



International Covenant on Civil and Political Rights

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Human Rights Committee

Communication No. 1809/2008

Decision adopted by the Committee at its 108th session (8–26 July 2013)

<i>Submitted by:</i>	V.B. (represented by David Strupek)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Czech Republic
<i>Date of communication:</i>	7 November 2007 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 6 October 2009 (not issued in document form)
<i>Date of adoption of decision:</i>	24 July 2013
<i>Subject matter:</i>	Alleged discrimination in the access to social security while in detention
<i>Substantive issue:</i>	Non-discrimination
<i>Procedural issue:</i>	Insufficient substantiation of claims
<i>Article of the Covenant:</i>	26
<i>Article of the Optional Protocol:</i>	2

Annex

Decision of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights (108th session)

concerning

Communication No. 1809/2008*

Submitted by: V.B. (represented by David Strupek)
Alleged victim: The author
State party: Czech Republic
Date of communication: 7 November 2007 (initial submission)

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

Meeting on 24 July 2013,

Adopts the following:

Decision on admissibility

1.1 The author of the communication is V.B., a Czech national of Roma origin, born on 25 February 1969. She claims to be a victim of a violation by the Czech Republic of article 26 of the International Covenant on Civil and Political Rights. She is represented by counsel, David Strupek.

1.2 On 14 September 2009, the Committee, through the Special Rapporteur on new communications and interim measures, decided not to consider the admissibility and the substance of the case separately.

The facts as submitted by the author

2.1 On 13 August 2002, the author was arrested and accused of the attempted murder of her co-habitant. On 15 August 2002, she was interrogated before the Prague Municipal Court, and she was detained on remand. On 1 October 2002, she was released awaiting trial upon the order of the Prague Municipal State Attorney Office. Following the trial, the author was acquitted of all charges by judgement of the Municipal Court of 9 April 2003.

2.2 On 16 June 2003, by letter to the Minister of Justice, the author claimed compensation for the time spent in detention, under section 30 of Act No. 82/1998 on

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Kheshoe Parsad Matadeen, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval.

Liability for Damage Caused by a Decision or an Incorrect Official Procedure of an Authority of the State.¹ Taking into account that she was unemployed when she was arrested, the author claimed a compensation of CZK 5,000² per month of detention. By letter of 19 August 2003, the Minister refused the author's claim, stating that section 30 of Act No. 82/1998 cannot be used where the lost profit is not proven. The Minister further considered that the establishment of pecuniary damage is a precondition to the State's responsibility under section 30 of Act No. 82/1998 and that, as pecuniary damage could not be proven in the present case, no compensation could be awarded.

2.3 The author filed a civil action against the State with the Prague District Court. She claimed that she should be compensated for the loss of the opportunity to find a job while detained. She noted that the amount fixed by section 30 (CZK 161 per day of detention in 2002, amounting to CZK 5,000 per month) was lower than the minimum wage. The legislator indicates that every person would usually have had the opportunity to earn at least that amount if she or he had not been deprived of liberty. She requested CZK 8,225 (CZK 3,064 for the 19 days of detention in August 2002, CZK 5,000 for her detention in September 2002, and CZK 161 for 1 day in detention in October 2002) plus interest and procedural costs.

2.4 On 4 August 2005, the District Court replied that the author was not entitled to compensation for detention in August and October, as she had been paid social security benefits during these two months, corresponding to the benefits she was entitled to before being taken into detention, and after her release. It took into account the author's lost income with respect to her lost social security benefits for September 2002, applying section 30 of Act No. 82/1998. It ordered the State to pay CZK 5,000 plus interest to the author. The Minister appealed this judgment before the Municipal Court of Prague, stating that the lost social security benefits could not be deemed to be "lost profit", as it is designed to satisfy the basic needs of a person, and such needs were satisfied during her detention. On 10 May 2006, the Municipal Court allowed the appeal and quashed the judgement of the District Court in relation to the compensation for September.

