



## International Covenant on Civil and Political Rights

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### Human Rights Committee

#### Communication No. 1847/2008

#### Views adopted by the Committee at its 103rd session, 17 October to 4 November 2011

<i>Submitted by:</i>	Miroslav Klain and Eva Klain (not represented by counsel)
<i>Alleged victim:</i>	The authors
<i>State party:</i>	Czech Republic
<i>Date of communication:</i>	16 March 2006 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 19 December 2008 (not issued in document form)
<i>Date of adoption of Views:</i>	1 November 2011
<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 and abuse of the right to submit a communication
<i>Substantive issues:</i>	Equality before the law; equal protection of the law
<i>Article of the Covenant:</i>	26
<i>Articles of the Optional Protocol:</i>	3 and 5, paragraph 2 (b)

On 1 November 2011, 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. 1847/2008.

[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 (103rd session)**

concerning

#### **Communication No. 1847/2008\*\***

*Submitted by:* Miroslav Klain and Eva Klain (not represented by counsel)

*Alleged victim:* The authors

*State party:* Czech Republic

*Date of communication:* 16 March 2006 (initial submission)

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

*Meeting on* 1 November 2011,

*Having concluded* its consideration of communication No. 1847/2008, submitted to the Human Rights Committee by Mr. Miroslav Klain and Ms. Eva Klain 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 authors of the communication are Miroslav Klain and Eva Klain, who are both naturalized American citizens residing in the United States of America, born on 25 August 1927 and 24 February 1937, respectively, in Czechoslovakia. They claim to be victims of a

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\*\* The following members of the Committee participated in the consideration of the present communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanut, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Mr. Fabian Omar Salvioli, Mr. Krister Thelin and Ms. Margo Waterval.

Pursuant to rule 91 of the Committee's rules of procedure, Committee member Mr. Gerald L. Neuman did not participate in the adoption of the present decision.

The text of an individual opinion signed by Committee member Mr. Krister Thelin is appended to the present Views.

violation by the Czech Republic of article 26 of the International Covenant on Civil and Political Rights.<sup>1</sup> They are not represented by counsel.

### **The facts as submitted by the authors**

2.1 The authors and their two children left Czechoslovakia in November 1968 and sought refuge in the United States of America, where they eventually obtained United States citizenship in 1978, thereby losing their Czechoslovak citizenship pursuant to the Naturalisation Treaty of 1928. Since the authors left Czechoslovakia without permission, they were sentenced, in absentia, to two and a half years' and one year's imprisonment, respectively, and had their property confiscated. In 1990, they were fully rehabilitated but could not reclaim their property because of the subsequent restitution law No. 87/1991. The authors' property includes movables and a family dwelling No. 11 and building parcels Nos. 1872 and 1873/2 situated in the Lhotka cadastral area of the State party.<sup>2</sup>

2.2 The authors could not claim restitution of their property on the basis of Czech law No. 87/1991 on extrajudicial rehabilitation.<sup>3</sup> The authors argue that they did not pursue any domestic remedies based on their understanding that no courts would order restitution in their favour unless they reacquired their Czech citizenship. As a result, the authors applied and eventually obtained Czech citizenship towards the end of 2004. The authors claim that no effective domestic remedies are available following the decision of the Constitutional Court of June 1997.<sup>4</sup>

### **The complaint**

3. The authors claim that the Czech Republic violated their rights under article 26 of the Covenant in its application of Law No. 87/1991, which requires Czech citizenship for property restitution.

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

4.1 On 3 June 2009, the State party submitted its observations on admissibility and merits. It further confirmed the facts as submitted by the authors, that the authors lost their Czechoslovak citizenship when they acquired American citizenship on 20 October 1978, and that they reacquired their Czech citizenship by declaration on 29 June 2004.

4.2 The State party submits that the communication should be found inadmissible for non-exhaustion of domestic remedies under articles 2 and 5, paragraph 2 (b), of the Optional Protocol. The State party recalls that the purpose of article 5, paragraph 2 (b), of

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<sup>1</sup> The Optional Protocol entered into force for the Czech Republic on 1 January 1993, as a consequence of the notification by the Czech Republic of succession to the ratification of the Optional Protocol by the Czech and Slovak Federal Republic on 12 March 1991.

<sup>2</sup> The address of the dwelling house has now changed to Na dlouhe mezi 11/2, Lhotka 142 00 Praha 411.

