



**International covenant
on civil and
political rights**

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HUMAN RIGHTS COMMITTEE
Eighty-second session
18 October - 5 November 2004

DECISION

Communication No. 1188/2003

Submitted by: Riedl-Riedenstein, Viktor-Gottfried and Josseline;
Scholtz, Maria (represented by counsel, Mr. Hans-
Jochen Moser and Mrs. Sylvia Moser)

Alleged victim: The authors

State party: Germany

Date of communication: 11 June 2003 (initial submission)

Document references: Special Rapporteur's rule 91 decision, transmitted to the
State party on 11 June 2003 (not issued in document
form).

Date of decision: 2 November 2004

[ANNEX]

* Made public by decision of the Human Rights Committee.

ANNEX

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

Eighty-second session

concerning

Communication No. 1188/2003**

Submitted by: Riedl-Riedenstein, Viktor-Gottfried and Josseline;
Scholtz, Maria (represented by counsel, Mr. Hans-
Jochen Moser and Mrs. Sylvia Moser)

Alleged victim: The authors

State party: Germany

Date of communication: 11 June 2003 (initial submission)

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

Meeting on 2 November 2004

Adopts the following:

DECISION ON ADMISSIBILITY

1. The authors of the communication are Viktor-Gottfried and Josseline Riedl-Riedenstein (first and second authors), born in 1916 and in 1934 respectively, and Maria Scholtz (née Riedl-Riedenstein; third author). All are Austrian nationals. The authors claim to be victims of a violation by Germany¹ of articles 14, paragraph 1, and 26 of the Covenant. They are represented by counsel.

** The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen and Mr. Maxwell Yalden.

¹ The International Covenant on Civil and Political Rights and the Optional Protocol entered into force for the State party respectively on 23 March 1976 and 25 November 1993. Upon ratification of the Optional Protocol, the State party entered the following reservation: "The

The facts as submitted by the authors

2.1 Prior to World War II, the family of the authors owned extensive property in Czechoslovakia, including stocks of German companies including *Daimler Benz* (worth 154.000 Reichsmark), *Dresdner Bank* (worth 142.000 Reichsmark) and *IG Farben Industrie AG* (worth 410.000 Reichsmark). These stocks were deposited at the family's secondary residence at Aich Castle. In September 1944, the first and third authors' father, in the first author's presence, decided to wrap the stocks in packages, on which he inscribed the third author's name. Pursuant to the *Benes decrees* of 1945, the family's properties in Czechoslovakia were confiscated, including Aich Castle, where the stocks were hidden in a hall cupboard. While the physical evidence of the stocks was confiscated, the Czechoslovak authorities did not attempt to redeem the value of the stocks.

2.2 In 1948, the Deutsche Mark was introduced in the Federal Republic of Germany, and stocks in Reichsmark were reissued. As proof of ownership, the old stocks had to be submitted; failing this, ownership had to be established in other ways, e.g. by submission of bank statements, tax returns etc. The Federal Republic of Germany acted as trustee for the owners and eventually took ownership of unclaimed stocks.

2.3 In 1965, the authors visited Aich Castle to collect information about their stocks for eventual submission to the German Federal Compensation Office, pursuant to the laws enacted between 1949 and 1964 on the procedure for examining and validating claims to securities lost or destroyed during or directly following the Second World War (Wertpapierbereinigungsschlussgesetze).

2.4 Between 1965 and 1976, the authors filed three claims for compensation with the Federal Compensation Office; these were dismissed in 1965, 1971 and 1981, respectively, for lack of sufficient proof of their ownership of the shares. The author's unsuccessfully appealed these decisions in separate proceedings, relating to each parcel of shares, before different courts.

2.5 Before 1990, the authors could not document their ownership of the stocks, since the papers kept at Aich Castle were inaccessible to them, and pertinent bank statements and tax returns had been destroyed in a fire at the family house in Vienna at the end of the War. Moreover, the Czech authorities had consistently refused to issue a certificate from the Central Bank, confirming the existence of their stocks.

Federal Republic of Germany formulates a reservation concerning article 5 paragraph 2 (a) to the effect that the competence of the Committee shall not apply to communications a) which have already been considered under another procedure of international investigation or settlement; or b) by means of which a violation of rights is reprimanded having its origin in events occurring prior to the entry into force of the Optional Protocol for the Federal Republic of Germany; c) by means of which a violation of article 26 of the [said Covenant] is reprimanded, if and insofar as the reprimanded violation refers to rights other than those guaranteed under the aforementioned Covenant.”

