication should be also declared inadmissible *ratione materiae*, as it related to the right to property, which is outside the scope of the Covenant.

4.5 On the merits, the State party notes that the right protected by article 26 of the Covenant, invoked by the authors, is an autonomous one, independent of any other right guaranteed by the Covenant. It recalls that in its jurisprudence, the Committee has reiterated that not all differences of treatment are discriminatory, and that a differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26. Article 26 does not imply that a State would be obliged to set right injustices of the past, especially considering the fact that the Covenant was not applicable at the time of the former communist Czechoslovakia.

4.6 Taking note of the Committee's jurisprudence on similar property restitution cases, the State party reiterates that it was not feasible to remedy all injustices of the past, and that

[7] Three natural persons and the Kurim state-owned farm.

[8] See note 1 above.

as part of its legitimate prerogatives, the legislator, using its margin of discretion, had to decide over which factual areas, and in which way it would legislate, so as to mitigate damages. The author's action was not successful before the District Court of Brno-venkov not only because he did not comply with the citizenship requirement in Act No. 87/1991, but also because he failed to meet the statutory precondition of requesting defendants to surrender the property within a fixed time period. Another problem was the fact that the author had failed to establish, before the District Court, that some of the defendants had acquired their property titles on the basis of illegal preference, which is another mandatory criteria for restitution under Act No. 87/1991.[9.] As for the later proceedings initiated by the author, based on civil property law, the State party contends that the process was not discriminatory. The courts correctly interpreted and applied domestic law, and as such, the matter is beyond the scope of the Committee's possible review. The State party concludes that it did not violate article 26 in the present case.

Authors' comments on the State party's observations

5. In his comments dated 2 June and 18 August 2008, the author maintains that Act No. 87/1991 is discriminatory, and in violation of the Covenant. He clarifies that for the purposes of the first instance proceedings, he sent requests for the surrender of his property to all defendants. The author does not agree with the State party's analysis of the judicial proceedings, and stresses that he exhausted domestic remedies after his appeal with the Constitutional Court was rejected on 5 April 2007. In any event, he notes that there are no available remedies offered to non-Czech citizens for property restitution in the State party. The author insists that it is the citizenship criteria which barred restitution of his property before Czech jurisdictions, and that this discriminatory requirement, which violates article 26 of the Covenant, constitutes the subject-matter of his complaint before the Committee.

Additional submission by the State party

6. On 21 May 2009, the State party submitted additional comments, in which it reiterated that the author's legal proceedings should be considered in two distinct parts. It also renewed its call to the Committee to consider the author's complaint inadmissible *ratione temporis*, or, subsidiarily, ill-founded under article 26 of the Covenant.

Additional submission by the author

7. On 8 July 2009, the author submitted additional comments, in which he reiterated that his communication should be declared admissible by the Committee, and that he was a victim of discrimination under article 26 of the Covenant as a result of the State party's failure to allow restitution of his immoveable property in Kurim.

[9] Act No. 87/1991, in addition to the citizenship and permanent residence requirements (the latter criteria was later repealed by Constitutional Court decision No. 164/1994), laid down other conditions that had to be met by claimants in order for them to be successful with their restitution claims. In particular, for protecting the current owners of property that is subject to a restitution claim, the Act stipulated that the current owner had to surrender property only if he/she had obtained the said property in breach of the laws then in force or if he/she had obtained it through unlawful preferential treatment. The State party notes that it invoked these arguments in the past, in communications No. 1533/2006 *Ondracka v. The Czech Republic*, and No. 945/2000, *Marik v. The Czech Republic*.

Issues and proceedings before the Committee

Consideration of admissibility

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

8.2 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.

8.3 The Committee has considered the judicial proceedings initiated by the author in 2005 before the District Court of Brno-venkov for the restitution of his family house and garden, seeking a declaration of title under civil property law. The District Court of Brno-venkov rejected his claim on 8 June 2005. The author appealed this decision before the Regional Court of Brno, which rejected his appeal on 10 October 2006, and this verdict was confirmed by the Constitutional Court on 5 April 2007. The State party has not contested the admissibility of this part of the communication. The Committee therefore considers that the author has exhausted domestic remedies under article 5, paragraph 2 (b), of the Optional Protocol in relation to the second procedure initiated by the author in 2005.

8.4 The Committee has noted the State party's argument that the communication should be declared inadmissible as an abuse of the right of submission because of the long delay between the decision of the District Court of Brno-venkov of 16 September 1992 and the submission of the communication to the Committee. The Committee notes that the Optional Protocol does not establish time limits within which a communication must be submitted. It is only in exceptional circumstances that the delay in submitting a communication can lead to the inadmissibility of a communication.[10] Examining the second judicial proceedings, which, in essence, deal with the same subject matter as the first proceedings, and which ended on 5 April 2007 with a decision of the Constitutional Court, and considering the fact that the author's initial petition was presented to the Committee on 12 March 2006, i.e. before having exhausted domestic remedies, the author's communication is admissible under article 3 of the Optional Protocol.

