# EQUALITY AND DISCRIMINATION - EMPLOYMENT

## III. JURISPRUDENCE

## CERD

- *Yilmaz-Dogan v. The Netherlands* (1/1984), CERD, A/43/18 (10 August 1988) 59 (CERD/C/36/D/1/1984) at paras. 2.1, 2.2, 9.2. 9.3 and 10.

...

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 setback 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 of 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.

...

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.

...

10. The Committee on the Elimination of Racial Discrimination...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.

- *Diop v. France* (2/1989), CERD, A/46/18 (18 March 1991) 124 (CERD/C/39/D/2/1989/Rev.2) at paras. 3.1 and 6.2-6.4.

...

3.1 The author considers that he was denied the right to work on the ground of national origin, and alleges that the French judicial authorities violated the principle of equality, enshrined in article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination. Allegedly, his right to equal treatment before the tribunals was violated in two respects: First, whereas he was denied to practice law in Nice, six lawyers of Senegalese nationality are members of the Paris Bar. According to the author, his application would have been granted had he submitted it in Paris; he considers it unacceptable that the State party should allow such differences within the national territory. Secondly, it is submitted that the principle of equality and reciprocity at the international level is also affected by virtue of the fact that on the basis of the above-mentioned bilateral instruments, all French lawyers have the right to exercise their profession in Senegal and vice versa.

...

6.2 The Committee has noted the author's claims (a) that he was discriminated against on one of the grounds defined in article 1, paragraph 1, of the Convention on the Elimination of All Forms of Racial Discrimination, (b) that the rejection of his application for admission to the Bar of Nice constituted a violation of his right to work (article 5 (e) of the Convention) and his right to a family life, and (c) that the rejection of his application violated the Franco-Senegalese Convention on Movement of Persons. After careful examination of the material placed before it, the Committee bases its decision on the following considerations.

6.3 In respect of the alleged violations of the Franco-Senegalese Convention on Freedom of Movement of 29 March 1974, the Committee observes that it is not within its mandate to interpret or monitor the application of bilateral conventions concluded between States parties to the Convention, unless it can be ascertained that the application of these conventions result in manifestly discriminatory or arbitrary treatment of individuals under the jurisdiction of States parties to the International Convention on the Elimination of All Forms of Racial Discrimination, which have made the declaration under article 14. The Committee has no evidence that the application or non-application of the Franco-Senegalese Conventions of March 1974 has resulted in manifest discrimination.

6.4 As to the alleged violation of article 5 (e) of the Convention and of the right to a family life, the Committee notes that the rights protected by article 5 (e) are of programmatic character, subject to progressive implementation. It is not within the Committee's mandate to see to it that these rights are established; rather, it is the Committee's task to monitor the implementation of these rights, once they have been granted on equal terms. Insofar as the author's complaint is based on article 5 (e) of the Convention, the Committee considers it to be ill-founded.

- *B. M. S. v. Australia* (8/1996), CERD, A/54/18 (12 March 1999) 78 (CERD/C/54/D/8/1996) at paras. 3.1, 9.2, 9.3 and 10.

...

3.1 Counsel claims that both the [Australian Medical Council] examination system for overseas doctors as a whole and the quota itself are unlawful and constitute racial discrimination. In this respect the judgement of the Federal Court of Australia condones the discriminatory acts of the Australian Government and the AMC and thereby reduces the protection accorded to Australians under the Racial Discrimination Act. At the same time, it eliminates any chance of reform of this discriminatory legislation.

...

9.2 The main issue before the Committee is whether the examination and the quota system for overseas-trained doctors respect the author's right, under article 5 (e) (i) of the Convention, to work and to free choice of employment. The Committee notes in this respect that all overseas-trained doctors are subjected to the same quota system and are required to sit the same written and clinical examinations, irrespective of their race or national origin. Furthermore, on the basis of the information provided by the author it is not possible to reach the conclusion that the system works to the detriment of persons of a particular race or national origin. Even if the system favours doctors trained in Australian and New Zealand medical schools such an effect would not necessarily constitute discrimination on the basis of race or national origin since, according to the information provided, medical students in Australia do not share a single national origin.

9.3 In the Committee's view, there is no evidence to support the author's argument that he has been penalized in the clinical examination for having complained to the HREOC, in view of the fact that an independent observer, appointed by him, was present during two of his attempts.

10. The Committee on the Elimination of Racial Discrimination...is of the opinion that the facts as submitted do not disclose a violation of article 5 (e) (i) or any other provision of the Convention.

**ICCPR**

- *Stalla Costa v. Uruguay* (198/1985), ICCPR, A/42/40 (9 July 1987) 170 at paras. 2.1 and 10.

...
2.1 ...The author states that he has submitted job applications to various governmental agencies in order to...obtain a job in the public service in his country. He has allegedly been told that only former public employees who were dismissed as a result of the application of Institutional Act No. 7 of June 1977 are currently admitted to public service. He refers in this connection to article 25 of Law 15.737 of 22 March 1985, which provides that all public employees who were dismissed as a result of the application of Institutional Act No. 7 have the right to be reinstated in their respective posts.
...
10. ...[T]he Committee observes that Uruguayan public officials dismissed on ideological, political or trade-union grounds were victims of violations of article 25 of the Covenant and as such are entitled to have an effective remedy under article 2, paragraph 3(a) of the Covenant. The Act should be looked upon as such a remedy...[T]he implementation of the Act [cannot] be regarded as an invidious distinction under article 2, paragraph 1...

- *Bhinder v. Canada* (208/1986), ICCPR, A/45/40 vol. II (9 November 1989) 50 at paras. 6.1, 6.2 and 7.

...
6.1 The Committee notes that in the case under consideration legislation which, on the face of it, is neutral in that it applies to all persons without distinction, is said to operate in a way which discriminates against persons of the Sikh religion. The author has also claimed a violation of article 18 of the Covenant. The Committee has also examined the issue in relation to article 26 of the Covenant.

6.2 Whether one approaches the issue from the perspective of article 18 or article 26, in the

view of the Committee the same conclusion must be reached. If the requirement that a hard hat be worn is regarded as raising issues under article 18, then it is a limitation that is justified by reference to the grounds laid down in article 18, paragraph 3. If the requirement that a hard hat be worn is seen as a discrimination *de facto* against persons of the Sikh religion under article 26, then, applying criteria now well established in the jurisprudence of the Committee, the legislation requiring that workers in federal employment be protected from injury and electric shock by the wearing of hard hats is to be regarded as reasonable and directed towards objective purposes that are compatible with the Covenant.

7. The Human Rights Committee...is of the view that the facts which have been placed before it do not disclose a violation of any provision of the International Covenant on Civil and Political Rights.

- *Delgado Páez v. Colombia* (195/1985), ICCPR, A/45/40 vol. II (12 July 1990) 43 at paras. 2.1, 2.2, 2.4 and 5.7.

...
2.1 In March 1983, the author was appointed by the Ministry of Education as a teacher of religions and ethics at a secondary school in Leticia, Colombia. He was elected vice-president of the teachers' union. As an advocate of "liberation theology", his social views differed from those of the then Apostolic Prefect of Leticia.

2.2 In October 1983, the Apostolic Prefect sent a letter to the Education Commission withdrawing the support that the Church had given to Mr. Delgado...
...
2.4 On 5 February 1984, Mr. Delgado was informed that he would no longer teach religion. Instead, a course in manual labour and handicrafts (*manualidades y artesanias*), for which he had no training or experience, was assigned to him...
...
5.7 With respect to article 18, the Committee is of the view that the author's right to profess or to manifest his religion has not been violated. The Committee finds, moreover, that Colombia may, without violating this provision of the Covenant, allow the Church authorities to decide who may teach religion and in what manner it may be taught.

- *Bwalya v. Zambia* (314/1988), ICCPR, A/48/40 vol. II (14 July 1993) 52 (CCPR/C/48/D/314/1988) at paras. 3.3 and 6.7.

...
3.3 The author states that, as a political activist and former prisoner of conscience, he has

been placed under strict surveillance by the authorities, and that he continues to be subjected to restrictions on his freedom of movement. He claims that he has been denied a passport as well as any means of making a decent living.

...

6.7 ...[O]n the basis of the information before it, the Committee concludes that the author has been discriminated against in his employment because of his political opinions, contrary to article 26 of the Covenant.

