



**International covenant
on civil and
political rights**

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

VIEWS

Communication No. 1479/2006

<u>Submitted by:</u>	Mr. Jaroslav Persan (not represented by counsel)
<u>Alleged victim:</u>	The author
<u>State party:</u>	Czech Republic
<u>Date of communication:</u>	17 April 2006 (initial submission)
<u>Document references:</u>	Special Rapporteur's rule 97 decision, transmitted to the State party on 21 June 2006 (not issued in document form)
<u>Date of adoption of Views:</u>	24 March 2009

* Made public by decision of the Human Rights Committee.

Subject matter: Discrimination on the basis of citizenship with respect to property restitution

Procedural issues: Abuse of right of submission, exhaustion of domestic remedies

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

Article of the Covenant: 26

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

On 24 March 2009 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. 1479/2006.

[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-fifth session

concerning

Communication No. 1479/2006**

<u>Submitted by:</u>	Mr. Jaroslav Persan (not represented by counsel)
<u>Alleged victim:</u>	The author
<u>State party:</u>	Czech Republic
<u>Date of communication:</u>	17 April 2006 (initial submission)

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

Meeting on 24 March 2009,

Having concluded its consideration of communication No. 1479/2006, submitted to the Human Rights Committee by Jaroslav Persan 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 Jaroslav Persan, a citizen of the United States and the Czech Republic, born on 23 April 1928, currently residing in Texas, United States. He claims to be a victim of a violation by the Czech Republic of article 26 of the International Covenant on

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

An individual opinion signed by Committee members Mr. Abdelfattah Amor, Mr. Ahmad Amin Fathalla and Mr. Lazhari Bouzid has been appended to the present Views

Civil and Political Rights. The Optional Protocol entered into force for the State party on 22 February 1993. The author is not represented.

Facts as presented by the author

2.1 The author used to live in the Czech Republic. His possessions included a private house and the surrounding land in the Rimov community, district of České Budějovice. The original property belonged to Vojtěch Persan since 1933. Upon his death, the author inherited half of that property. He purchased the other half in 1974.

2.2 The author left the Czech Republic with the intention to emigrate on 14 August 1981. On 3 May 1982, the District Criminal Court found him guilty of leaving the country and sentenced him to the punishment of property confiscation (1T 97/82-38). As part of the decision, the author's property was seized by the government. The property was subsequently sold to another private person (reg. 212/86).

2.3 The author obtained US citizenship on 1 May 1989. According to the Naturalization Treaty between Czechoslovakia and the United States of America of 16 July 1928, he automatically lost his Czech citizenship when acquiring American citizenship.

2.4 On 17 December 1990, the decision of the District Criminal Court was overturned by resolution of the District Court of České Budějovice under law 119/90 on judicial rehabilitation. On 13 October 1999, the District Office in České Budějovice issued a certificate of citizenship of the Czech Republic to the author.

2.5 On 15 July 1996, the author applied to the District Land Office in České Budějovice for restitution of his property under law 30/1996. On 28 May 1999, the District Land Office rejected the application on the ground that the author was not a Czech citizen on 31 January 1996, as required under Law 30/1996.

2.6 The author appealed to the Regional Court in České Budějovice on 19 July 1999. The Regional Court confirmed the decision of the District Land Office on 22 November 1999. It argued that the author was not a Czech citizen when Law 30/1996 entered into force, nor when he filed the restitution claim and did not become a citizen before the deadline for filing a claim. The fact that the author acquired Czech citizenship on 13 October 1999 was deemed irrelevant. The author did not attempt other judicial remedies in the Czech Republic, as he anticipated that they would be futile.

2.7 The author applied to the European Court of Human Rights on 5 August 2000, but his case was declared inadmissible on 21 February 2001 because it was not submitted within the statutory six-month time-limit.

The complaint

3. The author claims a violation of article 26 of the Covenant by the Czech Republic.

The State party's observations on admissibility and merits

4.1 In its submission of 8 January 2007, the State party addresses both admissibility and merits of the communication. As to admissibility, the State party notes that the decision of the European Court of Human Rights in the author's case was rendered on 21 February 2001. Thus, over five years elapsed before the author turned to the Committee on 17 April 2006. In the absence of any explanation by the author of the reason for the delay and in reference to the Committee's decision in *Gobin v. Mauritius*¹, the State party invites the Committee to consider the communication inadmissible as an abuse of the right to submit a communication, under article 3 of the Optional Protocol.

4.2 In addition, the State party notes that the author failed to initiate an action under section 8(1) of law 229/1991 against those natural persons to whom part of the property was transferred in 1986, requesting the determination that the ownership title to the properties had passed to him. The State party argues that the author has failed to exhaust domestic remedies in respect of this part of his claim.

