



International Covenant on Civil and Political Rights

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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2839/2016*, **

<i>Communication submitted by:</i>	Karel Malinovsky, Vladimir Malinovsky, Alexander Malinovsky and Katerina Malin (not represented by counsel)
<i>Alleged victims:</i>	The authors
<i>State party:</i>	Czechia
<i>Date of communication:</i>	3 September 2015 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 25 October 2016 (not issued in document form)
<i>Date of adoption of Views:</i>	6 November 2020
<i>Subject matter:</i>	Level of substantiation of claims; victim status; abuse of the right of submission; incompatibility <i>ratione materiae, ratione temporis</i> and <i>ratione personae</i> ; exhaustion of domestic remedies
<i>Substantive issues:</i>	Equality before the law; compensation for a miscarriage of justice
<i>Articles of the Covenant:</i>	14 (6) and 26
<i>Articles of the Optional Protocol:</i>	2, 3 and 5 (2) (b)

1. The authors of the communication are Karel Malinovsky (III), Vladimir Malinovsky, Alexander Malinovsky and Katerina Malin, nationals of the United States of America born in 1960, 1962, 1964 and 1961 respectively. They claim that the State party has violated their rights under articles 14 (6) and 26 of the Covenant. The Optional Protocol entered into force for the State party on 22 February 1993.¹ The authors are not represented by counsel.

* Adopted by the Committee at its 130th session (12 October–6 November 2020).

** The following members of the Committee participated in the examination of the communication:
Tania María Abdo Rocholl, Yadh Ben Achour, Arif Bulkan, Ahmed Amin Fathalla, Furuya Shuichi,
Christof Heyns, Bamariam Koita, David H. Moore, Duncan Laki Muhumuza, Photini Pazartzis,
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Andreas Zimmermann and Gentian Zyberi.

¹ The Optional Protocol entered into force for the Czech Republic on this date as a consequence of the notification by the Czech Republic of its succession to the international obligation of Czechoslovakia, which had acceded to the Optional Protocol on 12 March 1991.



Facts as submitted by the authors

2.1 The authors are four cousins, legitimate heirs of their grandfather, Karel Malinovsky (I), who acquired a farmstead in the village of Janovice in Czechoslovakia during the 1930s. The farmstead consisted of a house and a barn on its own lot, and several individual lots dedicated to orchards, agriculture and forests. Prior to settling in Janovice, Karel Malinovsky (I) worked as a diplomat in the Far East. While stationed in China, the authors' grandparents accumulated antique Chinese furniture and art, which they brought back with them and used in furnishing their newly acquired house.

2.2 After the Second World War, the elder son, Karel Malinovsky (II), went to the United States to pursue his studies in California. In 1949, he was ordered to return to Czechoslovakia by the Government, which he refused to do because he feared being persecuted. He was tried in absentia for high treason in 1953. Subsequently, both of the authors' grandparents died and the younger son, Rudolf Malinovsky, was left in charge of managing the farmstead. He converted the barn into an apartment unit and leased it to supplement his income. In 1966, he and his family escaped to the West owing to ongoing persecution; thereafter, all property belonging to the family was confiscated by the Communist Government. The brothers eventually became citizens of the United States.

2.3 After the fall of Communism, the two brothers decided to pursue restitution of their confiscated property. As Rudolf Malinovsky died in 1992, Karel Malinovsky (II) continued to pursue the claim on his own behalf and on behalf of his brother in Czechoslovakia. He applied for the restitution of the following confiscated property: the farmstead that had been transferred to various persons by the Communist regime; the antique Chinese furniture and art that had been transferred to the National Museum in Prague; and the gold coins that had been part of the household's personal property when Rudolf Malinovsky had fled the country.

2.4 In order to comply with the legal requirements of the newly introduced restitution laws of Czechoslovakia,² Karel Malinovsky (II) moved back to his country of origin, established permanent residency and obtained Czech citizenship. During the period from 1992 to 1995, the Government acquiesced and arranged for the return of 65 out of the 68 lots of the original farmstead.³ The most valued items, however, were not returned: the main house, its lot and two agricultural parcels, the antique Chinese furniture and art, and the gold coins. Karel Malinovsky (II) pursued the return of these goods through the domestic judicial system. In July 2000, the Government returned the majority of the antique Chinese furniture and art.

