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HUMAN RIGHTS COMMITTEE
Ninety-third session
7 to 25 July 2008

VIEWS

Communication No. 1423/2005

Submitted by:	Mr. Gennadi Šipin (not represented by counsel)
Alleged victim:	The author
State Party:	Estonia
Date of communication:	18 July 2005 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 23 August 2005 (not issued in document form)
Date of adoption of views:	9 July 2008

*Made public by decision of the Human Rights Committee.

Subject matter: Alleged arbitrary denial of citizenship

Procedural issues: None

Substantive issues: Discrimination, equality before the law and equal protection of the law
Articles of the Covenant: 26

Article of the Optional Protocol: 5 (2) (a)

On 9 July 2008, the Human Rights Committee adopted the annexed text as the Committee's Views, under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1423/2005.

[ANNEX]

ANNEX

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights

Ninety-third session

concerning

Communication No. 1423/2005[*]

Submitted by:	Mr. Gennadi Šipin (not represented by counsel)
Alleged victim:	The author
State Party:	Estonia
Date of communication:	18 July 2005 (initial submission)

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

Meeting on 9 July 2008,

Having concluded its consideration of communication No. 1423/2005, submitted to the Human Rights Committee by Mr. Gennadi Šipin 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:

[*] The following members of the Committee participated in the examination of the present communication: Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Mr. Gennadi Šipin, an ethnic Russian, born in the Kirovskaya region of the Russian Soviet Federative Socialist Republic on 8 October 1961 and currently residing in Estonia. He claims to be a victim of violations by Estonia of article 26 of the Covenant. The Optional Protocol entered into force for the State party on 21 January 1992. The author is not represented by counsel.

The facts as presented by the author

2.1. On 21 August 2001, the author, a former military servant of the former USSR army, submitted an application for Estonian citizenship by way of naturalization. On 5 February 2003, the author's application was denied, by Decree of the Government of 28 January 2003, on the ground that he belonged to a group of persons mentioned in paragraph 21 (1) clause 6 of the Citizenship Act 1995. The relevant section of the Act states as follows:

> "§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:
> ……
> 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……"

2.2 On 27 November 2003, the Tallinn Administrative Court dismissed the author's request for an appeal. A further appeal to the Tallinn Court of Appeal was dismissed on 21 June 2004. On 27 October 2004, the Supreme Court decided that the author's appeal was manifestly ill-founded.

The complaint

3.1 The author claims that paragraph 21 (1) clause 6 of the Law on Citizenship is a discriminatory provision which imposed unreasonable and unjustified restrictions on his rights on the basis of his social origin, attachment to a specific social group and/or position. This provision of the law includes a presumption that all foreigners who have served in the armed forces pose an indefinite threat to the State party, notwithstanding individual features of their service or training obtained. There is no evidence in the court documents that the author poses a threat to Estonian security. In addition, he adds that residence permits shall not be granted or shall be annulled where the individual in question is regarded as a threat to national security. However, the State party has granted temporary permits to the author several times, thus demonstrating that he does not represent such a threat.

3.2 Although the author concedes that there is no right to citizenship under the Covenant, article 26 provides for equality before the law, equal protection of the law and prohibition from discrimination. As the law itself unreasonably forbids persons belonging to a determined social group (or of determined social origin/position), from obtaining citizenship, it violates article 26, as it is discriminatory. In addition, as there are a number of people in Estonia who have received citizenship, despite their former service as military personnel of a foreign State (including the USSR), the law in question has not been applied in the same manner to all those subject to it. Thus, the author's right to equality before the law has been violated. The State party has failed to

submit any reasonable justification for the refusal to grant him citizenship. He has no criminal record and has never been tried for a criminal offence, he cannot be called for service in the security forces or armed forces "of any foreign State" because he is stateless and there is no pressing social need to refuse him citizenship. The only justification, provided by the State party, is paragraph 21 (1) clause 6 of the Citizenship Act, which the author regards as discriminatory in itself.

The State party's submission on admissibility and the merits

4.1 On 22 February 2006, the State party confirms that the author has exhausted domestic remedies but submits that the communication is manifestly ill-founded and thus inadmissible. The author was refused citizenship on national security grounds on account of his previous service as a professional member of the armed forces of the former USSR, pursuant to paragraph 21 (1) clause 6 of the Citizenship Act . The type or nature of service is irrelevant. As to the facts, the State party submits that in 1979, the author entered Ashinsky Technical Aviation Military Educational Institute from which he graduated in 1982. He continued his service as an air force technician in Kaliningrad between 1982 and 1985. In 1985, he was seconded to Paldiski in then Estonian Soviet Socialist Republic (ESSR) where he performed the tasks of squad commander. He entered the ESSR on 10 April 1985 after his appointment to Paldiski. He was assigned to the reserve from the armed forces of the former USSR with a rank of First Lieutenant in 1989 in connection with the commission of a criminal offence.