- *Cavalcanti v. The Netherlands* (418/1990), ICCPR, A/49/40 vol. II (22 October 1993) 114 (CCPR/C/49/D/418/1990) at paras. 7.3 and 7.4.

...

7.3 The Committee recalls its earlier jurisprudence and observes that, although a State is not required under the Covenant to adopt social security legislation, if it does, such legislation must comply with article 26 of the Covenant.

7.4 ...The Committee finds that the requirement of being unemployed at the time of application for benefits is…reasonable and objective, in view of the purposes of the legislation in question, namely to provide assistance to persons who are unemployed. The Committee therefore concludes that the facts before it do not reveal a violation of article 26 of the Covenant.

- *Nahlik v. Austria* (608/1995), ICCPR, A/51/40 vol. II (22 July 1996) 259 (CCPR/C/57/D/608/1995) at paras. 8.2-8.4.

...

8.2. ...The Committee observes that under articles 2 and 26 of the Covenant the State party is under an obligation to ensure that all individuals within its territory and subject to its jurisdiction are free from discrimination, and consequently the courts of States parties are under an obligation to protect individuals against discrimination, whether this occurs within the public sphere or among private parties in the quasi-public sector of, for example, employment. The Committee further notes that the collective agreement at issue in the instant case is regulated by law and does not enter into force except on confirmation by the Federal Minister for Labour and Social Affairs. Moreover, the Committee notes that the collective agreement concerns the staff of the Social Insurance Board, an institution of public law implementing public policy. For these reasons, the Committee cannot agree with the State party's argument that the communication should be declared inadmissible under article 1 of the Optional Protocol.

8.3 The Committee notes that the author claims that he is a victim of discrimination, because his pension is based on the salary before 1 January 1992, without the 200 ATS monthly entitlement which became effective for active employees on that date.

8.4 The Committee recalls that the right to equality before the law and to equal protection of the law without discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26. In the instant case, the contested differentiation is based only superficially on a distinction between employees who retired before 1 January 1992 and those who retired after that date. Actually, this distinction is based on a different treatment of active and retired employees at the time. With regard to this distinction, the Committee considers that the author has failed to substantiate, for purposes of admissibility, that the distinction was not objective or how it was arbitrary or unreasonable. Therefore, the Committee concludes that the communication is inadmissible under article 2 of the Optional Protocol.

*For dissenting opinion in this context, see Nahlik v. Austria* (608/1995), ICCPR, A/51/40 vol. II (22 July 1996) 259 (CCPR/C/57/D/608/1995) at Individual Opinion by Francisco José Aguilar Urbina, Prafullachandra Natwarlal Bhagwati, Elizabeth Evatt, Andreas Mavrommatis and Cecilia Medina Quiroga, 263.

- *Mazou v. Cameroon* (630/1995), ICCPR, A/56/40 vol. II (26 July 2001) 30 at paras.2.1-2.10, 8.2, 8.4 and 9.

...

2.1 Following an attempted *coup d'état* in Cameroon in April 1984, the author, who at that time was a second class magistrate, was arrested on 16 April 1984. He was suspected of having sheltered his brother, who was wanted by the police for having taken part in the *coup d'état*. The author was found guilty and sentenced by the military court in Yaoundé to five years' imprisonment....

2.2 While the author was detained, the President of Cameroon signed a decree on 2 June 1987 (No. 87/747) removing the author from his post as Secretary-General in the Ministry of Education and Chairman of the Governing Council of the National Sports Office. The Decree gave no reasons for the action and, according to the author, was issued in violation of article 133 of the Civil Service Statute.

2.3 On 23 April 1990 the author was released from prison but placed under house arrest in Yagoua, his birthplace, in the far north of the country. Not until the end of April 1991, following the adoption of the Amnesty Act of 23 April 1991 (No. 91/002), were the

restrictions lifted. On the date of transmission of the communication, however, the presidential decree of 2 June 1987 remained in force and the author had not been allowed to resume his duties.

2.4 On 12 June 1991 the author requested the President to reinstate him in the civil service. On 18 July 1991 he filed an appeal with the Ministry of Justice requesting the annulment of the presidential Decree of 2 June 1987. Receiving no response, on 9 September 1991 he applied for a judicial remedy to the administrative division of the Supreme Court, asking it to find that the Decree was illegal and ought therefore to be annulled. The author points out that although the Supreme Court has regularly ruled that such decrees should be annulled, as of 31 October 1994 the case had still not been settled.

2.5 On 4 May 1992, Decrees No. 92/091 and No. 92/092, setting out the terms of reinstatement and compensation of those covered by the Amnesty Act, were issued.

2.6 On 13 May 1992 the author applied to the Ministry of Justice for reinstatement in his post. Pursuant to Decree No. 92/091, his application was transmitted to the committee responsible for monitoring reinstatement in the civil service. On 12 May 1993 that committee issued an opinion in support of the author's reinstatement in the civil service. According to the author, however, the Ministry did not take action on this opinion.

2.7 On 22 September 1992 the author initiated proceedings before the administrative division of the Supreme Court to attack Decree No. 92/091 and Decree No. 92/092. In his view, the Decrees sought to block the full implementation of the Amnesty Act of 23 April 1991 which, he claims, provided for automatic reinstatement. This application was also pending at the time of submission of his communication.

2.8 In his initial communication the author stated that he had been out of work since being released from prison. He claimed that he was being persecuted for his opinions and on account of his ethnic origin. He added that other persons who had benefited from the Amnesty Act had been reinstated in their former posts.

2.9 At that time, the author stated that, in view of the silence of the judicial and political authorities, there were no further domestic remedies available to him.

2.10 Since the submission of his communication, however, the situation has improved significantly for the author; he was reinstated in his post on 16 April 1998 in accordance with a Supreme Court order of 30 January 1997 annulling Decree No. 87/747, the Decree removing him from his post.

...

8.2 The Committee learned that, pursuant to the Supreme Court decision of 30 January

1997, the author had been reinstated in his post and that his salary had been paid retroactively from the date of his dismissal. However, there seems to be no question that the State party neither honoured the request for damages in compensation for the injury suffered nor sought to restore the author's career, which would have resulted in his being reinstated at the grade to which he would have been entitled had he not been dismissed.

...

8.4 With regard to the author's allegations that the State party violated both article 2 and article 25 of the Covenant, the Committee considers that the Supreme Court proceedings that gave rise to the decision of 30 January 1997 satisfying the request that the author had made in his communication were unduly delayed, taking place more than 10 years after the author's removal from his post, and were not followed by restoration of his career on reinstatement, to which he was legally entitled in view of the annulment decision of 30 January 1997. Such proceedings cannot, therefore, be considered to be a satisfactory remedy in the meaning of articles 2 and 25 of the Covenant.

9. Consequently, the State party has an obligation to reinstate the author of the communication in his career, with all the attendant consequences under Cameroonian law, and must ensure that similar violations do not recur in the future.

- *Karakurt v. Austria* (965/2000), ICCPR, A/57/40 vol. II (4 April 2002) 304 (CCPR/C/74/D/965/2000) at paras. 3.1-3.4 and 8.2-8.4, 9 and 10.

...

3.1 The author possesses (solely) Turkish citizenship, while holding an open-ended residence permit in Austria. He is an employee of the 'Association for the Support of Foreigners' in Linz, which employs 10 persons in total. On 24 May 1994, there was an election for the Association's work-council ('Betriebsrat') which has statutory rights and responsibilities to promote staff interests and to supervise compliance with work conditions. The author, who fulfilled the formal legal requirements of being over 19 years old and having been employed for over six months, and another employee, Mr Vladimir Polak, were both elected to the two available spaces on the work-council.

3.2 On 1 July 1994, Mr Polak applied to the Linz Regional Court for the author to be stripped of his elected position on the grounds that he had no standing to be a candidate for the work-council. On 15 September 1994, the Court granted the application, on the basis that the relevant labour law, that is s. 53(1) Industrial Relations Act (Arbeitsverfassungsgesetz), limited the entitlement to stand for election to such work-councils to Austrian nationals or members of the European Economic Area (EEA). Accordingly, the author, satisfying neither criteria, was excluded from standing for the work-council.

