UNITED NATIONS

CCPR

International covenant on civil and political rights

Distr.
RESTRICTED*

CCPR/C/81/D/1136/2002
25 August 2004

Original: ENGLISH

HUMAN RIGHTS COMMITTEE
Eighty-first session
5 – 30 July 2004

VIEWS

Communication No. 1136/2002

Submitted by:	Mr. Vjatšeslav Borzov (not represented by counsel)
Alleged victim:	The author
State party:	Estonia
Date of communication:	2 November 2001 (initial submission)
Document references:	Special Rapporteur's rule 91 decision, transmitted to the State party on 18 November 2002 (not issued in document form)
Date of adoption of Views:	26 July 2004

On 26 July 2004 the Human Rights Committee adopted the annexed draft as the Committee's Views, under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1136/2002. The text of the Views is appended to the present document.

[ANNEX]

* Made public by decision of the Human Rights Committee.

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

Eighty-first session

concerning

Communication No. 1136/2002[**]

Submitted by: Mr. Vjatšeslav Borzov (not represented by counsel)

Alleged victim: The author

State party: Estonia

Date of communication: 2 November 2001 (initial submission)

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

Meeting on 26 July 2004,

Having concluded its consideration of communication No. 1136/2002, submitted to the Human Rights Committee by Mr. Vjatšeslav Borzov 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 Mr. Vjatšeslav Borzov, allegedly stateless, born in Kurganinsk, Russia, on 9 August 1942 and currently residing in Estonia. The author claims to be a victim of violations by Estonia of article 26 of the Covenant. He is not represented by counsel.

The facts as presented by the author

2.1 From 1962 to 1967, the author attended the Sevastopol Higher Navy College in the specialty of military electrochemical engineer. After graduation, he served in Kamchatka

[**] The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Franco Depasquale, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

until 1976 and thereafter in Tallinn as head of a military factory until 1986. On 10 November 1986, the author was released from service with rank of captain due to illness. The author has worked, since 1988, as a head of department in a private company, and he is married to a naturalized Estonian woman. In 1991, Estonia achieved independence.

2.2 On 28 February 1994, the author applied for Estonian citizenship. In 1994, an agreement between Estonia and the Russian Federation entered into force which concerned the withdrawal of troops stationed on the former's territory (the 1994 treaty). In 1995, the author obtained an Estonian residence permit, pursuant to the Aliens Act's provisions concerning persons who had settled in Estonia prior to 1990. In 1996, an agreement between Estonia and the Russian Federation entered into force, concerning "regulation of issues of social guarantees of retired officers of the armed forces of the Russian Federation in the territory of the Republic of Estonia" (the 1996 treaty). Pursuant to the 1996 treaty, the author's pension has been paid by the Russian Federation. Following delays occasioned by deficiencies of archive materials, on 29 September 1998, the Estonian Government, by Order No. 931-k, refused the application. The refusal was based on section 8 of the Citizenship Act of 1938, as well as section 32 of the Citizenship Act of 1995 which precluded citizenship for a career military officer in the armed forces of a foreign country who had been discharged or retired therefrom.

2.3 On 23 April 1999, the Tallinn District Court (Administrative Section) rejected the author's appeal against the refusal, holding that while the 1938 Act (which was applicable to the author's case) did not contain the specific exemption found in section 32 the 1995 Act, the Government was within its powers to reject the application. On 7 June 1999, the Tallinn Court of Appeal allowed the author's appeal against the District Court's decision and declared the Government's refusal of the authors' application to be unlawful. The Court considered that in simply citing a general provision of law rather than justifying the individual basis on which the author's application was refused, the Government had insufficiently reasoned the decision and left it impossible to ascertain whether the author's equality rights had been violated.

2.4 On 22 September 1999, upon reconsideration, the Government, by Decree 1001-k, again rejected the application, for reasons of national security. The order explicitly took into account the author's age, his training from 1962 to 1967, his length of service in the armed forces of a "foreign country" from 1967 to 1986, the fact that in 1986 he was assigned to the reserve as a captain, and that he was a military pensioner under article 2, clause 3, of the 1996 treaty pursuant to which his pension was paid by the Russian Federation.

