Zadání pro argumentační semináře z předmětu
Mezinárodní právo veřejné – univerzální a evropská ochrana lidských práv
Státní nástupnictví a řešení otázky státního občanství - Estonsko
Ak. r. 2005/2006

Situace: Estonsko bylo okupováno sovětskými vojsky a přičleněno jako šestnáctá republika k Sovětskému svazu po dvou desetiletích nezávislé existence, nabyté v důsledku rusko-estonské mírové smlouvy z Tartu v roce 1920. Okupace v důsledku Molotov-Ribbentroppova paktu, následné deportace a organizované vlny ruského přistěhovalectví změnily demografickou mapu Estonska i postoj estonské politické reprezentace vůči obyvatelstvu ruského etnika. Z celkového počtu pouhých 1 565 000 obyvatel Estonska tvoří etnicky estonské obyvatelstvo jen 61%. Celých 30% obyvatel pak jsou etničtí Rusové. Estonsko se v srpnu 1991 prohlásilo za právního nástupce meziválečné Estonské republiky, protiprávně anektované Sovětským svazem. Podle názorů, vyjadřovaných estonskou politickou reprezentací, nepřerušila sovětská okupace *de jure* právní statut nezávislého Estonska, takže všechny akty sovětské okupační moci postihla neplatnost *ex tunc*.[1] Z toho se pak dokonce dovozovalo, že ta část estonského obyvatelstva, které vstoupilo na území Estonska v době sovětské vlády, učinilo tak nelegálně a nemá vůbec právo na estonské občanství.

Estonsko vyhlásilo svou nezávislost v důsledku vývoje, zahájeného již obdobím přechodu k plné suverenitě, vyhlášeným Nejvyšším sovětem zvoleným v květnu 1990. Tento Nejvyšší sovět byl zvolen občany Estonské sovětské republiky, a všichni tito občané také byli oprávněnými voliči ve všelidovém referendu, které se konalo podle zákonů platných v Estonsku jakou součásti Sovětského svazu. Referendum potvrdilo následně samostatnost Estonska, když se v něm pro její vyhlášení vyslovilo 78% oprávněných voličů. Na základě sovětských zákonů ustavený estonský Nejvyšší sovět poté vyslal reprezentanty do Ústavního shromáždění, jež vypracovalo novou ústavu samostatného Estonska. Ústavodárné orgány Estonska tak byly vytvořeny za aktivní participace osob, které podle posléze oficiálně zastávané konstituční teorie nebyly oprávněny se na vytváření této reprezentace podílet, když z pohledu oficiálně zastávaných výkladů pouhá jejich přítomnost na území Estonska byla nezákonná.

Na počátku roku 1992 estonský Nejvyšší sovět zamítl liberální návrhy zákona o občanství, podle nichž měla existovat možnost opce pro obyvatele, kteří měli trvalý pobyt v Estonsku k 30. březnu 1990. Dne 26. února 1992 byla přijata rezoluce, kterou vstoupil v účinnost novelizovaný zákon o občanství z roku 1938.[2] Občany nového Estonska se tak automaticky stali pouze ti, kdo byli estonskými občany před rokem 1940 a jejich potomci. Ostatní obyvatelstvo mělo přístup k estonskému občanství pouze prostřednictvím naturalizace, pro niž zákon stanovil podmínky jako zkouška z jazyka a dvouletý trvalý pobyt. Nové znění zákona zároveň stanovilo, kdo je z možnosti být naturalizován zcela vyloučen: jedná se o profesionální příslušníky ozbrojených sborů cizího státu, osoby usvědčené ze závažných trestných činů, nebo ty, které se opakovaně dopouští trestných činů, a také osoby bez stálého příjmu. Kromě dvouletého trvalého pobytu bylo však třeba započíst ještě další rok, ve kterém měla žádost čekat na vyřízení a po jehož uplynutí měl žadatel znovu potvrdit, že má stále o získání estonského občanství zájem. Třetina estonského obyvatelstva byla tak vyloučena z možnosti získat bezodkladně občanství nástupnického státu, a určité procento z této skupiny bylo z možnosti je získat vyloučeno absolutně.

Estonský parlament (Riigikogu) pak upravil postavení obyvatelstva, jemuž nový stát nepřiznal své občanství, zákonem o pobytu cizinců v červnu 1993 jako postavení *„ne-občanů"*. Prezident Lennart Meri odmítl zákon podepsat a ten byl následně předložen expertům jmenovaným Radou Evropy k právnímu posouzení. Revidované znění zákona, (účinné od 12. července 1992), zaručuje osobám, které měly trvalý pobyt v Estonské

[1] Projev estonského ministra zahraničí na 47. zasedání Valného shromáždění OSN, citováno v: *Integrating Estonia´s non-citizen minority,* Human Rights Watch 1993
[2] Rezoluce *„O účinnosti zákona o občanství"*

sovětské socialistické republice k 1. červenci 1990, právo pobytu. Ne-občané jsou povinni požádat do jednoho roku od data účinnosti zákona o vydání průkazu o povolení k pobytu, jež není třeba obnovovat. Toto právo ovšem zákon nepřiznává těm, kdo byli odsouzeni za trestný čin, za nějž zákon dovoluje uložit trest odnětí svobody vyšší než jeden rok, nebo osobám, které sloužily v ozbrojených silách cizího státu.

