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Fifty-seventh session

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

- Fifty-seventh session -

Communication No. 586/1994*

Submitted by: Joseph Frank Adam [represented by counsel]

Alleged victim: The author

State party: The Czech Republic

Date of communication: 14 March 1994 (initial submission)

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

Meeting on 23 July 1996,

Having concluded its consideration of communication No. 589/1994, submitted to the Human Rights Committee by Mr. Joseph Frank Adam 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, his counsel and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Joseph Frank Adam, an Australian citizen, born in Australia of Czech parents, residing in Melbourne, Australia. He submits the communication on his own behalf and on that of his two brothers, John and Louis. He claims that they are victims of a violation of article 26 of the International Covenant on Civil and Political Rights by the Czech Republic. The Optional Protocol entered into force for the Czech Republic on 12 June 1991. **(a)**

The facts as submitted by the authors

2.1 The author's father, Vlatislav Adam, was a Czech citizen, whose property and business were confiscated by the Czechoslovak Government in 1949. Mr. Adam fled the country and eventually moved to Australia, where his three sons, including the author of the communication, were born. In 1985, Vlatislav Adam died and, in his last will and testament, left his Czech property to his sons. Since then, the sons have been trying in vain to have their property returned to them.

2.2 In 1991, the Czech and Slovak Republic enacted a law rehabilitating Czech citizens who had left the country under Communist pressure and providing for restitution of their property or compensation for the loss thereof. On 6 December 1991, the author and his brothers, through Czech solicitors, submitted a claim for restitution of their property. Their claim was rejected on the grounds that they did not fulfil the then applicable dual requirement of Act 87/91 that applicants have Czech citizenship and be permanent residents in the Czech Republic.

2.3 Since the rejection of their claim, the author has on several occasions petitioned the Czech authorities, explaining his situation and seeking a solution, all to no avail. The authorities in their replies refer to the legislation in force and argue that the provisions of the law, limiting restitution and compensation to Czech citizens are necessary and apply uniformly to all potential claimants.

The complaint

3. The author claims that the application of the provision of the law, that property be returned or its loss be compensated only when claimants are Czech citizens, makes him and his brothers victims of discrimination under article 26 of the Covenant.

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

4.1 On 23 August 1994, the communication was transmitted to the State party under rule 91 of the Committee's rules of procedure.

4.2 In its submission dated 17 October 1994, the State party states that the remedies in civil proceedings such as that applicable in the case of Mr. Adam are regulated by Act No. 99/1963, by the Code of Civil Procedure as amended, in particular by Act No. 519/1991 and Act No. 263/1992.

4.3 The State party quotes the texts of several sections of the law, without, however, explaining how the author should have availed himself of those provisions. It concludes that since 1 July 1993, Act No. 182/1993, on the Constitutional Court, stipulates the citizens' right to appeal also to the Constitutional Court of the Czech Republic. Finally, Mr. Adam did not make use of the possibility of filing a claim before the Constitutional Court.

5.1 By letter of 7 November 1994, the author informs the Committee that the State party is trying to circumvent his rights by placing his property and business on sale.

5.2 By letter of 5 February 1995, the author contests the relevance of the State party's general information and reiterates that his lawyers in Czechoslovakia have been trying to obtain his property since his father died in 1985. He submits that as long as Czech law requires claimants to be Czech citizens, there is no way that he can successfully claim his father's property in the Czech courts.

The Committee's decision on admissibility

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee observed ratione materiae that although the author's claims relate to property rights, which are not themselves protected in the Covenant, he also alleges that the confiscations under prior Czechoslovak governments were discriminatory and that the new legislation of the Czech Republic discriminates against persons who are not Czech citizens. Therefore, the facts of the communication appear to raise an issue under article 26 of the Covenant.

6.3 The Committee has also considered whether the violations alleged can be examined ratione temporis. It notes that although the confiscations took place before the entry into force of the Covenant and of the Optional Protocol for the Czech Republic, the new legislation that excludes 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.

6.4 Article 5, paragraph 2 (a), of the Optional Protocol precludes the Committee from considering a communication if the same matter is being examined under another procedure of international investigation or settlement. In this connection, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

6.5 With respect to the requirement of exhaustion of domestic remedies, the Committee recalls that only such remedies have to be exhausted which are both available and effective. The applicable law on confiscated property does not allow for restoration or compensation to the author. Moreover, the Committee notes that the author has been trying to recover his property since his father died in 1985 and that the application of domestic remedies can be deemed, in the circumstances, unreasonably prolonged.

7. Based on those considerations, the Human Rights Committee decided on 16 March 1995 that the communication was admissible inasmuch as it may raise issues under article 26 of the Covenant.

Observations of the State party

8.1 By note verbale of 10 November 1995, the State party reiterates its objections to the admissibility of the communication, in particular that the author has not availed himself of all national legal remedies.