2.5 On 4 October 2000, the Tallinn Administrative Court rejected, at first instance, the author's appeal against the new refusal of citizenship. The Court found that the author had not been refused citizenship because he had actually acted against the Estonian state and its security in view of his personal circumstances. Rather, for the reasons cited, the author was in a position where he could act against Estonian national security. On 25 January 2001, the Tallinn Court of Appeal rejected the author's appeal. The Court, finding the Citizenship Act as amended in 1999 to be the applicable law in the case, found that the Government had properly come to the conclusion that, for the reasons cited, the author could be refused citizenship on national security grounds. It observed that there was no need to make out a case of a specific individual threat posed by the author, as he had not been accused of engaging in actual activities against the Estonian state and its security.

2.6 The author filed a further appeal in cassation to the Supreme Court, arguing that the applicable law was in fact the 1938 Act, and that the Government's order refusing citizenship was insufficiently reasoned, as it simply referred to the law and listed factual circumstances. These circumstances did not, in his view, prove that he was a threat to national security. He also argued that the lower court had failed to assess whether the refusal was in fact discriminatorily based on his membership of a particular social group, in violation of article 12 of the Constitution. On 21 March 2001, the Appeals Selection Panel of the Supreme Court refused the author leave to appeal.

The complaint

3.1 The author argues that he has been the victim of discrimination on the basis of social origin, contrary to article 26 of the Covenant. He contends that section 21(1) of the Citizenship Act[1] imposes an unreasonable and unjustifiable restriction of rights on the grounds of a person's social position or origin. He argues that the law presumes that all foreigners who have served in armed forces pose a threat to Estonian national security, regardless of the individual features of the particular service or training in question. He argues that there is proof neither of a threat posed generally by military retirees, nor of such a threat posed by the author specifically. Indeed, the author points out that rather than his residence permit being annulled on national security grounds, he has been granted a five-year extension. The author also contends that refusal of citizenship on such grounds is in conflict with an alleged principle of international law pursuant to which persons cannot be considered to have served in a foreign military force if, prior to acquisition of citizenship, they served in armed forces of a country of which they were nationals.

3.2 The author argues that the discriminatory character of the Law is confirmed by section 21(2) of the Citizenship Act 1995, which provides that Estonian citizenship may be granted to "a person who has retired from the armed forces of a foreign state if the person has been married for at least five years to a person who acquired citizenship by birth" [rather than by naturalization] and if the marriage has not been dissolved. He argues that there is no rational reason why marriage to an Estonian by birth would reduce or eliminate a national security risk. Thus, he also sees himself as a victim of discrimination on the basis of the civil status of his spouse.

---

[1] Section 21(1) provides, in material part:
§ 21. Refusal to grant or refusal for resumption of Estonian citizenship
(1) Estonian citizenship shall not be granted to or resumed by a person who:
…
2) does not observe the constitutional order and Acts of Estonia;
3) has acted against the Estonian state and its security;
4) has committed a criminal offence for which a punishment of imprisonment of more than one year was imposed and whose criminal record has not expired or who has been repeatedly punished under criminal procedure for intentionally committed criminal offences;
5) has been employed or is currently employed by foreign intelligence or security services;
6) has served as a professional member of the armed forces of a foreign state or who has been assigned to the reserve forces thereof or has retired therefrom, and nor shall Estonian citizenship be granted to or resumed by his or her spouse who entered Estonia due to a member of the armed forces being sent into service, the reserve or into retirement.

3.3 The author argues that, as a result of this legal position, there are some 200,000 persons comprising 15% of the population that are residing permanently in the State party but who remain stateless. As a result of the violation of article 26, the author seeks compensation for pecuniary and non-pecuniary damage as well as costs and expenses of the complaint.

The State party's submissions on the admissibility and merits of the communication

4.1 By submissions of 30 June 2003, the State party contested both the admissibility and the merits of the communication. The State party argues, as to admissibility, that the author has failed to exhaust domestic remedies, and that the communication is incompatible with the provisions of the Covenant as well as manifestly ill-founded. As to the merits, the State party argues that the facts disclose no violation of the Covenant.

