



**International Covenant on  
Civil and Political Rights**

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**Human Rights Committee**

**Ninety-ninth session**

12 to 30 July 2010

**Views**

**Communication No. 1742/2007**

|                                   |   |
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| <u>Submitted by:</u>              | Nancy Gschwind (not represented by counsel)   |
| <u>Alleged victim:</u>            | The author  |
| <u>State party:</u>               | The Czech Republic  |
| <u>Date of communication:</u>     | 6 November 2007 (initial submission)  |
| <u>Document references:</u>       | Special Rapporteur's rule 97 decision,<br>transmitted to the State party on 10 December<br>2007 (not issued in document form) |
| <u>Date of adoption of Views:</u> | 27 July 2010  |

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\* Made public by decision of the Human Rights Committee.

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| <i>Subject matter:</i>                   | Discrimination on the basis of citizenship with respect to restitution of property |
| <i>Procedural issue:</i>                 | Non-exhaustion of domestic remedies  |
| <i>Substantive issues:</i>               | Equality before the law; equal protection of the law                               |
| <i>Article of the Covenant:</i>          | 26   |
| <i>Article of the Optional Protocol:</i> | 5, paragraph 2 (b)   |

On 27 July 2010, 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. 1742/2007.

[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-ninth session)**

concerning

#### **Communication No. 1742/2007\*\***

Submitted by: Nancy Gschwind (not represented by counsel)  
Alleged victim: The author  
State party: The Czech Republic  
Date of communication: 6 November 2007 (initial submission)

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

Meeting on 27 July 2010,

Having concluded its consideration of communication No. 1742/2007, submitted to the Human Rights Committee by Ms. Nancy Gschwind 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 Ms. Nancy Gschwind, born on 16 August 1939, and sole heir to the estate of Kamil Stephan Gschwind, who died on 14 April 2005. Prior to his death, the deceased was a citizen of the United States of America and a former citizen of Czechoslovakia. The author claims to be a victim of a violation by the Czech Republic of article 26 of the International Covenant on Civil and Political Rights.<sup>1</sup> She is not represented by counsel.

#### **The facts as presented by the author**

2.1 On an unspecified date, the author married Kamil Stephan Gschwind, a political refugee from Czechoslovakia from where he had “escaped” in 1958. He acquired United

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\*\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Mahjoub El Haiba, Mr. Yuji Iwasawa, Ms. Helen Keller, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O’Flaherty, Mr. Rafael Rivas Posada, Mr. Fabian Omar Salvioli and Mr. Krister Thelin.

<sup>1</sup> The Optional Protocol entered into force for the State party on 22 February 1993.

States citizenship and, pursuant to the treaty then in force between the two countries, he automatically lost his Czechoslovakia citizenship. Mr. Kamil Gschwind inherited from his mother, Ms. Miroslava Gschwind, one-eighth of an apartment building in 30, Graficka St., Prague 5, 150 00 Czech Republic. The rest of the building was returned to other members of the Mr. Gschwind's family. He passed away on 14 April 2005 and the author is his sole heir.

2.2 According to the decision of the Office of Prague Municipality No. 5 dated 24 January 2001, those entitled to the property in question under Law 87/1991 are Messrs. Kamil and Ota Gschwind. However, according to a letter from the Municipal Office of Prague Municipality No. 5, of 8 November 2000, Mr. Gschwind's American citizenship was a legal obstacle to his claim for the above-mentioned property.

2.3 On 11 November 2002, the Municipal Court of Prague No. 5 decided that Kamil Gschwind was the owner of one-eighth of the apartment building in question. On 24 October 2003, on appeal, the Prague City Court overturned this decision and decided that Mr. Gschwind's part had been put under national custody under Decree 5/1945. Transfer of the ownership right occurred at the moment when the owner abandoned this property with the intention of giving up his ownership right. The court concluded that the State obtained the ownership of this property under the law in force at the time.

2.4 The author challenges the court's reasoning by stating that Decree 5/1945 was used after the Second World War against Germans, Hungarians and others who were considered to be traitors. Mr. Gschwind "defected when his university class went to see architecture in East Berlin". The building in question was never abandoned and continued to be administered by his uncle, Jan Sammer.

2.5 On 22 December 2005, an extraordinary appeal to the Supreme Court of the Czech Republic was rejected. On 15 June 2006, a complaint to the Constitutional Court was considered inadmissible.

### **The complaint**

3. The author claims that the Czech Republic violated her rights under article 26 of the Covenant, by enforcing a discriminatory property restitution law. Had her husband escaped anywhere else but to the United States, he would have had no difficulties in recovering his property. To support her claim she refers to the case of a family member who immigrated to Canada in 1966, did not lose his Czech citizenship and subsequently successfully recovered his property.