4.3 On the merits of the case, the State party refers to its observations submitted to the Committee in similar cases,² in which it outlined the political circumstances and legal conditions for the restitution laws. The purpose of these laws was only to eliminate some of the injustices committed by the communist regime, as it was not feasible to eliminate all injustices committed during that time. The State party refers to the decisions by the Constitutional Court, which repeatedly considered the question of whether the precondition of citizenship complied with the Constitution and the fundamental rights and freedoms and found no reason for abolishing it.

4.4 The State party adopted the restitution laws, including Law No. 229/1991, as part of two-fold efforts: first, in an effort to mitigate, to a certain degree, at least some of the injustices committed earlier; second, in an effort to carry out speedily a comprehensive economic reform with a view to introducing a market economy. The restitution laws were part of the objective to transform society and to carry out economic reform including the restitution of private property. The condition of citizenship was included to ensure that private owners would take due care of the property.

4.5 The State party highlights that persons requesting property restitution could apply to Czech national authorities for citizenship also in 1990 and 1991, and that they stood a realistic chance of acquiring the citizenship, thereby meeting the precondition set forth by the restitutions laws. By failing to submit an application for Czech citizenship in this period, the author deprived himself of the opportunity to meet the nationality requirement in good time.

4.6 The State party notes that, in its judgment of 22 November 1999, the Regional Court held that if the properties had passed to natural persons the author should have sought the determination of the ownership title by an action brought against these natural persons rather than the Land Office. The State party notes that the author has not brought such an action. Had

¹ Communication No. 787/1997, *Gobin v. Mauritius*, inadmissibility decision adopted on 16 July 2001.

² See, for example, Communication No. 586/1994, *Adam v. Czech Republic*, Views adopted on 23 July 1996.

he initiated such an action, he would also have had to prove, in addition to citizenship, that these persons had acquired the properties on the basis of illegal preferential treatment or for a price lower than the price corresponding to the pricing regulations then in force.

4.7 With respect to the author's allegation that no domestic remedies were available to him, the State party argues that, in relation to the property that was transferred to private individuals, he could have requested a determination of ownership under section 8, subsection 1, of law 229/1991. The decision taken as a result of that action is subject to appeal. In respect of the part of the property that remained in the hands of the State, the author had available a remedy against the Land's Office decision under Section 2501 of the Rules of Civil Procedure before the Regional Court.

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

5.1 In his comments, dated 8 March 2007, on the State party's submission, the author states that he could not have re-acquired Czech citizenship by law 88/1990, as indicated by the State party. As regards the portion of property that passed to private hands, the author contends that he was never notified of the disposition of his property and that he did not know to whom it had been sold. In any case, the author claims that he was not an "entitled person" under the restitution laws as he did not meet the nationality requirement.

5.2 The author rejects the State party's argument that his communication is inadmissible as an abuse of the right of submission. He explains that the delay in submitting the communication was caused by lack of information and contends that the State party does not publish the Committee's decisions. As regards exhaustion of domestic remedies, the author reiterates that no domestic remedies were available to him.

Issues and proceedings before the Committee

Consideration of admissibility

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

6.2 The Committee notes that a similar claim filed by the authors was declared inadmissible by the European Court of Human Rights on 21 February 2001. However, article 5, paragraph 2 (a), of the Optional Protocol does not constitute an obstacle to the admissibility of the instant communication, since the matter is no longer pending before another procedure of international investigation or settlement, and the Czech Republic has not entered a reservation to article 5, paragraph 2 (a), of the Optional Protocol.³

6.3 The Committee notes the State party's argument that the communication should be considered inadmissible as constituting an abuse of the right to submit communications under article 3 of the Optional Protocol, in view of the delay in submitting the communication to the

³ See Communication 1463/2006, *Gratzinger v. Czech Republic*, Views adopted on 25 October 2007, paragraph 6.2.

Committee.⁴ The State party asserts that the author waited over five years after the inadmissibility decision of the European Court of Human Rights (over 6 years after exhaustion of domestic remedies) before submitting their complaint to the Committee. The author argues that the delay was caused by the lack of information available. The Committee reiterates that the Optional Protocol does not establish any deadline for the submission of communications, and that the period of time elapsing before doing so, other than in exceptional cases, does not in itself constitute an abuse of the right to submit a communication. In the instant case, the Committee does not consider a delay of seven years since the exhaustion of domestic remedies or over five years since the decision of another procedure of international investigation or settlement as an abuse of the right of submission.⁵

6.4 With respect to the requirement of exhaustion of domestic remedies, the Committee notes that the State party has challenged the admissibility of the part of the communication relating to the property that was transferred by the State to private individuals. The Committee recalls that only such remedies have to be exhausted which are both available and effective. The Committee notes that although the author failed to file an action against those private individuals, the State party itself acknowledged that the requirement of nationality was also applicable to this claim.⁶ Thus, the Committee considers that such an action would not have offered the author a reasonable chance of obtaining effective redress and therefore would not have constituted an effective remedy for the purpose of article 5, paragraph 2 (b), of the Optional Protocol. In the absence of any further objections to the admissibility of the communication, the Committee declares the communication admissible in so far as it may raise issues under article 26 of the Covenant.

