



**International covenant
on civil and political
rights**

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

VIEWS

Communication No. 1223/2003

<u>Submitted by:</u>	Vjatseslav Tsarjov (not represented by counsel)
<u>Alleged victims:</u>	The author
<u>State party:</u>	Estonia
<u>Date of communication:</u>	14 August 2003 (initial submission)
<u>Document references:</u>	Special Rapporteur's rule 97 decision, transmitted to the State party on 27 November 2003 (not issued in document form)
<u>Date of adoption of Views:</u>	26 October 2007

* Made public by decision of the Human Rights Committee.

Subject matter: Arbitrary refusal of permanent residence permit and resulting inability to travel abroad and to take part in the conduct of public affairs.

Substantive issues: Equality before the law; prohibited discrimination; right to liberty of movement; right to leave any country, including his own; right to take part in the conduct of public affairs.

Procedural issues: Abuse of the right of submission; non-exhaustion of domestic remedies

Articles of the Covenant: articles 2, paragraph 1; 12, paragraphs 2 and 4; 25; 26

Articles of the Optional Protocol: articles 5, paragraph 2 (b); 3

On 26 October 2007, the Human Rights Committee adopted the annexed text as the Committee's Views, under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1223/2003.

[ANNEX]

ANNEX

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

Ninety-first session

concerning

Communication No. 1223/2003*

<u>Submitted by:</u>	Vjatseslav Tsarjov (not represented by counsel)
<u>Alleged victims:</u>	The author
<u>State party:</u>	Estonia
<u>Date of communication:</u>	14 August 2003 (initial submission)

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

Meeting on 26 October 2007,

Having concluded its consideration of communication No. 1223/2003, submitted to the Human Rights Committee by Vjatseslav Tsarjov under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

Adopts the following:

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

1. The author of the communication is Vjatseslav Tsarjov, who claims to be stateless, born in the Russian Soviet Federative Socialist Republic on 7 December 1948 and currently residing in Estonia. He claims to be a victim of violations by Estonia of his rights under article 12, paragraphs 2 and 4; article 25; and article 26, read together with article 2, paragraph 1, of the International Covenant on Civil and Political Rights¹. He is unrepresented.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Ms. Christine Chanet, Mr. Yuji Iwasawa, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

¹ The Optional Protocol entered into force for the State party on 21 January 1992.

Factual background

2.1 Since 1956 the author has lived, studied and worked in Estonia. From October 1975 until August 1978 he had served as an operative worker in the National Security Committee (KGB) of the then Estonian Soviet Socialist Republic (ESSR). Then, until June 1981 he studied at the Higher School of the Soviet Union KGB in Moscow. From August 1981 until April 1986 he served as a senior operative worker in the KGB of the Buryatia ASSR in the Russian Soviet Federative Socialist Republic. From April 1986 until December 1991, he served as a senior operative worker at the KGB of the ESSR. In 1971, the author was given the rank of a lieutenant. The author was a citizen of the Union of Soviet Socialist Republics (USSR or Soviet Union) until 1991 and was a bearer of the uniform USSR passport until 12 July 1996. After that date, he never applied for the citizenship of another country. Until 1996, he had legal grounds for permanent residency in Estonia (*propiska*). In 1995, he was forced by the authorities to apply for an official residence permit and, on 17 June 1995, he filed his application.

2.2 On 31 December 1996, the Government by its Order No.1024 (Order No.1024), in accordance with article 12, section 5 of the Aliens Act, granted the author a temporary residence permit valid until 31 December 1998. On 14 September 1998, the author applied for a permanent residence permit on the basis of the Government Regulation No.137 "On the conditions and procedure for applying for a permanent residence permit" of 16 June 1998 (Regulation No.137). On 5 November 1998, the Citizenship and Migration Board (Board) refused to grant a permanent residence permit to the author. The Board in its decision referred to the temporary residence permit granted to the author earlier. The Board based its decision on clauses 1 and 36 of the Government Regulation No.368 "The procedure for the grant, extension and revocation of residence and work permits for foreigners" of 7 December 1995 (Regulation No.368).

