NATIONALITY

III. JURISPRUDENCE

CERD

- *Habassi v. Denmark* (10/1997), CERD, A/54/18 (17 March 1999) 86 (CERD/C/54/D/10/1997) at paras. 2.1, 2.2, 9.2-9.4 and 10.

...

2.1 On 17 May 1996 the author visited the shop "Scandinavian Car Styling" to purchase an alarm set for his car. When he inquired about procedures for obtaining a loan he was informed that "Scandinavian Car Styling" cooperated with Sparbank Vest, a local bank, and was given a loan application form which he completed and returned immediately to the shop. The application form included, *inter alia*, a standard provision according to which the person applying for the loan declared himself or herself to be a Danish citizen. The author, who had a permanent residence permit in Denmark and was married to a Danish citizen, signed the form in spite of this provision.

2.2 Subsequently, Sparbank Vest informed the author that it would approve the loan only if he could produce a Danish passport or if his wife was indicated as applicant. The author was also informed that it was the general policy of the bank not to approve loans to non-Danish citizens.

...

9.2 Financial means are often needed to facilitate integration in society. To have access to the credit market and be allowed to apply for a financial loan on the same conditions as those which are valid for the majority in the society is, therefore, an important issue.

9.3 In the present case the author was refused a loan by a Danish bank on the sole ground of his non-Danish nationality and was told that the nationality requirement was motivated by the need to ensure that the loan was repaid. In the opinion of the Committee, however, nationality is not the most appropriate requisite when investigating a person's will or capacity to reimburse a loan. The applicant's permanent residence or the place where his employment, property or family ties are to be found may be more relevant in this context. A citizen may move abroad or have all his property in another country and thus evade all attempts to enforce a claim of repayment. Accordingly, the Committee finds that, on the basis of article 2, paragraph (d), of the Convention, it is appropriate to initiate a proper investigation into the real reasons behind the bank's loan policy *vis à vis* foreign residents, in order to ascertain whether or not criteria involving racial discrimination, within the meaning of article 1 of the Convention, are being applied.

9.4 The Committee notes that the author, considering the incident an offence under the Danish Act against Discrimination, reported it to the police. First the police and

subsequently the State Prosecutor in Viborg accepted the explanations provided by a representative of the bank and decided not to investigate the case further. In the Committee's opinion, however, the steps taken by the police and the State Prosecutor were insufficient to determine whether or not an act of racial discrimination had taken place.

10. In the circumstances, the Committee is of the view that the author was denied effective remedy within the meaning of article 6 of the Convention in connection with article 2 (d).

ICCPR

- *Gueye v. France* (196/1985), ICCPR, A/44/40 (3 April 1989) 189 at paras. 9.4 and 9.5.

...
9.4 The Committee has noted the authors' claim that they have been discriminated against on racial grounds, that is, one of the grounds specifically enumerated in article 26. It finds that there is no evidence to support the allegation that the state party has engaged in racially discriminating practices *vis-à-vis* the authors. It remains, however, to be determined whether the situation encountered by the encountered by the authors falls within the purview of article 26. The Committee recalls that the authors are not generally within French jurisdiction, except that they rely on French legislation in relation to the amount of their pension rights. It notes that nationality does not figure among the prohibited grounds of discrimination listed in article 26, and that the Covenant does not protect the right to a pension, as such. Under article 26, discrimination in the equal protection of the law is prohibited on any grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. There has been a differentiation by reference to nationality acquired upon independence. In the Committee's opinion, this falls within the reference to "other status" in the second sentence of article 26. The Committee takes into account, as it did in Communication No. 182/1984, that "the right to equality before the law and to equal protection of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26".

9.5 In determining whether the treatment of the authors is based on reasonable and objective criteria, the Committee notes that it was not the question of nationality which determined the granting of pensions to the authors but the services rendered by them in the past...A subsequent change in nationality cannot by itself be considered as a sufficient justification for different treatment, since the basis for the grant of the pension was the same service which both they and the soldiers who remained French had provided. Nor can difference in the economic, financial and social conditions as between France and Senegal be invoked as

a legitimate justification. If one compared the case of retired soldiers of Senegalese nationality in Senegal with that of retired soldiers of French nationality in Senegal, it would appear that they enjoy the same economic and social conditions. Yet, their treatment for the purpose of pension entitlements would differ. Finally, the fact that the State party claims that it can no longer carry out checks of identity and family situation, so as to prevent abuses in the administration of pension schemes cannot justify a difference in treatment. In the Committee's opinion, mere administrative convenience or the possibility of some abuse of pension rights cannot be invoked to justify unequal treatment. The Committee concludes that the difference in treatment of the authors is not based on reasonable and objective criteria and constitutes discrimination prohibited by the Covenant.

- *Kulomin v. Hungary* (521/1992), ICCPR, A/51/40 vol. II (22 March 1996) 73 (CCPR/C/56/D/521/1992) at para. 11.6.

...
11.6 The author further has claimed that the judge at the trial of first instance was biased against him and, more specifically, that she discriminated against him because of his nationality. The Committee notes that the judgment of the Court of First Instance shows no trace of bias on the part of the judge and, moreover, that the author or his representative made no objection during the trial to the judge's attitude. In the circumstances, the Committee finds that there is no substantiation for the author's claim that he was discriminated against on the basis of his nationality.

- *Adam v. The Czech Republic* (586/1994), ICCPR, A/51/40 vol. II (23 July 1996) 165 at paras. 2.1, 12.2, 12.4-12.7, 13.1 and Individual Opinion by Nisuke Ando (concurring), 173.

...
2.1 The author's father, Vlatislav Adam, was a Czech citizen, whose property and business were confiscated by the Czechoslovak Government in 1949. Mr. Adam fled the country and eventually moved to Australia, where his three sons, including the author of the communication, were born. In 1985, Vlatislav Adam died and, in his last will and testament, left his Czech property to his sons. Since then, the sons have been trying in vain to have their property returned to them.
...
12.2 ... [T]he right to property, as such, is not protected under the Covenant. However, a confiscation of private property or the failure of a State party to pay compensation for such confiscation could still entail a breach of the Covenant if the relevant act or omission was based on discriminatory grounds, in violation of article 26 of the Covenant.
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12.4 In the instant case, the author has been affected by the exclusionary effect of the requirement in Act 87/1991 that claimants be Czech citizens. The question before the Committee, therefore, is whether the precondition to restitution or compensation is compatible with the non-discrimination requirement of article 26 of the Covenant. In this context, the Committee reiterates its jurisprudence that not all differentiation in treatment can be deemed to be discriminatory under article 26 of the Covenant. 2/ A differentiation which is compatible with the provisions of the Covenant and is based on reasonable grounds does not amount to prohibited discrimination within the meaning of article 26.

