EQUALITY AND DISCRIMINATION - OLD AGE

III. JURISPRUDENCE

ICCPR

· *Schmitz-de-Jong v. The Netherlands* (855/1999), ICCPR, A/56/40 vol. II (16 July 2001) 165 at paras. 2.1, 2.2, 3 and 7.2.

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2.1 Every Dutch citizen aged 65 years and older has the right to a pensioners' pass (so-called PAS-65). Partners of pass-holders have a subsidiary right to the pass, on the condition that they be 60 years or older. Pass owners pay reduced fees for public transport, social and cultural activities, library services and museum entries.

2.2 The author is married to Wilhelm Theodor Schmitz, born on 4 May 1924. Mr. Schmitz is in possession of a PAS-65. On 26 February 1993, the author applied for a partner pass. The municipality of Gulpen refused the pass on 16 March 1993, because the author did not fulfil the age requirement. The author applied for a review of the decision, which was rejected on 25 May 1993. The Council of State rejected her appeal on 15 August 1996. With this, all domestic remedies are said to have been exhausted.

3. According to the author, the failure to give her a partner pass constitutes discrimination based on age. She refers to the Government's information brochure which explains that the pass is meant to promote the active participation of old age pensioners in society, and that in order to enhance this, the pass is also given to partners of old age pensioners. Since the average age difference between old age pensioners and their partners is between 4 and 5 years, it has been decided that all partners of 60 years or older are also entitled to the pass. The author argues that this age limit is arbitrary, and that the purpose of the partner pass does not justify its limitation to partners of 60 years and older.

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7.2 The author has claimed that she is a victim of discrimination on the ground of age, because as a 44-year-old (in 1993) she was not entitled to a senior citizen's partner's pass, which was only provided to partners of 60 years and older. The Committee recalls that a distinction does not constitute discrimination if it is based on objective and reasonable criteria. In the present case, the Committee finds that the age limitation of allowing only partners who have reached the age of 60 years to obtain an entitlement to various rate reductions as a partner to a pensioner above the age of 65 years is an objective criterion of differentiation and that the application of this differentiation in the case of the author was not unreasonable.

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· *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, 8.3and 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...

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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.

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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.

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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.

For dissenting opinion in this context, see Love et al. v. Australia (983/2001), ICCPR, A/58/40 vol. II (25 March 2003) 286 (CCPR/C/77/D/983/2001) at Individual Opinion of Mr. Nisuke Ando, 300.

· *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.

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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.

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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.

Notes

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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)