4.2 The State party argues that the author did not submit a request to the administrative seeking the initiation of constitutional review proceedings to challenge the constitutionality of the Citizenship Act. The State party refers in this respect to a decision of 5 March 2001 where the Constitutional Review Chamber, on reference from the administrative court, declared provisions of the Aliens Act, pursuant to which the applicant had been refused a residence permit, to be unconstitutional. Additionally, with reference to a Supreme Court decision of 10 May 1996 concerning the Convention on the Rights of the Child, the State party observes that the Supreme Court exercises its capacity for striking down domestic legislation inconsistent with international human rights treaties.

4.3 The State party argues that, as equality before the law and protection against discrimination are rights protected by both the Constitution and the Covenant, a constitutional challenge would have afforded an available and effective remedy. In light of the Supreme Court's recent caselaw, the State party considers that such an application would have had a reasonable prospect of success and should have been pursued.

4.4 The State party argues, in addition, that the author did not pursue recourse to the Legal Chancellor to verify the non-conformity of an impugned law with the Constitution or Covenant. The Legal Chancellor has jurisdiction to propose a review of legislation regarded as unconstitutional, or, failing legislative action, to make a reference to this effect to the Supreme Court. The Supreme Court has "in most cases" granted such a reference. Accordingly, if the author regarded himself as incapable of lodging the relevant constitutional challenge, he could have applied to the Legal Chancellor to take such a step.

4.5 In any event, the State party argues that the author has not raised the particular claim of discrimination on the basis of his wife's status before the local courts, and this claim must accordingly be rejected for failure to exhaust domestic remedies.

4.6 The State party further contends that the communication is inadmissible for being incompatible with the provisions of the Covenant. It observes that the right to citizenship, much less a particular citizenship, is not contained in the Covenant, and that international law does not give rise to any obligation to grant unconditionally citizenship to a person permanently residing in the country. Rather, under international law all States have the right to determine who, and in which manner, can become a citizen. In so doing, the State also has the right and obligation to protect its population, including national security considerations.

The State party refers to the Committee's decision in V M R B v Canada,[2] where in finding no violation of article 18 or 19 in deporting an alien, the Committee observed that it was not for it to test a sovereign State's evaluation of an alien's security rating. Accordingly, the State argues that the refusal to grant citizenship on the grounds of national security does not, and cannot, interfere with any of the author's Covenant rights. The claim is thus inadmissible *ratione materiae* with the Covenant.

4.7 For the reasons developed below with respect to the merits of the communication, the State party also argues that the communication is manifestly ill-founded, as no violation of the Covenant is disclosed.

4.8 On the merits of the claim under article 26, the State party refers to the Committee's established jurisprudence that not all differences in treatment are discriminatory; rather, differences that are justified on a reasonable and objective basis are consistent with article 26. The State party argues that the exclusion in its law from citizenship of persons who have served as professional members of the armed forces of a foreign country is based on historical reasons, and must also be viewed in the light of the treaty with the Russian Federation concerning the status and rights of former military officers.

4.9 The State party explains that by 31 August 1994, troops of the Russian Federation were withdrawn pursuant to the 1994 treaty. The social and economic status of military pensioners was regulated by the separate 1996 treaty, pursuant to which military pensioners and family members received an Estonian residence permit on the basis of personal application and lists submitted by the Russian Federation. Under this agreement, the author was issued a residence permit entitling him to remain after the withdrawal of Russian troops. However, under the agreement, Estonia was not required to grant citizenship to persons who had served as professional members of the armed forces of a foreign country. As the author's situation is thus regulated by separate treaty, the State party argues that the Covenant is not applicable to the author.

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

4.11 The State party emphasizes that the author was not denied citizenship due to his social origin but due to particularized security considerations. With respect to the provision in law allowing the granting of citizenship to a spouse of an Estonian by birth, the State party argues that this is irrelevant to the present case as the author's application was denied on national security grounds alone. Even if the author's spouse were Estonian by birth, the Government would still have had to make the same national security assessment before granting citizenship. The State party invites the Committee to defer, as a question of fact and evidence,

[2] Case No 236/1987, Decision adopted on 18 July 1988.

to the assessment of the author's national security risk made by the Government and upheld by the courts.

4.12 The State party thus argues that the author was not treated unequally compared to other persons who have professionally served in foreign armed forces, as the law does not allow grant of citizenship to such persons. As no distinction was made on the basis of his wife's status (the decision being made on national security grounds), nor was the author subject to discrimination on the basis of social or family status. The State party argues that the refusal, taken according to law, was not arbitrary and has not had negative consequences for the author, who continues to live in Estonia with his family by virtue of residence permit. The further claim of a large-scale violation of rights in other cases should also be disregarded as an *actio popularis*.