8.5 The Committee also took note of the State party's claim that the communication should be declared inadmissible *ratione materiae*. Although the author's claim relates to property rights, which are not themselves protected in the Covenant, the author also alleges that the confiscations under prior Czechoslovak Governments were discriminatory and that the new legislation of the Czech Republic discriminates against persons who are not Czech citizens.[11] Therefore, the facts of the communication appear to raise an issue under article 26 of the Covenant, and are therefore admissible *ratione materiae*.

8.6 The Committee further noted the State party's objection to the admissibility of the present communication *ratione temporis*. It considers that although the confiscations took place before the entry into force of the Covenant and of the Optional Protocol for the Czech Republic, the new legislation that excludes claimants who are not Czech citizens has continuing consequences subsequent to the entry into force of the Optional Protocol for the

[10] See communications No. 1434/2005, *Fillacier v. France*, para. 4.3; No. 787/1997, *Gobin v. Mauritius*, para. 6.3, and No. 1582/2006, *Kudrna v. The Czech Republic*, para. 6.3.

[11] See communications No. 586/1994, *Adam v. The Czech Republic*, Views adopted on 23 July 1996, para. 6.2, and No. 1574/2007, *Slezak v. The Czech Republic*, Views adopted on 20 July 2009, para. 6.4.

Czech Republic, which could entail discrimination, in violation of article 26 of the Covenant.[12.]

8.7 In the absence of any further objections to the admissibility of the communication, the Committee declares it admissible, in so far as it may raise issues under article 26 of the Covenant, and proceeds to its consideration on the merits.

Consideration of the merits

9.1 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.

9.2 The issue before the Committee is whether the application to the author 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 differentiation 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.[13]

9.3 The Committee recalls its Views in the numerous Czech property restitution cases,[14] where it held that article 26 had been violated, and that it would be incompatible with the Covenant to require the authors to obtain Czech citizenship as a prerequisite for the restitution of their property or, alternatively, for the payment of appropriate compensation. Bearing in mind that the author's original entitlement to his property was not predicated on his citizenship, the Committee found that the citizenship requirement was unreasonable. In communication No. 747/1997, *Des Fours Walderode,*[15] the Committee observed that a citizenship requirement in the law as a necessary condition for restitution of property previously confiscated by the authorities makes an arbitrary and discriminatory distinction between individuals who are equally victims of prior State confiscations, and constitutes a violation of article 26 of the Covenant. The Committee considers that the principle established in the above cases equally applies to the author of the present communication. The Committee therefore concludes that the application to the author of the citizenship requirement in Act No. 87/1991 violated his rights under article 26 of the Covenant.

10. 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 International Covenant on Civil and Political Rights.

11. 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

[12] See *Adam v. The Czech Republic* (note 11 above), para. 6.3.

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

[14] Communications No. 516/1992, *Simunek v. The Czech Republic*, Views adopted on 19 July 1995, para. 11.6; No. 586/1994, *Adam v. The Czech Republic* Views adopted on 23 July 1996, para. 12.6; No. 857/1999, *Blazek v. The Czech Republic*, Views adopted on 12 July 2001, para. 5.8; No. 945/2000, *Marik v. The Czech Republic*, Views adopted on 26 July 2005, para. 6.4; No. 1054/2002, *Kriz v. The Czech Republic*, Views adopted on 1 November 2005, para. 7.3; No. 1445/2006, *Polackova and Polacek v. The Czech Republic*, Views adopted on 24 July 2007, para. 7.4; No. 1463/2006, *Gratzinger v. The Czech Republic*, Views adopted on 25 October 2007, para. 7.5; No. 1533/2006, *Ondracka v. The Czech Republic*, Views adopted on 2 November 2007, para. 7; No. 1479/2006, *Persan v. The Czech Republic*, Views adopted on 24 March 2009, para. 7.4; and No. 1574/2007, *Slezak v. The Czech Republic*, Views adopted on 20 July 2009, para. 7.3.

[15] Views adopted on 30 October 2001, para. 8.3-8.4.

compensation if the property in question cannot be returned. The Committee reiterates that the State party should review its legislation, specifically in relation to the citizenship requirement in Act No. 87/1991, to ensure that all persons enjoy both equality before the law and equal protection of the law.