2.3 On 4 December 1998, the author appealed the Board's decision to the Tallinn Administrative Court, maintaining that he had applied for a residence permit for the first time before 12 July 1995. According to article 20, section 1 of the Aliens Act, an alien who applied for a residence permit before 12 July 1995 and who had a residence permit and who was not among the aliens specified in article 12, section 4 of the Aliens Act, retained the rights and duties provided for in earlier legislation of the Republic of Estonia. The author relied in his complaint on the Regulation No.137 and claimed that he does not belong to the group of aliens listed in article 12, section 4 of the Aliens Act, and that article 12, section 5 of the Aliens Act, was a wrong legal basis for the Order No.1024.

2.4 On 18 January 1999 and on 19 February 1999, the Tallinn Administrative Court heard the case. In court, the author disputed the data presented in his questionnaire annexed to the request for permanent residence permit. According to him, the Soviet Union became a foreign country after 20 August 1991 (after Estonia re-gained independence) and he worked in the KGB before the Soviet Union was declared to be a foreign state. He maintained that he has the right to apply for a permanent residence permit on the basis of article 20, section 1 of the Aliens Act, as he had applied for a residence permit before 12 July 1995. In Court, the Board contested the complaint and asked that it be denied. The Board explained that it issued a temporary residence permit to the author as an exception under article 12, section 5 of the Aliens Act. It took into account that he had served in an intelligence or security service of a foreign state and he was among the foreigners listed in article 12, section 4 of the Aliens Act, who cannot get a residence permit.

2.5 Tallinn Administrative Court by its judgment of 22 February 1999 granted the author's complaint and declared the Board's decision unlawful on procedural grounds. The Court stated

that the Board refused to issue a permanent residence permit to the author by making a reference to the legal basis in clauses 1 and 36 of the Regulation No.368, whereas his application had to be reviewed on the basis of the Regulation No.137, which establishes a procedure for aliens who had requested a temporary residence permit before 12 July 1995 and who were granted such a permit and who are not among the aliens listed in article 12, section 4 of the Aliens Act. Since the Board reviewed the author's request for a permanent residence permit on the basis of a wrong legal act, the Court instructed the Board to review this case and make a new decision.

2.6 The Court agreed with the author's claim that provisions of article 20, section 1 of the Aliens Act, had to be applied with regard to him. He had applied for a residence permit before 12 July 1995 and he had been granted the permit. As the author disputed his classification among aliens listed in article 12, section 4 of the Aliens Act, in reviewing his application for a permanent residence permit a legal assessment had to be made whether his employment as a senior operative staff of the KGB of the ESSR from 1986 until December 1991 could be considered as being employed by an intelligence or security service of a foreign state. In accordance with the new version of the implementing provision article 20, section 1 of the Aliens Act, the author's application for a permanent residence permit could not be based on the provisions of article 12, section 3 of the Aliens Act. Until 30 September 1999, the relevant section of the Act read as follows:

“§ 12. Bases for issue of residence permits

[...] (3) A permanent residence permit may be issued to an alien who has resided in Estonia on the basis of a temporary residence permit for at least three years within the last five years and who has a residence and employment in Estonia or other legal income for subsistence in Estonia, unless otherwise provided by this Act. A permanent residence permit shall not be issued to an alien who has received a residence permit in Estonia pursuant to clause (1) 1) or 2) of this section or to an alien who has received a residence permit as an exception pursuant to subsection (5) of this section.”

2.7 The Board filed an appeal to the Tallinn Court of Appeal. On 12 April 1999 the Tallinn Court of Appeal annulled the decision of Tallinn Administrative Court of 22 February 1999 and granted the Board's appeal. The Tallinn Court of Appeal found that the court of first instance had wrongly applied norms of substantive law. It found that the author belonged to one of the classes of aliens listed in article 12, section 4 of the Aliens Act, and therefore he was not subject to the application of article 20, section 1 of the Aliens Act, and the Regulation No.137. The Court noted that the Aliens Act does not specify the type of employment, when, and in which bodies that are considered as being employed by intelligence and security services of foreign countries. The Act “For the Procedure for Registration and Disclosure of Persons who Have Served in or Co-operated with Intelligence or Counter-intelligence Organisations of Security Organisations or Military Forces of States which Have Occupied Estonia” (Act on Registration and Disclosure), passed on 6 February 1995 defines the security and intelligence bodies of states that have occupied Estonia and defines the notion of persons who have been in the service of such bodies. In accordance with article 2, section 2 of the Act, the security and intelligence organisations of states that have occupied Estonia are the security organisations and intelligence and counter-intelligence organisations of the military forces of the Soviet Union, or bodies subordinate to them; according to subsection 6 of the above section, this includes also the KGB of the Soviet Union. According to article 3, section 2 of the Act, an alien who was in the service of the security or intelligence body in the period between 17 June 1940 until 31 December 1991 and