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

5.1 By letter of 27 August 2003, the author responded to the State party's submissions. At the outset, he states that his complaint is not based upon the exemption provisions of the Citizenship Act concerning spouses who are Estonian by birth. Rather, he attacks article 21(1) of the Citizenship Act, which he argues is contrary to the Covenant as devoid of reasonable and objective foundation and being neither proportional nor in pursuit of a legitimate aim. In all proceedings at the domestic level, he unsuccessfully raised the allegedly discriminatory nature of this provision. The author contends that the courts' rejection of his discrimination claims illustrates that he was denied the equal protection of the law and show that he has no effective remedy.

5.2 As to the possibility of approaching the Legal Chancellor, the author observes that the Chancellor advised him to pursue judicial proceedings. As the author wished to challenge a specific decision concerning him, the issue did not concern legislation of general application, which is the extent of the Chancellor's mandate. In any event, the Chancellor must reject applications if the subject matter is, or has been, the subject of judicial proceedings.

5.3 On the substantive issues, the author argues with reference to the Committee's established jurisprudence that the protections of article 26 apply to all legislative action undertaken by the State party, including the Citizenship Act. He argues that he has been a victim of a violation of his right to equality before the law, as a number of (unspecified) persons in Estonia have received Estonian citizenship despite former service in the armed forces of a foreign state (including the then USSR). The denial in his case is accordingly arbitrary and not objective, in breach of the guarantee of equal application.

5.4 The author observes that as a result of the refusal of citizenship he remains stateless, while article 15 of the Universal Declaration of Human Rights provides for a right to nationality and freedom from arbitrary deprivation thereof. In this context, he argues that article 26 also imposes a positive duty on the State party to remedy the discrimination suffered by the author, along with numerous others, who arrived in Estonia after 1940 but who are only permanent residents.

5.5 The author rejects the characterisation that he had twice been refused citizenship on grounds of national security. On the first occasion, he and 35 others were rejected purely on the basis of membership of the former armed forces of the USSR. On the second occasion, the national security conclusion was based on the personal elements set out above. In the

author's view, this is in contradiction to other legislation – his residence permit was extended for a further five years, at the same time that the Law on Aliens provides that if a person represents a threat to national security, a residence permit shall not be issued or extended and deportation shall follow. The author contends that he does not satisfy any of the circumstances which the Aliens Act describes as threats to state security.

5.6 By contrast, the author argues he has never represented, and does not currently represent, such a threat. He describes himself as a stateless and retired electrician, without a criminal record and who has never been tried. Additionally, being stateless, he cannot be called for service in the armed forces of a foreign state. There is no pressing social need in refusing him citizenship, and thus no relevant and sufficient reasons to justify the discriminatory treatment are at hand.

5.7 The author also observes that, under the 1996 treaty, discharged military service members (except those who represent a threat to national security) shall be guaranteed residence in Estonia (article 2(1)), and Estonia undertook to guarantee to such service members rights and freedoms in accordance with international law (article 6). The author points out that, contrary to what the State party suggests, he did not receive his residence permit pursuant to the 1996 treaty, but rather first received such a permit in 1995 under article 20(2) of the Aliens Law as an alien who settled in Estonia before July 1990 and enjoyed permanent registration.

5.8 The author also argues that neither the 1994 nor 1996 treaties address issues of citizenship or statelessness of former military personnel. These treaties are therefore of no relevance to the current Covenant claim. The author also rejects that historical reasons can justify the discrimination allegedly suffered. He points out that after the dissolution of the USSR he was made against his will into a stateless person, and that the State party, where he has lived for an extended period, has repeatedly refused him citizenship. He queries therefore whether he will remain stateless for the remainder of his natural life.

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 87 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 the purposes of article 5, paragraph 2(a), of the Optional Protocol.

6.3 To the extent that the author maintains a claim of discrimination based upon the social status or origin of his wife, the Committee observes that the author did not raise this issue at any point before the domestic courts. This claim accordingly must be declared inadmissible under article 5, paragraph 2(b), of the Optional Protocol for failure to exhaust domestic remedies.