8.2 It argues that the author is an Australian citizen permanently resident in Australia. As to the alleged confiscation of his father's property in 1949, the State party explains that the Decree of the President of the Republic No. 5/1945 did not represent the conveyance of the ownership title to the State but only restricted the owner in exercising his ownership right.

8.3 The author's father, Vlatislav Adam, was a citizen of Czechoslovakia and left the country for Australia, where the author was born. If indeed Vlatislav Adam willed his Czech property to his sons by virtue of his testament, it is not clear whether he owned any Czech property in 1985, and the author has not explained what steps, if any, he has taken to acquire the inheritance.

8.4 In 1991 the Czech and Slovak Federal Republic adopted a law (Act No. 87/1991) on extrajudicial rehabilitations which rehabilitates Czech citizens who left the country under Communist oppression, and stipulates the restitution of their property and compensation for their loss. On 6 December 1991, the author and his brothers claimed the restitution of their property. Their claim was rejected because they were not persons entitled to the recovery of property pursuant to the Extrajudicial Rehabilitation Act, since they did not satisfy the conditions of citizenship of the Czech Republic and of permanent residence there. The author failed to invoke remedies available against the decision denying him restitution. Moreover, the author failed to observe the legal six-month term to claim his property, the statute of limitations having ended on 1 October 1991. Nevertheless, pursuant to article 5, paragraph 4, of the Extrajudicial Rehabilitation Act, the author could have filed his claims in court until 1 April 1992, but he did not do so.

8.5 The author explains that his attorney felt that there were no effective remedies and that was why they did not pursue their appeals. That subjective assessment is irrelevant to the objective existence of remedies. In particular, he could have lodged a complaint with the Constitutional Court.

8.6 Czech constitutional law, including the Charter of Fundamental Rights and Freedoms, protects the right to own property and guarantees inheritance. Expropriation is possible only in the public interest and on the basis of law, and is subject to compensation.

8.7 The Extrajudicial Rehabilitation Act was amended in order to eliminate the requirement of permanent residence; that occurred pursuant to a finding of the Constitutional Court of the Czech Republic of 12 July 1994. Moreover, in cases in which the real estate cannot be surrendered, financial compensation is available.

8.8 Articles 1 and 3 of the Charter of Fundamental Rights and Freedoms stipulate equality in the enjoyment of rights and prohibits discrimination. The right to judicial protection is regulated in article 36 of the Charter. The Constitutional Court decides about the abrogation of laws or of their individual provisions if they are in contradiction with a constitutional law or international treaty. A natural person or legal entity is entitled to file a constitutional complaint.

8.9 The author not only failed to invoke the relevant provisions of the Extrajudicial Rehabilitation Act in a timely fashion. He could also have lodged a claim to domestic judicial authorities based on the direct applicability of the International Covenant on Civil and Political Rights, with reference to article 10 of the Constitution, article 36 of the Charter of Fundamental Rights and Freedoms, articles 72 and 74 of the Constitutional Court Act, and article 3 of the Civil Procedure Code. If the author had availed himself of those procedures and if he had not been satisfied with the result, he could still have sought review of legal regulations pursuant to the Constitutional Court Act.

9.1 The State party also endeavours to explain the broader political and legal circumstances of the case and contends that the author's presentation of the facts is misleading. After the democratization process begun in November 1989, the Czech and Slovak Republic, and subsequently the Czech Republic, made a considerable effort to remove some of the property injustices caused by the communist regime. The endeavour to return property, as stipulated in the Rehabilitation Act, was in part a voluntary and moral act of the Government and not a duty or legal obligation. "It is also necessary to point out the fact that it was not possible and, with regard to the protection of the justified interests of the citizens of the present Czech Republic, even undesirable, to remove all injuries caused by the past regime over a period of forty years."

9.2 The precondition of citizenship for restitution or compensation should not be interpreted as a violation of the prohibition of discrimination pursuant to article 26 of the Covenant. "The possibility of explicit restriction to acquiring the ownership of certain property by only some persons is contained in article 11, paragraph 2, of the Charter of Fundamental Rights and Freedoms. This article states that the law may determine that certain property may only be owned by citizens or legal entities having their seat in the Czech and Slovak Federal Republic. In this respect, the Charter speaks of citizens of the Czech and Slovak Federal Republic, and

after January 1, 1993, of citizens of the Czech Republic."

9.3 The Czech Republic considers the restriction to exercising rights of ownership by imposing the condition of citizenship to be legitimate. In this connection, it refers not only to article 3, paragraph 1, of the Charter of Fundamental Rights and Freedoms, containing the non-discrimination clause, but above all to the relevant clauses of international human rights treaties.

The author's comments

10.1 As to the facts of the claim, the author explains that in January 1949 his father was ordered out of his business, which was confiscated. He had to hand over the books and the bank accounts and was not even able to take his own personal belongings. As to his departure from Czechoslovakia, he was not able to emigrate legally but had to cross the border illegally into West Germany, where he remained in a refugee camp for a year before being able to emigrate to Australia.