2.5 On 4 September 2006, the author filed an appeal to the Constitutional Court, arguing that she was aware that the entitlement of persons acquitted of criminal charges to compensation of damages was not guaranteed by the Constitution or by the international human rights treaties, but that the relevant legislation had to be applied in accordance with the principles of equality and non-discrimination. She admitted that the level of probability that she would have found a job at the time of her detention could be subject to dispute. She further considered that this should have been assessed, and that she had provided evidence in this respect. The author finally claimed that she had been discriminated against, not only because of her unemployment, but indirectly because of her ethnic origin. On 11 January 2007, the Constitutional Court rejected her constitutional appeal as manifestly ill-founded as the court is not another instance in a system of general justice and cannot review the assessments of facts and law as made by the general courts, and considered that the mere disagreement with the interpretation of the basic law does not challenge the decision's conformity with the constitutional order. The Constitutional Court further considered that pecuniary damages could be awarded only in cases of at least high probability that the

¹ Section 30: "The compensation of the lost income is provided in the amount of CZK 5000 per each month in detention on remand, imprisonment, protective education or protective medical treatment, unless the damaged person requests that the compensation for lost income is determined according to the special rules."

² Equivalent to about 194 euros (on 10 May 2013).

damage would occur. The court did not consider the issues of equality and non-discrimination.³

The complaint

3.1 The author states that persons who are taken into custody on remand and who are acquitted are protected by the law, which provides them with social security entitlements. She considers that section 30 of Act No. 82/1998 was designed also to accommodate unemployed persons who lost the opportunity to find a job because of detention, and that the authorities of the State party erroneously excluded such persons from the entitlement. The author further considers that, to determine the loss of profit, the national law violates article 26 of the Covenant, as it takes into account only the situation on the day the person is taken into custody, not allowing the consideration of the “loss of opportunity” to achieve an income, thereby directly discriminating against unemployed persons. Thus, the author considers that the aforementioned legislation and interpretation result in less favourable treatment of unemployed persons, as compared to employed and self-employed persons.

3.2 The author states that the law itself allows a differentiation in treatment. In this regard, the author refers to jurisprudence⁴ in which the Committee found a violation of article 26, where the law had explicitly excluded persons who were not Czech citizens from the restitution of property confiscated by the Communist regime. She considers that the differentiation in treatment, that is, the fact that the Czech authorities refused to compensate the author for lost income during her detention only because she was unemployed when arrested, is not reasonably justified, and that it amounts to direct discrimination based on her economic and social status (unemployment). The author also argues that, even though her income at the time of detention on remand was hypothetical in so far as it depended on her employment then, the court should have the discretion to calculate such income on the basis of the “statistical figures of average or (of the) minimum wage”.

3.3 The author further argues that she was indirectly discriminated against, based on her ethnic origin. In this regard, the author refers to the concluding observations of the Human Rights Committee and of the Committee on the Elimination of Racial Discrimination, highlighting the marginalization and social exclusion of the Roma people in the State party.⁵ The author also refers to reports of the European Commission against Racism and Intolerance and of others, according to which the unemployment rate of Roma has been about 70 per cent while the general rate of unemployment has been about 7 to 10 per cent.⁶ The author considers that, while the Roma community is socially and economically marginalized and strongly disadvantaged on the labour market, its members are indirectly discriminated against through the exclusion of unemployed persons from the application of section 30 of Act No. 82/1998.

State party’s observations on admissibility and merits

4.1 By note verbale of 31 March 2010, the State party submitted its observations, making no objections to the description of the facts by the author. The State party indicated that, according to the explanatory report of section 30 of Act No. 82/1998, a lump-sum

³ The author invoked the principle of equality and non-discrimination before the Constitutional Court only.

⁴ For example, communication No. 586/1994, *Adam v. Czech Republic*, Views adopted on 23 July 1996.

⁵ CCPR/CO/72/CZE, para. 10, and CERD/C/CZE/CO/7, para. 15. See also CERD/C/SR.1804, para. 42.