who lives on the territory under the jurisdiction of the Republic of Estonia is considered to be a person employed by the security or intelligence organisations.

2.8 On the basis of the above Act and in the light of the meaning of the Aliens Act, the Court found that the author's employment with the KGB of the ESSR and in the KGB of Buryatia ASSR, which he himself has confirmed in the questionnaire for his residence permit application, should be interpreted as being employed by an intelligence or security service of a foreign country within the meaning of article 12, section 4, clause 5 of the Aliens Act.² The Court noted that with the agreement concluded between the Prime Minister of the Republic of Estonia, Chairman of the KGB of the Soviet Union and Chairman of the Estonian National Security Committee on 4 September 1991, the Government of the Republic of Estonia undertook to guarantee social and political rights to workers of the KGB of the ESSR in accordance with generally recognised international rules and the legislation of Estonia. However, the agreement does not lend itself to interpretation that making of restrictions in issuing residence permits to aliens on the basis of article 12, section 4 of the Aliens Act would be in contradiction to the agreement.

2.9 In the light of the above, the Tallinn Court of Appeal found that although the author applied for a residence permit on 17 June 1995 and, as an exception, he was granted a temporary residence permit, he did not have the right to apply for a residence permit on the basis of article 20, section 1 of the Aliens Act, and his application for a permanent residence permit could not be dealt with on the basis of the Regulation No.137, as he belonged to the aliens listed in article 12, section 4 of the Aliens Act. The Court decided that in accordance with article 12, section 3 of the Aliens Act, a permanent residence permit may be issued to an alien who has resided in Estonia on the basis of a temporary residence permit for at least three years within the last five years and who has residence and employment in Estonia or other legal income for subsistence in Estonia, unless otherwise provided by the Aliens Act. A permanent residence permit shall not be issued to an alien who has received a residence permit in Estonia as an exception pursuant to article 12, section 5 of the Aliens Act. The author received a residence permit as an exception for two years by the Order No.1024 on the basis of article 12, section 5 of the Aliens Act. Therefore, the Court concluded that the Board had justifiably refused to grant a permanent residence permit to the author. Since the Regulation No.137 did not apply to him, the Board had correctly reviewed his application for a permanent residence permit on the basis of Regulation No.368.

2.10 On 10 May 1999, the author appealed in cassation the judgement of the Tallinn Court of Appeal to the Supreme Court. He claimed that the lower court had wrongly applied the law. His service in the KGB of the ESSR could not be considered as an employment in the foreign intelligence or security service and his inclusion in the list of persons specified in article 12, section 4 of the Aliens Act, violated articles 23 and 29 of the Estonian Constitution. Service within the borders of the former USSR could not be regarded as service abroad and one could not be convicted for employment in the security service. The author submitted that although there is not a subjective right to be granted a permanent residence permit, the refusal of a permanent residence permit should be well reasoned. The reasons for refusing to give a residence

² Article 12, section 4, clause 5 of the Aliens Act, referred to in the judgment of the Tallinn Court of Appeal of 12 April 1999 does not have an equivalent in the current version of the Act and read as follows:

“§ 12. Bases for issue of residence permits

[...] (4) A residence permit shall not be issued to an alien if:

[...] 5) he or she has been or is employed by an intelligence or security service of a foreign state;

permit should be in accordance with the Constitution and may not violate the person's rights, for example, the right to equal treatment. As a result, he concluded that he was discriminated against on the basis of origin, contrary to article 26 of the Covenant, as he was denied a permanent residence permit for being a former employee of the foreign intelligence and security service. Leave to appeal to the Supreme Court was refused on 16 June 1999 on the ground that the appeal in cassation was manifestly ill-founded.