2.6 Following the change of government in Czechoslovakia in 1990, the authors gradually obtained access to the necessary documentary evidence. On 19 April 1991, a new application for compensation of the *IG Farben* shares was submitted to the Securities Validation Chamber of the Frankfurt Regional Court, which dismissed the claim on 2 November 1992. On appeal, the Frankfurt Court of Appeal quashed that decision and referred the matter back to the Frankfurt Regional Court.

2.7 Following requests by the authors to defer a decision because new possibilities for securing fresh evidence from the Czech authorities had developed, the Securities Validation Chamber of the Frankfurt Regional Court decided, on 29 November 1999, that the authors had no case to claim compensation for *IG Farben* shares worth 410.000 Reichsmark, and set the amount in dispute at 1,644,000 DM. It considered that the requirements of Section 15, paragraph 1, of the 1964 Act on the finalization of the validation of securities had not been met, as the authors had not justified their failure to apply for verification and registration of their rights to the stocks before the legally prescribed deadline on 31 December 1964. The Court rejected the authors' argument that they had been unable to obtain evidence in support of their claims prior to the visit to Aich Castle in 1965, given the reappearance, in 1962, of their former estate manager at Aich (now "Doubi"), who had detailed knowledge of the authors' assets, including their stocks. Neither the confiscation of Aich Castle nor the fire at their house in Vienna could justify their failure to meet the deadline, since they could reasonably have been expected to make enquiries with the bank in Karlsbad which had acted as intermediary for the purchase of the stocks or to inquire into the possible existence of dividend coupons, tax returns, or other evidence available with the Czech authorities.

2.8 Moreover, the authors had not plausibly shown their ownership of the stocks, since the mere inscription of the third author's name, in 1944, on the packages did not constitute a "delivery" of the stocks to the daughter, nor a substitute for such delivery, without any indication of the legal position of the bearer of the inscribed name, and because the father's power to act on behalf of his wife and daughter had not been established. Even if the first author, as the sole heir, would have been entitled to claim compensation for the stocks, he had failed to have his ownership title registered in the compensation proceedings before the expiry of the deadline on 30 June 1976, as prescribed by Section 11, paragraph 1, of the 1975 Act to finalize the currency conversion. Lastly, the division and nominal value of the shares had not been specified.

2.9 On 2 October 2000, the Frankfurt Court of Appeal dismissed the authors' immediate appeal, in the absence of a legal error in the impugned decision of the Frankfurt Regional Court. With regard to the authors' argument that their deceased estate manager's knowledge of the existence of the stocks had suddenly become the central issue, the Court held that the mere fact that the authors' claims were previously dismissed on other grounds did not give rise to a *bona fide* expectation that their failure to meet the deadline for claiming validation of their stocks was considered to be justified.

2.10 Irrespective of the authors' argument that it was beyond their imagination that the estate manager would open the hall cupboard and find the stocks, the Court considered that the authors' failure to ask him about the destiny of the stocks amounted to a breach of their duty of care, given that he had continued to administer Aich Castle after the family's departure, that he had

witnessed the confiscation of said properties by the Czechoslovakian authorities in 1945, and that the transcript of the confiscation, which he had handed over to the authors in 1962, did not mention the stocks. The Appeal Court therefore endorsed the Regional Court's finding that the authors had failed to show that they had made every reasonable effort to find evidence in support of their validation claim prior to their visit to Aich Castle in October 1965. By rejecting the authors' compensation claim on the ground of their unexcused failure to apply for validation of their stocks before the deadline on 31 December 1964, the Court did not examine the question of ownership of the stocks.

2.11 On 13 September 2001, the Federal Constitutional Court dismissed the authors' constitutional complaint, finding that the lower courts' decisions did not violate the constitutional prohibition of arbitrariness and that the question of whether a possible breach of article 6 of the European Convention, which required an oral hearing also in non-adversarial proceedings of a civil character, would at the same time constitute a violation of the German Basic Law, had no bearing on the case, since the authors did not claim that they could have introduced further evidence during an oral hearing which would have changed the lower courts' decisions.