12.5 In examining whether the conditions for restitution or compensation are compatible with the Covenant, the Committee must consider all relevant factors, including the original entitlement of the author's father to the property in question and the nature of the confiscation. The State party itself has acknowledged that the confiscations under the Communist governments were injurious and that is why specific legislation was enacted to provide for a form of restitution. The Committee observes that such legislation must not discriminate among the victims of the prior confiscations, since all victims are entitled to redress without arbitrary distinctions. Bearing in mind that the author's original entitlement to his property by virtue of inheritance was not predicated on citizenship, the Committee finds that the condition of citizenship in Act 87/1991 is unreasonable.

12.6 In this context, the Committee recalls its rationale in its views on communication No. 516/1992 (*Simunek et al. v. the Czech Republic*), adopted on 19 July 1995, 3/ in which it considered that the authors in that case and many others in analogous situations had left Czechoslovakia because of their political opinions and had sought refuge from political persecution in other countries, where they eventually established permanent residence and obtained a new citizenship. Taking into account that the State party itself is responsible for the departure of the author's parents in 1949, it would be incompatible with the Covenant to require the author and his brothers to obtain Czech citizenship as a prerequisite for the restitution of their property or, alternatively, for the payment of appropriate compensation.

12.7 The State party contends that there is no violation of the Covenant because the Czech and Slovak legislators had no discriminatory intent at the time of the adoption of Act 87/1991. The Committee is of the view, however, that the intent of the legislature is not dispositive in determining a breach of article 26 of the Covenant, but rather the consequences of the enacted legislation. Whatever the motivation or intent of the legislature, a law may still contravene article 26 of the Covenant if its effects are discriminatory.

...

13.1 The Human Rights Committee ... is of the view that the denial of restitution or compensation to the author and his brothers constitutes a violation of article 26 of the International Covenant on Civil and Political Rights.

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Notes

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2/ See Official Records of the General Assembly, Forty-second Session, Supplement No. 40 (A/42/40), annex VIII.D, communication No. 182/1994, (*Zwaan-de Vries v. the Netherlands*), views adopted on 9 April 1987, para. 13.

3/ *Ibid*., Fiftieth Session, Supplement No. 40 (A/50/40), vol. II, annex X.K.

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Individual Opinion by Nisuke Ando

Considering the Human Rights Committee's views on communication No. 516/1992, I do not oppose the adoption by the Committee of the views in the instant case. However, I would like to point to the following:

First, under current rules of general international law, States are free to choose their economic system. As a matter of fact, when the United Nations adopted the International Covenant on Civil and Political Rights in 1966, the then Socialist States were managing planned economies under which private ownership was largely restricted or prohibited in principle. Even nowadays not a few States parties to the Covenant, including those adopting marked-oriented economies, restrict or prohibit foreigners from private ownership of immovable properties in their territories.

Second, consequently, it is not impossible for a State party to limit the ownership of immovable properties in its territory to its nationals or citizens, thereby precluding their wives or children of different nationality or citizenship from inheriting or succeeding to those properties. Such inheritance or succession is regulated by rules of private international law of the States concerned, and I am not aware of any universally recognized "absolute right of inheritance or of succession to private property".

Third, while the International Covenant on Civil and Political Rights enshrines the principle of non-discrimination and equality before the law, it does not prohibit "legitimate distinctions" based on objective and reasonable criteria. Nor does the Covenant define or protect economic rights as such. This means that the Human Rights Committee should exercise utmost caution in dealing with questions of discrimination in the economic field. For example, restrictions or prohibitions of certain economic rights, including the right of inheritance or succession, which are based on nationality or citizenship, may well be justified as legitimate distinctions.

See also:

- *Simunek et al. v. The Czech Republic* (516/1992), ICCPR, A/50/40 vol. II (19 July 1995) 89

at paras. 2.1, 11.3, 11.5-11.7 and 12.1.

- *Blazek et al. v. The Czech Republic* (857/1999), ICCPR, A/56/40 vol. II (12 July 2001) 168 at paras. 2.1, 5.4, 5.6, 5.8, 6 and Individual Opinion by Nisuke Ando (concurring), 174.
- *Des Fours v. Czech Republic* (747/1997), ICCPR, A/57/40 vol. II (30 October 2001) 88 (CCPR/C/73/D/747/1997) at paras. 2.1-2.4, 2.6, 2.7, 8.3, 8.4, 9.1 and 9.2.

- *Stewart v. Canada* (538/1993), ICCPR, A/52/40 vol. II (1 November 1996) 47 (CCPR/C/58/D/538/1993) at paras. 7.5, 12.2-12.5, 12.7-12.9 and Individual Opinion by Eckart Klein (concurring), 60.

...

7.5 Concerning the claim under article 12, the Committee noted the State party's contention that no substantiation in support of this claim had been adduced, as well as counsel's contention that article 12, paragraph 4, was applicable to Mr. Stewart's case. The Committee noted that the determination of whether article 12, paragraph 4, was applicable to the author's situation required a careful analysis of whether Canada could be regarded as the author's "country" within the meaning of article 12, and, if so, whether the author's deportation to the United Kingdom would bar him from reentering "his own country", and, in the affirmative, whether this would be done arbitrarily. The Committee considered that there was no *a priori* indication that the author's situation could not be subsumed under article 12, paragraph 4, and therefore concluded that this issue should be considered on its merits.

...

12.2 Article 12, paragraph 4, of the Covenant provides: "No one shall be arbitrarily deprived of the right to enter his own country". This article does not refer directly to expulsion or deportation of a person. It may, of course, be argued that the duty of a State party to refrain from deporting persons is a direct function of this provision and that a State party that is under an obligation to allow entry of a person is also prohibited from deporting that person. Given its conclusion regarding article 12, paragraph 4, that will be explained below, the Committee does not have to rule on that argument in the present case. It will merely assume that if article 12, paragraph 4, were to apply to the author, the State party would be precluded from deporting him.

12.3 It must now be asked whether Canada qualifies as being Mr. Stewart's "country". In interpreting article 12, paragraph 4, it is important to note that the scope of the phrase "his own country" is broader than the concept "country of his nationality", which it embraces and which some regional human rights treaties use in guaranteeing the right to enter a country. Moreover, in seeking to understand the meaning of article 12, paragraph 4, account must also be had of the language of article 13 of the Covenant. That provision speaks of "an alien lawfully in the territory of a State party" in limiting the rights of States to expel an individual categorized as an "alien". It would thus appear that "his own country" as a concept applies

to individuals who are nationals and to certain categories of individuals who, while not nationals in a formal sense, are also not "aliens" within the meaning of article 13, although they may be considered as aliens for other purposes.