Příznivější podmínky pro nabytí estonského občanství nepřinesl estonskému rusky mluvícímu obyvatelstvu ani nový zákon o občanství z 19. ledna roku 1995, který vstoupil v účinnost 1. dubna 1995. Podle tohoto zákona, novelizovaného v letech 1995, 1998, a 2000, mohou tito obyvatelé Estonska nabýt státní občanství tohoto státu pouze naturalizací; kromě podmínky pětiletého trvalého pobytu (prodlouženého opět o jeden rok) je podmínkou naturalizace stálý příjem, znalost estonštiny, estonské Ústavy a zákona o občanství. Znalost jazyka se ověřuje zkouškou, která má část konverzační, poslechovou, písemnou a porozumění čtenému textu. Od testu znalosti jazyka jsou osvobozeny osoby, které absolvovaly základní, střední nebo vysokoškolské vzdělání v estonštině.

Zákon zcela vyloučil z možnosti naturalizace v Estonsku bývalé i současné příslušníky ozbrojených sil cizího státu, jejich manžele a manželky nebo osoby, které se dopustily trestných činů jež nebyly zahlazeny, nebo které se trestných činů dopouštěly opakovaně. Teprve novela z roku 1998 umožnila naturalizaci nezletilých narozených v Estonsku po 26. únoru 1992 rodičům, kteří jsou bývalými občany Sovětského svazu a nemají jiné státní občanství.

Podstatné zmírnění požadavků na zkoušku znalosti jazyka pro postižené přinesla až novelizace zákona z 14. června 2000. Postižení byli zcela osvobozeni od povinnosti skládat zkoušku ze znalosti jazyka, Ústavy a zákona o občanství. Osvobozeny jsou i osoby, které budou výrokem soudu uznány za neschopné zkoušku podstoupit. Novelu doplnila nová pravidla pro skládání zkoušky z estonštiny, Ústavy a zákona o občanství. Vysoké poplatky, které byli žadatelé nuceni za zkoušky zaplatit a které představovaly až 40% průměrného měsíčního příjmu, byly sníženy.

Otázky:

1. Jaký je rozdíl mezi rovností a zákazem diskriminace
2. Co znamená právo nebýt diskriminován?
3. Co je z pohledu čl. 26 Mezinárodního paktu o občanských a politických právech diskriminací (pokrývá tento článek jako důvod diskriminace občanství) ?
4. Jaký význam z hlediska mezinárodního práva veřejného má absolutní vyloučení některých skupin obyvatelstva z možnosti nabýt estonské občanství? Jedná se o zakázanou diskriminaci, z jakých důvodů a podle jakých pravidel mezinárodního práva? Posuďte pro případ:
    a) vyloučení příslušníků ozbrojených sil cizího státu (v tomto případě Ruska);
    b) vyloučení manželů/manželek těchto příslušníků.
5. Jaký význam z hlediska mezinárodního práva veřejného má úprava některých požadavků estonského zákona, které fakticky vylučují určité skupiny obyvatel z možnosti nabýt estonské občanství:
    a) Znalost jazyka;
    b) test ze znalosti estonských reálií a zákonů.

    Které skupiny obyvatel jsou zejména ohroženy tím, že nebude v jejich silách tyto požadavky splnit? Může se jednat o zakázanou diskriminaci, z jakých důvodů a podle jakých pravidel/pramenů mezinárodního práva by ji bylo možno dovodit?

Povinná literatura:

1) SUDRE, F.: *Mezinárodní a evropské právo lidských práv*, Brno, Masarykova univerzita, 1997, str. 220 -225.
2) CCPRGeneral Comment No. 18: Non-discrimination : . 10/11/89.

Dokumenty:

1) Mezinárodní pakt o občanských a politických právech z roku 1966
2) Úmluva o ochraně lidských práv a základních svobod z roku 1950

Přiložené dokumenty:

1. General Comment No. 18: Non-discrimination : . 10/11/89. CCPR General Comment No. 18. (General Comments)

Convention Abbreviation: CCPR

GENERAL COMMENT 18

Non-discrimination

(Thirty-seventh session, 1989)

1. Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights. Thus, article 2, paragraph 1, of the International Covenant on Civil and Political Rights obligates each State party to respect and ensure to all persons within its territory and subject to its jurisdiction the rights recognized in the Covenant without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Article 26 not only entitles all persons to equality before the law as well as equal protection of the law but also prohibits any discrimination under the law and guarantees to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Indeed, the principle of non-discrimination is so basic that article 3 obligates each State party to ensure the equal right of men and women to the enjoyment of the rights set forth in the Covenant. While article 4, paragraph 1, allows States parties to take measures derogating from certain obligations under the Covenant in time of public emergency, the same article requires, inter alia, that those measures should not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. Furthermore, article 20, paragraph 2, obligates States parties to prohibit, by law, any advocacy of national, racial or religious hatred which constitutes incitement to discrimination.