3.3 On 15 March 1995 the Linz Court of Appeal dismissed the author's appeal and upheld the lower Court's reasoning. It also held that no violation of Art. 11 of the European Convention on Human Rights (ECHR) was involved, considering that the right to join trade unions had not been interfered with. On 21 April 1995, the author appealed to the Supreme Court, including a request for a constitutional reference (including in terms of the ECHR) of s. 53(1) of the Act by the Constitutional Court.

3.4 On 21 December 1995, the Supreme Court discussed the author's appeal and denied the request for a constitutional reference. The Court considered that the work-council was not an 'association' within the meaning of Art. 11 ECHR. The work-council was not an association formed on a voluntary and private basis, but its organisation and functions were determined by law and was comparable to a chamber of trade. Nor were the staff as such an independent association, as they were not a group of persons associated on a voluntary basis. As to arguments of discrimination against foreigners, the Supreme Court, referring to the State party's obligations under the International Convention for the Elimination of All Forms of Racial Discrimination, considered the difference in treatment between Austrian nationals and foreigners to be justified both under the distinctions that the European economic treaties draw in labour matters between nationals and non-nationals, and also on account of the particular relationship between nationals and their home State. Moreover, as a foreigner's stay could be limited and subjected to administrative decision, the statutory period of membership in a work-council was potentially in conflict.

...

8.2 As to the State party's argument that the claim is, in truth, one under article 25 of the Covenant, the Committee observes that the rights protected by that article are to participation in the public political life of the nation, and do not cover private employment matters such as the election of an employee to a private company's work-council. It accordingly finds article 25, and any adverse consequences possibly flowing for the author from it, not applicable to the facts of the present case.

8.3 In assessing the differentiation in the light of article 26, the Committee recalls its constant jurisprudence that not all distinctions made by a State party's law are inconsistent with this provision, if they are justified on reasonable and objective grounds.7/

8.4 In the present case, the State party has granted the author, a non-Austrian/EEA national, the right to work in its territory for an open-ended period. The question therefore is whether there are reasonable and objective grounds justifying exclusion of the author from a close and natural incident of employment in the State party otherwise available to EEA nationals, namely the right to stand for election to the relevant work-council, on the basis of his citizenship alone. Although the Committee had found in one case (No. 658/1995, *Van Oord v. The Netherlands*) that an international agreement that confers preferential treatment to nationals of a State party to that agreement might constitute an objective and reasonable

ground for differentiation, no general rule can be drawn therefrom to the effect that such an agreement in itself constitutes a sufficient ground with regard to the requirements of article 26 of the Covenant. Rather, it is necessary to judge every case on its own facts. With regard to the case at hand, the Committee has to take into account the function of a member of a work council, i.e., to promote staff interests and to supervise compliance with work conditions (see para. 3.1). In view of this, it is not reasonable to base a distinction between aliens concerning their capacity to stand for election for a work council solely on their different nationality. Accordingly, the Committee finds that the author has been the subject of discrimination in violation of article 26.

9. The Human Rights Committee...is of the view that the facts before it disclose a violation of article 26 of the Covenant.

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, consisting of modifying the applicable law so that no improper differentiation is made between persons in the author's situation and EEA nationals.

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Notes

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7/ See, for example, *Broeks v. The Netherlands* (Communication 172/1984), *Sprenger v. The Netherlands* (Communication 395/1990) and *Kavanagh v. Ireland* (819/1998).

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*For dissenting opinion in this context, see Karakurt v. Austria* (965/2000), ICCPR, A/57/40 vol. II (4 April 2002) 304 (CCPR/C/74/D/965/2000) at Individual Opinion by Sir Nigel Rodley and Mr. Martin Scheinin.

- *Wackenheim v. France* (854/1999), ICCPR, A/57/40 vol. II (15 July 2002) 179 at paras. 2.1-2.3, 2.5, 3 and 7.2-7.6.

...

2.1 The author, who suffers from dwarfism, began in July 1991 to appear in "dwarf tossing" events organized by a company called Société Fun-Productions. Wearing suitable protective gear, he would allow himself to be thrown short distances onto an air bed by clients of the establishment staging the event (a discotheque).

2.2 On 27 November 1991, the French Ministry of the Interior issued a circular on the policing of public events, in particular dwarf tossing, which instructed prefects to use their policing powers to instruct mayors to keep a close eye on spectacles staged in their

communes. The circular said that dwarf tossing should be banned on the basis of, among other things, article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

2.3 On 30 October 1991 the author applied to the administrative court in Versailles to annul an order dated 25 October 1991 by the mayor of Morsang-sur-Orge banning a dwarf tossing event scheduled to take place in a local discotheque. The court annulled the mayor's order in a ruling on 25 February 1992 ...

...

2.5 By an order dated 27 October 1995 the Council of State overturned the ruling on the grounds, first, that dwarf tossing was an attraction that affronted human dignity, respect for human dignity being part of public order and the authority vested in the municipal police being the means of ensuring it, and second, that respect for the principle of freedom of employment and trade was no impediment to the banning of an activity, licit or otherwise, in exercise of that authority if the activity was of a nature to disrupt public order. The Council of State went on to say that the attraction could be banned even in the absence of particular local circumstances.

...

3. The author affirms that banning him from working has had an adverse effect on his life and represents an affront to his dignity. He claims to be the victim of a violation by France of his right to freedom, employment, respect for private life and an adequate standard of living, and of an act of discrimination. He further states that there is no work for dwarves in France and that his job does not constitute an affront to human dignity since dignity consists in having a job...

...

7.2 The Committee must decide whether the authorities' ban on dwarf tossing constitutes discrimination within the meaning of article 26 of the Covenant, as the author asserts.

7.3 The Committee recalls its jurisprudence whereby not every differentiation of treatment of persons will necessarily constitute discrimination, which is prohibited under article 26 of the Covenant. Differentiation constitutes discrimination when it is not based on objective and reasonable grounds. The question, in the present case, is whether the differentiation between the persons covered by the ban ordered by the State party and persons to whom this ban does not apply may be validly justified.

7.4 The ban on throwing ordered by the State party in the present case applies only to dwarves (as described in paragraph 2.1). However, if these persons are covered to the exclusion of others, the reason is that they are the only persons capable of being thrown. Thus, the differentiation between the persons covered by the ban, namely dwarves, and those to whom it does not apply, namely persons not suffering from dwarfism, is based on an objective reason and is not discriminatory in its purpose. The Committee considers that the

State party has demonstrated, in the present case, that the ban on dwarf tossing as practised by the author did not constitute an abusive measure but was necessary in order to protect public order, which brings into play considerations of human dignity that are compatible with the objectives of the Covenant. The Committee accordingly concludes that the differentiation between the author and the persons to whom the ban ordered by the State party does not apply was based on objective and reasonable grounds.

7.5 The Committee is aware of the fact that there are other activities which are not banned but which might possibly be banned on the basis of grounds similar to those which justify the ban on dwarf tossing. However, the Committee is of the opinion that, given that the ban on dwarf tossing is based on objective and reasonable criteria and the author has not established that this measure was discriminatory in purpose, the mere fact that there may be other activities liable to be banned is not in itself sufficient to confer a discriminatory character on the ban on dwarf tossing. For these reasons, the Committee considers that, in ordering the above-mentioned ban, the State party has not, in the present case, violated the rights of the author as contained in article 26 of the Covenant.

7.6 The Human Rights Committee...is of the view that the facts before it do not reveal any violation of the Covenant.

- *Love et al. v. Australia* (983/2001), ICCPR, A/58/40 vol. II (25 March 2003) 286 (CCPR/C/77/D/983/2001) at paras. 2.1, 8.2, 8.3, Individual Opinion of Mr. Nisuke Ando, 300 and Individual Opinion of Mr. Prafullachandra Natwarlal Bhagwati, 302.

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2.1 On 27 October 1989, 24 November 1989, 10 January 1990 and 24 March 1990, respectively, Messrs. Ivanoff, Love, Bone and Craig, all experienced pilots, commenced contracts as pilots on domestic aircraft operated by Australian Airlines, now part of Qantas Airlines Limited. Australian Airlines was wholly State-owned and operated by government-appointed management. The airline terminated the authors' contracts upon their reaching 60 years of age pursuant to a compulsory age-based retirement policy. The respective dates of the authors' compulsory retirement were the day before they reached 60 years of age, that is, for Mr. Craig, 29 August 1990; for Mr. Ivanoff, 18 September 1990; for Mr. Bone, 12 October 1991, and, for Mr. Love, on 17 May 1992. The contracts under which they were employed did not include a specific clause to provide for compulsory retirement at that or any other age. Each of the authors held valid pilot licences, as well as medical certificates, at the time of the terminations...