12.4 What is less clear is who, in addition to nationals, is protected by the provisions of article 12, paragraph 4. Since the concept "his own country" is not limited to nationality in a formal sense, that is, nationality acquired on birth or by conferral, it embraces, at the very least, an individual who, because of his special ties to or claims in relation to a given country cannot there be considered to be a mere alien. This would be the case, for example, of nationals of a country who have there been stripped of their nationality in violation of international law and of individuals whose country of nationality has been incorporated into or transferred to another national entity whose nationality is being denied them. In short, while these individuals may not be nationals in the formal sense, neither are they aliens within the meaning of article 13. The language of article 12, paragraph 4, permits a broader interpretation, moreover, that might embrace other categories of long-term residents, particularly stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence.

12.5 The question in the present case is whether a person who enters a given State under that State's immigration laws, and subject to the conditions of those laws, can regard that State as his own country when he has not acquired its nationality and continues to retain the nationality of his country of origin. The answer could possibly be positive were the country of immigration to place unreasonable impediments on the acquiring of nationality by new immigrants. But when, as in the present case, the country of immigration facilitates acquiring its nationality, and the immigrant refrains from doing so, either by choice or by committing acts that will disqualify him from acquiring that nationality, the country of immigration does not become "his own country" within the meaning of article 12, paragraph 4, of the Covenant. In this regard it is to be noted that while in the drafting of article 12, paragraph 4, of the Covenant the term "country of nationality" was rejected, so was the suggestion to refer to the country of one's permanent home.

...

12.7 This case would not raise the obvious human problems Mr. Stewart's deportation from Canada presents were it not for the fact that he was not deported much earlier. Were the Committee to rely on this argument to prevent Canada from now deporting him, it would establish a principle that might adversely affect immigrants all over the world whose first brush with the law would trigger their deportation lest their continued residence in the country convert them into individuals entitled to the protection of article 12, paragraph 4.

12.8 Countries like Canada, which enable immigrants to become nationals after a reasonable period of residence, have a right to expect that such immigrants will in due course acquire all the rights and assume all the obligations that nationality entails. Individuals who do not

take advantage of this opportunity and thus escape the obligations nationality imposes can be deemed to have opted to remain aliens in Canada. They have every right to do so, but must also bear the consequences. The fact that Mr. Stewart's criminal record disqualified him from becoming a Canadian national cannot confer on him greater rights than would be enjoyed by any other alien who, for whatever reasons, opted not to become a Canadian national. Individuals in these situations must be distinguished from the categories of persons described in paragraph 12.4 above.

12.9 The Committee concludes that as Canada cannot be regarded as Mr. Stewart's "country", for the purposes of article 12, paragraph 4, of the Covenant, there could not have been a violation of that article by the State party.

...

Individual Opinion by Eckart Klein

Being in full agreement with the finding of the Committee that the facts of the case disclose neither a violation of article 12, paragraph 4, nor of article 17 and 23...I cannot accept the way how the relationship between article 12, paragraph 4, and article 13 has been determined. Although this issue is not decisive for the outcome of the present case, it could become relevant for the consideration of other communications, and I therefore feel obliged to clarify this point.

The view suggests that there is a category of persons who are not "nationals in the formal sense", but are also not "aliens within the meaning of article 13" (paragraph 12.4). While I clearly accept that the scope of article 12, paragraph 4, is not entirely restricted to nationals but may embrace other persons as pointed out in the view, I nevertheless think that this category of persons - not being nationals, but still covered by article 12, paragraph 4 - may be deemed to be "aliens" in the sense of article 13. I do not believe that article 13 deals only with some aliens. The wording of the article is clear and provides for no exceptions, and aliens are all non-nationals. The relationship between article 12, paragraph 4, and article 13 is not exclusive. Both provisions may come into play together.

I therefore hold that article 13 applies in all cases where an alien is to be expelled. Article 13 deals with the procedure of expelling aliens, while article 12, paragraph 4, and, under certain circumstances, also other provisions of the Covenant may bar deportation for substantive reasons. Thus, article 12, paragraph 4, may apply even though it concerns a person who is an "alien".

For dissenting opinions in this context, see Stewart v. Canada (538/1993), ICCPR, A/52/40 vol. II (1 November 1996) 47 (CCPR/C/58/D/538/1993) at Individual Opinion by Laurel B. Francis (dissenting in part), 60, Individual Opinion by Elizabeth Evatt and Cecilia Medina Quiroga and

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Francisco José Aguilar Urbina, 62, Individual Opinion by Christine Chanet and Julio Prado Vallejo, 64 and Individual Opinion by Prafullachandra Bhagwati, 65.

- *Canepa v. Canada* (558/1993), ICCPR, A/52/40 vol. II (3 April 1997) 115 (CCPR/C/59/D/558/1993) at para. 11.3 and Individual Opinion by Martin Scheinin (concurring), 123.

...

11.3 As to the author's claim that his expulsion from Canada violates article 12, paragraph 4, of the Covenant, the Committee recalls that in its prior jurisprudence, 25/ it expressed the view that a person who enters a State under the State's immigration laws, and subject to the conditions of those laws, cannot regard that State as his own country when he has not acquired its nationality and continues to retain the nationality of his country of origin. An exception might only arise in limited circumstances, such as where unreasonable impediments are placed on the acquisition of nationality. No such circumstances arose in the prior case the Committee dealt with, nor do they arise in the present case. The author was not impeded in acquiring Canadian citizenship, nor was he deprived of his original citizenship arbitrarily. In the circumstances, the Committee concludes that the author cannot claim that Canada is his own country, for purposes of article 12, paragraph 4, of the Covenant.

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25/ Communication No. 538/1993 (*Stewart v. Canada*), Views adopted on 1 November 1996, para. 12.2 to 12.9.

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Individual Opinion by Martin Scheinin

While I share the Committee's view that there was no violation of the author's rights, I wish to explain my reasoning for such a conclusion.

As regards the alleged violation of article 12, paragraph 4, I have difficulties in accepting the majority reasoning in communication No. 538/1993 (*Stewart v. Canada*), decided prior to my term as a member of the Committee. In my opinion, there are situations in which a person is entitled to protection both as an alien (i.e. a non-citizen) under article 13 and because the country of residence being understood as his or her "own country" under article 12, paragraph 4. In paragraph 11.3 of the present case, reference is made to the Views in *Stewart* which, in my opinion, give too narrow a picture of situations in which a non-citizen is to be understood to reside in his or her "own country".