3. Because of their basic and general character, the principle of non-discrimination as well as that of equality before the law and equal protection of the law are sometimes expressly referred to in articles relating to particular categories of human rights. Article 14, paragraph 1, provides that all persons shall be equal before the courts and tribunals, and paragraph 3 of the same article provides that, in the determination of any criminal charge against him, everyone shall be entitled, in full equality, to the minimum guarantees enumerated in subparagraphs (a) to (g) of paragraph 3. Similarly, article 25 provides for the equal participation in public life of all citizens, without any of the distinctions mentioned in article 2.

4. It is for the States parties to determine appropriate measures to implement the relevant provisions. However, the Committee is to be informed about the nature of such measures and their conformity with the principles of non-discrimination and equality before the law and equal protection of the law.

5. The Committee wishes to draw the attention of States parties to the fact that the Covenant sometimes expressly requires them to take measures to guarantee the equality of rights of the persons concerned. For example, article 23, paragraph 4, stipulates that States parties shall take appropriate steps to ensure equality of rights as well as responsibilities of spouses as to marriage, during marriage and at its dissolution. Such steps may take the form of legislative, administrative or other measures, but it is a positive duty of States parties to make certain that spouses have equal rights as required by the Covenant. In relation to children, article 24 provides that all children, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, have the right to such measures of protection as are required by their status as minors, on the part of their family, society and the State.

6. The Committee notes that the Covenant neither defines the term "discrimination" nor indicates what constitutes discrimination. However, article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination provides that the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. Similarly, article 1 of the Convention on the Elimination of All Forms of Discrimination against Women provides that "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

7. While these conventions deal only with cases of discrimination on specific grounds, the Committee believes that the term "discrimination" as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

8. The enjoyment of rights and freedoms on an equal footing, however, does not mean identical treatment in every instance. In this connection, the provisions of the Covenant are explicit. For example, article 6, paragraph 5, prohibits the death sentence from being imposed on persons below 18 years of age. The same paragraph prohibits that sentence from being carried out on pregnant women. Similarly, article 10, paragraph 3, requires the segregation of juvenile offenders from adults. Furthermore, article 25 guarantees certain political rights, differentiating on grounds of citizenship.

9. Reports of many States parties contain information regarding legislative as well as administrative measures and court decisions which relate to protection against discrimination in law, but they very often lack information which would reveal discrimination in fact. When

reporting on articles 2 (1), 3 and 26 of the Covenant, States parties usually cite provisions of their constitution or equal opportunity laws with respect to equality of persons. While such information is of course useful, the Committee wishes to know if there remain any problems of discrimination in fact, which may be practised either by public authorities, by the community, or by private persons or bodies. The Committee wishes to be informed about legal provisions and administrative measures directed at diminishing or eliminating such discrimination.

10. The Committee also wishes to point out that the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.

11. Both article 2, paragraph 1, and article 26 enumerate grounds of discrimination such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The Committee has observed that in a number of constitutions and laws not all the grounds on which discrimination is prohibited, as cited in article 2, paragraph 1, are enumerated. The Committee would therefore like to receive information from States parties as to the significance of such omissions.

12. While article 2 limits the scope of the rights to be protected against discrimination to those provided for in the Covenant, article 26 does not specify such limitations. That is to say, article 26 provides that all persons are equal before the law and are entitled to equal protection of the law without discrimination, and that the law shall guarantee to all persons equal and effective protection against discrimination on any of the enumerated grounds. In the view of the Committee, article 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory. In other words, the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant.

13. Finally, the Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.

2. Zpráva Komise pro lidská práva

COMMISSION ON HUMAN RIGHTS
Sub-Commission on Prevention of Discrimination and Protection of Minorities
Forty-seventh session Agenda item 17

E/CN.4/Sub.2/1995/44
10 August 1995

Estonia

3. Under the citizenship legislation applied until recently, persons with Estonian citizenship as of 16 June 1940 were recognized as citizens of the Republic. All others have been classified as aliens and may be granted citizenship only by naturalization. For applicants seeking citizenship by naturalization, the Citizenship Act passed by the Estonian National Assembly on 19 January 1995 sets out extremely high requirements, often even more stringent than those of the 1938 Citizenship Act in force until 1 April 1995.

