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III. JURISPRUDENCE

CERD

- *E. I. F. v. The Netherlands* (15/1999), CERD, A/56/18 (21 March 2001) 116 at paras. 2.1-2.3, 6.2 and 7.

...
2.1 The author claims to have been discharged from the Netherlands Police Academy (NPA) on racial grounds and mentions a number of instances of discrimination that allegedly took place during his training at the Academy between 1991 and 1993, such as the following:

> He used to be told repeatedly that he was a bad learner, that his Dutch was insufficient and that he should pattern himself on the white male police officers;
>
> When a white student was late for his classes it was not registered. If the author arrived slightly late, it was registered, resulting in a permanent minus point;
>
> His sports teacher made him perform an exercise. When it appeared that he did not perform well enough the teacher told the group: "The muscles needed for performing this exercise well are poorly developed in apes";
>
> As part of a sports test, a distance had to be covered within a certain time. When the author had run the distance it appeared that the sports teacher had forgotten to register the time. White students did not experience such problems;
>
> The Academy received an invitation to participate in a football tournament. As a committee member of the sports group, the author had to decide on the composition of the team. One of the lecturers told him: "See to it that the academy is well represented, so don't select too many blacks";

On 9 July 1993 the principal of the Academy informed the author in writing that he would like to have a discussion with him in the course of August 1993 about his study results. The author was to be informed during that meeting that he had to finish his examinations before the end of October 1993. The author, however, was in Suriname from 8 July to 26 August 1993. Therefore, he could not know anything about the "agreement" with respect to the deadline of October 1993. As a result, the author did not finish his examinations before the end of October 1993. The Academy later argued that he had to leave because he had not taken his examinations.

2.2 The author further alleges that he was dismissed from the Academy in 1994 after a group

of students led by him made a public statement in which they complained about the situation of foreign students. That statement, as well as pressure from the media, led to the appointment by the Minister of the Interior of the Boekraad Committee, whose mandate was to examine the complaints about the Police Academy. According to the author, the Committee recognized in its final report that the Academy had committed irregularities which had resulted in the discourteous treatment of a certain group of students and addressed a number of recommendations to the Minister.

2.3 The author brought his case before the Administrative Law Division of the Amsterdam Court, which in its judgement of 3 April 1996 annulled the dismissal and recognized that the author had been subjected to discrimination. However, by decision of 6 November 1997 the Central Appeals Court for the public service and social security matters in Utrecht ruled that the decision should stand.

...

6.2 With respect to the merits of the communication, the Committee considers that some of the allegations submitted by the author and summarized in paragraph 2.1 above have racial connotations of a serious nature. However, they did not constitute the subject of the claims brought before the Amsterdam District Court and the Central Appeals Tribunal, which dealt mainly with the question of the dismissal from the Police Academy. Furthermore, it does not appear from the information received by the Committee that the decision to terminate the author's participation in the Police Academy was the result of discrimination on racial grounds. Nor has any evidence been submitted to substantiate the claim that his poor academic results were related to the incidents referred to in paragraph 2.1.

7. The Committee on the Elimination of Racial Discrimination...is of the opinion that the facts, as submitted, do not disclose a violation of the Convention by the State party.

ICCPR

- *Hudoyberganova v. Uzbekistan* (931/2000), ICCPR, A/60/40 vol. II (5 November 2004) 44 at paras. 2.1-2.4, 6.2, 7 and Individual Opinion of Sir Nigel Rodley (concurring), at 52.

...

2.1 Ms. Hudoyberganova was a student at the Farsi Department at the Faculty of languages of the Tashkent State Institute for Eastern Languages since 1995 and in 1996 she joined the newly created Islamic Affairs Department of the Institute. She explains that as a practicing Muslim, she dressed appropriately, in accordance with the tenets of her religion, and in her second year of studies started to wear a headscarf ("hijab"). According to her, since September 1997, the Institute administration began to seriously limit the right to freedom of belief of practicing Muslims. The existing prayer room was closed and when the students

complained to the Institute's direction, the administration began to harass them. All students wearing the hijab were "invited" to leave the courses of the Institute and to study at the Tashkent Islamic Institute instead.