Consideration of the merits

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

7.2 The issue before the Committee is whether the denial of the author's request for restitution of his property on the ground that he did not fulfill the citizenship requirement contained in Act 229/1991, as amended, constitutes a violation of the Covenant.

7.3 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

⁴ See paragraph 4.1.

⁵ Communication No. 1484/2006, *Lnenicka v. Czech Republic*, Views adopted on 25 March 2008, para. 6.3; Communication No. 1485/2006, *Vlcek v. Czech Republic*, Views adopted on 10 July 2008, para. 6.3; Communication No. 1488/2006, *Süsser v. Czech Republic*, Views adopted on 25 March 2008, para. 6.3; Communication No. 1305/2004, *Villamon Ventura v. Spain*, Views adopted on 31 October 2006, para. 6.4.

⁶ See paragraph 4.6.

provisions of the Covenant and is based on objective and reasonable grounds does not amount to prohibited discrimination within the meaning of article 26.⁷

7.4 The Committee recalls its Views in the cases of *Simunek, Adam, Blazek, Marik, Kriz, Gratzinger* and *Ondracka*⁸ where it held that article 26 had been violated, and that 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. Bearing in mind that the author's original entitlement to his properties had not been predicated on citizenship, it found that the citizenship requirement was unreasonable. In the case *Des Fours Walderode*,⁹ the Committee observed further that a requirement in the law for citizenship as a necessary condition for restitution of property previously confiscated by the authorities makes an arbitrary, and, consequently a discriminatory distinction between individuals who are equally victims of prior state confiscations, and constitutes a violation of article 26 of the Covenant. The Committee considers that the principle established in the above cases equally applies to the author of the present communication.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of article 26 of the International Covenant on Civil and Political Rights.

9. 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, including compensation if the property in question cannot be returned. The Committee reiterates that the State party should review its legislation and practice to ensure that all persons enjoy both equality before the law and equal protection of the law.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognised the competence of the Committee to determine whether there has been a violation of the Covenant or not, and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognised in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's views.

⁷ See *inter alia* Communication No.182/1984, *Zwaan-de Vries v. The Netherlands*, Views adopted on 9 April 1987, paragraph 13.

⁸ Communication No. 516/1992, *Simunek v. Czech Republic*, Views adopted on 19 July 1995, paragraph 11.6; Communication No. 586/1994, *Adam v. Czech Republic*, Views adopted on 23 July 1996, paragraph 12.6; Communication No. 857/1999, *Blazek v. Czech Republic*, Views adopted on 12 July 2001, paragraph 5.8; Communication No. 945/2000, *Marik v. Czech Republic*, Views adopted on 26 July 2005, paragraph 6.4; Communication No. 1054/2002, *Kriz v. Czech Republic*, Views adopted on 1 November 2005, paragraph 7.3; Communication 1463/2006, *Gratzinger v. Czech Republic*, Views adopted on 25 October 2007, paragraph 7.5; and Communication No. 1533/2006, *Ondracka v. Czech Republic*, Views adopted on 2 November 2007, paragraph 7.3.

⁹ Communication No. 747/1997, *Des Fours Walderode v. Czech Republic*, Views adopted on 30 October 2001, paragraphs 8.3 - 8.4.

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

APPENDIX

Individual opinion by Committee member Mr. Abdelfattah Amor (Dissenting)

In this communication, the Committee does not consider the delay of more than seven years since the exhaustion of domestic remedies and over five years since the decision of a procedure of international investigation or settlement as an abuse of the right of submission. It therefore concludes that the communication is admissible.

We do not share the Committee's opinion in that regard and would like to:

1. Refer to my dissenting opinion on communication No. 1533/2006 (*Ondracka v. Czech Republic*);
2. Point out that the author provided an explanation for the delay in submitting his communication only in response to the State party's assertion that the communication constituted an abuse of rights;
3. Specify that the only explanation given by the author to justify the delay was that he had not been aware of the Committee's decisions since the State party did not publish them, which is neither a reasonable nor a convincing explanation for the delay, leaving the way wide open for all kinds of evasions and seriously jeopardizing legal certainty;
4. Stress that the Committee has not taken it upon itself to analyse and establish whether the delay was justified, thereby giving the impression that it was distancing itself from what its jurisprudence consistently required or did not consider it important in this particular case to establish whether the delay was justified or not;
5. Note with regret the inconsistencies in the Committee's jurisprudence regarding the deadline for the submission of communications, which undermined the authority of the Committee's Views and called into question its credibility.

[Signed] Mr. Abdelfattah Amor

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

**Individual opinion of Committee members Mr. Ahmad Amin Fathalla and
Mr. Bouzid Lazhari**

We associate ourselves with the opinion of Mr. Abdelfattah Amor's in this case.

(Signed): Mr. Ahmad Amin Fathalla

(Signed): Mr. Bouzid Lazhari

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