COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION

Yilmaz-Dogan v. the Netherlands

Communication No. 1/1984

10 August 1988

CERD/C/36/D/1/1984*

VIEWS

Submitted by: H. F. Doeleman (counsel)

On behalf of: A. Yilmaz-Dogan (petitioner)

State party concerned: The Netherlands

Date of communication: 28 May 1984 (date of initial letter)

Date of decision on admissibility: 19 March 1987

The Committee on the Elimination of Racial Discrimination, established under article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination,

Meeting on 10 August 1988,

Having concluded its consideration of communication No. 1/1984, submitted to the Committee by H. F. Doeleman on behalf of A. Yilmaz-Dogan under article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination.

Having taken into consideration all written information made available to it on behalf of Mrs. A. Yilmaz-Dogan and by the State party,

Bearing in mind rule 95 of its rules of procedure, which requires it to formulate an opinion on the communication before it,

Including in its opinion suggestions and recommendations for transmittal to the State party and to the petitioner under article 14, paragraph 7 (b), of the Convention,

Adopts the following:

Opinion

1. The communication (initial letter dated 28 May 1984, further letters dated 23 October 1984, 5 February 1986 and 14 September 1987) placed before the Committee on the Elimination of Racial Discrimination by H. F. Doeleman, a Netherlands lawyer practicing in Amsterdam. He submits the communication on behalf of Mrs. A. Yilmaz-Dogan, a Turkish national residing in the Netherlands, who claims to be the victim of a violation of articles 4 (a), 5(e) (i) and 6 of the International Convention on the Elimination of All Forms of Racial Discrimination by the Netherlands.

2.1 The petitioner states that she had been employed, since 1979, by a firm operating in the textile sector. On 3 April 1981, she was injured in a traffic accident and placed on sick leave. Allegedly as a result of the accident, she was unable to carry out her work for a long time; it was not until 1982 that she resumed part-time duty of her own accord. Meanwhile, in August 1981, she married Mr. Yilmaz.

2.2 By a letter dated 22 June 1982, her employer requested permission from the District Labour Exchange in Apeldoorn to terminate her contract. Mrs. Yilmaz was pregnant at that time. On 14 July 1982, the Director of the Labour Exchange refused to terminate the contract on the basis of article 1639h (4) of the Civil Code, which stipulates that employment contracts may not be terminated during the pregnancy of the employee. He pointed, however, to the possibility of submitting a request to the competent Cantonal Court. On 19 July 1982, the employer addressed the request for termination of the contract to the Cantonal Court in Apeldoorn. The request included the following passage: [...]

> "When a Netherlands girl marries and has a baby, she stops working. Our foreign women workers, on the other hand, take the child to neighbours or family and at the slightest set-back disappear on sick-leave under the terms of the Sickness Act. They repeat that endlessly. Since we all must do our utmost to avoid going under, we cannot afford such goings-on."

After hearing the request on 10 August and 15 September 1982, the Cantonal Court agreed, by a decision on 29 September 1982, to terminate the employment contract with effect from 1 December 1982. Article 1639w (former numbering) of the Civil Code excludes the possibility of an appeal against a decision of the Cantonal Court.

2.3 On 21 October 1982, Mrs. Yilmaz requested the Prosecutor at the Supreme Court to seek annulment of the decision of the Cantonal Court in the interest of the law. By a letter of 26 October, she was informed that the Prosecutor saw no justification for proceeding in that way. Convinced that the employer's observations of 19 July 1982 constituted offences under the Netherlands Penal Code, Mrs. Yilmaz, on 21 October 1982, requested the Prosecutor at the District Court at Zutphen to prosecute her employer. On 16 February 1983, the Prosecutor replied that he did not consider the initiation of penal proceedings to be opportune. The petitioner further applied to the Minister of Justice, asking him to order the Prosecutor at Zutphen to initiate such proceedings. The Minister, however, replied on 9 June 1983 that he saw no reason to intervene, since recourse had not yet been had to the complaint procedure pursuant to article 12 of the Code of Penal Procedure, which

