



**International covenant
on civil and
political rights**

Distr.
RESTRICTED*

CCPR/C/95/D/1575/2007
29 April 2009

Original: ENGLISH

HUMAN RIGHTS COMMITTEE
Ninety-fifth session
16 March to 3 April 2009

DECISION

Communication No. 1575/2007

<u>Submitted by:</u>	Herman Aster (not represented by counsel)
<u>Alleged victim:</u>	The author
<u>State party:</u>	The Czech Republic
<u>Date of communication:</u>	16 February 2007 (initial submission)
<u>Document references:</u>	Special Rapporteur's rule 97 decision, transmitted to the State party on 18 July 2007 (not issued in document form)
<u>Date of adoption of decision:</u>	27 March 2009

* 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: No-exhaustion of domestic remedies

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

Article of the Covenant: 26

Article of the Optional Protocol: 5, paragraph 2 (b)

[Annex]

ANNEX

DECISION OF THE HUMAN RIGHTS COMMITTEE UNDER THE OPTIONAL
 PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND
 POLITICAL RIGHTS

Ninety-fifth session

concerning

Communication No. 1575/2007**

<u>Submitted by:</u>	Herman Aster (not represented by counsel)
<u>Alleged victim:</u>	The author
<u>State party:</u>	The Czech Republic
<u>Date of communication:</u>	16 February 2007 (initial submission)

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

Meeting on 27 March 2009,

Adopts the following:

DECISION ON ADMISSIBILITY

1. The author of the communication is Herman Aster, born on 1 May 1934 in Rychnov and Kneznou in the former Czechoslovakia, now residing in the United States of America. He claims to be a victim of a violation by the Czech Republic¹ of article 26 of the Covenant. The author is not represented.

** The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Lazhari Bouzid, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood.

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.

The facts as presented by the author

2.1 On 6 July 1969, the author left Czechoslovakia. Before that date, he had bought a co-operative apartment in Brno, Vystavni St. No. 20. On 28 August 1970, he was sentenced *in absentia* to two years imprisonment for leaving the country and his property was confiscated. On 7 September 1988, he obtained US citizenship, thereby losing his Czech citizenship, pursuant to the Naturalisation Treaty of 16 July 1928 between the two countries.

2.2 The decision to confiscate his property was annulled under Law no. 119/90 on Rehabilitation. The author thereupon filed a lawsuit in the Brno Regional Commercial Court to have his apartment returned to him. However on 4 May 2000, the Court rejected his claim as he was not a citizen of the Czech or Slovak Federal Republic, as required by Act No. 87/1991. This Law on Extra-judicial Rehabilitation had been adopted by the Czech Government in 1991, and it set out the conditions for recovering property, confiscated under Communist rule.

2.3 On 28 August 2001, the European Court of Human Rights rejected the author's application no. 62940/00, as the facts occurred before the entry into force of the European Convention for the Czech Republic.

The complaint

3. The author claims a violation of article 26 of the Covenant, on the basis of the citizenship requirement of Act. No. 87/1991.

The State party's submission on admissibility and merits

4.1 On 15 January 2008, the State party commented on the admissibility and merits of the communication. On the facts, it submits that on 31 October 1995, the author first brought an action before the Brno Municipal Court against the Drubža Housing Construction Cooperative concerning the conclusion of an agreement on the surrender of a membership share, based on Act. No. 87/1991 on Extra-judicial Rehabilitations. Due to lack of jurisdiction, the action was transferred to the Brno Regional Commercial Court. According to the State party, due to missing documents, the Cooperative in question could neither prove nor rebut the author's claim that he held a membership share in the original cooperative, which also included the right to use the apartment.

4.2 The State party submits that the communication is inadmissible for: non-exhaustion of domestic remedies; *ratione temporis*; and as an abuse of the right of submission. In regard to non-exhaustion, the State party submits that the author did not appeal the judgement of the Brno Regional Commercial Court, and that this was the reason why the ECHR actually dismissed his case. The State party further submits that the property in question was forfeited in 1970, prior to the entry into force of the Covenant and Optional Protocol in the Czechoslovak Socialist Republic; and consequently the communication is inadmissible *ratione temporis*.

4.3 The State party invokes the jurisprudence² of the Committee to argue that the submission of the communication six and a half years after the last domestic decision in the case and five and a half years after the rejection of the author's application before the ECHR, is an abuse of the right of submission. In the State party's view, the author should be required to provide a reasonable objective explanation as to why he delayed addressing the Committee. If the principle of *ignorantia legis non excusat* has any meaning the explanation of the author for failure to pursue his rights within a reasonable timeframe cannot depend on the extent to which the author *ex post facto* succeeds in advancing a subjective pretext as to why he/she delayed his/her submission to the Committee. In this regard, the State party notes that the author has provided no explanation in this case as to why a period of five and a half years elapsed after the decision of the ECHR before addressing the Committee.