12. Bearing in mind that, by becoming a Party to the Optional Protocol, the State party has recognized 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 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.]

Appendix

Individual opinion of Committee member, Mr. Abdelfattah Amor (dissenting)

In my opinion, this communication should have been declared inadmissible as it brings together two separate legal actions, both in themselves inadmissible.

The first legal action concerned a claim for restitution of the author's property. By decision of 16 September 1992, the District Court of Brno-venkov, which was seized of the matter, rejected the claim on the basis of Act No. 87/1991, which specified that such claims could be submitted only by persons of Czechoslovakian nationality who had permanent residence in Czechoslovakia. The author did not appeal this decision. The requirement of the exhaustion of domestic remedies could legitimately be waived, since these remedies were rendered ineffective by the position taken by the Constitutional Court in upholding the constitutionality of Act No. 87/1991. Moreover, if the communication was admissible, article 26 of the Covenant would have been applicable, since the inclusion of a citizenship requirement in the law as a prerequisite for the restitution of property confiscated by the authorities amounted to the establishment of an arbitrary and discriminatory distinction between individuals who had all likewise been victims of confiscations in the past, and constituted a violation of that article.

In fact, this part of the communication is fundamentally distinct from the rest of the communication, as will be clarified below. The uncontested facts mention two specific dates: the court rejected the author's claim on 16 September 1992, and the communication was submitted to the Committee on 12 March 2006. Thus, a period of more than 13 and a half years elapsed between the court's decision and the submission of the communication to the Committee. This delay is manifestly excessive and undeniably constitutes an abuse of the right to submit a communication within the meaning of article 3 of the Optional Protocol. The jurisprudence of the Committee — despite being quite liberal and, frankly speaking, lacking in rigour — does not permit such long delays. Not wishing to labour the point, I would merely draw attention to my dissenting opinions in this regard, in particular my dissenting opinion on communication No. 1533/2006, *Ondracka v. The Czech Republic*. I would also like to take this opportunity to refer to my contribution to the collection of articles honouring Ahmed Mahiou entitled "Le délai de présentation des communications individuelles au Comité des droits de l'homme: Considérations sur une lacune du Protocole facultatif se rapportant au Pacte international relatif aux droits civils et politiques" (The time limit for submitting individual communications to the Human Rights Committee: Reflections on a gap in the Optional Protocol to the International Covenant on Civil and Political Rights).[a]

The second legal action was initiated by the author before the District Court of Brno-venkov in 2005, that is, 13 years on from the first one, and concerned a claim for declaration of title. The author substantiated this action by claiming that, further to his rehabilitation under Act No. 119/1990, his ownership title had been restored and he was consequently seeking a declaration of title on the basis of the general principles of Czech property law. The District Court of Brno-venkov rejected the claim on 8 June 2005. The Regional Court of Brno rejected the appeal brought before it in this matter "on the ground

[a] In Yadh Ben Achour, Jean-Robert Henry and Rostane Mehdi, *Le débat juridique au Maghreb: De l'étatisme à l'Etat de Droit, Etudes en l'honneur d'Ahmed Mahiou* (Editions Publisud-IREMAM, 2009), p. 241 ff.

that civil law actions for property restitution after rehabilitation under Act No. 119/1990 could not be undertaken so as to circumvent applicable restitution legislation (i.e. Act No. 87/1991)". The author's appeal to the Constitutional Court was dismissed as ill-founded on 5 April 2007, nearly one year prior to submission of the present communication, and prior to the exhaustion of domestic remedies.

This second legal action, which differs from the first in terms of its object and the law applicable to it, can neither be combined with the first nor appended to it. The Committee itself recognizes that it constituted a new legal action, referring to it as "the second judicial proceedings" (para. 8.4), in respect of which, moreover, domestic remedies have been exhausted and the matter referred to the Committee within what could be considered a reasonable period of time. The object of this new legal action was a declaration of title, unlike that of 1992 (which was referred belatedly to the Committee), the object of which was the restitution of property. Because it concerns questions of ownership, the new action is unquestionably inadmissible *ratione materiae*, given that the right to own property lies outside the scope of the Covenant. The Committee's statement to the effect that "the second judicial proceedings" is, in essence, linked to the first arises from an assessment of the purpose, not the object, of the proceedings.

By equating the concept of object with that of purpose, by appending the second action to the first in a legally questionable manner through a reference to "consideration of the second part of the legal action", and by allowing its attention to be diverted from lack of jurisdiction ratione materiae by considerations relating to article 26 — which could have been applied to the first action (for restitution) — the Committee has made errors of judgement with regard to both the facts and the law.

(*Signed*) Mr. Abdelfattah Amor

[Done in English, French and Spanish, the French 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.]