The complaint

3.1 The author claims that the refusal to grant him a permanent residence permit violates his rights under articles 12, paragraphs 2 and 4, of the Covenant, as the period of validity of his temporary residence permit is too short to allow him to obtain a travel visa for certain countries. The travel document for a stateless person is an alien's passport. According to article 27(1) of the Identity Documents Act, the alien's passport is issued if the person has a valid residence permit.³ Under article 28 of the same Act, the validity of an alien's passport cannot exceed the period of validity of the residence permit issued to the alien.⁴ As the author's last residence permit was issued for two years, so was the validity of his alien's passport. If he wishes to travel to another country for a longer period of time, he might have problems to obtain an entry visa. Besides, if he wishes to travel for a longer period and does not manage to extend his residence permit beforehand, he might be refused re-entry to Estonia, as he would then have no legal basis for staying there.

3.2 The author further claims that the refusal to grant him a permanent residence permit violates his right to vote and to be elected under article 25, insofar as this right is vested only upon Estonian citizens or persons who are Estonian permanent residents. Article 60(2) of the Estonian Constitution and article 4(1) of the Parliament Election Act provide that every Estonian citizen entitled to vote who has attained 21 years of age may be a candidate for the Parliament. The author is deprived of the right to be elected in local elections, as he is not a citizen of Estonia or the European Union or to vote in local elections, as he does not have permanent residence permit. Under article 156 of the Estonian Constitution, all persons who have reached the age of eighteen years and who reside permanently on the territory of that local government unit shall have the right to vote in the election of the local government council.

3.3 Finally, the author argues that he is a victim of discrimination on the grounds of ethnic and social origin and his association with a relevant status, namely the former military personnel of the former Soviet Union, contrary to article 26 read together with article 2, paragraph 1, of the

³ Article 27(1) provides:

§ 27. Basis for issue of alien's passport

(1) An alien's passport shall, on the basis of a personal application, be issued to an alien who holds a valid residence permit in Estonia if it is proved that the alien does not hold a travel document issued by a foreign state and that it is not possible for him or her to obtain a travel document issued by a foreign state. [...]

⁴ Article 28 provides:

§ 28. Period of validity of alien's passport

An alien's passport shall be issued with a period of validity of up to ten years, but the period of validity shall not exceed the period of validity of the residence permit issued to the alien.

(17.05.2000 entered into force 01.08.2000 - RT I 2000, 40, 254)

Covenant. He contends that article 12, section 4, clause 7, of the Estonian Aliens Act⁵ is discriminatory as it restricts the issuance or the extension of a residence permit to an alien if he or she served as a member of the armed forces of a foreign state. The relevant provision of the Act states:

“§ 12. Basis for issue of residence permits

[...] (4) A residence permit shall not be issued to or extended for an alien if:

[...] 7) he or she has served as a professional member of the armed forces of a foreign state or has been assigned to the reserve forces thereof or has retired therefrom; [...].”

3.4 Under section 5 of the same article, as an exception, temporary residence permits may be issued to aliens listed, *inter alia*, under section 4, clause 7 of the Aliens Act, and such residence permits may be extended. At the same time, according to article 12, section 7, of the Act, the restriction of, *inter alia*, article 12, section 4, clause 7, does not extend ‘to the citizens of the member states of the European Union or NATO’. The author claims that the law amounts to discrimination as it presumes that all foreigners, except citizens of EU and NATO member states, who have served in the armed forces pose a threat to Estonian national security, regardless of the individual features of the particular service in question. He argues that there is no proof either of any threat posed generally by military retirees, nor of any threat posed by himself. He also contends that the “threat” must be proven, for example, by an executory court sentence. He clarifies that he did not apply for Estonian citizenship; the permanent residence permit he applied for would have given him a more stable status in the only State in which he has reasons to stay.

The State party’s observations on admissibility and the merits

4.1 By submissions of 1 June 2004, the State party contested both the admissibility and the merits of the communication. On admissibility, it argues that the communication should be considered an abuse of the right of communication. It further argues that the author has failed to exhaust domestic remedies. On the merits, the State party argues that the facts disclose no violation of the Covenant.