provided for the possibility of submitting a request to the Court of Appeal to order prosecution of a criminal offence. In conformity with the Minister's advice, Mrs. Yilmaz, on 13 July 1983, requested the Court of Appeal at Arnhem, under article 12 of the Code of Penal Procedure, to order the prosecution of her employer. On 30 November 1983, the Court of Appeal rejected the petition, stating, inter alia, that it could not be determined that the defendant, by raising the issue of differences in absenteeism owing to childbirth and illness between foreign and Netherlands women workers, intended to discriminate by race, or that his actions resulted in race discrimination. While dismissing the employer's remarks in the letter of 19 July 1982 as "unfortunate and objectionable", the Court considered "that the institution of criminal proceedings [was] not in the public interest or in the interest of the petitioner". The Court's decision taken pursuant to article 12 of the Code of Penal Procedure cannot be appealed before the Supreme Court.

2.4 Petitioner's counsel concludes that the Netherlands violated article 5 (e) (i) of the Convention, because the alleged victim was not guaranteed the right to gainful work and protection against unemployment, which is said to be reflected in the fact that both the Director of the Labour Exchange and the Cantonal Court endorsed the termination of her employment contract on the basis of reasons which must be considered as racially discriminatory. Secondly, he claims that the Netherlands violated article 6 of the Convention since it failed to provide adequate protection as well as legal remedies because Mrs. Yilmaz was unable to have the discriminatory termination of her contract reviewed by a higher court. Thirdly, it is alleged that the Netherlands violated article 4 of the Convention because it did not order the Prosecutor to proceed against the employer on the basis of either article 429 quater or article 137c to article 137e of the Netherlands Penal Code, provisions incorporated in that Code in the light of the undertaking, under article 4 of the Convention, to take action to eliminate manifestations of racial discrimination. Finally, it is argued that article 6 of the Convention was violated because the State party denied the petitioner due process by virtue of article 12 of the Code of Penal Procedure, when she unsuccessfully petitioned for penal prosecution of the discrimination of which she claims to have been the victim.

3. At its thirty-first session in March 1985, the Committee on the Elimination of Racial Discrimination decided to transmit the communication, under rule 92, paragraphs 1 and 3, of its rules of procedure, to the State party, requesting information and observations relevant to the question of the admissibility of the communication.

4.1 By submissions dated 17 June and 19 November 1985, the State party objects to the admissibility of the communication. It affirms that the Committee is entitled, under its rules of procedure, to examine whether a prima facie consideration of the facts and the relevant legislation reveals that the communication is incompatible with the Convention. For the reasons set out below, it considers the communication to be incompatible ratione materiae with the Convention and therefore inadmissible.

4.2 The State party denies that either the Director of the Labour Exchange or the Cantonal Court in Apeldoorn violated any of the rights guaranteed by article 5 (e) (i) of the Convention and argues that it met its obligation under that provision to guarantee equality before the law in the enjoyment of the right to employment by providing non-discriminatory remedies. With respect to the content of the letter of Mrs. Yilmaz's employer dated 19 July 1982, the State party points out that the decision of the Cantonal Court does not, in any way, justify the conclusion that the court accepted

the reasons put forth by the employer. In reaching its decision to dissolve the contract between the petitioner and her employer, the Court merely considered the case in the light of the relevant rules of civil law and civil procedure; it refrained from referring to the petitioner's national or ethnic origin.

4.3 With respect to the petitioner's argument that the State party should have provided for a more adequate mechanism of judicial review and appeal against Cantonal Court judgements related to the termination of employment contracts, the state party points out that the relevant domestic procedures, which were followed in the present case, provide adequate protection and legal remedies within the meaning of article 6 of the Convention. Article 6 does not include an obligation for States parties to institute appeal or other review mechanisms against judgements of the competent judicial authority.