...

8.2 The issue to be decided by the Committee on the merits is whether the author(s) have been subject to discrimination, contrary to article 26 of the Covenant. The Committee recalls

its constant jurisprudence that not every distinction constitutes discrimination, in violation of article 26, but that distinctions must be justified on reasonable and objective grounds, in pursuit of an aim that is legitimate under the Covenant. While age as such is not mentioned as one of the enumerated grounds of prohibited discrimination in the second sentence of article 26, the Committee takes the view that a distinction related to age which is not based on reasonable and objective criteria may amount to discrimination on the ground of "other status" under the clause in question, or to a denial of the equal protection of the law within the meaning of the first sentence of article 26. However, it is by no means clear that mandatory retirement age would generally constitute age discrimination. The Committee takes note of the fact that systems of mandatory retirement age may include a dimension of workers' protection by limiting the life-long working time, in particular when there are comprehensive social security schemes that secure the subsistence of persons who have reached such an age. Furthermore, reasons related to employment policy may be behind legislation or policy on mandatory retirement age. The Committee notes that while the International Labour Organization has built up an elaborate regime of protection against discrimination in employment, mandatory retirement age does not appear to be prohibited in any of the ILO Conventions. These considerations will of course not absolve the Committee's task of assessing under article 26 of the Covenant whether any particular arrangement for mandatory retirement age is discriminatory.

8.3 In the present case, as the State party notes, the aim of maximizing safety to passengers, crew and persons otherwise affected by flight travel was a legitimate aim under the Covenant. As to the reasonable and objective nature of the distinction made on the basis of age, the Committee takes into account the widespread national and international practice, at the time of the author's dismissals, of imposing a mandatory retirement age of 60. In order to justify the practice of dismissals maintained at the relevant time, the State party has referred to the ICAO [International Civil Aviation Organization] regime which was aimed at, and understood as, maximizing flight safety. In the circumstances, the Committee cannot conclude that the distinction made was not, at the time of Mr Love's dismissal, based on objective and reasonable considerations. Consequently, the Committee is of the view that it cannot establish a violation of article 26.

...

Individual Opinion of Mr. Nisuke Ando (concurring)

I share the conclusion of the majority Views that the imposition of a mandatory retirement age of 60 is not a violation of article 26. However, I am unable to agree to the Views' statement that "a distinction related to age…may amount to discrimination on the ground of “other status” under the clause in question, or to a denial of the equal protection of the law within the meaning of the first sentence of article 26" (para. 8.2) for the following reasons:

*Firstly*, I consider that “age” should not be included in “other status” because age has a

distinctive character which is different from all the grounds enumerated in article 26. All the grounds enumerated in article 26 are applicable only to a portion of the human species, however large it may be. In contrast, age is applicable to all the human species, and because of this unique character, age constitutes ground to treat a portion of persons differently from others in the whole scheme of the Covenant. For example, article 6, paragraph 5, prohibits the imposition of death sentence on "persons below eighteen years of age", and article 23, paragraph 2, speaks of "men and women of marriageable age". In addition, terms such as "every child" (article 24) and "every citizen" (article 25) presuppose a certain age as a legitimate ground to differentiate persons. In my opinion, "other status" referred to in article 26 should be interpreted to share the characteristic which is common to all the grounds enumerated in that article, thus precluding age. Of course, this does not deny that differentiation based on "age" may raise issues under article 26, but the term "such as" which precedes the enumeration implies that there is no need to include "age" in "other status".

*Secondly*, I doubt if the issue in the present case is "a denial of the equal protection of the law within the meaning of the first sentence of article 26". In essence, the authors of the present case are claiming that "professional qualifications" to be a pilot should be judged on the basis of each individual's physical and other capacities (abilities), that the imposition of a mandatory retirement age ignores this basis, and that such imposition constitutes discrimination based on age which is prohibited under article 26. This is tantamount to claiming that different treatment of persons of the same age with different capacities violates the principle of equal protection of the law. However, a professional qualification usually requires a minimum age, while a person below that age may well have sufficient capacities to qualify for the profession. In other words, a professional qualification usually requires a certain minimum age as well as maximum age, and such age requirements have little to do with the principle of equal protection of the law.

*Thirdly*, in my opinion, the present case concerns "the right to work" and its "legitimate limitations" under the International Covenant on Economic, Social and Cultural Rights (art. 6, para. 1, and art. 4, respectively). Thus, at issue here is a proper balance between an economic or social right and its limitations. Of course, article 26 of the International Covenant on Civil and Political Rights prohibits discrimination in law or in fact in any field regulated and protected by public authorities, thus applying to economic or social rights as well. Nevertheless, as in the present case, the limitations of certain economic or social rights, in particular the right to work or to pension or to social security, require thorough scrutiny of various economic and social factors, of which the State party concerned is ordinarily in the best position to make objective and reasonable evaluation and adjustment. This means that the Human Rights Committee should respect the limitations of those rights set by the State party concerned unless they involve clearly unfair procedural irregularities or entail manifestly inequitable results.

## EQUALITY AND DISCRIMINATION - EMPLOYMENT

Individual Opinion of Mr. Prafullachandra Natwarlal Bhagwati (concurring)

The question is whether imposing a mandatory age of retirement at 60 for airline pilots could be said to be a violation of article 26 of the Covenant. Article 26 does not say in explicit terms that no one shall be subjected to discrimination on ground of age. The prohibited grounds of discrimination are set out in article 26, but age is not one of them. Article 26 has therefore no application in the present case, so runs an argument that could be made.

This argument, plausible though it may seem, is in my opinion not acceptable. There are two very good reasons why I take this view.

In the first place, article 26 embodies the guarantee of equality before the law and non-discrimination. This is a guarantee against arbitrariness in State action. Equality is antithetical to arbitrariness. Article 26 is therefore intended to strike against arbitrariness in State action. Now, fixing the age of retirement at 60 for airline pilots cannot be said to be arbitrary. It is not as if a date has been arbitrarily picked out by the State party for retirement of airline pilots. It is not uncommon to find that in many countries 60 years is the age fixed for superannuation of airline pilots, since that is the age at which it would not be unreasonable to expect airline pilots would be affected, particularly since they have to fly airplanes which require considerable alacrity, alertness, concentration and presence of mind. I do not think that the selection of the age of 60 years for mandatory retirement for airline pilots can be said to be arbitrary or unreasonable so as to constitute a violation of article 26.

In the second place, the words "such as" preceding the enumeration of the grounds in article 26 clearly indicate that the grounds there enumerated are illustrative and not exhaustive. Age as a prohibited ground of discrimination is therefore not excluded. Secondly, the word "status" can be interpreted so as to include age. It is therefore a valid argument that if there was discrimination on the grounds of age, it would attract the applicability of article 26. But it must still be discrimination. Every differentiation does not incur the vice of discrimination. If it is based on an objective and reasonable criterion having rational relation to the object sought to be achieved, it would not be hit by article 26. Here, in the present case, for the reasons given above, prescribing the age of 60 years as the age of mandatory retirement for airline pilots could not be said to be arbitrary or unreasonable, having regard to the need for maximizing safety, and consequently it was not in violation of article 26.

- *Adrien Mundyo Buyso, Thomas Osthudi Wongodi, René Sibu Matubuka et al. v. Democratic Republic of the Congo* (933/2000), ICCPR, A/58/40 vol. II (31 July 2003) 224 (CCPR/C/78/D/933/2000) at paras. 2.1-2.3, 5.2, 6.1 and 6.2.

...

## EQUALITY AND DISCRIMINATION - EMPLOYMENT

2.1 Under Presidential Decree No. 144 of 6 November 1998, 315 judges and public prosecutors, including the above-mentioned authors, were dismissed on the following grounds:

> "The President of the Republic;
>
> Having regard to Constitutional Decree-Law No. 003 of 27 May 1997 on the organization and exercise of power in the Democratic Republic of Congo, as subsequently amended and completed;
>
> Having regard to articles 37, 41 and 42 of Ordinance-Law No. 88-056 of 29 September 1988 on the status of judges;
>
> Given that the reports by the various commissions which were set up by the Ministry of Justice and covered the whole country show that the above-mentioned judges are immoral, corrupt, deserters or recognized to be incompetent, contrary to their obligations as judges and to the honour and dignity of their functions;
>
> Considering that the conduct in question has discredited the judiciary, tarnished the image of the system of justice and hampered its functioning;
>
> Having regard to urgency, necessity and appropriateness;
>
> On the proposals of the Minister of Justice;
>
> Hereby decrees:
>
> Article 1:
>
> The following individuals are dismissed from their functions as judges...".