4.2 For the State party, the author did not explain why his communication was submitted to the Committee more than four years after the final national judicial decision. Although the Optional Protocol does not set any time limits for the submission of a written communication, it is up to the Committee to decide whether a substantial delay in submitting a communication does consist of an abuse of the right of submission,⁶ as prescribed by article 3 of the Optional Protocol.

⁵ The author challenges before the Committee article 12, section 4, clause 7, of the Aliens Act – ‘he or she has served as a professional member of the armed forces of a foreign state or has been assigned to the reserve forces thereof or has retired therefrom’, although the State party considers that he falls under the provision of article 12, section 4, clause 5, of the Aliens Act valid at the time of the consideration of the author’s application for a permanent residence permit – ‘he or she has been or is employed by an intelligence or security service of a foreign state’. There was no equivalent of the latter provision in the Aliens Act at the time of submission of the communication.

⁶ Reference is made to Gobin v. Mauritius, Communication No.787/1997, decision on inadmissibility adopted on 16 July 2001.

Estonia acceded to the Covenant and the Optional Protocol in 1991. Article 3 of the Constitution states that generally recognised principles and rules of international law are an inseparable part of the Estonian legal system, and article 123 states that if laws or other legislation of Estonia are in conflict with international treaties ratified by the parliament, the provisions of the international treaty shall apply. The State party submits that the author should have known these principles. Any remedy that an individual seeks to pursue requires that the individual takes steps in order to bring his/her case before the relevant body within a reasonable time.

4.3 The author did not submit a request to the administrative court, seeking a constitutional review of the constitutionality of the Aliens Act. The State party refers to a decision of 5 March 2001 where the Constitutional Review Chamber, on reference from the administrative court, declared provisions of the Aliens Act, pursuant to which the applicant had been refused a residence permit, to be unconstitutional. The State party also observes that the Supreme Court does exercise its power to strike down domestic legislation inconsistent with international human rights treaties. It adds that, as equality before the law and protection against discrimination are protected both by the Constitution and the Covenant, a constitutional challenge would have afforded the author an available and effective remedy. In light of the Supreme Court's recent case law, the State party considers that such an application would have had a reasonable prospect of success and should have been pursued.

4.4 The author also did not pursue recourse to the Legal Chancellor to verify the non-conformity of the impugned law with the Constitution or Covenant. The Legal Chancellor may propose a review of legislation considered unconstitutional, or, failing legislative action, can make a reference to this effect to the Supreme Court. The Supreme Court has "in most cases" accepted such a reference. Accordingly, if the author considered himself incapable of lodging a constitutional challenge, he could have applied to the Legal Chancellor to take such a step.

4.5 The State party notes that the right to be granted a permanent residence permit and the ancillary rights are not guaranteed by the Covenant. Under international law, every state can decide on the entry to and stay of foreigners in the country, including the question of issuing residence permits. Estonian authorities have discretion to regulate these questions by national legislation. The restrictions on granting permanent residence permits is necessary for reasons of guaranteeing national security and public order. The State party refers to the Committee's decision in V.M. R.B. v. Canada,⁷ where the Committee observed that it could not test a sovereign State's evaluation of an alien's security rating. Accordingly, the State party argues that the refusal to grant a permanent residence permit to the author does not interfere with any of his Covenant rights.

4.6 On the merits of the article 26 claim, the State party invokes the Committee's established jurisprudence that not all differences in treatment are discriminatory; and that differences that are justified on a reasonable and objective basis are consistent with article 26. Differences in result arising from the uniform application of laws do not *per se* constitute prohibited discrimination.⁸ According to the Aliens Act, as a general rule, a residence permit is not granted to a person who served in the intelligence or security services of a foreign country; as an exception, they can be

⁷ V.M. R.B. v. Canada, Communication No.236/1987, decision on inadmissibility adopted on 18 July 1988.

⁸ Reference is made to F.H.Zwaan-de Vries v. the Netherlands, Communication No.182/1984; Hendrika S. Vos v. the Netherlands, Communication No.218/1986; A. Järvinen v. Finland, Communication No.295/1988).

granted a temporary residence permit with the permission of the Government. The author was granted temporary residence permit on exceptional grounds and he was refused permanent residence permit in accordance with the provisions of the domestic law, as he had served in the intelligence and security service of a foreign state.