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Besides a situation in which there are unreasonable impediments on the acquisition of nationality, as mentioned in the Views, the same conclusion must, in my opinion, be made in certain other situations as well, for instance, if the person is stateless or if it would be impossible or clearly unreasonable for him or her to integrate into the society corresponding to his or her *de jure* nationality. Just to take one illustrative example, for a blind or deaf person who knows the language used in the country of residence but not the language of his or her nationality country, the country of residence should be interpreted as the person's "own country" under article 12, paragraph 4.

For dissenting opinions in this context, see Canepa v. Canada (558/1993), ICCPR, A/52/40 vol. II (3 April 1997) 115 (CCPR/C/59/D/558/1993) at Individual Opinion by Elizabeth Evatt and Cecilia Medina Quiroga, 123 and Individual Opinion by Christine Chanet, 124.

- *van Oord v. The Netherlands* (658/1995), ICCPR, A/52/40 vol. II (23 July 1997) 311 (CCPR/C/60/D/658/1995) at paras. 8.4-8.6.

...

8.4 The Committee has noted the authors' claim that they have been discriminated against on the basis of their nationality, because (a) their benefits are reduced for the period between their 15th birthday and 1 January 1957 that they were not living in the Netherlands, whereas they are not reduced for Dutch citizens living in the Netherlands, and (b) their benefits are reduced and they are required to pay taxes on them whereas other former citizens of the Netherlands, now citizens of Canada, Australia or New Zealand do not suffer similar reductions.

8.5 With regard to this claim, the Committee observes that it is undisputed that the criteria used in determining the authors' pension entitlements are equally applied to all former Dutch citizens now living in the USA, and that the authors also benefit from a treaty concluded between the Netherlands and the USA, which has the effect of raising their pension to a higher level than originally agreed. According to the authors, the fact that former Dutch citizens now living in Australia, Canada and New Zealand benefit from other privileges, entails discrimination. The Committee observes, however, that the categories of persons being compared are distinguishable and that the privileges at issue respond to separately negotiated bilateral treaties which necessarily reflect agreements based on reciprocity. The Committee recalls its jurisprudence that a differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26. 32/

8.6 The Committee finds therefore that the facts presented by the authors do not raise an issue under article 26 of the Covenant...This part of the communication is therefore inadmissible.

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Notes

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32/ *Inter alia*, the Committee's Views with regard to Communication No. 182/1984, *Zwaan-de Vries v. The Netherlands*, adopted by the Committee on 9 April 1987.

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- *Toala et al. v. New Zealand* (675/1995), ICCPR, A/56/40 vol. II (2 November 2000) 35 at paras. 2.1, 2.5-2.7, 6.3 and 11.2-11.6.

...

2.1 The authors were all born in Western Samoa: Mr. Toala was born in 1932, Mrs. Toala in 1934, and their adopted child, Eka Toala, in 1984, 1/ Mr. Tofaeono in 1934 and Mrs. Tofaeono in 1933. At the time of the communication, the families were residing in New Zealand, where deportation orders were recently issued against them. The families went into hiding in New Zealand, so as to avoid deportation. The authors claim that they are New Zealand citizens, and that the acts of the New Zealand Government which seek to remove them from New Zealand violate the Covenant.

...

2.5 The authors claim that they are New Zealand citizens pursuant to the decision of the Judicial Committee of the Privy Council in *Lesa v. The Attorney-General of New Zealand* [1983] 2 A.C. 20. 2/ In this case, the Privy Council held that by virtue of the British Nationality and Status of Aliens (in New Zealand) Act 1928, persons born in Western Samoa between 13 May 1924 and 1 January 1949 (and their descendants) are New Zealand citizens.

2.6 It is stated that there was considerable adverse reaction in New Zealand to the Lesa judgement, which was delivered by the Privy Council in July 1982. It was estimated that some 100,000 Samoans out of a total population of 160,000 would be affected by the decision.

2.7 The response of the New Zealand Government was to negotiate a Protocol to the Treaty of Friendship between New Zealand and Western Samoa. The Protocol was ratified on 13 September 1982 by the two parties. Within one month, the New Zealand Government passed into law the Citizenship (Western Samoa) Act of 1982, which gave effect to the Protocol in New Zealand, and nullified the effect of the "Lesa" decision, except for Ms. Lesa herself and a very limited number of persons.

...

6.3 The authors claimed that they were, pursuant to the Lesa ruling, New Zealand citizens and consequently, had the right to freely enter and reside in New Zealand territory, despite the 1982 Act which stripped them of their New Zealand citizenship. The legislation in

question was enacted in 1982 after New Zealand had ratified the International Covenant on Civil and Political Rights, but before it ratified the Optional Protocol in 1989. The Committee considered, however, that the legislation in question may have continuing effects which in themselves could constitute a violation under article 12, paragraph 4, of the Covenant. The issue of whether these continuing effects were in violation of the Covenant was one which should be examined on the merits. The Committee considered therefore that it was not precluded *ratione temporis* from declaring the communication admissible.

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11.2 With regard to the authors' claim to enter and remain in New Zealand the Committee notes that this claim depends on whether under article 12, paragraph 4, of the Covenant New Zealand is or has been at any time their own country and if so, whether they have been deprived arbitrarily of the right to enter New Zealand. In this regard, the Committee notes that none of the authors holds New Zealand nationality at present, nor do they have entitlement to that nationality under New Zealand law. It also notes that all the authors are Western Samoan citizens under the nationality law of that country, which has applied since 1959.

11.3 The Committee notes that the effect of the 1982 Lesa decision was to make four of the authors New Zealand citizens, as from the date of their birth. The fifth author Eka Toala was born in 1984, and appears not to have been affected by Lesa. The four authors who had New Zealand nationality under the Lesa decision, were by virtue of that fact entitled to enter New Zealand. When the 1982 Act took away New Zealand citizenship it removed their right to enter New Zealand as citizens. Their ability to enter New Zealand thereafter was governed by New Zealand immigration laws.

11.4 The Committee's general comment on article 12 observes that "A State party must not by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent that person from returning to his or her own country." In this case, the Committee considers that the circumstances in which the authors gained and then lost New Zealand citizenship need to be examined in the context of the issues which arise under article 12(4).

11.5 The Committee notes that in 1982 the authors had no connection with New Zealand by reason of birth, descent from any New Zealander, ties with New Zealand or residence in New Zealand. They were unaware of any claim to New Zealand citizenship at the time of the Lesa decision and had acquired New Zealand citizenship involuntarily. It also appears that, with the exception of Mr Toala, none of the authors had ever been in New Zealand. All these circumstances make it arguable that New Zealand did not become their "own country" by virtue of the Lesa decision. But in any event, the Committee does not consider that the removal of their New Zealand citizenship was arbitrary. In addition to the circumstances already mentioned, none of the authors had been in New Zealand between the date of the Lesa decision and the passage of the 1982 Act. They had never applied for a New Zealand

passport or claimed to exercise any rights as New Zealand citizens. The Committee is therefore of the view that article 12(4) was not violated in the authors' case.