4.2 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 be viewed in the light of its treaty with the Russian Federation concerning the status and rights of former military officers. 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 agreement on the issues of social guarantees to the retired military personnel of the armed forces of the Russian Federation on the territory of Estonia, 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. Thus, the social and legal issues concerning military pensioners, of which the author is one, were regulated with separate agreements between the State party and the Russian Federation. After the collapse of the USSR and the restoration of Estonian independence in 1991, the author has the status of former military personnel and thus has had the right to apply for a residence permit in Estonia as of 26 July 1994, pursuant to bilateral treaties between the State party and the Russian Federation. Upon application, he was granted a residence permit that is valid until 2008.

4.3 As the State party has the right to establish conditions for granting citizenship and the right to refuse granting it on grounds of national security, such a refusal cannot in itself constitute discrimination. As the right to citizenship is neither a fundamental right nor a Covenant right, the author cannot claim that the refusal to grant him citizenship was discriminatory. The State party refers to the Committee's established jurisprudence that not all differences in treatment are discriminatory; differences that are justified on a reasonable and objective basis are consistent with article 26. The State party states that differences which remain between those with residence permits as opposed to citizenship largely relate to political rights. The author has a

residence permit allowing him to reside in Estonia and he has wide social, economic and cultural rights. When considering the issuance of a residence permit or the granting of citizenship, the State party takes into account "different level[s] of threat".

4.4 The State party submits that paragraph 21 (1) clause 6 of the Citizenship Act is justified for national security reasons, as a person who has been a member of the armed forces of a foreign country is someone with a strong relationship with that State, who dedicated his activities to its national security, was prepared to risk his life, and as a rule swore an oath to this effect. Granting citizenship to such a person may later cause him ethical and moral dilemmas, as having sworn a military oath to one country he might later have to act against as a citizen of another country.

4.5 According to the State party, the country in which the applicant served as a member of the armed forces is irrelevant for the purposes of paragraph 21 (1) clause 6, as whenever such a fact is ascertained the applicant is refused citizenship. Such service is not the only ground for refusal. The State party quotes from the Committee's jurisprudence [1] for the proposition 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. According to the State party, both the Tallinn Administrative Court and the Tallinn Court of Appeal considered the same claims raised before the Committee, including the claims of discrimination, as well as the claim that the refusal to grant him citizenship on the basis of paragraph 21 (1) clause 6 of the Citizenship Act was unconstitutional, as there was no right of discretion. The author was represented by counsel and both had the opportunity to attend the hearing and make submissions.

4.6 The State party sets out the findings of both courts. The Court of Appeal found that the distinction in the legislation was reasonable and objective, as the State party had not been newly independent for very long and the potential threat to its security arising from a large number of persons who had served in the armed forces of another country, including a country that had been occupying Estonia, could not be ruled out. In being refused citizenship, the person's participation in general decision-making on the national level is restricted. Considering the number of former professional members of the armed forces of a foreign country residing in the State party, this restriction was considered a suitable and necessary measure. However, the resident is not completely deprived of the opportunity to participate in politics within the State party and may vote in elections to local government councils.

4.7 The Court considered that the author's reference to professional members of armed forces who have been provided with citizenship is irrelevant, as in such cases the individuals were treated differently either because their spouse was of Estonian nationality and thus fell into the exception under paragraph 21 (2) or arose through an administrative error. It emphasised that the refusal to grant citizenship to the author and the failure to grant any discretion to the administrative authority did not yield a disproportionate result. There were no significant reasons why he should have been granted citizenship and his statelessness could not be such a reason. In this regard, it refers to the Committee's Views in Borzov v. Estonia[2], in which it stated that the

[1] Borzov v. Estonia, Communication No. 1136/2002, Views adopted on 26 July 2004.
[2] Borzov v. Estonia, supra n.1.

role of the State parties' courts in reviewing administrative decisions, including those decided with reference to national security, appears to entail genuine substantive review.

4.8 The State party submits that according to the Citizenship Act of the Russian Federation of 28 November 1991, the former USSR citizens, of which the author is one, could register as Russian citizens until 31 December 2000. In the State party's view, the author had the opportunity to define his citizenship that he had not used.

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

5.1 On 9 June 2006, the author commented on the State party's submission. He submits that the denial of citizenship was based not on national security reasons but purely on the basis of his membership of a particular group. In making its decree, the government did not take into account any considerations regarding the author's personal threat to the national security of the State party. In the fifteen years since independence, the State party has not demonstrated any personal danger from the author.