4.7 The State party argues that the restriction on granting a permanent residence permit is necessary for reasons of national security and public order. It is also necessary in a democratic society for the protection of state sovereignty and is proportional to the aim set out in the law. In refusing to grant the author a permanent residence permit, the Board justified its order in a reasoned fashion, which reasons, in the State party's view, were relevant and sufficient. In adopting the law in question, it was also taken into account that in certain conditions former members of the armed forces might endanger Estonian sovereignty from within. This particularly applies to persons who were assigned to the reserve, as they are familiar with Estonian circumstances and can be called to service in a foreign country's forces.

4.8 The State party maintains that the author was not treated unequally compared to other persons who served in the intelligence service of a foreign country, as the law does not allow granting permanent residence permit to such persons. With regard to the author's claim that article 12, section 5 of the Aliens Act, does not apply to citizens of EU and NATO, the State party recalls that the author's request was refused in 1998, but that the provision the author invokes entered into force only on 1 October 1999. The State party thus argues that the reasons to refuse the residence permit to the author were based on considerations of national security, not on any circumstance relating to the author's social origin. The refusal, made according to law, was not arbitrary and had no negative consequences for the author.

4.9 According to the State party, the ancillary rights, which the author claims also to have been denied, are closely connected with the main issue at stake - the right to be granted a residence permit. They should be assessed as a whole. In any event, the State party argues, the alleged violations of article 12 are now moot, as the author was granted a temporary residence permit for a period of 5 years and was issued an aliens passport. An alien's passport is a travel document and its holder can cross the borders, although for entering some countries it is necessary to obtain a visa. Any complaint related to requirements for the issuance of such visas by foreign governments cannot be directed against the Estonian Government.

4.10 The author's claim that he might lose the right to enter Estonia if he stays abroad for longer periods is without substance. It would be possible to ask for a prolongation of the residence permit and issue an alien's passport from the Board in writing. According to articles 42 and 44 of the Act on Consular Affairs, Estonian consulates can deliver an alien's passport and issue residence permits. The author could apply for an alien's passport or a residence permit from outside Estonia.

4.11 As to the claim that the author is denied the right to vote and to be elected, the State party recalls that the right to vote of aliens with a residence permit is not a right contained in the provisions of article 25, which guarantees these rights only to citizens of a state.

4.12 The State party notes that in addition to the temporary residence permit issued to the author on 31 December 1996 with the validity until 31 December 1998, he has been issued further temporary residence permits for the following periods of time: from 5 October 1999 to 1 February 2000, from 11 May 2000 to 31 December 2000, from 1 January 2001 to 31 December 2001, from 1 January 2002 to 31 December 2003 and from 1 January 2004 to 31 December 2008.

The author's comments on the State party's observations

5.1 On 20 and 30 July 2004, the author commented on the State party's observations. He recalls that he has lived in Estonia since the age of eight, was a USSR citizen until 1991 and benefited from permanent registration (*propiska*) in Estonia until 1996. Until 31 December 1996, when the Order was adopted, he was not considered to be a threat to Estonian national security. Former employees of the KGB of the ESSR, whose parents held Estonian citizenship until 1940, obtained Estonian citizenship after independence, despite falling into the same category of being a threat to Estonian national security as the author.

5.2 The author further submits that the Act on Registration and Disclosure applied by the State party (paragraph 2.7 above) is contrary to article 23, part 1 of the Constitution, which states that no one may be found guilty of an act, if that act did not constitute a crime under a law which was in effect when the act was committed. The author's employment by the KGB between 1975 and 1991 did not constitute at that time either work in special services of a foreign state, or amounted to cooperation with the special services of an occupying state.

5.3 The author adds that the different periods of validity of his temporary residence permits – between four months and five years - prove that the State party's argument about national security is unfounded. The State party failed to demonstrate how and under which criteria the assessment of the author's threat to Estonian national security justified such significant discrepancy in the length of the permits' validity. The author also challenges the State party's argument that 'in certain conditions former members of the armed forces might endanger Estonian statehood from within' and 'can be called to service in a foreign country's forces', as in his case, both the USSR and ESSR ceased to exist, while Buryatia ASSR could hardly pose a threat to the Estonia's state interests.