11.6 As to the claim that the 1982 Act was discriminatory, the Committee observes that the Act applied only to those Western Samoans were not resident in New Zealand and that the authors at that time were not resident in New Zealand and had no ties with that country. There is no basis for concluding that the application of the Act to the authors was discriminatory contrary to article 26 of the Covenant.

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Notes

1/ It is stated that Eka Toala is adopted by Mr. and Mrs. Toala, and as a descendent to them entitled to all rights that they are entitled to; reference is made to the New Zealand Adoption Act 1955, Section 16 (2): "The adopted child shall be deemed to become the child of the adoptive parent, and the adoptive parent shall be deemed to become the parent of the child, as if the child had been born to that parent in lawful wedlock."

2/ Judgment delivered on 28 July 1982.

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- *Karakurt v. Austria* (965/2000), ICCPR, A/57/40 vol. II (4 April 2002) 304 (CCPR/C/74/D/965/2000) at paras. 3.1-3.2, 3.4, 7.5, 8.3, 8.4, 9, 10 and Individual Opinion by Sir Nigel Rodley and Mr. Martin Scheinin (partly dissenting), 311.

...

3.1 The author possesses (solely) Turkish citizenship, while holding an open-ended residence permit in Austria. He is an employee of the 'Association for the Support of Foreigners' in Linz, which employs 10 persons in total. On 24 May 1994, there was an election for the Association's work-council ('Betriebsrat') which has statutory rights and responsibilities to promote staff interests and to supervise compliance with work conditions. The author, who fulfilled the formal legal requirements of being over 19 years old and having been employed for over six months, and another employee, Mr Vladimir Polak, were both elected to the two available spaces on the work-council.

3.2 On 1 July 1994, Mr Polak applied to the Linz Regional Court for the author to be stripped of his elected position on the grounds that he had no standing to be a candidate for the work-council. On 15 September 1994, the Court granted the application, on the basis that the relevant labour law, that is s. 53(1) Industrial Relations Act (Arbeitsverfassungsgesetz), limited the entitlement to stand for election to such work-councils to Austrian nationals or members of the European Economic Area (EEA). Accordingly, the author, satisfying neither

criteria, was excluded from standing for the work-council.

...

3.4 On 21 December 1995, the Supreme Court discussed the author's appeal and denied the request for a constitutional reference. The Court considered that the work-council was not an 'association' within the meaning of Art. 11 ECHR. The work-council was not an association formed on a voluntary and private basis, but its organisation and functions were determined by law and was comparable to a chamber of trade. Nor were the staff as such an independent association, as they were not a group of persons associated on a voluntary basis. As to arguments of discrimination against foreigners, the Supreme Court, referring to the State party's obligations under the International Convention for the Elimination of All Forms of Racial Discrimination, considered the difference in treatment between Austrian nationals and foreigners to be justified both under the distinctions that the European economic treaties draw in labour matters between nationals and non-nationals, and also on account of the particular relationship between nationals and their home State. Moreover, as a foreigner's stay could be limited and subjected to administrative decision, the statutory period of membership in a work-council was potentially in conflict.

...

7.5 The Committee has taken note of the State party's reservation to article 26, according to which the State party understood this provision "to mean that it does not exclude different treatment of Austrian nationals and aliens, as is also permissible under article 1, paragraph 2, of the International Convention on the Elimination of All Forms of Racial Discrimination." The Committee considers itself precluded, as a consequence, from examining the communication insofar as it argues an unjustified distinction in the State party's law between Austrian nationals and the author. However, the Committee is not precluded from examining the claim relating to the further distinction made in the State party's law between aliens being EEA nationals and the author as another alien. In this respect the Committee finds the communication admissible and proceeds without delay to the examination of the merits.

...

8.3 In assessing the differentiation in the light of article 26, the Committee recalls its constant jurisprudence that not all distinctions made by a State party's law are inconsistent with this provision, if they are justified on reasonable and objective grounds.7/

8.4 In the present case, the State party has granted the author, a non-Austrian/EEA national, the right to work in its territory for an open-ended period. The question therefore is whether there are reasonable and objective grounds justifying exclusion of the author from a close and natural incident of employment in the State party otherwise available to EEA nationals, namely the right to stand for election to the relevant work-council, on the basis of his citizenship alone. Although the Committee had found in one case (No. 658/1995, *Van Oord v. The Netherlands*) that an international agreement that confers preferential treatment to nationals of a State party to that agreement might constitute an objective and reasonable

ground for differentiation, no general rule can be drawn therefrom to the effect that such an agreement in itself constitutes a sufficient ground with regard to the requirements of article 26 of the Covenant. Rather, it is necessary to judge every case on its own facts. With regard to the case at hand, the Committee has to take into account the function of a member of a work council, i.e., to promote staff interests and to supervise compliance with work conditions (see para. 3.1). In view of this, it is not reasonable to base a distinction between aliens concerning their capacity to stand for election for a work council solely on their different nationality. Accordingly, the Committee finds that the author has been the subject of discrimination in violation of article 26.

9. The Human Rights Committee...is of the view that the facts before it disclose a violation of article 26 of the Covenant.

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, consisting of modifying the applicable law so that no improper differentiation is made between persons in the author's situation and EEA nationals.

Notes

...

7/ See, for example, *Broeks v. The Netherlands* (Communication 172/1984), *Sprenger v. The Netherlands* (Communication 395/1990) and *Kavanagh v. Ireland* (819/1998).

...

Individual Opinion by Sir Nigel Rodley and Mr. Martin Scheinin (partly dissenting)

We share the Committee's views that there was a violation of article 26 of the Covenant. However, we take the position that the State party's reservation under that provision should not be understood to preclude the Committee's competence to examine the issue whether the distinction between Austrian nationals and aliens is contrary to article 26.

Both the wording of the reservation and the State party's submission in the present case refer to Austria's intention to harmonise its obligations under the Covenant with those it has undertaken pursuant to the Convention for the Elimination of All Forms of Racial Discrimination (CERD). Hence, the effect of the reservation, interpreted according to the ordinary meaning of its terms, is that the Committee is precluded from assessing whether a distinction made between Austrian nationals and aliens amounts to such discrimination on grounds of "race, colour, descent or national or ethnic origin"1/ that is incompatible with article 26 of the Covenant.