2.2 The author and the concerned students continued to attend the courses, but the teachers put more and more pressure on them. On 5 November 1997, following a new complaint to the Rector of the Institute alleging the infringement of their rights, the students' parents were convoked in Tashkent. Upon arrival, the author's father was told that Ms. Hudoyberganova was in touch with a dangerous religious group which could damage her and that she wore the hijab in the Institute and refused to leave her courses. The father, due to her mother's serious illness, took his daughter home. She returned to the Institute on 1 December 1997 and the Deputy Dean on Ideological and Educational matters called her parents and complained about her attire; allegedly, following this she was threatened and there were attempts to prevent her from attending the lectures.

2.3 On 17 January 1998, she was informed that new regulations of the Institute have been adopted, under which students had no right to wear religious dress and she was requested to sign them. She signed them but wrote that she disagreed with the provisions which prohibited students from covering their faces. The next day, the Deputy Dean on Ideological and Educational matters called her to his office during a lecture and showed her the new regulations again and asked her to take off her headscarf. On 29 January the Deputy Dean called the author's parents and convoked them, allegedly because Ms. Hudoyberganova was excluded from the students' residence. On 20 February 1998, she was transferred from the Islamic Affairs Department to the Faculty of languages. She was told that the Islamic Department was closed, and that it was possible to reopen it only if the students concerned ceased wearing the hijab.

2.4 On 25 March 1998, the Dean of the Farsi Department informed the author of an Order by which the Rector had excluded her from the Institute. The decision was based on the author's alleged negative attitude towards the professors and on a violation of the provisions of the regulations of the Institute. She was told that if she changed her mind about the hijab, the order would be annulled.

...

6.2 The Committee has noted the author's claim that her right to freedom of thought, conscience and religion was violated as she was excluded from University because she refused to remove the headscarf that she wore in accordance with her beliefs. The Committee considers that the freedom to manifest one's religion encompasses the right to wear clothes or attire in public which is in conformity with the individual's faith or religion. Furthermore, it considers that to prevent a person from wearing religious clothing in public or private may constitute a violation of article 18, paragraph 2, which prohibits any coercion that would impair the individual's freedom to have or adopt a religion. As reflected in the

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Committee's general comment No. 22 (para. 5), policies or practices that have the same intention or effect as direct coercion, such as those restricting access to education, are inconsistent with article 18, paragraph 2. It recalls, however, that the freedom to manifest one's religion or beliefs is not absolute and may be subject to limitations, which are prescribed by law and are necessary to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others (article 18, paragraph 3, of the Covenant). In the present case, the author's exclusion took place on 15 March 1998, and was based on the provisions of the Institute's new regulations. The Committee notes that the State party has not invoked any specific ground for which the restriction imposed on the author would in its view be necessary in the meaning of article 18, paragraph 3. Instead, the State party has sought to justify the expulsion of the author from University because of her refusal to comply with the ban. Neither the author nor the State party have specified what precise kind of attire the author wore and which was referred to as "hijab" by both parties. In the particular circumstances of the present case, and without either prejudging the right of a State party to limit expressions of religion and belief in the context of article 18 of the Covenant and duly taking into account the specifics of the context, or prejudging the right of academic institutions to adopt specific regulations relating to their own functioning, the Committee is led to conclude, in the absence of any justification provided by the State party, that there has been a violation of article 18, paragraph 2.

...

7. The Human Rights Committee...is of the view that the facts before it disclose a violation of article 18, paragraph 2, of the Covenant.

...

Individual Opinion of Sir Nigel Rodley

I agree with the finding of the Committee and with most of the reasoning in paragraph 6.2. I feel obliged, however, to dissociate myself from one assertion in the final sentence of that paragraph, in which the Committee describes itself as "duly taking into account the specifics of the context".

The Committee is right in the implication that, in cases involving such "clawback" clauses as those contained in articles 12, 18, 19, 21 and 22, it is necessary to take into account the context in which the restrictions contemplated by those clauses are applied. Unfortunately, in this case, the State party did not explain on what basis it was seeking to justify the restriction imposed on the author. Accordingly, the Committee was not in a position to take any context into account. To assert that it has done so, when it did not have the information on the basis of which it might have done so, enhances neither the quality nor the authority of its reasoning.

For dissenting opinions in this context, see Hudoyberganova v. Uzbekistan (931/2000), ICCPR, A/60/40 vol. II (5 November 2004) 44 at Individual Opinion of Mr. Hipolitio Solari Yrigoyen, 50

and Individual Opinion of Ms. Ruth Wedgwood, 53.