⁶ See, among others, European Commission against Racism and Intolerance, “Third report on the Czech Republic”, adopted on 5 December 2003, para. 59.

compensation would be provided instead of damages applicable under general regulations, and would not apply when the aggrieved person did not “lose any profit”. If prior to custody or imprisonment the aggrieved person had no work but already had arranged for a specific employment or a similar relationship, the calculation would be based on the expected income that he would have received in this employment or in the exercise of another gainful activity. The legal system is based on the possibility to provide compensation for loss of earnings, also in relation to a gainful activity that is only expected at the moment of the beginning of the imprisonment or custody, the performance of which would begin later. The mere circumstance that in the period prior to serving the sentence a claimant was not working does not in principle exclude his or her claim for damages. Such damages can be claimed if the person suffered damage for not being able, as a consequence of his or her detention, to start an employment for which prior steps had already been taken. The opportunity for a gainful activity, or an offer or tentative promise by an employer, is not enough: there must be a finding that only due to the beginning of imprisonment the arranged gainful activity could not be performed and that the aggrieved person would actually have performed such activity for the arranged period had he or she not served the sentence. The State party further indicates that the decision of the Supreme Court in the present case reflects the established case law.

4.2 With regard to the author’s claim of a violation of article 26 of the Covenant, the State party recalls the Committee’s jurisprudence according to which the right to equal protection of the law without discrimination is an autonomous right independent of any other right provided for in the Covenant; and that not all differences of treatment are discriminatory, as long as a differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26.⁷

4.3 On the ground that article 26 of the Covenant does not impose an obligation upon the States to adopt specific legal provisions, or to introduce legal dispositions to enable claims for compensation of a lost opportunity to realize a profit, the State party considers that the communication does not fall within the scope of competency of the Covenant and should be held inadmissible.

4.4 The State party further highlights that it agrees with the author that section 30 of Act No. 82/1998 allows for the awarding of compensation for loss of profit only in cases when the aggrieved person was engaged in a gainful activity on the day of being taken into custody, or had in place an arranged or prearranged contract for such activity. Compensation for loss of profit would be possible only when profit was actually lost, and a lump sum of CZK 5,000 was to be provided in cases where it was impossible or excessively difficult to quantify the lost profit. Additionally, when the facts referred to occurred, the legal system of the State party did not allow the courts to grant compensation for “loss of opportunity” to aggrieved persons, whatever their socioeconomic status. Consequently, the unemployed and the author herself were not victims of unequal treatment. The State party therefore considers that the claim is inadmissible under articles 2 and 3 of the Optional Protocol to the Covenant.

4.5 The State party further considers that the claim of the author with regard to alleged indirect discrimination against her should be held inadmissible for insufficient substantiation, in so far as the mere assertion of a 70 per cent unemployment rate in the Roma group in the State party is insufficient to establish a suspicion that article 26 of the Covenant was violated. The State party further considers that the author’s assertion

⁷ The State party specifically refers to communication No. 182/1984, *Zwaan de Vries v. Netherlands*, Views adopted on 9 April 1987, paras. 12.1 to 13.

according to which Roma persons are placed into custody more frequently than the rest of the population is a speculation, which is not justified by any factual basis.

4.6 As to the merits of the communication, the State party recalls that the claim of the author lies in the fact that she was not compensated for loss of profit for the period she spent in custody. The State party reiterates that the Czech legal system only allows compensation for loss of profit for the period in custody if, prior to his or her detention, the person detained was engaged in a gainful activity or had in place an arranged or prearranged contract for such activity. Taking into account that the author was unemployed when she was detained and did not demonstrate any arranged or prearranged employment contract, her claim for compensation on the grounds of “loss of opportunity” before domestic courts was rejected in compliance with the law and jurisprudence in place, without discrimination.

4.7 The State party further notes that the author compares her position with that of employed and self-employed persons, arguing that while these persons receive compensation for loss of profit for the period of their custody, she did not receive any. The State party considers that the situation of the author cannot be compared to the position of employed or self-employed persons who were engaged in a gainful activity before being taken into custody. The State party recalls that where it was not possible or excessively burdensome for the aggrieved person to determine exactly the amount of the lost profit or to provide the relevant evidence to this end, the law determined that a lump sum of CZK 5,000 could be awarded. However, the State party highlights that this disposition is not applicable where, as in the case of the author, the person was unemployed and had not contractually arranged or prearranged the exercise of a gainful activity before being taken into custody. Under such circumstances, the authorities of the State party had taken their decisions in full compliance with domestic law and were “reasonable, based on objective reasons and free of any arbitrariness”. The State party therefore considers that article 26 of the Covenant was not violated.