4.4 With respect to the allegation that the State party violated articles 4 and 6 of the Convention by failing to order the Prosecutor to prosecute the employer, the State party argues that the obligation arising from article 4 of the Convention was met by incorporating in the Penal Code articles 137c to e and articles 429 ter and quater and penalizing any of the actions referred to in these provisions. Article 4 cannot be read as obligating States parties to institute criminal proceedings under all circumstances with respect to actions which appear to be covered by the terms of the article. Concerning the alleged violation of article 6, it is indicated that there is a remedy against a decision not to prosecute: the procedure pursuant to article 12 of the Code of Criminal Procedure. The State party recalls that the petitioner indeed availed herself of this remedy, although the Court of Appeal did not find in her favour. It further observes that the assessment made by the Court of Appeal before deciding to dismiss her petition was a thorough one. Thus, the discretion of the court was not confined to determining whether the Prosecutor's decision not to institute criminal proceedings against the employer was a justifiable one; it was also able to weigh the fact that it is the Minister of Justice's policy to ensure that criminal proceedings are brought in as many cases as possible where racial discrimination appears to be at issue.

5.1 Commenting on the State party's submission, petitioner's counsel, in a submission dated 5 February 1986, denies that the communication should be declared inadmissible as incompatible ratione materiae with the provisions of the Convention and maintains that his allegations are well-founded.

5.2 In substantiation of his initial claim, it is argued, in particular, that the Netherlands did not meet its obligations under the Convention by merely incorporating in its Penal Code provisions such as articles 137c to e and 429 ter and quater. He affirms that, by ratifying the Convention, the State party curtailed its freedom of action. In his opinion, this means that a State cannot simply invoke the expediency principle which, under domestic law, leaves it free to prosecute or not; rather, it requires the Netherlands actively to prosecute offenders against sections 137c to e and 429 ter and quater unless there are grave objections to doing so.

5.3 Furthermore, petitioner's counsel maintains that, in the decision of the Court of Appeal of 30 November 1983, the causal relationship between the alleged victim's dismissal and the different rate of absenteeism among foreign and Netherlands women workers, as alleged by the employer, is clear. On the basis of the Convention, it is argued, the Court should have dissociated itself from the

discriminatory reasons for termination of the employment contract put forth by the employer.

6. On 19 March 1987, the Committee, noting that the State party's observations concerning the admissibility of the communication essentially concerned the interpretation of the meaning and scope of the provisions of the Convention and have further ascertained that the communication met the admissibility criteria set out in article 14 of the Convention, declared the communication admissible. It further requested the State party to inform the Committee as early as possible, should it not intend to make a further submission on the merits, so as to allow it to deal expeditiously with the matter.

7. In a further submission dated 7 July 1987, the State party maintains that no violation of the Convention can be deemed to have taken place in the case of Mrs. Yilmaz. It argues that the alleged victim's claim that, in cases involving alleged racial discrimination, the weighing by the judge of the parties' submissions has to meet especially severe criteria, rests on personal convictions rather than legal requirements. The requirement in civil law disputes is simply that the judge has to pronounce himself on the parties' submissions inasmuch as they are relevant to the dispute. The State party further refutes the allegation that the terms of the Convention require the establishment of appeal procedures. In this respect, it emphasizes that criminal law, by its nature, is mainly concerned with the protection of the public interest. Article 12 of the Code of Criminal Procedure gives individuals who have a legitimate interest in prosecution of an offence the right to lodge a complaint with the Court of Appeal against the failure of the authorities to prosecute. This procedure guarantees the proper administration of criminal law, but it does not offer the victims an enforceable right to see alleged offenders prosecuted. This, however, cannot be said to constitute a violation of the Convention.