However, in its practice the Committee has not addressed distinctions based on citizenship

from the perspective of race colour, ethnicity or similar notions but as a self-standing issue under article 26.2/ In our view distinctions based on citizenship fall under the notion of "other status" in article 26 and not under any of the grounds of discrimination covered by article 1, paragraph 1, of the CERD.

Consequently, the Austrian reservation to article 26 does not affect the Committee's competence to examine whether a distinction made between citizens and aliens amounts to prohibited discrimination under article 26 of the Covenant on other grounds that those covered also by the CERD. Consequently, the Committee is not prevented from assessing whether a distinction based on citizenship is per se incompatible with article 26 in the current case.

For us, therefore, the issue before the Committee is that of the compatibility with its obligations under article 26 of the State party's legislation as applied in the present case preventing an alien from standing for elective office in a work-council. Nothing in the State party's response persuades us that the restriction is either reasonable or objective. Therein lies the State party's violation of article 26 of the Covenant.

_____

Notes

1/ The terms used in article 1, paragraph 1, of the CERD. Article 1, paragraph 2, of the CERD makes it clear that citizenship is not covered by the notion of "national origin".

2/ Ibrahima Gueye and 742 other retired Senegalese members of the *French Army v. France* (Communication No. 196/1985).

_____

- *Rajan v. New Zealand* (820/1998), ICCPR, A/58/40 vol. II (6 August 2003) 410 (CCPR/C/78/D/820/1998) at paras. 2.1-2.4 and 7.5.

...

2.1 Mr. Rajan emigrated to Australia in 1988, where he was granted a residence permit on 19 February 1990, on the basis of his *de facto* relationship with an Australian woman. Subsequently, in 1994, the woman was convicted in Australia of making a false statement in Mr. Rajan's application for residence. In 1990, Mr. Rajan married Sashi Kantra Rajan in Fiji, who followed him to Australia in 1991, where she obtained a residence permit on her husband's residency status. In 1991, Australian authorities became aware that the claimed *de facto* relationship was fraudulent and started taking action against Mr. and Mrs. Rajan, as well as against Mr. Rajan's brother (Bal) and sister who were believed to have obtained Australian residency under similarly false pretences. On 2 February 1992, son Vicky was

born in Australia. On 22 April 1992, Mr. Rajan's brother (Bal) was arrested on ground of false immigration, and Mr. Rajan was advised of a pending interview by authorities.

2.2 The following day, Mr. and Mrs. Rajan migrated to New Zealand. They did not disclose events transpiring in Australia, and were granted New Zealand residence permits on the basis of their Australian permits. On 24 April 1992, Mr. Rajan's brother (Bal) also left Australia for New Zealand. On 30 April 1992, the Australian authorities cancelled Mr. and Mrs. Rajan's Australian permits. On 5 June 1992, the New Zealand authorities were informed that Mr. and Mrs. Rajan were deemed to have absconded from Australia and were prohibited from re-entering Australia. On 3 July 1992, Mr. Rajan admitted to New Zealand authorities that his original *de facto* relationship in Australia was not genuine. Following investigations by the authorities, including interviews with Mr. and Mrs. Rajan, the Minister of Immigration, on 21 June 1994 revoked Mr. and Mrs. Rajan's residence permits on the basis that Mr. Rajan had failed to disclose that the Australian documentation (upon which the New Zealand permits were founded) was dishonestly obtained.

2.3 Mrs. Rajan, not having disclosed these facts in an application for citizenship to the Ministry of Internal Affairs, was granted citizenship on 26 October 1994, whereby, under s.8 of the Citizenship Act 1977, her Fijian citizenship was automatically annulled. In early 1995, her son Vicky was also granted New Zealand citizenship. On 19 April 1995, the Minister of Internal Affairs issued notice of intention to revoke citizenship on the grounds that it was procured by fraud, false representation, wilful concealment of relevant information or by mistake.

2.4 On 31 July 1995, the High Court dismissed an appeal against the revocation of residence permits and an application for judicial review of the Minister's decision to revoke, finding that they had been procured by fraud and false and misleading representation. The Court considered there was no threat to the family unit, as the child could live with the parents in Fiji and, if he so wished, return to New Zealand in his own right. The Court of Appeal dismissed their appeal. In March 1996, a second child, Ashnita, was born and automatically acquired New Zealand citizenship by birth.

...

7.5 The Committee notes the claim that Vicky Rajan will be rendered stateless, as a result of the revocation of his New Zealand citizenship, thereby violating article 24, paragraph 3, of the Covenant. It appears, however, from the materials before the Committee, that Vicky Rajan still retains his Australian citizenship and, therefore, no issue under article 24, paragraph 3, of the Covenant arises. This claim in the communication is therefore inadmissible *ratione materiae* under article 3 of the Optional Protocol. Taking into account that the Fijian authorities have confirmed that Mrs. Rajan's Fijian passport remains valid and that she continues to be a Fijian citizen, the same conclusion applies to any claim concerning revocation of Mrs. Rajan's New Zealand citizenship.

NATIONALITY

- *Borzov v. Estonia* (1136/2002), ICCPR, A/59/40 vol. II (26 July 2004) 369 at paras. 2.1, 2.2, 7.2-7.4 and 8.

...

2.1 From 1962 to 1967, the author attended the Sevastopol Higher Navy College in the specialty of military electrochemical engineer. After graduation, he served in Kamchatka until 1976 and thereafter in Tallinn as head of a military factory until 1986. On 10 November 1986, the author was released from service with rank of captain due to illness. The author has worked, since 1988, as a head of department in a private company, and he is married to a naturalized Estonian woman. In 1991, Estonia achieved independence.

2.2 On 28 February 1994, the author applied for Estonian citizenship. In 1994, an agreement between Estonia and the Russian Federation entered into force which concerned the withdrawal of troops stationed on the former's territory (the 1994 treaty). In 1995, the author obtained an Estonian residence permit, pursuant to the Aliens Act's provisions concerning persons who had settled in Estonia prior to 1990. In 1996, an agreement between Estonia and the Russian Federation entered into force, concerning "regulation of issues of social guarantees of retired officers of the armed forces of the Russian Federation in the territory of the Republic of Estonia" (the 1996 treaty). Pursuant to the 1996 treaty, the author's pension has been paid by the Russian Federation. Following delays occasioned by deficiencies of archive materials, on 29 September 1998, the Estonian Government, by order No. 931-k, refused the application. The refusal was based on section 8 of the Citizenship Act of 1938, as well as section 32 of the Citizenship Act of 1995 which precluded citizenship for a career military officer in the armed forces of a foreign country who had been discharged or retired therefrom.

...