2.2 Contesting the legality of these dismissals, the authors filed an appeal, following notification and within the three-month period established by law, with the President of the Republic to obtain the withdrawal of the above-mentioned decree. Having received no response, in accordance with Ordinance No. 82/017 of 31 March 1982 on procedure before the Supreme Court of Justice, the 68 judges all referred their applications to the Supreme Court during the period from April to December 1999. According to the information provided by the authors, it appears, first of all, that the Attorney-General of the Republic, who was required to give his views within one month, deliberately failed to transmit the report1/ by the Public Prosecutor's Office until 19 September 2000 in order to block the appeal. Moreover the Supreme Court, by a ruling of 26 September 2001, decided that

## EQUALITY AND DISCRIMINATION - EMPLOYMENT

Presidential Decree No. 144 was an act of Government inasmuch as it came within the context of government policy aimed at raising moral standards in the judiciary and improving the functioning of one of the three powers of the State. The Supreme Court consequently decided that the actions taken by the President of the Republic, as the political authority, to execute national policy escaped the control of the administrative court and thus declared inadmissible the applications by the authors.

2.3 On 27 and 29 January 1999, the authors, who formed an organization called the "Group of the 315 illegally dismissed judges", known as the "G.315", submitted their application to the Minister for Human Rights, without results.

...

5.2 The Committee notes that the authors have made specific and detailed allegations relating to their dismissal, which was not in conformity with the established legal procedures and safeguards. The Committee notes in this regard that the Minister of Justice, in his statement of June 1999...and the Attorney-General of the Republic, in the report by the Public Prosecutor's Office of 19 September 2000 (see note 1), recognize that the established procedures and safeguards for dismissal were not respected. Furthermore, the Committee considers that the circumstances referred to in Presidential Decree No. 144 could not be accepted by it in this specific case as grounds justifying the fact that the dismissal measures were in conformity with the law and, in particular, with article 4 of the Covenant. The Presidential Decree merely refers to specific circumstances without, however, specifying the nature and extent of derogations from the rights provided for in domestic legislation and in the Covenant and without demonstrating that these derogations are strictly required and how long they are to last. Moreover, the Committee notes that the Democratic Republic of the Congo failed to inform the international community that it had availed itself of the right of derogation, as stipulated in article 4, paragraph 3, of the Covenant. In accordance with its jurisprudence, 6/ the Committee recalls, moreover, that the principle of access to public service on general terms of equality implies that the State has a duty to ensure that it does not discriminate against anyone. This principle is all the more applicable to persons employed in the public service and to those who have been dismissed. With regard to article 14, paragraph 1, of the Covenant, the Committee notes the absence of any reply from the State party and also notes, on the one hand, that the authors did not benefit from the guarantees to which they were entitled in their capacity as judges and by virtue of which they should have been brought before the Supreme Council of the Judiciary in accordance with the law, and on the other hand, that the President of the Supreme Court had publicly, before the case had been heard, supported the dismissals that had taken place...thus damaging the equitable hearing of the case. Consequently, the Committee considers that those dismissals constitute an attack on the independence of the judiciary protected by article 14, paragraph 1, of the Covenant. The dismissal of the authors was ordered on grounds that cannot be accepted by the Committee as a justification of the failure to respect the established procedures and guarantees that all citizens must be able to enjoy on general terms of equality. In the absence

of a reply from the State party, and inasmuch as the Supreme Court, by its ruling of 26 September 2001, has deprived the authors of all remedies by declaring their appeals inadmissible on the grounds that Presidential Decree No. 144 constituted an act of Government, the Committee considers that, in this specific case, the facts show that there has been a violation of article 25, paragraph (c), read in conjunction with article 14, paragraph 1, on the independence of the judiciary, and of article 2, paragraph 1, of the Covenant.

...

6.1 The Human Rights Committee...is of the view that the State party has committed a violation of article 25 (c), article 14, paragraph 1, article 9 and article 2, paragraph 1, of the Covenant.

6.2 Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee is of the view that the authors are entitled to an appropriate remedy, which should include, *inter alia*: (a) in the absence of a properly established disciplinary procedure against the authors, reinstatement in the public service and in their posts, with all the consequences that that implies, or, if necessary, in similar posts; 7/ and (b) compensation calculated on the basis of an amount equivalent to the salary they would have received during the period of non-reinstatement.8/ The State party is also under an obligation to ensure that similar violations do not occur in future and, in particular, that a dismissal measure can be taken only in accordance with the provisions of the Covenant.

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Notes

1/ The authors transmitted a copy of the report by the Public Prosecutor's Office. In the report, the Office of the Attorney-General of the Republic requests the Supreme Court of Justice to declare, first and foremost, that Presidential Decree No. 144 is an act of Government that is outside its jurisdiction; and, secondly, that this decree is justified because of exceptional circumstances. On the basis of accusations made by both the population and foreigners living in the Democratic Republic of the Congo against allegedly incompetent, irresponsible, immoral and corrupt judges, as well as of the missions carried out by judges in this regard, the Attorney-General of the Republic maintains that the Head of State issued Presidential Decree No. 144 in response to a crisis situation characterized by war, partial territorial occupation and the need to intervene as a matter of urgency in order to combat impunity. He stressed that it was materially impossible for the authorities to follow the ordinary disciplinary procedure and that the urgency of the situation, the collapse of the judiciary and action to combat impunity were incompatible with any decision to suspend the punishment of the judges concerned.

...

6/ Communication No. 422/1990 *Adimayo M. Aduayom T. Diasso and Yawo S. Dobou v. Togo;* general comment No. 25 on article 25 (fiftieth session - 1996).

7/ Communications No. 630/1995 *Abdoulaye Mazou v. Cameroon*; No. 641/1995 *Gedumbe v. Democratic Republic of the Congo*; and No. 906/2000 *Felix Enrique Chira Vargas-Machuca v. Peru*.

8/ Communications Nos. 422/1990, 423/1990 and 424/1990 *Adimayo M. Aduayom, Sofianou T. Diasso and Yawo S. Dobou v. Togo*; No. 641/1995 *Gedumbe v. Democratic Republic of the Congo*; and No. 906/2000 *Felix Enrique Chira Vargas-Machuca v. Peru*.

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- *Pastukhov v. Belarus* (814/1998), ICCPR, A/58/40 vol. II (5 August 2003) 69 (CCPR/C/78/D/814/1998) at paras. 2.1-2.5, 7.2, 7.3, 9 and Individual Opinion of Mrs. Ruth Wedgwood and Mr. Walter Kaelin (concurring), 75.

...
2.1 On 28 April 1994, the Supreme Council (Parliament), acting according to the relevant legal procedure and, in particular, the Constitution of 15 March 1994, elected the author a judge of the Constitutional Court for a period of 11 years.

2.2 By a presidential decree of 24 January 1997, the author lost his post on the ground that his term of office had expired following the entry into force of the new Constitution of 25 November 1996 1/.

2.3 On 11 February 1997, the author applied to a district court for reinstatement. On 21 February 1997, the court refused to admit the application.

2.4 On 31 March 1997, the author appealed that decision to the Minsk Municipal Court, which rejected his appeal on 10 April 1997 on the ground that the courts were not competent to consider disputes over the reinstatement of persons, such as Constitutional Court judges, who had been appointed by the Supreme Council of the Republic of Belarus.

2.5 On 2 June 1997, the author applied for judicial review to the Supreme Court. On 13 June 1997, the Supreme Court dismissed the application on the above ground.
...
7.2 In reaching its Views, the Committee has taken into account, first, the fact that the State party did not provide it with sufficiently well supported arguments concerning the effective remedies available in the present case and, second, that it did not respond to the author's allegations concerning either the termination of his service on the bench or the independence of the courts in that regard. The Committee draws attention to the fact that article 4, paragraph 2, of the Optional Protocol requires States parties to submit to it written explanations or statements clarifying the matter and the remedies, if any, that they may have

taken. That being so, the allegations in question must be recognized as carrying full weight, since they were adequately supported.