5.4 The author quotes at length from a 1991 agreement between Estonia and the Russian Federation on the status of military bases and bilateral relations in support of his claim that this treaty did not exclude former KGB servicemen from the provisions of article 3, allowing the USSR citizens to freely choose between the Russian and Estonian citizenship. The author adds that his initial intention was to apply for Estonian citizenship after living in Estonia with a permanent residence permit for five years. However, as one of 175,000 stateless persons who are long-term residents of Estonia the author cannot obtain Estonian citizenship, since he belongs to a special group of the so-called former military personnel of the USSR.

5.5 The author denies that his case is an abuse of the right to submit a communication, since the Estonian Supreme Court did not inform him about further possibilities of redress after refusing his leave to appeal on 16 June 1999.

5.6 On the argument that he did not initiate constitutional review proceedings to challenge the constitutionality of the Aliens Act, the author submits that under article 6 of the Law on Constitutional Review Procedure (in force until 1 July 2002), only the President of Estonia, the Legal Chancellor and the courts could initiate the constitutional review procedure. Contrary to the State party's claim, he unsuccessfully tried to raise the issue of unconstitutionality of the Aliens Act and its incompatibility with article 26 of the Covenant in the domestic courts.

5.7 As to the possibility of approaching the Legal Chancellor, the author observes that according to article 22(2) of the Law on the Legal Chancellor, the Chancellor must reject applications if the subject matter is, or has been, the subject of judicial proceedings. Given the

limited effectiveness of the Legal Chancellor's competences, the author opted for judicial review of the Board's decision.

5.8 On 6, 12, 15 and 21 June 2007, the author submitted further comments on the State party's observations. In addition to reiterating his earlier claims, the author states that he was involved in other court proceedings in Estonia from 2004 to 2006, and that his complaint related to the latter proceedings was registered by the European Court of Human Rights in 2007. Moreover, in October 2006, he was granted a status of a 'long-term resident – EU' by the Board on the basis of his request submitted on 10 July 2006.⁹ A holder of this status does not need a work permit in Estonia; however, even this status does not give him the grounds to become a naturalised Estonian citizen due to the restrictions imposed by the Order No.1024.

Issues and proceedings before the Committee

Consideration of admissibility

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

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

6.3 The Committee notes the State party's argument that the communication amounts to an abuse of the right of submission, given the excessive delay between the submission of the complaint and the adjudication of the issue by the domestic courts. As regards the supposedly excessive delay in submitting the complaint, the Committee points out that the Optional Protocol sets no deadline for submitting communications, that the amount of time that elapsed before submission, other than in exceptional cases, does not in itself constitute an abuse of the right to submit a communication.¹⁰ In the circumstances of this particular case, the Committee does not find that a delay of 4 years between exhaustion of domestic remedies and presentation of the communication to the Committee amounts to an abuse of the right of submission.

6.4 On the requirement of exhaustion of domestic remedies in relation to the alleged violation of articles 12, paragraphs 2 and 4, and article 25, the Committee recalls that the author did not raise these issues before the domestic courts. It further recalls that an author is required to at least raise the substance of his or her claims in the domestic courts before submitting them to the Committee. As the author failed first to raise the alleged violations of his rights in the domestic courts, the Committee considers that this part of the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

⁹ As of 1 June 2006, an alien holding a permanent residence permit issued by the Estonian authorities shall automatically be deemed as an alien holding the 'long-term resident – EU' status. It seems that the author was granted this status on an exceptional basis, as he never had a permanent residence permit issued by the Estonian authorities.

¹⁰ See, Gobin v. Mauritius, supra n.6, and Fillacier v. France, Communication No.1434/2005, Views adopted on 28 April 2006, para. 4.3.

6.5 As to the State party's contention that the claim under article 26 is likewise inadmissible, as a constitutional review could have been initiated, the Committee observes that the author has consistently argued, up to the level of the Supreme Court, that the rejection of a permanent residence permit on the grounds of social origin, as a former employee of a foreign intelligence and security service, violated the equality guarantee of the Estonian Constitution and article 26 of the Covenant. In light of the courts' rejection of these arguments, the Committee considers that the State party has not shown how such a remedy would have a reasonable prospect of success. This claim, therefore, is not inadmissible for failure to exhaust domestic remedies.