7.2 Turning to the substance of the admissible claim under article 26, the Committee refers to its jurisprudence that an individual may be deprived of his right to equality before the law if a provision of law is applied to him or her in arbitrary fashion, such that an application of law to an individual's detriment is not based on reasonable and objective grounds 3/. In the present case, the State party has invoked national security, a ground provided for by law, for its refusal to grant citizenship to the author in the light of particular personal circumstances.

7.3 While the Committee recognizes that the Covenant explicitly permits, in certain circumstances, considerations of national security to be invoked as a justification for certain actions on the part of a State party, the Committee emphasizes that invocation of national security on the part of a State party does not, *ipso facto*, remove an issue wholly from the Committee's scrutiny. Accordingly, the Committee's decision in the particular circumstances of *V.M.R.B* 4/ should not be understood as the Committee divesting itself of the jurisdiction to inquire, as appropriate, into the weight to be accorded to an argument of

national security. While the Committee cannot leave it to the unfettered discretion of a State party whether reasons related to national security existed in an individual case, it recognizes that its own role in reviewing the existence and relevance of such considerations will depend on the circumstances of the case and the relevant provision of the Covenant. Whereas articles 19, 21 and 22 of the Covenant establish a criterion of necessity in respect of restrictions based on national security, the criteria applicable under article 26 are more general in nature, requiring reasonable and objective justification and a legitimate aim for distinctions that relate to an individual's characteristics enumerated in article 26, including "other status". The Committee accepts that considerations related to national security may serve a legitimate aim in the exercise of a State party's sovereignty in the granting of its citizenship, at least where a newly independent State invokes national security concerns related to its earlier status.

7.4 In the present case, the State party concluded that a grant of citizenship to the author would raise national security issues generally on account of the duration and level of the author's military training, his rank and background in the armed forces of the then USSR. The Committee notes that the author has a residence permit issued by the State party and that he continues to receive his pension while living in Estonia. Although the Committee is aware that the lack of Estonian citizenship will affect the author's enjoyment of certain Covenant rights, notably those under article 25, it notes that neither the Covenant nor international law in general spells out specific criteria for the granting of citizenship through naturalization, and that the author did enjoy a right to have the denial of his citizenship application reviewed by the courts of the State party. Noting, furthermore, that the role of the State party's courts in reviewing administrative decisions, including those decided with reference to national security, appears to entail genuine substantive review, the Committee concludes that the author has not made out his case that the decision taken by the State party with respect to the author was not based on reasonable and objective grounds. Consequently, the Committee is unable, in the particular circumstances of this case, to find a violation of article 26 of the Covenant.

8. The Human Rights Committee...is of the view that the facts before it do not disclose a violation of article 26 of the Covenant.

Notes

...

3/ See *Kavanagh v. Ireland* (No. 1), case No. 819/1998, Views adopted on 4 April 2001.

4/ [Case No. 236/1987, decision adopted on 18 July 1988].

NATIONALITY

- *Madafferi v. Australia* (1011/2001), ICCPR, A/59/40 vol. II (28 July 2004) 208 at para. 9.6.

...
9.6 As to whether Mr. Madafferi's rights under article 12, paragraph 4, of the Covenant were violated by being arbitrarily deprived of his right to leave his own country, the Committee must first consider whether Australia is indeed Mr. Madafferi's "own country" for the purposes of this provision. The Committee recalls its jurisprudence in the case of *Stewart v. Canada*, that a person who enters a State under the State's immigration laws, and subject to the conditions of those laws, cannot normally regard that State as his "own country", when he has not acquired its nationality and continues to retain the nationality of his country of origin. An exception might only arise in limited circumstances, such as where unreasonable impediments are placed on the acquisition of nationality. No such circumstances arise in the present case, and neither are the other arguments advanced by the authors sufficient to trigger the exception. In the circumstances, the Committee concludes that Mr. Madafferi cannot claim that Australia is his "own country", for purposes of article 12, paragraph 4, of the Covenant. Consequently, there cannot be a violation of this provision in the current case.

- *El Ghar v. Libyan Arab Jamahiriya* (1107/2002), ICCPR, A/60/40 vol. II (2 November 2004) 156 at paras. 2.1-2.4, 3, 7.2, 7.3, 8 and 9.

...
2.1 The author, of Libyan nationality, has lived all her life in Morocco with her divorced mother and holds a residence permit for that country. As a student of French law at the Hassan II University faculty of law in Casablanca, she wished to continue her studies in France and to specialize in international law. To that end, she has been applying to the Libyan Consulate in Morocco for a passport since 1998.

2.2 The author claims that all her applications have been denied, without any lawful or legitimate grounds. She notes that although she is an adult, she attached to her application form an authorization from her father, who is resident in the Libyan Arab Jamahiriya, that was certified by the Libyan Ministry of Foreign Affairs in order to obtain any official document required. She adds that in September 2002 the Libyan consul stated, without giving any details, that on the basis of the pertinent regulations he could not issue her a passport, but could only provide her with a temporary travel document allowing her to travel to the Libyan Arab Jamahiriya.

2.3 The author also contacted the French diplomatic mission in Morocco to ascertain whether it would be possible to obtain a *laissez-passer* for France, a request which the French authorities were unable to comply with.

2.4 Since she had no passport, the author was unable to enrol in the University of Montpellier I in France.

3. The author claims that the refusal by the Libyan Consulate in Casablanca to issue her with a passport prevents her from travelling and studying and constitutes a violation of the Covenant.

...

7.2 The Committee notes that to date the author has been unable to obtain a passport from the Libyan consular authorities even though, according to the authorities' own statements, her official application dates back at least to 1 September 1999. Moreover, it is clear that initially, on 18 September 2002, the Libyan consul had indicated to the author that it was not possible to issue her a passport but that she could be given a *laissez-passer* for Libya, by virtue of a regulation that was explained neither orally nor on the *laissez-passer* itself. The passport application submitted to the Libyan Consulate was thus rejected without any explanation of the grounds for the decision, the only comment being that since the author "is a native of Morocco and has not obtained a passport, this travel document [*laissez-passer*] is issued to enable her to return to national territory". The Committee considers that this *laissez-passer* cannot be considered a satisfactory substitute for a valid Libyan passport that would enable the author to travel abroad.