7.3 The Committee takes note of the author's claim that he could not be removed from the bench since he had, in accordance with the law in force at the time, been elected a judge on 28 April 1994 for a term of office of 11 years. The Committee also notes that presidential decree of 24 January 1997 No. 106 was not based on the replacement of the Constitutional Court with a new court but that the decree referred to the author in person and the sole reason given in the presidential decree for the dismissal of the author was stated as the expiry of his term as Constitutional Court judge, which was manifestly not the case. Furthermore, no effective judicial protections were available to the author to contest his dismissal by the executive. In these circumstances, the Committee considers that the author's dismissal from his position as a judge of the Constitutional Court, several years before the expiry of the term for which he had been appointed, constituted an attack on the independence of the judiciary and failed to respect the author's right of access, on general terms of equality, to public service in his country. Consequently, there has been a violation of article 25 (c) of the Covenant, read in conjunction with article 14, paragraph 1, on the independence of the judiciary and the provisions of article 2.

...

9. By virtue of article 2, paragraph 3, of the Covenant, the author has a right to an effective remedy including compensation. It is incumbent on the State party to ensure that there is no recurrence of such violations.

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Notes

1/ "Presidential decree No. 106 of 24 January 1997 dismissing Mr. Mikhail Pastukhov from his duties as judge of the Constitutional Court: In conformity with article 146 of the Belarus Constitution, Mr. Pastukhov is dismissed from his duties as judge of the Constitutional Court upon expiry of his term of office."

...

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Individual Opinion of Mrs. Ruth Wedgwood and Mr. Walter Kaelin (concurring)

The dismissal of Judge Mikhail Ivanovich Pastukhov from his position as a judge of the Belarus Constitutional Court was part of an attempt to diminish the independence of the judiciary. While the organization of a national court system may be changed by legitimate democratic means, the change here was part of an attempt to consolidate power in a single branch of government through the pretense of a constitutional referendum. It has interrupted the state party's fledgling progress towards an independent judiciary. As such, the presidential decree dismissing Judge Pastukhov from his office as judge of the Constitutional

Court violated the rights guaranteed to him and to the people of Belarus under Articles 14 and 25 of the Covenant.

- *Kazantzis v. Cyprus* (972/2001), ICCPR, A/58/40 vol. II (7 August 2003) 499 (CCPR/C/78/D/972/2001) at paras. 2.1-2.4 and 6.5.

...
2.1 On 23 June 1997, the Supreme Council of Judicature invited applications from qualified advocates for two vacancies of the post of District Judge and one vacancy of the post of Judge of the Industrial Disputes Tribunal. The author applied for both posts on 30 July 1997. He was interviewed by the Supreme Council of Judicature for both posts on 9 September and 11 September 1997, respectively.

2.2 On 18 September 1997, the Supreme Council of Judicature decided that a candidate other than the author was most suitable for the post of Judge of the Industrial Disputes Tribunal. The Council also ascertained that there were four additional vacancies for the post of District Judge, in addition to the two vacancies in relation to which applications had already been invited. It decided not to fill two vacancies at the time, but rather to invite also applications for the four additional vacancies. It was decided that, concerning the four additional vacancies, candidates who had already submitted applications for the two vacant posts would be considered for all six vacancies. On 15 and 18 October 1997, all candidates, including the author, were interviewed.

2.3 On 21 October 1997, the Council evaluated the candidates, taking into account the reports on the abilities of each, by the President of the District Court in which the candidate was practicing as a lawyer, and decided to appoint the six candidates considered the most suitable for the post of District Judge. The author was not among those selected for appointment. Notice of the appointments decided by the Council was published in the Official Gazette of the Republic on 14 November 1997. The author was not personally notified of his non-appointment, nor the reasons therefor.

2.4 The author did not contest this issue before the local courts, as previous jurisprudence of the Supreme Court had held that no Cypriot court had jurisdiction over the decisions of the Supreme Council of Judicature. In *Kourris v. Supreme Council of Judicature*,1/ the Supreme Court held, by a majority of three judges to two, that "...it follows that the Court has no jurisdiction to entertain a recourse against any act, decision or omission of the said Council (of Judicature) because the functions of such Council *are very closely connected with the exercise of judicial power.*" (Emphasis original)
...
6.5 As to the author's claim under article 14, paragraph 1, the Committee observes that, in

contrast to the situation in *Casanovas v. France*6/ and *Chira Vargas v. Peru*7/ concerning removal from public employment, the issue in dispute concerns the denial by a body exercising a non-judicial task of an application for employment in the judiciary. The Committee recalls that the concept of "suit at law" under article 14, paragraph 1, is based on the nature of the right in question rather than the status of one of the parties.8/ It considers that the procedure of appointing judges, albeit subject to the right in article 25(c) to access to public service on general terms of equality as well as the right in article 2, paragraph 3, to an effective remedy, does not additionally come within the purview of a determination of rights and obligations in a suit at law, within the meaning of article 14, paragraph 1, of the Covenant. This part of the communication is therefore inadmissible *ratione materiae*, under Article 3 of the Optional Protocol.

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Notes

1/ (1972) 3 CLR 390.

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6 Case No. 441/1990, Views adopted on 19 July 1994.

7/ Case No. 906/2000, Views adopted on 22 July 2002.

8/ *Y. L. v Canada* Case No. 112/81, Decision adopted on 8 April 1986, at paragraph 9.2; and *Casanovas v. France* [Case No. 441/1990], at paragraph 5.2.

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- *Althammer et al. v. Austria* (998/2001), ICCPR, A/58/40 vol. II (8 August 2003) 317 (CCPR/C/78/D/998/2001) at paras. 2.1, 2.2 and 10.2.

...

2.1 The authors are retired employees of the Social Insurance Board in Salzburg *(Salzburger Gebietskrankenkasse*). Counsel states that they receive retirement benefits under the relevant schemes of the Regulations A of Service for Employees of the Social Insurance Board (*Dienstordnung A für die Angestellten bei den Sozialversicherungsträgern*).

2.2 Amongst various monthly entitlements, the Regulations provided for monthly household entitlements of ATS 220 and children's entitlements of ATS 260 per child for those with children up to the age of 27. On 1 January 1996, an amendment to the regulations came into effect which abolished the monthly household entitlement and increased the children's benefits to ATS 380 per child.

...

10.2 The authors claim that they are victims of discrimination because the abolition of the

household benefits affects them, as retired persons, to a greater extent than it affects active employees. The Committee recalls that a violation of article 26 can also result from the discriminatory effect of a rule or measure that is neutral at face value or without intent to discriminate.7/ However, such indirect discrimination can only be said to be based on the grounds enumerated in Article 26 of the Covenant if the detrimental effects of a rule or decision exclusively or disproportionately affect persons having a particular race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, rules or decisions with such an impact do not amount to discrimination if they are based on objective and reasonable grounds. In the circumstances of the instant case, the abolition of monthly household payments combined with an increase of children's benefits is not only detrimental for retirees but also for active employees not (yet or no longer) having children in the relevant age bracket, and the authors have not shown that the impact of this measure on them was disproportionate. Even assuming, for the sake of argument, that such impact could be shown, the Committee considers that the measure, as was stressed by the Austrian courts,...was based on objective and reasonable grounds. For these reasons, the Committee concludes that, in the circumstances of the instant case, the abolition of monthly household payments, even if examined in the light of previous changes of the Regulations of Service for Employees of the Social Insurance Board, does not amount to discrimination as prohibited in Article 26 of the Covenant.

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7/ See the Committee's general comment No. 18 on non-discrimination and the Committee's Views adopted on 19 July 1995 in Case No. 516/1992 (*Simunek et al. v. the Czech Republic*) (CCPR/C/54/D/516/1992, para. 11.7)

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- *Jazairi v. Canada* (958/2000), ICCPR, A/60/40 vol. II (26 October 2004) 304 at paras. 2.2, 2.3 and 7.4.

...

2.2 In July 1989, the author complained to the Ontario Human Rights Commission, alleging that his right to equal treatment with respect to employment without discrimination and harassment had been infringed because of his race, ethnic origin, creed and association, in contravention of the Ontario Human Rights Code, 1981 (henceforth "the Ontario Code") 1/. He alleged that certain members of his faculty had come to view him as anti-Semitic, and that his political opinions at the relevant time that Israel could be criticized for not doing more to resolve the Palestinian question, together with other facts, including his race, ethnic origin and religion, became an issue which adversely affected his right to equal treatment in employment, and specifically in his application for promotion to full professor. Between

December 1989 and May 1993, the Commission investigated the complaint.