4. Out of a total population of 1.52 million in Estonia there are approximately 550,000 to 560,000 non-Estonians, of whom more than 400,000 are Russians. Between 30,000 and 35,000 Russian-speakers have obtained Estonian citizenship, while more than 75,000 have taken Russian citizenship. About 70,000 ethnic Russians have left Estonia. Some categories of persons not
belonging to the Estonian nation are completely unable to obtain citizenship. These include over 40,000 ethnic Russians.

5. The new Citizenship Act raises the residence qualification and sharply increases the requirements for knowledge of Estonian. In practice, the Act deprives a considerable part of the Russian-speaking population of the opportunity to obtain Estonian citizenship and bars the way to natural integration of non-citizens of Estonia into the country's political, economic and social life.

6. The Act concerning language passed in Estonia in 1995 furthers discrimination against persons who do not speak the State language in many important areas of public life. It does not ensure the availability of education in a language other than Estonian.

7. The legislative system established in the Republic of Estonia, which serves to regulate the social, economic, property and civil rights of non-citizens, creates in those people a feeling of uncertainty and dread of being deported from the Republic. Indeed, in late March of this year, Russian citizen P. Rozhok was forcibly expelled from the country, having been given no opportunity to exercise the right to appeal against the authorities' actions by judicial means. This sets a dangerous precedent of forcible deportation in breach of generally accepted norms concerning the rights of an alien who had been living permanently and legally in Estonia.

8. Under the Estonian Constitution restrictions may be placed on non-citizens' exercise of the right to disseminate freely ideas, opinions or beliefs, as well as other information, and to hold meetings without prior authorization. Non-citizens of Estonia are not entitled to form political parties.

9. The Local Government Elections Act and Aliens Act deprive Russians – as non-citizens of Estonia - of the right to stand for election to local government bodies even in those regions where they constitute the overall majority of the population.

10. The Republic's Russian-speaking population have substantially restricted economic and social rights: they do not qualify for privatization of land; and not taking into account periods of employment outside the Republic of Estonia or service in the Soviet Army affects housing privatization and pension entitlements. For non-citizens the right to work as officials in State institutions is limited.

11. Retired military personnel (totalling about 10,500 in the Republic, or more than 40,000 including members of their families) have been placed in an extremely difficult position. Their problems were intended to be resolved by the Agreement, signed in Moscow on 26 July 1994, concerning social guarantees for pensioners having served in the armed forces, under which retired military personnel receive residence permits except in cases where the Government of
the Republic of Estonia decides that the denial of a permit is justified because of a security threat to the State. Despite the provision in article 15 of the Agreement regarding its application from the time of signature, residence permits were issued to the first 68 retired persons only a year later, in July 1995.

12. For "non-citizens", dealing with vitally important matters both within the country, especially in regard to family reunification, and when travelling abroad has become a serious problem.

13. While residence permit applications from permanent residents of Estonia were due to be submitted by 12 July of this year, the Estonian Parlament passed amendments to the Aliens Act on 27 June allowing the Government to institute special arrangements for a period of four months to akcept applications from persons failing to meet the 12 July deadline.

14. The very fact of amending the Act may be regarded as an indirect admission that the legal status of aliens who are permanent residents of Estonia has not been resolved. However, the measures do little to change the status of "non-citizens" and leave wide scope for officialism and red tape. The law still does not cover people who entered the country to take up permanent residence at the invitation of close relatives before the introduction of the visa system.

15. One of the most psychologically discomforting trends for the hundreds of thousands of Russians in the Republic of Estonia is the ever-narrowing range of information and cultural facilities in Russian and the largely artificial breakdown of links in this area with the ethnic motherland. The most obvious example is the decision to stop relaying Russian television programmes.

16. The position of the Estonian Orthodox Church has recently been a cause of particular concern to Russia. We have repeatedly drawn the Estonian leadership's attention to the unlawfulness of denying the Church's rights to property confiscated in 1940. In breach of the Estonian Constitution and international norms, the authorities are blatantly interfering in the internal affairs of the Church, imposing on it the canonical jurisdiction of the Constantinople Patriarchate; they are spreading disinformation about its activities and, indeed, have begun forcibly taking possession of churches and church property. Persecution of the Orthodox Church in Estonia has already led to the deportation of priests on the ground that they were

not holding residence permits. The Russian public was most distressed by the recent decision of the Estonian authorities to expel 50 nuns of the Pühtitsa nunnery from the country. We consider this to be a violation of the rights of believers and of freedom of religion.

3. Konkrétní případ řešený Výborem pro lidská práva

Communication No 1136/2002 : Estonia. 25/08/2004. CCPR/C/81/D/1136/2002. (Jurisprudence)

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 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 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.

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, 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 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.]

** 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.

Notes

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.

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

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

4. Op.cit.

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