2.5 On 23 August 2004, the District Court in Frýdek-Místek ruled in favour of Karel Malinovsky (II) and ordered the return of the withheld house and property from the beneficiaries of the confiscation. Karel Malinovsky (II) subsequently died, so the authors of the present communication, as the children of the deceased co-owners, became legitimate heirs of the claimed property.

2.6 On 12 December 2008, the Regional Court overturned the decision of the District Court on the ground that Karel Malinovsky (II) was not a citizen of the Czech Republic and was therefore not entitled to restitution of confiscated property.

2.7 The authors filed an appeal before the Supreme Court, in Brno, which, in its decision of 16 September 2010, reiterated that citizenship was required for restitution of property and denied the appeal. The Supreme Court further noted that, at the time of the application by

² Act No. 87/1991 on extrajudicial rehabilitation was adopted by the Government, spelling out the conditions for recovery of property for persons whose property had been confiscated under 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 Constitutional Court of 12 July 1994 (No. 164/1994) annulled the condition of permanent residency 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.

³ The returned property comprised the following: land of 15,273 m², land of 1,825 m², land of 172,541 m², land of 35,177 m², land of 8,309 m², land of 765 m² and four additional lots of 1,298 m².

Karel Malinovsky (II) for the return of the confiscated property, account should have been taken of the so-called Bancroft treaty of 1929 on naturalization between Czechoslovakia and the United States, under which dual citizenship was forbidden and he was therefore prevented from obtaining Czech citizenship.

2.8 On 11 September 2012, the Constitutional Court dismissed the authors' case.

2.9 The authors claim to have exhausted all domestic remedies.

Complaint

3.1 The authors claim that the State party has violated their rights under article 26 of the Covenant, as well as article 17 (2) of the Universal Declaration of Human Rights, in its application of Act No. 87/1991, which requires Czech citizenship for the restitution of property. They underline that the District Court of Frýdek-Místek ruled in favour of Karel Malinovsky (II) and ordered the return of the withheld house and property from the beneficiaries. Nevertheless, this decision was overturned on the sole ground that the appeal courts could no longer establish that the authors' ancestor met the requirement of citizenship.

3.2 Furthermore, the authors complain of a violation of article 14 (6) of the Covenant. In particular, they complain that their ancestor was convicted of high treason, and the State party used his conviction as a means to confiscate the family's property. Act No. 119/1990 on judicial rehabilitation declared such convictions null and void, and subsequent laws (such as Act No. 87/1991) were passed to enable the restitution of property. The authors claim that these laws are interdependent and clearly prescribe remedial measures. However, compensation for the confiscation of the withheld house and property, which is closely linked to the wrongful conviction of their grandfather, has never been granted to the family.

State party's observations on admissibility and the merits

4.1 On 25 April 2017, the State party submitted its observations on admissibility and the merits. It confirmed the facts as submitted by the authors.

4.2 The State party submits that to the extent that the communication alleges the violation of the Universal Declaration of Human Rights, it should be declared inadmissible for incompatibility *ratione materiae* with the Covenant. The State party argues that the Committee has no jurisdiction to examine alleged violations of the Universal Declaration of Human Rights.

4.3 The State party further asserts that the communication should be found inadmissible for abuse of the right of submission under article 3 of the Optional Protocol. In this regard, the State party recalls that 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. It is noted, however, that the authors submitted their communication almost three years after they had been notified on 27 September 2012 of the decision of the Constitutional Court. The State party argues that this delay is unreasonable, considering that the authors have not presented any reasonable justification, and calls on the Committee to define the time limits within which communications should be submitted.

4.4 With regard to the alleged violation of article 26, the State party reiterates that, out of 236,689 m² of confiscated land, the authors' ancestor successfully claimed restitution of 235,188 m² of land, corresponding to 99.4 per cent of the total amount of land claimed. In 2000, the antique Chinese furniture and art were also returned to the family. The remaining three plots of land, totalling 1,501 m², were owned by private individuals and thus were subject to court proceedings. The State party argues that considering that only 0.6 per cent of the original farmstead was not returned to the authors, the differentiation in treatment against the authors cannot be regarded as unreasonable. In this respect, the State party notes that, according to the Committee's jurisprudence, not all differentiation in treatment can be deemed to be discriminatory.⁴ It also refers to the decision of the European Court of Human Rights in the case of *Haškovcová and Věříšová v. Czech Republic*, in which the applicants

⁴ *Gratzinger and Gratzinger v. Czech Republic* (CCPR/C/91/D/1463/2006), para. 7.3.

acquired only half of their claimed property in the domestic restitution proceedings.⁵ In that case, since restitution legislation was aimed at making up for only some of the injustices of the previous regime, the Court found that a fair balance had been struck between the applicants' right to property and the legitimate aim pursued by the interference. In view of the fact that restitution also took place to a certain extent in the present case, the State party argues that the authors have lost their status as victims under article 1 of the Optional Protocol. The State party thus asserts that there has been no discrimination against the authors and that their rights have not been violated under article 26 of the Covenant.