8.1 Commenting on the State party's submission, petitioner's counsel, in a submission dated 14 September 1987, reiterates that the State party violated article 5 (e) (i) in that the cantonal judge failed to protect the petitioner against unemployment, although the request for her dismissal was, allegedly, based on racially discriminatory grounds. He asserts that, even if the correspondence between the Director of the Labour Exchange and the employer did not refer to the national or ethnic origin of the alleged victim, her own family name and that of her husband must have made it clear to all the authorities involved that she was of Turkish origin.

8.2 With respect to the State party's argument that its legislation provides for adequate protection - procedural and substantive - in cases of alleged racial discrimination, it is claimed that domestic law cannot serve as a guideline in this matter. The expediency principle, i.e. the freedom to prosecute, as laid down in Netherlands law, has to be applied in the light of the provisions of the Convention with regard to legal protection in cases of alleged racial discrimination.

9.1 The Committee on the Elimination of Racial Discrimination has considered the present communication in the light of all the information made available to it by the parties, as required under article 14, paragraph 7 (a), of the Convention and rule 95 of its rules of procedure, and bases its opinion on the following considerations.

9.2 The main issues before the Committee are (a) whether the State party failed to meet its obligation, under article 5 (e) (i), to guarantee equality before the law in respect of the right to work

and protection against unemployment, and (b) whether articles 4 and 6 impose on States parties an obligation to initiate criminal proceedings in cases of alleged racial discrimination and to provide for an appeal mechanism in cases of such discrimination.

9.3 With respect to the alleged violation of article 5 (e) (i), the Committee notes that the final decision as to the dismissal of the petitioner was the decision of the Sub-District Court of 29 September 1982, which was based on article 1639w (2) of the Netherlands Civil Code. The Committee notes that this decision does not address the alleged discrimination in the employer's letter of 19 July 1982, which requested the termination of the petitioner's employment contract. After careful examination, the Committee considers that the petitioner's dismissal was the result of a failure to take into account all the circumstances of the case. Consequently, her right to work under article 5 (e) (i) was not protected.

9.4 Concerning the alleged violation of articles 4 and 6, the Committee has noted the petitioner's claim that these provisions required the State party actively to prosecute cases of alleged racial discrimination and to provide victims of such discrimination with the opportunity of judicial review of a judgement in their case. The Committee observes that the freedom to prosecute criminal offences - commonly known at the expediency principle - is governed by considerations of public policy and notes that the Convention cannot be interpreted as challenging the raison d'être of that principle. Notwithstanding, it should be applied in each case of alleged racial discrimination, in the light of the guarantees laid down in the Convention. In the case of Mrs. Yilmaz-Dogan, the Committee concludes that the prosecutor acted in accordance with these criteria. Furthermore, the State party has shown that the application of the expediency principle is subject to, and has indeed in the present case been subjected to, judicial review, since a decision not to prosecute may be, and was reviewed in this case, by the Court of Appeal, pursuant to article 12 of the Netherlands Code of Criminal Procedure. In the Committee's opinion, this mechanism of judicial review is compatible with article 4 of the Convention; contrary to the petitioner's affirmation, it does not render meaningless the protection afforded by sections 137c to e and 429 ter and quater of the Netherlands Penal Code. Concerning the petitioner's inability to have the Sub-District Court's decision pronouncing the termination of her employment contract reviewed by a higher tribunal, the Committee observes that the terms of article 6 do not impose upon States parties the duty to institute a mechanism of sequential remedies, up to and including the Supreme Court level, in cases of alleged racial discrimination.

10. The Committee on the Elimination of Racial Discrimination, acting under article 14, paragraph 7, of the Convention, is of the opinion that the information as submitted by the parties sustains the claim that the petitioner was not afforded protection in respect of her right to work. The Committee suggests that the State party take this into account and recommends that it ascertain whether Mrs. Yilmaz-Dogan is now gainfully employed and, if not, that it use its good offices to secure alternative employment for her and/or to provide her with such other relief as may be considered equitable.

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*/ Made public by decision of the Committee on the Elimination of Racial Discrimination.