5.2 The author refers to paragraph 12 (6) of the Law on Aliens Act which sets out criteria for

the establishment of a threat to the security of the State, including if an alien has submitted false information upon application of a visa, does not observe the laws of the State party, he or she is in the active service of the armed forces of a foreign state, has been repeatedly punished for committing criminal offences etc. The author submits that he does not meet any of these criteria and thus does not pose such a threat. He insists that he has no criminal record, has never been tried of a criminal offence and cannot understand how, as a retired electrician, he could be a threat to national security. Furthermore, he cannot be called to service in the security forces or armed forces of any foreign state as he is stateless. He highlights that even those who have been convicted of criminal offences on the basis of which they are denied citizenship may reapply after expiry of a certain period.

5.3 The author notes that the State party had failed to provide reasonable justification for the fact that some people have received Estonian citizenship despite their former service as military personnel of a foreign State (including the USSR). He states that he has the same possibility as any other Estonian resident to apply for a citizenship of any country in the world, including neighboring Latvia, Finland and the Russian Federation, provided that he meets the naturalization requirements of a country in question. He further submits that the State party cannot force him to choose citizenship of another State, and that since 1988 he has integrated into Estonian society to the extent that he may apply for Estonian citizenship.

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 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant. As required under article 5, paragraph 2(a), of the Optional Protocol, the Committee has ascertained that the same

matter is not being examined under another international procedure of international investigation or settlement.

6.2 The Committee notes that the only argument advanced by the State party on the admissibility of the communication is that the author's claims are "manifestly ill-founded". The Committee does not find the State party's argument persuasive and finds that the author's claims are sufficiently substantiated, for purposes of admissibility. As it can see no other reason to consider the claims inadmissible, it proceeds to its consideration of the merits.

Consideration of 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 The author claims that paragraph 21 (1) clause 6 of the Citizenship Act, which automatically excludes him from receiving Estonian citizenship on the basis that "he is a former member of the armed forces of another country", violates article 26 of the Covenant. The State party invokes national security grounds as a justification for this provision of the Act. The Committee refers to its jurisprudence that an individual may be wrongly deprived of his right to equality before the law, if the application of a provision of law to an individual's detriment, is not based on reasonable and objective grounds.[3] It also refers to its Views in Borzov v. Estonia[4] and Tsarjov v. Estonia,[5] where it was held 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. It recalls that the invocation of national security on the part of a State party does not, *ipso facto*, remove an issue wholly from the Committee's scrutiny and recognizes that its own role in reviewing the existence and relevance of such considerations will depend on the circumstances of each case.[6]

7.3 In this particular case, article 26 requires no more than reasonable and objective justification and a legitimate aim for the operation of distinctions. The Committee observes that the enactment of the Citizenship Act 1995 and, in particular, a blanket prohibition to grant Estonian citizenship to anyone who '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' cannot be examined outside its factual context. While the above-mentioned blanket prohibition does amount to differential treatment, in the circumstances of the present case, the reasonableness of such differential treatment depends on how the State party justifies its national security arguments.

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[3] Kavanagh v. Ireland (No.1), Communication No. 819/1998, Views adopted on 4 April 2001, para. 10.3, Borzov v. Estonia, supra n.1, para. 7.2 and Tsarjov v. Estonia, Communication No. 1223/2003, Tsarjov v. Estonia, Views adopted on 26 October 2007, para. 7.3.
[4] Borzov v. Estonia, supra n.1, para. 7.3.
[5] Tsarjov v. Estonia, supra n.3, para. 7.3.
[6] V.M.R.B. v. Canada, Communication No. 236/1987, Decision adopted on 18 July 1988, and Borzov v. Estonia, supra n.1.

7.4 In the present case, the State party has concluded that granting citizenship to the author would raise national security issues on account of his former service in the armed forces of another country, including a country that had previously occupied Estonia, and that the denial of any discretionary power to administrative authority in the application of the Citizenship Act was not disproportionate. The Committee notes that neither the Covenant nor international law in general spell out specific criteria for the granting of citizenship by naturalization, and that the author indeed was able to have the denial of his citizenship application reviewed by the State party's courts.

7.5 The Committee also notes that the category of individuals excluded by the State party's legislation from the benefit of Estonian citizenship is closely linked to considerations of national security. Furthermore, where such justification for differential treatment is persuasive, it is unnecessary that the application of the legislation be additionally justified in the circumstances of an individual case.[7] The decision in Borzov[8] is consistent with the view that distinctions made in the legislation itself, where justifiable on reasonable and objective grounds, do not require additional justification on these grounds in their application to an individual. Consequently, the Committee does not, in the circumstances of the present case, conclude that there was 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 also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

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[7] Tsarjov v. Estonia, supra n.3, para. 7.6.
[8] Borzov v. Estonia, supra n.1.