4.5 The State party further submits that the authors did not cooperate with the Regional Court in Ostrava during the appeals procedure as they failed to submit documents proving their ancestor's Czech nationality. The State party argues that in view of the fact that the Czech nationality of Karel Malinovsky (II) had been successfully claimed in earlier domestic processes, it was only the lack of cooperation by the authors to adduce evidence that had prevented the Regional Court from finding in their favour. The State party explains that this lack of cooperation should be found to be to the detriment of the authors in the Committee's assessment of the alleged violation of article 26 of the Covenant.

4.6 The State party recalls the Committee's jurisprudence that differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26 of the Covenant.⁶ Consequently, the State party is of the position that article 26 of the Covenant does not oblige it to provide full redress for injustices of a previous regime, from a time when the Covenant did not even exist. The State party therefore submits that its legislature should enjoy a wide margin of discretion in determining the scope of past injustices that it seeks to address and the conditions for such remedies.

4.7 As regards the authors' claim under article 14 of the Covenant, the State party submits that it should be declared inadmissible for incompatibility *ratione personae*, *ratione temporis* and *ratione materiae* with the Covenant and for non-exhaustion of domestic remedies, under articles 2, 3 and 5 (2) (b) of the Optional Protocol.

4.8 The State party argues that it follows from the very nature of article 14 (6) of the Covenant that it may be invoked only by the person who was wrongfully punished and not by that person's legal heirs. This part of the communication should therefore be declared inadmissible for incompatibility *ratione personae* with the Covenant.

4.9 The State party recalls that Czechoslovakia acceded to the Optional Protocol on 12 March 1991, which entered into force for the Czech Republic on 22 February 1993. It also notes that the conviction of Karel Malinovsky (II) was annulled *ex lege* on the basis of Act No. 119/1990 on judicial rehabilitation, which entered into force on 1 July 1990. As this date precedes the entry into force of the Covenant for the Czech Republic, the State party holds that the authors' claim should be declared inadmissible for incompatibility *ratione temporis* with the Covenant.

4.10 The State party also submits that the requirements contained in article 14 (6) should be strictly interpreted. Accordingly, when a criminal conviction is reversed on grounds other than that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, article 14 (6) may not be applied. The State party underlines that this interpretation corresponds to the jurisprudence of the European Court of Human Rights, as established in the case of *Bachowski v. Poland*.⁷ In that case, the Court found the application inadmissible for incompatibility *ratione materiae* with the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), holding that the acquittal of the applicant had been based on the reassessment of evidence already available at the time of conviction. In addition, the State party submits that the conviction of Karel Malinovsky (II) was overturned *ex lege*, and not by a judicial body. For these reasons, the State party reiterates its position that this part of the communication should be declared inadmissible for incompatibility *ratione materiae* with the Covenant.

⁵ Application No. 43905/04, decision, 7 December 2010.

⁶ For example, *Zwaan-de Vries v. Netherlands*, communication No. 182/1984, para. 13.

⁷ Application No. 32463/06, decision, 2 November 2010.

4.11 The State party further argues that the authors failed to exhaust domestic remedies as they did not bring their claim under article 14 (6) before the Constitutional Court, which would have had jurisdiction to examine it on the basis of article 87 (1) (d) of the Constitution. According to the well-established case law of the European Court of Human Rights, a constitutional complaint constitutes an effective remedy in the State party for the purposes of the requirement of exhaustion of domestic remedies.⁸

4.12 On the merits, the State party submits that the authors have failed to sufficiently substantiate their allegations and that the information before the Committee does not suffice to find a violation of article 14 (6) the Covenant. States parties must have the freedom to determine the scope of property restitution, and the right to compensation may be interpreted and secured only within the framework established in the relevant national legislation. As the author's property claim fell outside of the scope and prerequisites set forth in the relevant domestic laws, they had no right to compensation and thus there has been no violation of article 14 (6) of the Covenant.