<sup>3</sup> Law No. 87/1991 on extrajudicial rehabilitation was adopted by the Czech Government, spelling out the conditions for recovery of property for persons whose property had been confiscated under the Communist rule. Under the Act, in order to claim entitlement to recover property, a person claiming restitution of the property had to be, inter alia, (a) a Czech citizen, and (b) a permanent resident in the Czech Republic. These requirements had to be fulfilled during the time period in which restitution claims could be filed, namely between 1 April and 1 October 1991. A judgment by the Czech Constitutional Court of 12 July 1994 (No. 164/1994) 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.

<sup>4</sup> See the decision of the Constitutional Court in the case of *Jan Dlouhy v. Czech Republic* passed on 4 June 1997.

the Optional Protocol is to afford the State parties an opportunity of preventing or putting right the violations of the Covenant alleged against them before those allegations are submitted for the Committee's consideration. The State party observes that the authors are claiming the restitution of their confiscated property after a period of more than 40 years from the date of its acquisition and, had the authors resorted to the Czech courts, the courts could have been afforded the opportunity to examine the merits of their assertions on discrimination within the ambit of article 26 of the Covenant. The State party submits that since the authors have not pursued any of the domestic remedies available to them such as approaching all levels of the court system up to the Constitutional Court. The State party, therefore, argues that the communication should be declared inadmissible.

4.3 The State party further submits that the communication be found inadmissible for abuse of the right of submission under article 3 of the Optional Protocol. The State party recalls the Committee's jurisprudence according to which the Optional Protocol does not set forth any fixed time limits and that a mere delay in submitting a communication in itself does not constitute an abuse of the right of its submission. The State party, however, submits that the authors submitted their communication on 16 March 2006, which the State party argues is almost eleven years after the expiration of the prescribed time limit in the law of restitution, as interpreted by the Constitutional Court, i.e., 1 May 1995. The State party argues that this delay is unreasonable considering that the authors have not presented any reasonable justification for the delay. The State party further observes that it shares the view expressed by a Committee member in his dissenting opinion in similar cases against the Czech Republic, according to which in the absence of an explicit definition of the notion of abuse of the right of submission of a communication in the Optional Protocol, the Committee itself is called upon to define the time limits within which communications should be submitted.<sup>5</sup>

4.4 On the merits, the State party recalls the Committee's jurisprudence on article 26, which asserts that a differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26 of the Covenant.<sup>6</sup> The State party argues that the authors failed to comply with the legal citizenship requirement and, therefore, were not entitled to restitution of their property pursuant to the legislation in force. Finally, the State party argues that article 26 of the Covenant does not suggest an obligation on the part of the State party to provide redress for the injustices that occurred during the previous regime at a time that the Covenant did not exist. The State party submits that its legislature should enjoy a wide range of discretion in determining the factual areas of past injustices that they seek to address and the prescriptions for such remedies.

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

5.1 On 16 July 2009, the authors submitted their comments on the State party's observations on admissibility and merits. With regard to the exhaustion of domestic remedies, the authors argue that, following the finding by the Constitutional Court in June 1997 that denial of restitution to those persons who lost their Czech citizenship was legitimate, no effective remedies are available in the State party. They further argue that they could have just spent money on lawyers for no reason if they had decided to go to court because they do not know of any single case where a court ordered that an American citizen of Czech origin should have his property restituted.

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<sup>5</sup> See dissenting opinion by Mr. Abdelfattah Amor in communication No. 1533/2006, *Ondračka and Ondračková v. Czech Republic*.

<sup>6</sup> See, for example, communication No. 182/1984, *Zwaan-de Vries v. the Netherlands*, Views adopted on 9 April 1987, paragraphs 12.1–13.

5.2 With regard to the authors' belated submission of their communication, they argue that the Constitutional Court's decision being final on the issue of citizenship and restitution, they had come to the conclusion that they could not obtain restitution unless they reacquired their Czech citizenship. In this regard, they applied for citizenship, which they obtained towards the end of 2004. The authors argue that it is only after one year and a few weeks after they obtained their Czech citizenship that they decided to submit a communication to the Committee. They, therefore, reject the State party's assertion that the delay is almost eleven years.

5.3 With regard to the merits, the authors submit that their right to full restitution of their property has been violated following the application of a law that discriminated on the basis of citizenship. They submit that the legislation is illegal and unconstitutional.

#### **Additional submission by the State party**

6. The State party further claims, without any elaboration, that the communication should be declared inadmissible *ratione temporis* by the Committee.

#### **Issues and proceedings before the Committee**

##### *Consideration of admissibility*

7.1 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.