6.6 As to the State party's other arguments, the Committee notes that the author has not advanced any claim to a free-standing right to a permanent residence permit, but rather that he claims that the refusal to grant a permanent residence permit to him on the grounds of social origin as a former employee of a foreign intelligence and security service violates his right to non-discrimination and equality before the law. This claim falls within the scope of article 2, paragraph 1, read together with article 26, and is, in the Committee's view, sufficiently substantiated for purposes of admissibility.

Consideration of the merits

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

7.2 The author claims that article 12, section 4, clause 7,¹¹ of the Estonian Aliens Act violates article 2, paragraph 1, read together with article 26 of the Covenant, so far as it restricts the issuance or the extension of a residence permit to an alien if he or she served as a professional member of the armed forces of a foreign state. At the same time, under article 12, section 7, of the Act, this restriction does not extend to citizens of EU or NATO member states. The author claims that the law is discriminatory as it presumes that all foreigners, except citizens of EU and NATO member states, who served in the armed forces pose a threat to Estonian national security, regardless of the individual features of the particular service or training in question. With regard to the latter, the Committee takes note of the State party's argument that while the author's request was refused in 1998, article 12, section 7, invoked by the author, only entered into force on 1 October 1999.

7.3 The Committee further observes that the State party invokes national security grounds as a justification for the refusal to grant a permanent residence permit to the author. 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.¹² It also recalls its jurisprudence established in Borzov v. Estonia,¹³ that considerations related to national security may serve a legitimate aim in the exercise of a State party's sovereignty in the granting of citizenship or, as in the present case, of a permanent residence permit. It recalls that the invocation of national security on the part of a State party does not, *ipso facto*, remove an issue

¹¹ See footnote No.5 above.

¹² Kavanagh v. Ireland (No.1), Communication No.819/1998, Views adopted on 4 April 2001, and Borzov v. Estonia, Communication No.1136/2002, Views adopted on 26 July 2004.

¹³ *Supra*.

wholly from the Committee's scrutiny and recognizes that its own role in reviewing the existence and relevance of such considerations will depend on the circumstances of the case.¹⁴

7.4 Whereas article 19, article 21 and article 22 of the Covenant establish a criterion of necessity in respect of restrictions based on national security, the criteria applicable under article 26 and article 2, paragraph 1, 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 observes that enactment of the Aliens Act and, in particular, a blanket prohibition of the issue of a permanent residence permit to the 'former members of the armed forces' of a foreign state cannot be examined outside the historical context, that is, the historical relationship between the State party and the USSR. The Committee is of the view that although the above-mentioned blanket prohibition *per se* constitutes differentiated treatment, in the circumstances of the present case, the reasonableness of such differentiated treatment would depend on the basis for national security arguments invoked by the State party.

7.5 The State party has argued that legislation does not violate article 26 of the Covenant if the grounds of distinction contained therein are justifiable on objective and reasonable grounds. In the present case, it concluded that granting permanent residence permit to the author would raise national security issues on account of his former employment in the KGB. The Committee notes that neither the Covenant nor international law in general spell out specific criteria for the granting of residence permits, and that the author had a right to have the denial of his application for permanent residence reviewed by the State party's courts.

7.6 The Committee notes that the category of people excluded by the State party's legislation from being able to benefit from permanent residence permits is closely linked to the considerations of national security. Furthermore, where such justification for differentiated treatment is persuasive, it is unnecessary that the application of the legislation be additionally justified in the circumstances of an individual case. The decision in Borzov,¹⁵ decided on the basis of a different legislation, is consistent with the view that distinctions made in the legislation itself, where justifiable on reasonable and objective grounds, do not require additional justification on these grounds in their application to an individual. Consequently, the Committee does not, in the circumstances of the present case, conclude that there was a violation of article 26, read together with article 2, paragraph 1, of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not disclose a violation of article 26, read together with article 2, paragraph 1, of the Covenant.

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

¹⁴ V.M.R.B. v. Canada, supra n.7 and Borzov v. Estonia, supra n.12.

¹⁵ Supra n. 12.