

A. Yilmaz - Dogan v The Netherlands, Communication No. 1/1984, U.N. Doc. CERD/C/36/D/1/1984 (1988)

1) Reference Details

Jurisdiction: UN Committee on the Elimination of Racial Discrimination

Date of decision: 10 August 1988

Link to full case:

<http://www1.umn.edu/humanrts/country/decisions/1-1984.html>

2) Facts

The petitioner had been employed since 1979. In April 1981, she was injured and went on sick leave. She resumed part time work in 1982. In June 1982, her employer asked permission from the District Labour Exchange (DLE) to terminate her contract. She was pregnant at that time. The DLE refused on the basis that the Civil Code under which her contract was made stated that the contract may not be terminated during pregnancy.

In July 1982, the employer addressed a request to the Cantonal Court stating:

"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 ... They repeat that endlessly ... we cannot afford such goings on."

In September 1982, the Cantonal Court agreed the termination effective as of 1 December 1982. Under the Civil Code no appeal was possible. In October 1982, Mrs Yilmaz requested the Prosecutor of the Supreme Court to annul the decision. He saw no justification for doing so. Consequently the petitioner requested the District Court to prosecute her employer because of his comments to the Cantonal Court, but the Court refused. Mrs Yilmaz asked the Minister of Justice to order the Prosecutor to proceed. He saw no reason to intervene, since the complaint procedure available had not been invoked.

In July 1983, Mrs. Yilmaz asked the Court of Appeal to order prosecution. The Court rejected this because it could not determine that the defendant intended to discriminate, or that his actions resulted in discrimination. The Court stated:

"The employer's remarks were 'unfortunate and objectionable ... but criminal proceedings were not in the interest of the public or of the petitioner'. This decision cannot be appealed before the Supreme Court."

3) Law

National Law

- Netherlands Civil Code
- Netherlands Penal Code

International Law

International Convention on the Elimination of all forms of Racial Discrimination

- Article 4(a) of the International Convention on the Elimination of all forms of Racial Discrimination (CERD)
- Article 5 (e)(i) of CERD
- Article 6 of CERD (effective protection and remedies)

4) Legal Arguments

The Petitioner

The petitioner argued that the Netherlands had violated the Convention as she had been subjected to racial discrimination. Furthermore, the Netherlands had failed to provide adequate protection or legal remedies.

The State

The State argued that neither the Director of the Labour Exchange or the Cantonal Court violated the Convention as it met its obligation to guarantee equality of the right to employment by providing non-discriminatory remedies. The decision of the Cantonal Court does not show that the court accepted the employer's arguments. The case was considered in the light of civil law, not the petitioner's ethnic origin.

Furthermore, the relevant domestic procedures provided adequate protection and legal remedies under the Convention, which does not oblige States to institute appeal mechanisms against competent judicial judgements.

5) Decision

The Committee held that the petition was admissible and there was a violation. It set out that the main issues were (a) whether the State party failed to meet its obligation 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 State 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.

With respect to (a) the final decision on the dismissal of the petitioner was the decision of the District Court, which does not address the alleged discrimination in the employer's letter requesting termination of the petitioner's employment. The petitioner's dismissal was the result of a failure to take into account all the circumstances of the case and her right to work was not protected.

The freedom to prosecute criminal offences is governed by considerations of public policy. The Convention cannot be interpreted as challenging that principle, but it should be applied in each case of alleged racial discrimination. The prosecutor acted in accordance with these criteria. The application of the expediency principle is shown to be subject to judicial review, since the Court of Appeal reviewed the decision not to prosecute. This is compatible with the Convention, which does not impose a duty to institute a mechanism of sequential remedies, up to and including the Supreme Court.

The petitioner's right to work was not protected. The State should ascertain whether Mrs. Yilmaz is now gainfully employed and, if not, help her secure alternative employment and/or to provide her with equitable relief.