Authors' comments on the State party's observations on admissibility and the merits

5.1 On 30 August 2017, the authors submitted their comments on the State party's observations.

5.2 With regard to their claim under article 26 of the Covenant, the authors reiterate that the relevant restitution laws of the State party discriminated against them on the basis of their nationality. They refer to the Committee's concluding observations on the third periodic report of the Czech Republic, in which the Committee expressed its concern at the State party's continuing failure to implement the Committee's Views under the Optional Protocol to the Covenant, in particular the numerous cases concerning the restitution of property under Act No. 87/1991.⁹

5.3 The authors also submit that the State party's interpretation of the wording of the relevant legislation is mistaken. The preamble of Act No. 87/1991 indicates that the aim of the restitution laws was to mitigate the consequences of some property and other injustices that occurred between 1948 and 1989. The word *některých* used in the Czech text corresponds to "some" in English and not to "certain", as erroneously used by the State party several times in its observations. By doing so, the State party is attempting to set the stage for justifying conditionality in the restitution process.

5.4 Furthermore, the authors argue that adding up the number of square metres is only one way to quantify the property returned to them. On the basis of an appraisal issued by a licensed appraiser, they argue that property valued at 4,562,000 Czech koruna was returned to them, while property with a market value of 2,015,000 Czech koruna, amounting to 30.6 per cent of the property claimed in total, was not. This exercise shows that numbers, although factually derived, can be twisted to conform to a given argument.

5.5 Regarding the State party's argument that the authors have abused the right of submission by waiting almost three years to bring their complaint before the Committee, the authors refer to rule 99 (c) of the Committee's rules of procedure and argue that they complied with the five-year principle set forth therein.

5.6 The authors also note that Karel Malinovsky (II) died in 2005, and they were unable to find any documents proving his Czech nationality. Furthermore, it is unclear to the authors why they were requested to provide documents for this purpose in the light of the fact that their ancestor's Czech nationality, as also acknowledged by the State party, must have been successfully proved in earlier proceedings when some property was restored to him. In any event, the nationality requirement should have never been applied in the first place, owing to its discriminatory nature. Notwithstanding the Committee's Views in this respect, the State party fails to adopt appropriate procedures to implement them.

⁸ European Court of Human Rights, *Buishvili v. Czech Republic*, application No. 30241/11, judgment, 25 October 2012, para. 54.

⁹ CCPR/C/CZE/CO/3, para. 6.

5.7 With regard to the alleged violation of article 14 (6), the authors submit that this violation arises from the fact that their ancestor was wrongfully convicted by the State party in order that the family's property could be confiscated. The fact that the authors have not had full restitution of the claimed property or been compensated for the family's unjust loss on the grounds of their alleged failure to prove their grandfather's Czech nationality amounts to a violation of article 14 (6) of the Covenant.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 97 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

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

6.3 With regard to the authors' claim under article 26 of the Covenant, the Committee notes their contention that they have exhausted all domestic remedies available to them. In the absence of any objection by the State party in connection with this article, the Committee considers that the requirements of article 5 (2) (b) of the Optional Protocol have been met.

6.4 The Committee further notes the authors' claim under article 17 (2) of Universal Declaration of Human Rights, which falls outside of the scope of the Covenant. The Committee therefore considers that the violation claimed in this respect is inadmissible for incompatibility *ratione materiae* with the Covenant, under article 3 of the Optional Protocol.

6.5 With regard to the authors' claim under article 14 (6) of the Covenant, the Committee notes the State party's arguments that it should be declared inadmissible for incompatibility *ratione personae*, *ratione temporis* and *ratione materiae* with the Covenant and for non-exhaustion of domestic remedies, under articles 2, 3 and 5 (2) (b) of the Optional Protocol. In this respect, the Committee notes that under article 14 (6) of the Covenant, compensation is to be paid to persons who have been convicted of a criminal offence by a final decision, and have suffered punishment as a result of such conviction, when their conviction is subsequently reversed or they have been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice. In the light of the prerequisites contained therein, the Committee considers that the authors' communication falls short of substantiating how their rights under article 14 (6) have been violated by the State party, especially since the person convicted, Karel Malinovsky (II), is not mentioned as a victim in the present communication. In any event, there is no information on file proving that this claim had been raised by the authors at the domestic level. Accordingly, the Committee declares this part of the communication inadmissible pursuant to articles 2 and 5 (2) (b) of the Optional Protocol.