4.8 The State party notes the author’s position that, as she was not awarded compensation for a “loss of opportunity” to achieve some profit while she was in custody, she was treated less favourably than employed and self-employed persons. The State party reiterates that, at the time of the facts under consideration, the law did not allow employed or self-employed persons to claim compensation for loss of profit on the ground of “loss of opportunity”. In that regard, the State party considers that, while the corresponding legislation and its interpretation were not necessarily the best solution to the problem, they could not be considered arbitrary or manifestly erroneous. The legislation was the same for employed, self-employed and unemployed persons, and the author was therefore not treated differently and less favourably.

4.9 The State party further suggests that if the Committee were to consider that compensation for “loss of opportunity” to achieve a profit for a period in custody should have been provided for by the legislation of the State party in application of the Covenant, the specific situation of the author should be examined to determine whether such disposition would be applicable to her case. The Committee should then establish how probable it would have been for the author to have found employment and achieved a profit in the period of one and a half months when she was deprived of liberty. In that regard, the State party indicates that according to the information provided by the author, she had been unemployed for seven months and six days before being taken into custody, and for one month and nine days after being released. Additionally, the State party recalls that the author was kept on the list of job applicants during 23 of the 33 months between January 2001 and September 2003. In view of this information, the State party considers that the probability that the author would have found an employment during the period she was held

in custody was not very high. The State party therefore considers that article 26 was not violated.

Author's comments on the State party's observations

5.1 On 9 July 2010, the author rejected the State party's observations on admissibility and merits. The author considers that the failure of domestic law to allow the claims for compensation for a loss of opportunity is not a consequence of the legislation itself, but of the interpretation of that law. The author highlights that the law does not explicitly exclude the concept of loss of opportunity from the notion of loss of profit, and that the concept of lost profit as a result of detention in custody pursuant to Act No. 82/1998 is much narrower than the same concept as interpreted in private (civil and commercial) law.

5.2 The author recalls that, under Czech case law, lost profit is the damage consisting in the fact that the value of the claimant's assets does not increase in the manner it would during the "natural course of events". The author considers that the requirement by State authorities for the claimant to have a particular concluded or pre-negotiated contract puts a much higher burden of proof on the claimant than for the assessment of the "normal course of events" in other circumstances.

5.3 The author reiterates the reference, made in her initial complaint, to the Committee's jurisprudence, according to which the State party violated article 26 of the Covenant when the law did not allow for the restitution of property claimed by persons without Czech citizenship. The author considers that the narrow interpretation of Act No. 82/1998 similarly excludes a specific category of persons (persons unemployed the day of apprehension) from an entitlement generally granted in cases of lawful detention of a defendant who is later acquitted of criminal charges. The author therefore considers that article 26 of the Covenant is applicable to her case and claims that the existing legislation should be interpreted in conformity with the Covenant.

5.4 The author further considers that the statistics of the European Commission against Racism and Intolerance referred to in her communication are credible and sufficient to demonstrate the indirect discrimination she suffered as a member of the Roma community. The author also considers that there is a "general tendency" to consider that communities that are segregated, undereducated and discriminated against are more inclined to perpetuate criminal acts, which results in de facto discrimination against the members of the Roma community, including in the interpretation of the legislation.

5.5 Additionally, the author claims that her case was not assessed individually, as the courts did not critically consider the evidence provided to demonstrate her efforts to find a job, but rather carried out a blanket assessment, considering that the author did not prove any assured gainful activity on the day of her detention. The author therefore considers that domestic courts treated her differently than other persons in a comparable position.