7.3 The Committee notes that subsequently, on 1 July 2003, the Passport Department sent a *communiqué* to the Libyan consular authorities in Morocco with a view to granting the author a passport; this information was certified by the State party, which produced a copy of the document. The State party alleges that the author was contacted personally by telephone at home and told to collect her passport from the Libyan Consulate. However, it appears that thus far, despite the author's two visits to the Libyan Consulate, no passport has been issued to her, through no fault of her own. The Committee recalls that a passport provides a national with the means "to leave any country, including his own", as stipulated in article 12, paragraph 2, of the Covenant, and that owing to the very nature of the right in question, in the case of a national residing abroad, article 12, paragraph 2, of the Covenant imposes obligations both on the individual's State of residence and on the State of nationality, and that article 12, paragraph 1, of the Covenant cannot be interpreted as limiting Libya's obligations under article 12, paragraph 2, to nationals living in its territory. The right recognized by article 12, paragraph 2, may, by virtue of paragraph 3 of that article, be subject to restrictions "which are provided by law [and] are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant". Thus there are circumstances in which a State may, if the law so provides, refuse to issue a passport to one of its nationals. In the present case, however, the State party has not put forward any such argument in the information it has submitted to the Committee but has actually assured the Committee that it issued instructions to ensure that the author's passport application was

successful, a statement that was not in fact followed up.

8. The Human Rights Committee...is of the view that the facts before it disclose a violation of article 12, paragraph 2, of the Covenant insofar as the author was denied a passport without any valid justification and subjected to an unreasonable delay, and as a result was prevented from travelling abroad to continue her studies.

9. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to ensure that the author has an effective remedy, including compensation. The Committee urges the State party to issue the author with a passport without further delay. The State party is also under an obligation to take effective measures to ensure that similar violations do not recur in future.

- *Marik v. Czech Republic* (945/2000), ICCPR, A/60/40 vol. II (26 July 2005) 54 at paras. 2.1-2.4, 6.2-6.5, 7 and 8.

...
2.1 In 1969, the author emigrated from Czechoslovakia to the United States with his family. He later became a United States citizen. In 1972, he was convicted of fleeing the country by the Plzen District Court; his property was confiscated, *inter alia* his two houses in Letkov and in Plzen.

2.2 On 23 April 1990, the Czech and Slovak Republic passed Act No. 119/1990 Coll. on Judicial Rehabilitation, which 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.

2.3 On 1 February 1991, Act 87/1991 on Extra-Judicial Rehabilitation was adopted. Under it, a person claiming restitution of property had to (a) be a Czech-Slovak citizen and (b) be a permanent resident in the Czech Republic to claim entitlement to regain his or her property. In addition, according to the Act, (c) the claimant has a burden for proving the unlawfulness of the acquisition by the current owner of the property in question. The first two requirements had to be fulfilled during the time period in which restitution claims could be filed, between 1 April and 1 October 1991. A judgement of the Czech Constitutional Court of 12 July 1994 (No. 164/1994), however, annulled the condition of permanent residence and established a new time frame for the submission of restitution claims by persons who had thereby become entitled persons, running from 1 November 1994 to 1 May 1995. According to the author, this judgement established a right to restitution which could be exercised by those who did not have permanent residence in the country and met the citizenship condition

in the new time period. However, the Supreme Court and the Constitutional Court supported an interpretation to the effect that the newly entitled persons were persons who, during the original period of time (1 April to 1 October 1991), had met all the other conditions, including the citizenship condition, with the exception of permanent residence. Although the author claims that he never lost Czech citizenship, he formally became Czech citizen again in May 1993.

2.4 In 1994, the author filed two separate restitution claims with regard to his houses in Letkov and Plzen. In the first case (the Letkov property), the Plzen-mesto District Court refused the restitution claim on 13 November 1995, because the author did not fulfil the citizenship requirement during the initial period open for restitution claims, i.e. 1 October 1991 at the latest. It also found that the third requirement for restitution, concerning the unlawfulness of the current owners acquisition, was not met in the case. This decision was confirmed by the Plzen Regional Court on 25 March 1996. The author's appeal to the Supreme Court was dismissed on 20 August 1997 on the ground that he did not fulfil the precondition of citizenship in 1991. The judgement confirmed that the new established time frame did not change this original requirement but gave non-residents additional time to lodge their restitution claims. It did not consider the other requirements. A further appeal to the Constitutional Court was rejected on 12 May 1998.

...

6.2 The issue before the Committee is whether the application to the author of Act 87/1991 amounted to a violation of his right to equality before the law and to equal protection of the law, contrary to article 26 of the Covenant.

6.3 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 6/. Whereas the citizenship criterion is objective, the Committee must determine whether its application to the author was reasonable in the circumstances of the case.

6.4 The Committee recalls its Views in the cases of *Simunek*, *Adam*, *Blazek* and *Des Fours Walderode*,7/ where it held that article 26 of the Covenant had been violated: "the authors in that case and many others in analogous situations had left Czechoslovakia because of their political opinions and had sought refuge from political persecution in other countries, where they eventually established permanent residence and obtained a new citizenship. Taking into account that the State party itself is responsible for the author's...departure, it would be incompatible with the Covenant to require the author…to obtain Czech citizenship as a prerequisite for the restitution of [his] property or, alternatively, for the payment of appropriate compensation" 8/. The Committee further recalls its jurisprudence 9/ that the citizenship requirement in these circumstances is unreasonable. In addition, the State party's

argument that the citizenship condition was included in the law to incite owners to take good care of the property after the privatization process has not been substantiated.

6.5 The Committee considers that the precedent established in the above cases also applies to the author of the present communication. The Committee notes that in the case of the Letkov property, the State party argues that the author did not fulfil the third requirement, i.e. proving that the property was acquired unlawfully by the present owners. However, the Committee further notes that although the lower courts took this element into consideration, the Supreme Court based its decision only on the non-fulfilment of the citizenship precondition. In the light of these considerations, the Committee concludes that the application to the author of Act 87/1991, which lays down a citizenship requirement for the restitution of confiscated property, violated his rights under article 26 of the Covenant.

7. The Human Rights Committee...is of the view that the facts before it disclose a violation of article 26 of the International Covenant.

8. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, which may be compensation, and in the case of the Plzen property, restitution, or, in the alternative compensation. The Committee reiterates that the State party should review its legislation to ensure that all persons enjoy both equality before the law and equal protection of the law.

Notes

...

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

7/ See footnote 8.

8/ See communication No. 586/1994, *Adam v. The Czech Republic*, Views adopted on 23 July 1996, para. 12.6 and communication No. 857/1999, *Blazek v. The Czech Republic*, Views adopted on 12 July 2001, para. 5.8.

9/ See communication No. 516/1992, *Simunek v. The Czech Republic*, Views adopted on 19 July 1995, para. 11.6.

- *Mauritian Women v. Mauritius* (35/1978) (R.9/35), ICCPR, A/36/40 (9 April 1981) 134 at paras. 9.2(b)2(i)6, 9.2(b)2(ii)3, 9.2(b)2(ii)4 and 10. For text of Communication, see **EQUALITY AND DISCRIMINATION** - GENDER DISCRIMINATION - General.

NATIONALITY