6.4 As to the State party's contention that the claim concerning a breach of article 26 is likewise inadmissible, as constitutional motions could have been advanced, the Committee

observes that the author consistently argued before the domestic courts, up to the level of the Supreme Court, that the rejection of his citizenship claim on national security grounds violated equality guarantees of the Estonian Constitution. In light of the courts' rejection of these arguments, the Committee considers that the State party has not shown how such a remedy would have any prospects of success. Furthermore, with respect to the avenue of the Legal Chancellor, the Committee observes that this remedy became closed to the author once he had instituted proceedings in the domestic courts. This claim, therefore, is not inadmissible for failure to exhaust domestic remedies.

6.5 The Committee takes note of the State party's argument that the Covenant does not apply *rationae materiae* because it concluded, after its ratification of the Covenant, the 1994 treaty with the Russian Federation regarding Estonian residence permits for former Russian military pensioners. It considers, however, that in accordance with general principles of the law of treaties, reflected in articles 30 and 41 of the Vienna Convention on the Law of Treaties, the subsequent entry into force of a bilateral treaty does not determine the applicability of the Covenant.

6.6 As to the State party's remaining arguments, the Committee observes that the author has not advanced a free-standing right to citizenship, but rather the claim that the rejection of his citizenship on the national security grounds advanced violates his rights to non-discrimination and equality before the law. These claims fall within the scope of article 26 and are, in the Committee's view, sufficiently substantiated, for purposes of admissibility.

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 Turning to the substance of the admissible claim under article 26, the Committee refers to its jurisprudence that an individual may be deprived of his right to equality before the law if a provision of law is applied to him or her in arbitrary fashion, such that an application of law to an individual's detriment is not based on reasonable and objective grounds.[3] In the present case, the State party has invoked national security, a ground provided for by law, for its refusal to grant citizenship to the author in the light of particular personal circumstances.

7.3 While the Committee recognizes that the Covenant explicitly permits, in certain circumstances, considerations of national security to be invoked as a justification for certain actions on the part of a State party, the Committee emphasizes that invocation of national security on the part of a State party does not, ipso facto, remove an issue wholly from the Committee's scrutiny. Accordingly, the Committee's decision in the particular circumstances of V M R B[4] should not be understood as the Committee divesting itself of the jurisdiction to inquire, as appropriate, into the weight to be accorded to an argument of national security. While the Committee cannot leave it to the unfettered discretion of a State party whether reasons related to national security existed in an individual case, it recognizes that its own

[3] See Kavanagh v Ireland (No.1) Case No 819/1998, Views adopted on 4 April 2001.
[4] Op.cit.

role in reviewing the existence and relevance of such considerations will depend on the circumstances of the case and the relevant provision of the Covenant. Whereas articles 19, 21 and 22 of the Covenant establish a criterion of necessity in respect of restrictions based on national security, the criteria applicable under article 26 are more general in nature, requiring reasonable and objective justification and a legitimate aim for distinctions that relate to an individual's characteristics enumerated in article 26, including "other status". The Committee accepts that considerations related to national security may serve a legitimate aim in the exercise of a State party's sovereignty in the granting of its citizenship, at least where a newly independent state invokes national security concerns related to its earlier status.

7.4 In the present case, the State party concluded that a grant of citizenship to the author would raise national security issues generally on account of the duration and level of the author's military training, his rank and background in the armed forces of the then USSR. The Committee notes that the author has a residence permit issued by the State party and that he continues to receive his pension while living in Estonia. Although the Committee is aware that the lack of Estonian citizenship will affect the author's enjoyment of certain Covenant rights, notably those under article 25, it notes that neither the Covenant nor international law in general spells out specific criteria for the granting of citizenship through naturalization, and that the author did enjoy a right to have the denial of his citizenship application reviewed by the courts of the State party. Noting, furthermore, that the role of the State party's courts in reviewing administrative decisions, including those decided with reference to national security, appears to entail genuine substantive review, the Committee concludes that the author has not made out his case that the decision taken by the State party with respect to the author was not based on reasonable and objective grounds. Consequently, the Committee is unable, in the particular circumstances of this case, to find a violation of article 26 of the Covenant.

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

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