4.4 On the merits, the State party contends that the communication is "ill-founded", as the Brno Regional Commercial Court rejected the author's action for the surrender of the membership share in the cooperative, on two equivalent grounds: for failure to comply with the citizenship requirement and by reason of the fact that the Restitution Act no. 87/1991 did not apply to the case in question. The Court explicitly noted that the second ground for rejecting the action would have applied even if the author had complied with the citizenship requirement³.

4.5 The State party invokes its Civil Code: thus, Section 119 categorises "things", in the legal sense, as movable and immovable property. Although the Code itself does not define "a thing", according to the established legal interpretation, it refers to "a controllable tangible object or a uncontrollable natural force that serves human needs". According to this definition, no legal regulation defines a membership share in a cooperative as a "thing"; therefore, *a contrario*, it is a right or a pecuniary value.

4.6 The State party notes that the author never challenged the Regional Court's interpretation of Act No. 87/1991 to the extent that it does not apply to forfeited shares in cooperatives. The State party argues that article 26 provides the legislator with a certain margin of appreciation as to whether, and to what extent, it can provide redress for injustices committed during the previous non-democratic regime. The legislator could choose whether or not to include membership shares in

² Communication No. 787/1997, *Gobin v. Mauritius*, Decision of 16 July 2001. Communication No. 1434/2005, *Fillacier v. France*, Decision of 16 July 2001. Communication No. 1452/2006, *Chytil v. the Czech Republic*, Decision of 24 July 2007.

³ The Court stated the following: "Another legal ground is the nature of the claim raised. Apart from certain special claims explicitly provided for, Act no. 87/1991 provides for the surrender of property acquired in ways envisaged in Section 2 of this Act. A membership share in a cooperative does not constitute a thing within the meaning of Section 2 of this Act. A membership share in a cooperative does not constitute a thing within the meaning of Section 119 of the Civil Code. This provision distinguishes movable and immovable property. However, a membership share represents a set of property and personal rights which is entirely outside the scope of Section 119 of the Civil Code. Even if the claimants ...were Czech Republic citizens, Act no. 87/1991, as amended, would not have applied to the surrender of the membership share in the cooperative."

housing cooperatives within the subject matter covered by Act No. 87/1991. The legislator considered that it was unfair to interfere with the rights of those people who were placed in these flats after the author's departure and were not responsible for his departure.

4.7 In addition, the State party submits that regardless of the fact that the author's possession of a membership share in the housing co-operative was never proven, he would not have had any "ownership" title in the apartment, but only the right to use it. The State party admits that injustices committed in the past have not been mitigated and that the author may well believe that the non-surrender to him of the membership share in the cooperative constituted one such injustice. However, that does not mean that he was discriminated against on exactly those grounds. As to the citizenship requirement, the State party reiterates its arguments made in relation to earlier, similar, property cases.

The authors' comments

5. On 28 February 2008, the author reiterates his initial arguments and submits that there is no doubt about his ownership of the property in question. He considers it "useless" to analysis the court decisions, since they are obviously discriminatory.

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

6.2 The State party has argued that the communication is inadmissible, *inter alia*, for non-exhaustion of domestic remedies. It also argues that the author has not proven that he had a membership share in the original cooperative in question and that, in any event, the Regional Commercial Court considered that, irrespective of the question of citizenship, the author would not have been entitled to recover the property due to the fact that the nature of the property being such it did not fall within the scope of Act No. 87/1991 on Extra-judicial Rehabilitation. The Committee observes that the author has failed to raise this issue before any court in the State party and also failed to pursue his claim following its rejection by the Brno Regional Commercial Court. The Committee notes that the pursuit of a court action would have, *inter alia*, clarified the contested facts, as well as the interpretation of domestic law, which the Committee is not in a position itself to evaluate. Notably, it would have clarified whether the author had in fact held a member share in the cooperative in question, and whether such property rights (shares in a cooperative) fell within the scope of Act No. 87/1991. In any event, the Committee also notes that the author has not argued either before the domestic courts or indeed in his claim before the Committee how the Regional Court's interpretation of Act No. 87/1991 amounts to prohibited discrimination within the meaning

of article 26. It recalls that article 5, paragraph 2 (b) of the Optional Protocol, by referring to "all available domestic remedies", refers in the first place to judicial remedies⁴. Accordingly, the Committee concludes that the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol, for failure to exhaust domestic remedies.

6.3 The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 5, paragraph 2 (b) of the Optional Protocol;

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

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

⁴ Communication No. 262/1987, *R.T. v France*, Decision of 30 March 1989. Communication No. 1515/2006, *Herbert Schmidl v. Germany*, Decision of 1 April 2008.