6.6 The Committee notes 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 Committee observes that according to rule 99 (c) of its rules of procedure, the Committee must 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 five years after the exhaustion of domestic remedies by the author of the communication, or, where applicable, three 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 circumstances of the present case, the Committee considers that, given that the authors submitted the communication less than three years after they had been notified on 27 September 2012 of the decision of the Constitutional Court, the delay does not constitute an abuse of the right of submission under article 3 of the Optional Protocol.

6.7 The Committee is mindful of the State party's argument that the authors have lost their status as victims under article 1 of the Optional Protocol, because a substantial part of their claimed property has been returned to them, and that they cannot therefore be victims of a violation under article 26 of the Covenant. In this context, the Committee first refers to the decision of the European Court of Human Rights in *Haškovcová and Věříšová v. Czech Republic* cited by the State party and considers that it substantially differs from the case under review. The Committee observes that the former case involves the alleged violation of the right to property under article 1 of the first Protocol to the European Convention on Human Rights, requiring the Court to examine the issue of proportionality once it has been established that the Government's interference served the public interest, satisfied the requirement of lawfulness and was not arbitrary. In contrast, the present case concerns the prohibition of discrimination under article 26 of the Covenant, which allows for differentiation only if it is based on reasonable and objective criteria, in the pursuit of an aim that is legitimate under the Covenant. Accordingly, and taking into account the scope of the Committee's examination, which is limited to the authors' claim under article 26 of the Covenant, criteria such as the size in square metres or the overall financial value of the property not returned to the authors are relevant only to the extent that they indicate whether the authors are still able to show that they have suffered disadvantage as a result of the Government's interference. The Committee notes the authors' submission that, on the basis of an appraisal issued by a licensed appraiser, property with a market value of 2,015,000 Czech koruna, amounting to 30.6 per cent of the property claimed in total, was not returned to them, owing to domestic legislation on nationality. In the light of these circumstances, the Committee considers that the authors have sufficiently substantiated their claim that they continue to suffer from the harmful consequences of the relevant domestic legislation and cannot be deemed to have lost their status as victims for the purposes of article 1 of the Optional Protocol and article 26 of the Covenant.

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

Consideration of the merits

7.1 The Committee has considered the present communication in the light of all the information submitted to it by the parties, as required under article 5 (1) of the Optional Protocol.

7.2 The issue before the Committee, as it has been presented by the parties, is whether the application to the authors of Act No. 87/1991, requiring them to prove their ancestor's Czech citizenship for the purposes of restitution of property, 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. Differentiation that is compatible with the provisions of the Covenant and is based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26.¹⁰

7.3 The Committee recalls its Views in the case of *Des Fours Walderode and Kammerlander v. Czech Republic*,¹¹ 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 that case, and many others, equally applies to the authors of the present communication, since they have been

¹⁰ *Zwaan-de Vries v. Netherlands*, para. 13.

¹¹ *Des Fours Walderode and Kammerlander v. Czech Republic* (CCPR/C/73/D/747/1997), paras. 8.3–8.4. See also *Adam v. Czech Republic* (CCPR/C/57/D/586/1994) para. 12.6; *Blazek et al. v. Czech Republic* (CCPR/C/72/D/857/1999), para. 5.8; *Marik v. Czech Republic* (CCPR/C/84/D/945/2000), para. 6.4; *Gratzinger v. Czech Republic*, para. 7.5; *Ondracka and Ondracka v. Czech Republic* (CCPR/C/91/D/1533/2006), para. 7.3; and *Klain and Klain v. Czech Republic* (CCPR/C/103/D/1847/2008), para. 8.3.

barred from obtaining restitution of their family's property on the sole basis of their ancestor's nationality status. The Committee therefore concludes that the application to the authors of the citizenship requirement under Act No. 87/1991 violates their rights under article 26 of the Covenant.

8. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it disclose a violation by the State party of article 26 of the Covenant.

9. Pursuant to article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the authors with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated, *inter alia*, to take appropriate steps to provide adequate compensation, if the property cannot be returned. The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the future. In particular, the Committee reiterates that the State party should ensure that its laws and policies concerning the restitution of property are applied without discrimination of any kind, especially without discrimination on grounds of nationality.

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 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 when it has been determined that a violation has occurred, 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 present Views and to have them widely disseminated in the official language of the State party.