2.3 The Commission rejected the author's complaint on 29 August 1994, finding that: (i) while the evidence indicated that his application for promotion to Full Professor did not receive a fair and timely evaluation, the irregularities in the process did not appear to be related to any prohibited ground of discrimination; and (ii) while the evidence indicated that he might have been differently treated, there was insufficient evidence to indicate that this was a result of his creed rather than his political beliefs, the latter not being a prohibited ground of discrimination under the Ontario Code. The Commission decided not to request the appointment of a Board of Inquiry and dismissed the complaint. The author requested reconsideration of the Commission's decision.

...

7.4 Turning to the major claim that the omission of political belief from the enumerated grounds of prohibited discrimination in the Ontario Code violates the Covenant, the Committee observes that an absence of protection against discrimination on this ground does raise issues under the Covenant 8/. Moreover, the exclusion in the Ontario Code of political opinion as a prohibited basis of discrimination suggests that the State party may have failed to ensure that, in an appropriate case, there would be a remedy available to a victim of discrimination on political grounds in the field of employment. The Committee observes however that the Court of Appeal, having found that the author's views did not amount to a protected "creed", went on to conclude that even considering the matter in the light most favourable to the author, there was nothing on the record to suggest that the author's political beliefs had disentitled him to consideration for advancement in the Department of Economics. It is not for the Committee to substitute its views for the judgement of the domestic courts on the evaluation of facts and evidence in a case, unless the evaluation is manifestly arbitrary or amounts to a denial of justice. If a particular conclusion of fact is one that is reasonably available to a trier of fact on the basis of the evidence before it, *ipso facto* a showing of manifest arbitrariness or a denial of justice will not have been made out. In the Committee's view, the author has failed to discharge the burden of showing that the factual assessment of the domestic courts was thus flawed. In the light of this conclusion, the claim under article 26 concerning the absence of protection of political belief in the Ontario Code is rendered hypothetical. The claim is accordingly unsubstantiated and inadmissible under article 2 of the Optional Protocol.

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Notes

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1/ Section 5 (1) of the Ontario Code provides: "Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or handicap."

...

8/ See *Love et al. v. Australia*, case No. 983/2001, Views adopted on 25 March 2003.

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*For dissenting opinion in this context, see Jazairi v. Canada* (958/2000), ICCPR, A/60/40 vol. II (26 October 2004) 304 at Individual Opinion of Ms. Christine Chanet, Mr. Maurice Glele Ahanhanzo, Mr. Ahmed Tawfik Khalil and Mr. Rajsoomer Lallah, 313.

- *Radosevic v. Germany* (1292/2004), ICCPR, A/60/40 vol. II (22 July 2005) 438 at paras. 2.1, 2.2, 2.4, 7.2, 7.3 and 8.

...

2.1 The author served a prison term in Heimsheim prison in Germany from 10 March 1998 to 28 February 2003, when he was deported. The remainder of his prison term was suspended, provided that he would not return to Germany.

2.2 During imprisonment, the author performed work, as required under section 41 of the German Enforcement of Sentences Act. He was remunerated from April 1998 until August 1999 and again in April 2000, as well as from June until August 2001. The wages were calculated pursuant to section 200 of the Enforcement of Sentences Act, on the basis of 5 per cent of the base amount 2/ from April until August 1999 and in April 2000, and on the basis of 9 per cent of the base amount from June until August 2001. They ranged from about 180 to about 400 Deutsche Mark (DM) per month.

...

2.4 By judgement of 1 July 1998, the Federal Constitutional Court ruled that the constitutional principle of resocialization of prisoners requires adequate remuneration for their work; the Court set aside the calculation methods for the wages of prisoners laid down in section 200 of the Enforcement of Sentences Act (5 per cent of the base amount, despite the legislator's original intention progressively to raise the level of remuneration to 40 per cent of the base amount). It considered the average wages paid to prisoners under that legislation, which amounted to 1.70 DM per hour or 10 DM per day, or 200 DM per month, in 1997, to be incompatible with the German Basic Law, in the absence of any other work-related benefits apart from the employer's contribution to the prisoner's unemployment insurance. The Court argued that "in the light of the amount paid for mandatory work performed by a prisoner, he cannot be convinced that honest work is an appropriate means for earning a living" after his release. However, it allowed the legislator a transitional period, to run until 31 December 2000, to introduce an adequate raise in the remuneration of work as well as revised provisions for social insurance coverage of such work.

...

7.2 The Committee notes the author's argument that his remuneration calculated on the basis of 5 per cent of the base amount between April 1998 and August 1999 and in April 2000, and

on the basis of 9 per cent of the base amount between June and August 2001, was grossly and unjustifiably disproportionate to wages paid for similar work performed by the regular workforce, thereby violating his right to equality under article 26 of the Covenant. It also notes that the State has invoked its reservation to article 5, paragraph 2 (a), of the Optional Protocol, to the extent that it precludes the Committee from examining communications "by means of which a violation of article 26 […] is reprimanded, if and insofar as the reprimanded violation refers to rights other than those guaranteed under the aforementioned Covenant". The Committee considers that the author has not sufficiently substantiated, for purposes of admissibility, his claim that he was a victim of discrimination based on his status as a prisoner because he received only a small part of what he would have been paid on the labour market. In particular, he has not provided any information on the type of work that he performed during his incarceration and whether it was of a kind that is available in the labour market, nor about the remuneration paid for comparable work in the labour market. Mere reference to a certain percentage of the base amount, i.e. the average amount of benefits payable under the German statutory pensions insurance scheme, does not suffice to substantiate the alleged discriminatory discrepancy between the remuneration for his work and work performed by the regular workforce. It follows that this part of the communication is inadmissible under article 2 of the Optional Protocol. The Committee therefore need not address the issue of the State party's reservation concerning article 26.

7.3 The Committee further notes the author's claims that article 26, read in conjunction with article 8, paragraph 3 (c) (i), contains a right to adequate remuneration for work performed by prisoners, and that he was discriminated against in the enjoyment of that right because of the continued application of section 200 of the Enforcement of Sentences Act for a transitional period of two years and six months after the Constitutional Court had declared that provision incompatible with the constitutional principle of resocialization of prisoners. It considers that article 8, paragraph 3 (c) (i), read in conjunction with article 10, paragraph 3, of the Covenant requires that work performed by prisoners primarily aims at their social rehabilitation, as indicated by the word "normally" in article 8, paragraph 3 (c) (i), but does not specify whether such measures would include adequate remuneration for work performed by prisoners. While reiterating that, rather than being only retributory, penitentiary systems should seek the reformation and social rehabilitation of prisoners,13/ the Committee notes that States may themselves choose the modalities for ensuring that treatment of prisoners, including any work or service normally required of them, is essentially directed at these aims. It notes that the German Constitutional Court justified the transitional period, during which prisoners were continued to be remunerated on the basis of 5 per cent of the base amount, with the fact that the necessary amendment of section 200 of the Enforcement of Sentences Act required a reassessment by the legislator of the underlying resocialization concept. It further recalls that it is generally for the national courts, and not for the Committee, to review the interpretation or application of domestic legislation in a particular case, unless it is apparent that the courts' decisions are manifestly arbitrary or amount to a denial of justice.14/

The Committee considers that the author has not substantiated any such defects in relation to the Constitutional Court's decision to allow the legislator a transitional period until 31 December 2000 to amend section 200. Accordingly, this part of the communication is inadmissible under article 2 of the Optional Protocol.

8. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;
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Notes

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2/ Section 18 of Book IV of the German Social Security Code defines the base amount as follows: "Without prejudice to the specific provisions applicable to the different insurance systems, base amount within the meaning of the provisions on social security means the average amount of benefits payable under the statutory pensions insurance during the preceding calendar year, rounded up to the next highest amount which can be divided by 420."

...

13/ General comment 21 [44], 10 April 1992, at para. 10.

14/ Communication No. 1188/2003, *Riedl-Riedenstein et al. v. Germany*, decision on admissibility adopted on 2 November 2004, at para. 7.3; communication No. 1138/2002, *Arenz et al. v. Germany*, decision on admissibility adopted on 24 March 2004, at para. 8.6.