### **State party's observations on admissibility and merits**

4.1 On 6 June 2008, the State party submitted comments on the admissibility and merits of the communication.

4.2 On the facts, the State party submitted that the action filed on 14 May 2001 in the Prague District Court No. 5 was a request by Mr. Gschwind, pursuant to section 126 of the Civil Code, in conjunction with Section 80(c) of the Rules of Civil Procedure, to declare him the owner of the property in question. The Municipal Court in Prague, acting as the appellate court, reversed the judgment of the court of first instance. It held that Mr. Gschwind had lost his ownership right to the contentious properties as a result of dereliction and that the said right had passed to the State; that the Act No. 87/1991 on Extra-Judicial Rehabilitations offered an opportunity to redress such situations; however, Mr. Gschwind failed to lodge a restitution claim under that Act and, instead, lodged an action under a general legal regulation. The State party further submits that the author's husband then brought an appeal on points of law before the Supreme Court which was rejected on the same grounds. The author then brought the case before the Constitutional

Court which declared it inadmissible on 15 June 2006 for being premature. A new constitutional appeal by the author was rejected for being manifestly ill-founded on 17 July 2007.

4.3 On admissibility, the State party submits that any claims relating to events prior to 12 March 1991 are incompatible *ratione temporis*, given that the Optional Protocol only entered into force after that date. Also, to the extent that the author contends a violation of the protection of ownership of a part of the contentious properties, her communication is incompatible *ratione materiae* with the Covenant, given that the right to property is not, as such, protected by the Covenant.

4.4 The State party submits that the author has not exhausted domestic remedies, as both she and her deceased husband failed to initiate restitution proceedings under the Act on Extra-Judicial Rehabilitation to obtain a decision on the merits of their property claims.

4.5 The State party submits that the case is inadmissible under article 3 of the Optional Protocol as an abuse of the right of submission. The domestic proceedings were concluded on 15 June 2006 and the author approached the Committee on 6 November 2007. Thus, it argues that, as the author did not approach the Committee until almost one and a half years after completion of the domestic court proceedings without providing any objective and sustainable reasonable explanation, she abused her right to submit a communication to the Committee. The State party refers to the jurisprudence of the Committee in this regard, and shares the views of Mr. Amor in his dissenting opinion in the case of *Ondrackova v. Czech Republic*.<sup>2</sup> It also refers to a similar complaint made by the author to the European Court of Human Rights. In its view, communications that are submitted after the case has been subject to proceedings before another body for monitoring the observance of human rights should be assessed more strictly.

4.6 On the merits, the State party disputes the claim that the court proceedings described by the author constituted a violation of her rights. In its view, these proceedings concluded that the author's husband did lose the ownership right to the property in question after having emigrated, the ownership having passed to the State, and that after 1989 the author's husband had the possibility of seeking restitution of the property solely through restitution proceedings and not through a declaratory action under the Civil Code. These conclusions are fully in conformity with the domestic law. The relationship between restitution legislation and general civil law regulations as declared by the courts was a logical result of the application of the principle of legal certainty.<sup>3</sup> Restitution legislation was based on the one hand on the principle of continuity of the validity of legal acts from the past and, on the other hand, on defined equal substantive and procedural criteria under which certain acts relating to property could be challenged in restitution proceedings. Such proceedings were set up as the only mechanism suitable to contest long existing property relationships. The State party submits that the courts in question, at no stage of the proceedings, assign any

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<sup>2</sup> Communication no. 1533/2006, Views adopted on 31 October 2007.

<sup>3</sup> The State party refers to the Judgement of the Grand Chamber of the Civil Law Division of the Supreme Court, dated 11 September 2003, which stated that "an eligible person whose real property was taken over by the State during the decisive period (from 25 February 1948 through 1 January 1990) in spite of the absence of legal grounds, may not seek protection of their ownership right under Section 126(1) of the Civil Code, not even through a declaration of ownership right pursuant to Section 80(c) of the Rules of Civil Procedure, inasmuch [it is understood that this should be "unless"] as she/he may have requested the surrender of the thing (property) under the provisions of the restitution (rehabilitation) law." It also refers to the Constitutional Court's "plenum"/opinion of 1 November 2005, which concluded that an action for the declaration of an ownership right could not be used to circumvent the meaning and purpose of restitution legislation.

importance to the citizenship of the author or her husband, and thus acted in no way arbitrarily or discriminatorily.

4.7 The State party argues that the author's and her husband's failure to choose the appropriate procedure, a petition to commence restitution proceedings, rather than a declaratory action under the civil code, cannot be attributable to the State party. All the more so when they were represented by counsel.

4.8 The State party submits that the author cannot claim a purely hypothetical violation of the Covenant that may have occurred if the author, or her husband, had made the appropriate application. Regardless of the question of citizenship, the Act on Extra-Judicial Rehabilitation laid down other preconditions for a restitution claim to be successful. In particular, the law laid down a limitation period prior to which the claim had to be lodged against the liable person to return the property, i.e. 1 May 1995. The outcome of the restitution proceedings would also have depended on whether the liable person met certain conditions. According to the State party, it is clear, among other things, that when the author's husband filed the action under the Civil Code on 14 May 2001, the aforementioned time limit laid down by the Act on Extra-Judicial Rehabilitation had been exceeded by more than 6 years and that his entitlement would have expired. Thus, the statutory requirements for granting the petition would not have been met in restitution proceedings due to passage of time. Accordingly, it should not be inferred that the courts would have denied Mr. Gschwind's claim solely on the ground of citizenship and that they may have thereby committed any discrimination.