2.12 On 1 February 1999, the authors submitted an application to the European Court of Human Rights, alleging that the length of compensation proceedings in relation to the *Dresdner Bank*, *Daimler Benz* and *IG Farben* shares violated article 6 of the European Convention, whereas the denial of any compensation for these shares breached their right to property (as enshrined in article 1 of Protocol No. 1 to the European Convention). On 22 January 2002, the Court dismissed the authors' claims in respect of the proceedings concerning the *IG Farben* and *Dresdner Bank* shares for non-exhaustion of domestic remedies. With regard to the *Daimler Benz* shares, it rejected their complaint about the length of these proceedings as manifestly ill-founded and declared the application inadmissible *ratione materiae*, insofar as article 1 of Protocol No. 1 to the Convention was concerned, since the German courts' conclusion that the authors had not sufficiently established their property rights over the shares was neither arbitrary nor contrary to relevant provisions of national law.

The complaint

3.1 The authors, who limit the scope of their communication to the proceedings concerning the *IG Farben* shares, allege violations of their right under article 14, paragraph 1, to an impartial tribunal and of their right to equality and non-discrimination, under article 26, in conjunction with article 14, paragraph 1, of the Covenant, arguing that the German courts arbitrarily rejected their compensation claim by applying a stricter standard of proof to their case than to past compensation claims, which had frequently been granted in cases concerning confiscation of Jewish property. This discriminatory treatment could be linked to the courts' intention to protect the German treasury in times of severe economic constraints.

3.2 The authors submit that they exercised due diligence to document their claims, but were first denied information by the former Czechoslovak authorities and, when they finally obtained evidence that proved their ownership of the stocks, were denied compensation by the German

courts, on the basis of their late filing of the claim and their failure to involve their former estate manager.

3.3 The authors submit that they exhausted domestic remedies and that the same matter is not being examined under another procedure of international investigation or settlement. Regarding the German reservation to article 5, paragraph 2 (a), they argue that their application to the European Court did not relate to the same substantive rights, since it concerned their right to property, which is not as such protected by the Covenant, and the length of the proceedings, rather than their right to equality of treatment and non-discrimination. Moreover, their claim regarding the *IG Farben* shares was not examined by the European Court at all.

The State party's observations on admissibility

4.1 On 12 August 2003, the State party contested the admissibility of the communication, arguing that the authors' claims are unsubstantiated, incompatible *ratione materiae* with the provisions of the Covenant, insofar as an isolated argument based on article 26 would be incompatible with the German reservation, and inadmissible for non-exhaustion of domestic remedies, to the extent that the authors failed to raise "the prohibition of arbitrariness under the aspect of unequal treatment compared to other claimants" in the Federal Constitutional Court.

4.2 The State party submits that the authors have not substantiated, for purposes of article 2 of the Optional Protocol, that their right to equality before the courts was violated, and in particular by reference to which comparable groups, or on the basis of which criteria, they had been discriminated against by the German courts' application of an allegedly more stringent standard of proof. Neither unidentified claimants who obtained compensation for lost securities nor claimants who obtained restitution for the confiscation of Jewish property could be deemed suitable groups of comparison, in the absence of any indication of the criteria on which the differential treatment was allegedly based, and since Jewish compensation claims for war-induced losses concerned an entirely different situation subject to distinct legislation.

Authors' comments

5.1 By submission of 4 November 2003, the authors argued that the German reservation has no bearing on their claims, since the issue before the Committee is a denial of equal treatment in a suit at law; their complaint is thus based on article 26, in conjunction with article 14, paragraph 1, rather than on article 26 alone. If the reservation was deemed to cover their claim, the authors request the Committee to examine whether it is compatible with the object and purpose of the Optional Protocol.

5.2 The authors submit that they sufficiently substantiated their claims, for purposes of admissibility, thereby reversing the burden of proof, in accordance with Committee jurisprudence. Accordingly, it was incumbent on the State party to specify what additional information it wished to obtain and to explain why other claimants had their ownership recognized, while the authors were always required to provide hard evidence inaccessible until the 1990s.

5.3 The authors reiterate that, once their claims had been made out, the German courts rejected them on entirely different grounds, namely that the authors should have tried to obtain an affidavit from someone who did not necessarily know of the stocks and who had not listed them in the inventory of Aich Castle. The State party should be estopped from raising this issue after the estate manager had died. Moreover, the State party itself could have assisted in obtaining the necessary information from the Czechoslovakian authorities.