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- *Karatsis v. Cyprus* (1182/2003), ICCPR, A/60/40 vol. II (25 July 2005) 378 at paras. 2.1-2.6, 3.1 and 6.3-6.5.

...

2.1 On 11 January 1994, the author was appointed to the post of Family Court judge, a position that he continues to hold until today. In June 2000, he applied for a vacant post of District Court judge offering better promotion opportunities, a higher salary scale and higher pension benefits. On 12 July 2000, the Supreme Council of Judicature ("the Supreme Council"), a panel responsible for the appointment and promotion of judges under the Administration of Justice Law (1964), whose 13 members also sit as Supreme Court of Cyprus, selected the author for a temporary post as District Court judge for a period of one year from 1 October 2000, subject to the condition that he would resign from his post of Family Court judge before taking up his function at the District Court. At the end of that period, the Supreme Council would decide about his appointment as permanent judge and

civil servant.

2.2 On 14 July 2000, acting on instructions from the Supreme Court, the Chief Registrar communicated with the author. After the author had accepted the conditions of appointment, including his prior resignation from the post of Family Court judge, the Chief registrar sent him an offer of appointment to the post of District Court judge (with the starting salary of the scale for District Court judges) and advertised the author's post of Family Court judge. By letter of 19 July 2000, the author accepted the written offer of appointment, which did not contain *a proviso* on his resignation from the post as Family Court judge.

2.3 On 26 September 2000, the Chief Registrar sent the author the following letter together with the document of his appointment to the temporary post of District Court judge:

> "Further to the letter offering appointment dated 13 July 2000 and its acceptance by you by your letter dated 19 July 2000, I forward to you the relevant document of your appointment to the post of temporary district judge.
>
> 1. It is noted that, as you have been informed, a prerequisite to your appointment is your resignation from the post of judge of the Family Court before the assumption of your duties.
>
> 2. Provided the above [is] observed, you will take the judicial oath and will give the affirmation to the Republic for the post of temporary district judge next Monday, 2 October 2000, at 8.00 a.m. at the Supreme Court."

2.4 On 2 October 2000, the author objected to the condition of prior resignation from his post as Family Court judge, which he believed to have been dropped, as it had not been included in the written offer of appointment. He argued that such resignation would result in a reduction of his annual salary by CYP£ 10,000.00, loss of benefit of his more than six years of service in the Family Court, including loss of his pension benefits, and uncertainty of tenure as it was not sure whether he would be permanently appointed at the end of the one-year period. He would only accept the "new condition" of prior resignation in the event of permanent appointment to the post of District Court judge on a scale which corresponds to the salary of a Family Court judge with more than six years' service and if any acquired rights were preserved.

2.5 On the same day, the Chief Registrar informed the author that his appointment had been revoked, as he did not accept the conditions of such appointment. On 4 December 2000, the author filed a complaint with the Supreme Court, challenging the Supreme Council's notification of 26 September 2000 on the basis that it purported unilaterally to change the terms of his employment contract. The author also challenged the Council's decision of 2

October 2000 revoking his appointment. The case was first referred to a single judge of the Court but later assigned to the full Supreme Court by the Chief Registrar. On 23 January 2001, the author, by reference to article 153 (9) 2/ of the Constitution of Cyprus, applied for his case to be heard by a different bench, arguing that the 13 judges of the Supreme Court were the very authors of the impugned decisions, which they had taken in their capacity as members of the Supreme Council.

2.6 By judgement of 15 March 2001, the Supreme Court dismissed the case for want of jurisdiction without addressing the issue of impartiality 3/. It held that the appointment of judges is an exercise of the judicial rather than the executive or administrative power, thus falling within the exclusive competence of the Supreme Council and outside the Supreme Court's jurisdiction under article 146 of the Constitution of Cyprus 4/.

...

3.1 The author claims that the fact that the Supreme Court's decision not to hear his case was taken by the same judges who, in their capacity as members of the Supreme Council, had revoked his temporary appointment as District Court judge deprived him of his rights to a fair and public hearing before an impartial tribunal and to an effective remedy, in violation of article 14, paragraph 1, read alone and in conjunction with article 2, paragraph 3, of the Covenant.

...

6.3 As to the author's claim under article 14, paragraph 1, the Committee observes that, in contrast to *Casanovas v. France* and *Chira Vargas v. Peru*, the present case concerns the revocation of an appointment to another post within the judiciary rather than the dismissal from public service. The Committee recalls that the concept of "suit at law" under article 14, paragraph 1, is based on the nature of the rights in question rather than the status of one of the parties 12/. It also recalls that that the procedure of appointing judges, albeit subject to the right in article 25 (c) to access to public service on general terms of equality, as well as the right in article2, paragraph 3, to an effective remedy, does not as such come within the purview of a determination of rights and obligations in a suit at law within the meaning of article 14, paragraph 1.

6.4 The issue before the Committee is therefore whether the proceedings initiated by the author to challenge the revocation of his appointment to the post of District Court judge constituted a determination of his rights and obligations in a suit at law. The Committee recalls that the author chose not to resign from his post as Family Court judge to prevent a substantial reduction in his annual salary, exclusion of his years of service at the Family Court from the calculation of his pension benefits, as well as uncertainty of tenure. It notes that the author entirely preserved these acquired rights and considers that his claim concerning the loss of career prospects and possible increases in salary and pension benefits caused by the revocation of his appointment is merely hypothetical. Similarly, he has failed to substantiate any violation of his right under article 25 (c) to equal access to public

service...The author has therefore not substantiated that the proceedings initiated by him constituted a determination of his rights and obligations in a suit at law within the meaning of article 14, paragraph 1.

6.5 While the revocation of appointments within the judiciary must not necessarily be determined by a court or tribunal, the Committee recalls that whenever a judicial body is entrusted under national law with the task of deciding on such matters, it must respect the guarantee of equality of all persons before the courts and tribunals as enshrined in article 14, paragraph 1, and the principles of impartiality, fairness and equality of arms implicit in this guarantee 14/. However, the author has not rebutted the State party's argument that the Supreme Court's judgement in *Kourris v. The Supreme Council of Judicature* was a binding precedent to the effect that the Supreme Council's exercise of powers is not subject to judicial review and falls outside the Supreme Court's jurisdiction under article 146 of the Constitution. Accordingly, the Committee considers that the Supreme Court did not violate the guarantees of article 14, paragraph 1, when it declared itself incompetent to deal with the author's case, given that Cypriot law explicitly excluded the Court's jurisdiction to adjudicate the matter. The initiation of proceedings before a judicial body that manifestly lacks jurisdiction to deal with a matter cannot trigger the guarantees of article 14, paragraph 1. The Committee concludes that this part of the communication is therefore inadmissible *ratione materiae* under article 3 of the Optional Protocol.

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2/ Article 153 (9) of the Constitution of Cyprus reads: "In the case of temporary absence or incapacity of the President of the High Court or of one of the Greek judges or of the Turkish judge thereof, the President of the Supreme Constitutional Court or the Greek judge of the Turkish judge thereof, respectively, shall act in his place during such temporary absence of incapacity. Provided that it is impracticable or inconvenient for the Greek or the Turkish judge of the Supreme Constitutional Court to act, the senior in office Greek or Turkish judge in the judicial service of the Republic shall so act respectively."

3/ The Court recalled that "[i]t is up to the court, which is legally competent under the law, to decide whether the subject matter of an application comes under its jurisdiction. This matter takes precedence over any other. Once it is considered that the court has jurisdiction to deal with the subject matter of an application, then the question of excluding judges who will exercise the court's jurisdiction is examined." Supreme Court of Cyprus, case No. 1547/2000, *Savvas Karatsis v. The Republic*, Judgement of 15 March 2001.

4/ The Supreme Court referred to its previous judgement in *Antonios Kourris v. The Supreme Council of Judicature* (1972) 3 CLR, 390.

...

12/ Communication No. 112/1981, *Y.L. v. Canada*, decision on admissibility adopted on 8 April 1986, at para. 9.2; communication No. 441/1990, *Casanovas v. France*, at para. 5.2.

...

14/ Cf. communication No. 1015/2001, *Perterer v. Austria*, Views adopted on 20 July 2004, at para. 9.2.

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