4.9 As to the letters/memos from the District Authority dated 8 November 2000 and 24 January 2001, which note the obstacle to citizenship, the State party notes that the legal opinion of a government authority, moreover given outside the examination of a particular matter, is not binding on third parties under Czech law and even less so on independent courts that would be considering the matter in the future. In terms of assessing a potential violation of the Covenant in possible restitution proceedings such opinions are therefore irrelevant.

4.10 Finally, with respect to the claim of discrimination on the grounds that another person from the author's family, who immigrated to Canada, did not lose his citizenship and thus successfully recovered his property, the State party argues that the author did not submit accurate information about this claim. It has no doubt that the individual in question raised their claims within the time limit applicable under the restitution legislation applicable, unlike that of the author's husband.

#### **Author's comments on the State party's observations**

5.1 On 21 July 2008, while acknowledging that both the Municipal Court of Prague and the Supreme Court stated that the author's husband should have proceeded under the restitution act of 87/1991, the author submits that this was precisely the discriminating law, as it disqualified anybody who did not have Czech citizenship between 1 April and 1 October 1991. Her husband was not an "eligible person" under that Act, as he did not have Czech citizenship during the relevant period. Accordingly, his claim would have been fruitless. She recalls that it was firmly established by the Constitutional Court decision of 6 October 1999 that the requirement of citizenship for restitution was reasonable. She also refers to Law 289/1999 in the "Collection of Laws", which she claims allows for those who do not meet the conditions of citizenship to assert their rights according to the Civil Code.

5.2 On the issue of delay, the author submits that the delay was due to the fact that her husband was involved in other proceedings and was ultimately refused compensation on citizenship grounds under Law 261/1991, relating to a "Monetary Award for Participants of the National Struggle for Liberation in the II World War and for their Orphans".

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

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

6.3 The State party has argued that the communication is inadmissible, inter alia, for non-exhaustion of domestic remedies, as the author is claiming a violation of article 26 of the Covenant with respect to Act No. 87/1991 on Extra-Judicial Rehabilitation, without there having been any claim made in this regard before the domestic courts. The author does not dispute the fact that all of the proceedings taken before the national authorities related to a claim under different legislation - section 126 of the Civil Code, in conjunction with section 80(c) of the Rules of Civil Procedure. Neither does the author dispute the fact that both the Municipal Court of Prague and the Supreme Court advised the author's husband to pursue his claims under the appropriate law - Act No. 87/1991.

6.4 The Committee refers to its established jurisprudence that, for purposes of the Optional Protocol, the author of a communication need not exhaust domestic remedies when these remedies are known to be ineffective. The Committee notes that because of the preconditions of Law No. 87/1991, the author could not claim restitution at the time because he no longer had Czech citizenship. In this context the Committee notes that other claimants have unsuccessfully challenged the constitutionality of the law in question; that earlier views of the Committee in similar cases remain unimplemented and that despite those complaints, the Constitutional Court upheld the constitutionality of the Restitution Law. The Committee therefore concludes that no effective remedies were available to the author.<sup>4</sup> Furthermore, with regard to the State party's argument that Mr. Gschwind did not meet other conditions set up in Act No. 87/1991, the Committee considers it to be irrelevant, since under the explicit terms of the law he was excluded from the restitution scheme from the outset.

6.5 In the circumstances, the Committee finds that article 5, paragraph 2 (b), of the Optional Protocol does not preclude the Committee's consideration of the present communication.

6.6 For the above reasons, 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 With regard to the author's claim that he is a victim of discrimination, since Act No. 87/1991 makes restitution of his property conditional on having Czech citizenship, 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

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<sup>4</sup> The Committee reached a similar conclusion in communication No. 1497/2006, *Preiss v. Czech Republic*, Views adopted on 17 July 2008, para. 6.5.

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.

7.3 The Committee further recalls its Views in the cases, inter alia, of *Simunek, Adam, Blazek, Des Fours* and *Gratzinger*, where it held that article 26 of the Covenant had been violated and that it would be incompatible with the Covenant to require the authors to meet the condition of Czech citizenship for the restitution of their property or alternatively for its compensation.<sup>5</sup> The Committee considers that the principle established in the above cases equally applies to the author's husband in the present communication and that the application to him of the citizenship requirement laid down in Act No. 87/1991 violated his and the author's rights under article 26 of the Covenant.

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 recognized 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 recognized 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.

[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.]

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<sup>5</sup> Communications No. 516/1992, *Simunek v. Czech Republic*, Views adopted on 19 July 1995, para. 11.6; No.586/1994, *Adam v. Czech Republic*, Views adopted on 23 July 1996, para. 12.6; No. 857/1999, *Blazek v. Czech Republic*, Views adopted on 12 July 2001, para. 5.8; No. 747/1997, *Des Fours v. Czech Republic*, Views adopted on 30 October 2001, para. 8.3; No. 1463/2006, *Gratzinger v. the Czech Republic*, Views adopted on 25 October 2007, para. 7.4; and No. 1497/2006, *Preiss v. Czech Republic*, Views adopted on 17 July 2008, para. 7.3.