Additional State party's observations on admissibility and merits

6.1 By note verbale of 30 November 2010, in its response to the author's comments, the State party reiterated its initial observations of 31 March 2010. In particular, the State party recalls that, at the time of the facts referred to in the complaint, national legislation did not allow any assertion based on the concept of "loss of opportunity", regardless of the socioeconomic status of the person concerned.

6.2 The State party further refers to the established case law, according to which the Committee is not a fourth instance, and it is for the courts of States parties to interpret and

apply domestic legislation in a particular case, unless it can be shown that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice, or that the court otherwise violated its obligation of independence and impartiality.⁸

6.3 The State party considers that, even if the relevant legislation and its interpretation are not necessarily the best solution to the problem, they cannot be said to be arbitrary or manifestly erroneous. The State party considers that the Committee should not review the interpretation of the domestic legislation made by the Czech courts in the case under consideration.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 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 case is admissible under the Optional Protocol to the Covenant.

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

7.3 The Committee notes that the author's claim relates to the failure of the State party to provide her with compensation for the loss of her security benefit for the month of September and for the lost opportunity to find a job, resulting from her remand in detention from 15 August to 1 October 2012, when she was released awaiting trial. Although the author acknowledges that her arrest and detention were lawful, she claims that the failure to provide her with compensation, on the basis of her status as "an unemployed person", resulted in a violation of article 26 of the Covenant. The Committee notes that the legislation in question (Act No. 82/1998) refers to the provision of compensation in cases of "lost income". It also notes that lost income has been interpreted by national courts as actual financial loss or, as acknowledged by the author, potential loss when there is a pre-negotiated labour contract in existence. In this regard, the Committee recalls that it is generally not for the Committee, but for the courts of States parties, to interpret legislation and to review or to evaluate facts and evidence in a particular case, unless it can be ascertained that the conduct of the trial or the evaluation of facts and evidence was clearly arbitrary or amounted to a denial of justice.⁹ Based on the materials made available to it, the Committee is unable to conclude that the State party's authorities acted arbitrarily in evaluating the facts and evidence of the case and it considers that the claim is not sufficiently substantiated.

7.4 The Committee further observes that, when claiming a violation of article 26, the author refers to figures and information related to the situation of the Roma community in

⁸ The State party specifically refers to communication No. 1618/2007, *Brychta v. Czech Republic*, decision adopted on 27 October 2009, para. 6.5.

⁹ Human Rights Committee general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40*, vol. I (A/62/40 (Vol. I)), annex VI, para. 26. See also, inter alia, communications No. 1943/2010, *H.P.N. v. Spain*, decision of inadmissibility adopted on 25 March 2013; No. 1500/2006, *M.N. et al. v. Tajikistan*, decision of inadmissibility adopted on 29 October 2012; No. 1210/2003, *Damianos v. Cyprus*, decision of inadmissibility adopted on 25 July 2005, para. 6.3; No. 1212/2003, *Lanzarote Sánchez et al. v. Spain*, decision of inadmissibility adopted on 25 July 2006, para. 6.3; No. 1358/2005, *Korneenko v. Belarus*, decision of inadmissibility adopted on 1 April 2008, para. 6.3; No. 1758/2008, *Jessop v. New Zealand*, Views adopted on 29 March 2011, paras. 7.11-7.12.

the Czech Republic. The Committee does not question the accuracy of the referred information. However, it considers that this information does not sufficiently substantiate the position of the author that, under the particular circumstances, she was a victim of direct and indirect discrimination on the basis of her ethnic origin. Accordingly, this communication is inadmissible, as insufficiently substantiated, under article 2 of the Optional Protocol.¹⁰ The Human Rights Committee therefore decides:

- (a) That the communication is inadmissible under article 2 of the Optional Protocol;
- (b) That this decision shall be transmitted to the State party and to the author.

[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.]

¹⁰ Communication No. 1771/2008, *Mohamed Musa Gbondo Sama v. Germany*, decision on admissibility adopted on 28 July 2009, para.6.9; communication No. 1537/2006, *Yekaterina Gerashchenko v. Belarus*, decision on admissibility adopted on 23 October 2009, para. 6.4.