7.2 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.

7.3 The Committee has noted the State party's argument that the communication should be considered inadmissible on the ground of non-exhaustion of domestic remedies. The Committee notes that the State party contends that the authors have decided not to use domestic remedies available to them in order for courts to examine the merits of their assertions in the context of non-discrimination under article 26 of the Covenant. However, the Committee recalls that it is only remedies that are both available and effective in a State party that must be exhausted. In this regard, the Committee reiterates that when the highest domestic court has ruled on the matter in dispute, thereby eliminating any prospect that a remedy before domestic courts may succeed, the author is not obliged to exhaust domestic remedies, which are in fact fruitless, for the purposes of the Optional Protocol.<sup>7</sup> The Committee observes that, after decision No. 185/1997 by the Constitutional Court of the Czech Republic, restitution was contingent upon proof of citizenship. The law No. 87/1991 on restitution prescribed a period for making claims which, as subsequently established by the Constitutional Court, expired in 1995. It, therefore, follows that the authors did not have a remedy after reacquiring their citizenship because, in order to benefit from the restitution laws, they needed to have been citizens during a specific and defined period of time before 2004, when they obtained Czech citizenship. Therefore, the Committee concludes that no effective remedies were available to the authors.

7.4 The Committee has also noted the State party's argument that the communication should be considered inadmissible on the basis that it constitutes an abuse of the right to submit communications under article 3 of the Optional Protocol. The State party contends that the authors waited for nearly eleven years after the time limit that was set by the

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<sup>7</sup> Communication No. 1095/2002, *Gomariz Valera v. Spain*, Views adopted on 22 July 2005, para. 6.4.

interpretation of the Constitutional Court of the law on restitution in order to submit a communication to the Committee. The State party therefore argues that, in view of the excessive delay in submitting the communication to the Committee and the absence of a justifiable reason, the communication should be declared inadmissible on the ground of abuse of the right of submission. However, the authors attribute the delay to the procedure undertaken in order to reacquire their Czech citizenship, which they argue was a condition for the recovery of their property. The authors thus argue that they approached the Committee a year and a few weeks after they reacquired their Czech citizenship in 2004, and not almost eleven years as submitted by the State party. The Committee notes that the State party calculates the delay from 1995, which was the time limit, as established by the decision of the Constitutional Court, set for individuals with Czech citizenship to invoke restitution laws and obtain restitution.

7.5 The Committee observes that the Optional Protocol does not establish time limits within which a communication should be submitted, and that the period of time elapsing before doing so, other than in exceptional circumstances, does not in itself constitute an abuse of the right of submission of a communication.<sup>8</sup> It is clear that, in determining what constitutes excessive delay, each case must be decided on its own facts. In the present case, the authors were stripped of their Czechoslovak citizenship when they left Czechoslovakia and left for the United States of America in 1968. Thus, during the time between the enactment of the laws on restitution and the year 2004, the authors were American citizens. The authors argue that the delay in submitting the communication was engendered by their knowledge and understanding, seemingly uncontested by the State Party, that there was no hope for them to obtain restitution, unless they reacquired their Czech citizenship, which they did in 2004.

7.6 The Committee observes that according to its new rule of procedure 96 (c), applicable to communications received by the Committee after 1 January 2012, the Committee shall ascertain that the communication does not constitute an abuse of the right of submission. An abuse of the right of submission is not, in principle, a basis of a decision of inadmissibility *ratione temporis* on grounds of delay in submission. However, a communication may constitute an abuse of the right of submission when it is submitted 5 years from the exhaustion of domestic remedies by the author of the communication, or, where applicable, after 3 years from the conclusion of another procedure of international investigation or settlement, unless there are reasons justifying the delay taking into account all the circumstances of the communication. In the meantime, the Committee applies its jurisprudence which allows for finding an abuse where an exceptionally long period of time has elapsed before the presentation of the communication, without sufficient justification.<sup>9</sup> In the circumstances of the instant case, the Committee considers that the delay, taking into account the authors' efforts and commitment in reacquiring Czech citizenship in order to pursue their claims, and despite the fact that no domestic action was taken by the authors as Czech citizens, does not constitute an abuse of the right of submission under article 3 of the Optional Protocol.