10.2 He disputes the State party's contention that he did not avail himself of domestic remedies. He reiterates that he himself and his attorneys in Prague have tried to assert the claim to inheritance since his father died, in 1985, without success. In December 1991, he and his brothers submitted their claim, which was rejected for lack of citizenship and permanent residence. Moreover, their claim was by virtue of inheritance. He further complains about unreasonably prolonged proceedings in the Czech Republic, in particular that whereas their letters to the Czech Government reached the Czech authorities within a week, the replies took 3 to 4 months.

10.3 As to their Czech citizenship, they claim that the consulate in Australia informed them that if both mother and father were Czech citizens, the children were automatically Czech citizens. However, the Czech Government subsequently denied that interpretation of the law.

Review of admissibility

11.1 The State party has requested that the Committee revise its decision on admissibility on the grounds that the author has not exhausted domestic remedies. The Committee has taken into consideration all arguments presented by the State party and the explanations given by the author. In the circumstances of this case, considering that the author is abroad and that his lawyers are in the Czech Republic, it would seem that the imposition of a strict statute of limitations for lodgings claims by persons abroad is unreasonable. In the author's case, the Committee has taken into account the circumstance that he has been trying to assert his inheritance claim since 1985 and that his Prague attorneys have been unsuccessful, ultimately not because of the statute of limitations but because the Rehabilitation Act, as amended, stipulates that only citizens can claim restitution or compensation. Since the author, according to his last submission, which has not been disputed by the State party (para. 10.3) is not a Czech citizen, he cannot invoke the Rehabilitation Act in order to obtain the return of his father's property.

11.2 In the absence of legislation enabling the author to claim restitution, recourse to the Constitutional Court cannot be considered an available and effective remedy for purposes of article 5, paragraph 2 (b), of the Optional Protocol. In the circumstances of this case, such a remedy must be considered as an extraordinary remedy, since the right being challenged is not a constitutional right to restitution as such, bearing in mind that the Czech and Slovak legislature considered the 1991 Rehabilitation Act to be a measure of moral rehabilitation rather than a legal obligation (para. 9.1). Moreover, the State has argued that it is compatible with the Czech Constitution and in keeping with Czech public policy to restrict the ownership of property to citizens.

11.3 Under these circumstances, the Committee finds no reason to set aside its decision on admissibility of 16 March 1995.

Examination of the merits

12.1 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.

12.2 The communication was declared admissible only insofar as it may raise issues under article 26 of the Covenant. As the Committee has already explained in its decision on admissibility (para. 6.2 above), the right to property, as such, is not protected under the Covenant. However, a confiscation of private property or the failure of a State party to pay compensation for such confiscation could still entail a breach of the Covenant if the relevant act or omission was based on discriminatory grounds, in violation of article 26 of the Covenant.

12.3 The issue before the Committee is whether the application of Act 87/1991 to the author and his brothers entailed a violation of their right to equality before the law and to the equal protection of the law. The Committee observes that the confiscations themselves are not here at issue but rather the denial of restitution to the author and his brothers, whereas other claimants under the Act have recovered their properties or received compensation therefor.

12.4 In the instant case, the author has been affected by the exclusionary effect of the requirement in Act 87/1991 that claimants be Czech citizens. The question before the Committee, therefore, is whether the precondition to restitution or compensation is compatible with the non-discrimination requirement of article 26 of the Covenant. In this context, the Committee reiterates its jurisprudence that not all differentiation in treatment can be deemed to be discriminatory under article 26 of the Covenant. **(b)** A differentiation which is compatible with the provisions of the Covenant and is based on reasonable grounds does not amount to prohibited discrimination within the meaning of article 26.

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

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

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

12.8 In the light of the above considerations, the Committee concludes that Act 87/1991 and the continued practice of non-restitution to non-citizens of the Czech Republic have had effects

upon the author and his brothers that violate their rights under article 26 of the Covenant.

13.1 The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the denial of restitution or compensation to the author and his brothers constitutes a violation of article 26 of the International Covenant on Civil and Political Rights.

13.2 In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author and his brothers with an effective remedy, which may be compensation if the property in question cannot be returned. The Committee further encourages the State party to review its relevant legislation to ensure that neither the law itself nor its application is discriminatory.

13.3 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 and 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 90 days, information about the measures taken to give effect to the Committee's views.

* The text of an individual opinion of one Committee member is appended.

[Adopted in English, French and Spanish, the English text being the original version.]

Notes

a. The Czech and Slovak Federal Republic ratified the Optional Protocol in March 1991, but on 31 December 1992 the Czech and Slovak Federal Republic ceased to exist. On 22 February 1993, the Czech Republic notified its succession to the Covenant and the Optional Protocol.

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

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

Appendix

[Original: English]

Individual opinion of Committee member Nisuke Ando

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

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

Second, consequently, it is not impossible for a State party to limit the ownership of immovable

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

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

(Signed) Nisuke Ando