# WORK - RIGHT TO WORK

## 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.

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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.

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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.

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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.

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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.

· *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.

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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.

· *Diop v. France* (2/1989), CERD, A/46/18 (18 March 1991) 124 (CERD/C/3 9/D/2/1989/Rev.2). For text of communication, see **EQUALITY AND DISCRIMINATION** - EMPLOYMENT.

**ICCPR**

· *Gedumbe v. Democratic Republic of the Congo* (641/1995), ICCPR, A/57/40 vol. II (9 July 2002) 24 (CCPR/C/75/D/641/1995) at paras. 2.1-2.5, 5.2, 5.3, 6.1 and 6.2.

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2.1 In 1985 the author was appointed director of a Zairian consular school in Bujumbura, Burundi. In 1988 he was suspended from his duties by Mboloko Ikolo, the then Zairian ambassador to Burundi. This suspension allegedly was attributable to a complaint addressed by the author and by other staff members of the school1/ to several administrative authorities of Zaire, including the President and the Minister of Foreign Affairs, concerning the embezzlement by Mr. Ikolo of the salaries for the personnel of the consular school. More particularly, the ambassador allegedly embezzled the author's salary in order to force him to yield his wife.

2.2 In March 1988 a fact-finding commission was sent from Zaire to Bujumbura, which, purportedly, made an overwhelming report against the ambassador and confirmed all the allegations made against him. In August 1988 the Minister of Foreign Affairs of Zaire enjoined Mr. Ikolo to pay all the salary arrears to the author, who, in the meantime, had been transferred as director of the Zairian consular school to Kigali, Rwanda. The ambassador, who allegedly refused to obey this order, was suspended from his duties and recalled to Zaire on 20 June 1989.

2.3 In September 1989 the Ministry of Primary and Secondary Education issued an order to reinstate the author in his post in Bujumbura. Accordingly, the author moved back to Burundi in order to fill his post. Subsequently, Mr. Ikolo, who despite his suspension

remained in Bujumbura until 20 December 1989, informed the authorities in Zaire that the author was a member of a network of political opponents of the Zairian Government, and that he therefore had requested the authorities of Burundi to expel him. For this reason, the author maintains, Mr. Ikolo and his successor at the embassy, Vizi Topi, refused to reinstate him in his post, even after confirmation by the Minister of Primary and Secondary Education, or to pay his salary arrears.

2.4 The author appealed to the Public Prosecutor of the County Court (*Tribunal de Grande Instance*) of Uvira, who passed on the file to the Public Prosecutor of the Court of Appeal (*Cour d'Appel*) of Bukavu on 25 July 1990. Both offices described the facts as being an abuse of rights and called into question the former ambassador's conduct. On 14 September 1990 the case was further transmitted for advice to the Office of the Public Prosecutor in Kinshasa, where the case was registered in February 1991. Since then, despite numerous reminders sent by the author, no further action has been taken. Consequently, the author appealed to the Minister of Justice and to the Chairman of the National Assembly. The latter interceded with the Minister of Foreign Affairs and the Minister of Education, who, allegedly, intervened on the author's behalf with Mr. Vizi Topi, all to no avail.

2.5 On 7 October 1990 the author served a summons on Mr. Ikolo for adultery, slanderous denunciation and prejudicial charges, abuse of power and embezzlement of private monies. By a letter dated 24 October 1990, the President of the Kinshasa Court of Appeal (*Cour d'Appel*) informed the author that Mr. Ikolo, as an ambassador, benefited from functional immunity and could only be brought to trial upon summons of the Public Prosecutor. All the author's requests to the latter to start legal proceedings against Mr. Ikolo have to date remained unanswered. According to the author, this is due to the fact that a special authorization of the President is required to start legal proceedings against members of the security police and that, therefore, the Public Prosecutor could not take the risk of serving a summons on Mr. Ikolo, who is also a senior official in the National Intelligence and Protection Service. Accordingly, the author's case cannot be the subject of a judicial determination. Therefore, it is submitted, all available and effective domestic remedies have been exhausted.

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5.2 With regard to the alleged violation of article 25 (c) of the Covenant, the Committee notes that the author has made specific allegations relating, on the one hand, to his suspension in complete disregard of legal procedure and, in particular, in violation of the Zairian regulations governing State employees, and, on the other hand, to the failure to reinstate him in his post, in contravention of decisions by the Ministry of Primary and Secondary Education. In this connection the Committee notes also that the non-payment of the author's salary arrears, notwithstanding the instructions by the Minister for Foreign Affairs, is the direct consequence of the failure to implement the above-mentioned decisions by the authorities. In the absence of a response by the State party, the Committee

finds that the facts in the case show that the decisions by the authorities in the author's favour have not been acted upon and cannot be regarded as an effective remedy for violation of article 25 (c) read in conjunction with article 2 of the Covenant.

5.3 To the extent that the Committee has found that there was no effective legal procedure allowing the author to invoke his rights before a tribunal (article 25 (c) in conjunction with article 2), no separate issue arises concerning the conformity of proceedings before such a tribunal with article 14 of the Covenant. With regard to article 26, the Committee sustains the author's reasoning by finding a violation of article 25 (c).

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6.1 The Human Rights Committee...is of the view that the facts before it disclose violations by the Democratic Republic of the Congo of articles 25 (c) in conjunction with article 2 of the Covenant.

6.2 Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee is of the view that the author is entitled to an appropriate remedy, namely: (a) effective reinstatement to public service and to his post, with all the consequences that that implies, or, if necessary, to a similar post;2/ (b) compensation comprising a sum equivalent to the payment of the arrears of salary and remuneration that he would have received from the time at which he was not reinstated to his post, beginning in September 1989.3/

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Notes

1/ This complaint was also signed by Odia Amisi; communication No. 497/1992 (*Odia Amisi v. Zaire*), declared inadmissible on 27 July 1994.

2/ Communication No. 630/1995 *Abdoulaye Mazou v. Cameroon*.

3/ Communications No. 422/1990, 423/1990 and 424/1990, *Adimayo M. Aduayom, Sofianou T. Diasso and Yawo S. Dobou v. Togo*.

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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, 8.3, 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...

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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.

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. 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.

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.