WORK - EQUALITY IN THE WORKPLACE

III. JURISPRUDENCE

ICCPR

- *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, 8.2-8.4, 9 and 10.

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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.

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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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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, 311.

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

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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.

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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.

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."

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

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.