7.7 The Committee further notes the State party's objection to the admissibility of the present communication *ratione temporis*. The Committee recalls its previous jurisprudence and considers that, although the confiscations took place before the entry into force of the Covenant and of the Optional Protocol for the Czech Republic, the legislation that excludes

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<sup>8</sup> See, for example, communications No. 1223/2003, *Tsarjov v. Estonia*, Views adopted on 26 October 2007, paragraph 6.3; No. 1434/2005, *Fillacier v. France*, decision of inadmissibility adopted on 28 April 2006, paragraph 4.3; and No. 787/1997, *Gobin v. Mauritius*, decision of inadmissibility adopted on 16 July 2001, paragraph 6.3.

<sup>9</sup> *Ibid.*

claimants who are not Czech citizens has continuing consequences subsequent to the entry into force of the Optional Protocol for the Czech Republic, which could entail discrimination, in violation of article 26 of the Covenant.<sup>10</sup>

7.8 In the absence of any further objections to the admissibility of the communication, the Committee declares it admissible, in so far as it may raise issues under article 26 of the Covenant, and proceeds to its consideration on the merits.

*Consideration of the merits*

8.1 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.

8.2 The issue before the Committee, as it has been presented by the parties, is whether the application to the author of Law No. 87/1991 on extrajudicial rehabilitation amounted to discrimination, in violation of article 26 of the Covenant. The Committee reiterates its jurisprudence that not all differentiation 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.<sup>11</sup>

8.3 The Committee recalls its views in the case *Des Fours Walderode*<sup>12</sup> 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 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 case, and many others, equally applies to the authors of the present communication. The Committee, therefore, concludes that the application to the authors of the citizenship requirement under Law No. 87/1991 violates their rights under article 26 of the Covenant.

9. 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 Covenant.

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, including compensation, if the properties cannot be returned. 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.

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<sup>10</sup> See, communication No. 1615/2007, *Zavrel v. Czech Republic*, Views adopted on 27 July 2010, paragraph 8.6.

<sup>11</sup> See communication No. 182/1984, *Zwaan-de Vries v. The Netherlands*, Views adopted on 9 April 1987, paragraph 13.

<sup>12</sup> Communication No. 747/1997, *Des Fours Walderode v. Czech Republic*, Views adopted on 30 October 2001, paras. 8.3–8.4. See also communications 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. 945/2000, *Marik v. Czech Republic*, Views adopted on 26 July 2005, para. 6.4; No. 1054/2002, *Kriz v. Czech Republic*, Views adopted on 1 November 2005, para. 7.3; No. 1463/2006, *Gratzinger v. Czech Republic*, Views adopted on 25 October 2007, para. 7.5; No. 1533/2006, *Ondracka and Ondracka v. Czech Republic*, Views adopted on 31 October 2007, para. 7.3.

11. 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 that 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. The State party is also requested to publish the Committee's Views and to have them translated into the official language and widely distributed.

[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. Krister Thelin (dissenting)

The majority has found the communication to be admissible. I disagree. In my view the communication should have been deemed inadmissible and the Committee's decision in this respect should instead read as follows.

7.1 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.

7.2 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.

7.3 The Committee notes the State party's argument that the communication should be considered inadmissible on the ground of non-exhaustion of domestic remedies under articles 2, as read with 5(2) (b), of the Optional Protocol, as the authors have not raised the issue before national authorities.

7.4 The Committee notes that the authors' only argument for non-exhaustion of remedies is that, with the Constitutional Court's decision of June 1997 being final on the issue of citizenship and restitution, it is futile to exhaust domestic remedies. Yet, according to the authors, they acquired Czech citizenship in 2004, in order obviously to pursue their claim, contending that there was no hope for them to obtain restitution, unless they reacquired their Czech citizenship. However, no such claim, as evidenced by the information available, was ever submitted to any Czech court or other domestic authority and the authors have consequently never raised in any domestic proceedings the issue of discrimination against them in relation to the restitution of their property.<sup>13</sup>

7.5 The Committee, therefore, for reasons stated in the preceding paragraph, concludes that the communication is inadmissible for failure to exhaust domestic remedies pursuant to article 5, paragraph 2 (b), of the Optional Protocol.

7.6 In light of the conclusion reached by the Committee, it does not find it necessary to refer to the arguments of the State party related to the authors' abuse of the right of submission and the inadmissibility of the communication *ratione temporis*.

8. The Human Rights Committee therefore decides that:

(a) The communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol; and

(b) This decision shall be communicated to the State party and to the authors.

[signed] Krister Thelin

[Done 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.]

<sup>13</sup> See communication No. 1515/2006, *Herbert Schmidl v. Czech Republic*, Views adopted on 1 April 2008.