5.4 Lastly, the authors submit that it would be unreasonable to require them to exhaust any further domestic remedies, after they had for decades exercised due diligence to obtain their rights in German courts.

6.1 On 29 September 2004, counsel forwarded further comments, submitting that, unlike Jewish and other victims of persecution on racial grounds, whose claims could be assessed under the Act on Compensation for Nazi Injustice (Bundesentschädigungsgesetz), the authors had been required to state the nominal value of their shares. When this information finally became available from the Czech authorities, their claim was rejected under the pretext that the same information could have been obtained from their former estate manager earlier. Given that the Compensation Act does not establish a requirement that each potential witness be contacted, the authors claim that they have been discriminated against in comparison to Jewish and other victims of racial persecution.

6.2 In support of their claim, the authors submit a decision dated 12 June 2002 of the Berlin Regional Revenue Office, granting a considerable amount of compensation to the joint heirs of a reportedly Jewish victim of confiscation of real estate in 1944. This compensation had been estimated in the absence of precise information on the real estate value to be compensated.

Issues and proceedings before the Committee

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

7.2 With regard to the authors' claim that the German courts' discriminated against them by applying a more stringent standard of proof to their case than to other past compensation claims, in particular claims concerning restitution of confiscated Jewish property, the Committee notes that the authors did not address this issue in their constitutional complaint dated 13 November 2000. It recalls that, in addition to ordinary judicial and administrative appeals, authors must also avail themselves of all other judicial remedies, including constitutional complaints, to meet the requirement of exhaustion of all available domestic remedies, insofar as such remedies appear to be effective in the given case and are *de facto* available to an author.² The Committee considers that the authors have not shown that addressing the alleged discriminatory application of a more stringent standard of proof to their claims before the Federal Constitutional Court would have been a futile remedy, merely because the lower courts had consistently applied such a standard of

² Communication No. 1003/2001, *P.L. v. Germany*, decision on admissibility adopted on 22 October 2003, at para. 6.5.

proof to their case. It therefore concludes that this part of the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol, since the authors have not exhausted all available domestic remedies in that respect.

7.3 The Committee notes the authors' claim that the German courts' dismissal of their compensation claim, in the proceedings concerning the *IG Farben* stocks, on the ground that they did not contact their former estate manager before the statutory deadline (31 December 1964) for filing a validation claim, was arbitrary and in violation of their rights under article 14, paragraph 1, in conjunction with article 26, of the Covenant, given the uncertainty about the latter's knowledge of the existence of the stocks. It recalls its constant jurisprudence that it is generally for the courts of States parties to the Covenant to review facts and evidence, or the application of domestic legislation, in a particular case, unless it can be shown that such evaluation or application was clearly arbitrary or amounted to a denial of justice, or that the court otherwise violated its obligation of independence and impartiality.³ The Committee notes that the German courts based their finding that the authors had breached their duty of care, *inter alia*, on the assumption that it would have been the normal conduct for anyone who, as the first author, claimed to have known of the existence of the stocks since 1944, to inquire about their whereabouts upon receipt, in 1962, of a confiscation transcript that made no mention of them, as well as on their failure to inquire into the possible existence of other evidence of said stocks (e.g. by checking with the family's former bank in Karlsbad for proof of their purchase). It further notes that the Frankfurt Regional Court dismissed the authors' compensation claim not only on grounds of their unexcused failure to provide evidence of the *IG Farben* stocks before 31 December 1964, but also because they had not plausibly established their ownership of the stocks. In these circumstances, the Committee concludes that the authors have failed to substantiate, for purposes of admissibility, any arbitrariness on the part of the German courts; this part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

7.4 In the light of the foregoing, the Committee need not address the question of whether the State party's reservation regarding article 26 of the Covenant applies in the present case.

8. The Human Rights Committee therefore decides:

- (a) That the communication is inadmissible under articles 2 and 5, paragraph 2 (b), of the Optional Protocol;
- (b) That this decision shall be communicated to the State party and to the authors.

[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.]

³ Communication No. 886/1999, *Bondarenko v. Belarus*, Views adopted on 3 April 2003, at para. 9.3; Communication No. 1138/2002, *Arenz et al. v. Germany*, decision on admissibility adopted on 24 March 2004, at para. 8.6.