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COMMITTEE ON THE ELIMINATION
OF RACIAL DISCRIMINATION
Fifty-third session
3-21 August 1998

DECISIONS

Communication No. 9/1997

Submitted by:	D.S.
Alleged victims:	The author
State party concerned:	Sweden
Date of communication:	15 February 1997 (initial submission)
Date of present decision:	17 August 1998

Decision on admissibility

[ANNEX]

* Made public by decision of the Committee on the Elimination of Racial Discrimination.

GE.98-17848 (E)

DECISION OF THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION UNDER ARTICLE 14 OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

FIFTY-THIRD SESSION

concerning

Communication No. 9/1997

Submitted by: D.S.

Alleged victim: The author

State party concerned: Sweden

Date of communication: 15 February 1997

The Committee on the Elimination of Racial Discrimination, established under article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination,

Meeting on 17 August 1998,

Adopts the following:

Decision on admissibility

1. The author of the communication (initial submission dated 15 February 1997) is D.S., a Swedish citizen of Czechoslovak origin, born in 1947, currently residing in Solna, Sweden. She claims to be a victim of violations by Sweden of articles 2, 3, 5 (e) (i) and 6 of the International Convention on the Elimination of Racial Discrimination.

The facts as submitted by the author

2.1 In April 1995, the National Board of Health and Welfare advertised a vacancy for a post of researcher/project coordinator with the National Board of Health and Welfare (*Socialstyrelsen)*. In the vacancy announcement, the Board looked for applicants who would be able to collect and process material from investigative studies, and follow up, in the field of public health and medical care, the structure, content and quality of medical care in hospitals. The vacancy announcement stipulated that applicants for general research jobs should have good knowledge of and experience in the subject area and good knowledge of techniques and measures used to measure, describe, evaluate and judge the efficacy and results of an activity. Another requirement was that applicants should have a basic academic degree, if possible supplemented by further courses in the field of research and evaluation and with experience in the subject area. Other requirements included the ability to cooperate with others, power of initiative and ease of oral and written expression. Proficiency in another language was considered an additional asset.

2.2 One hundred and forty-seven individuals applied for the vacancy, including the author and S.L. On 10 November 1995, the National Board of Health and Welfare decided to appoint S.L. as researcher and project coordinator to the Board; she assumed her duties with effect from 1 October 1995. The author appealed to the Government against this decision, considering that her qualifications were superior to those of S.L., and that she had been refused the post because of her foreign origin.

2.3 On 14 March 1996, the Government annulled the National Board's decision to appoint S.L. to the post and referred the matter back to the Board for reconsideration. The Government's decision was based on the fact that at the time of S.L.'s appointment, the latter had not yet earned an academic degree (although she was studying for one at that time). Therefore, S.L. did not formally satisfy the requirements for the position as specified by the National Board in the Vacancy Announcement. The National Board's decision in the case was found to be formally incorrect.

2.4 Shortly afterwards, the National Board of Health and Welfare re-advertised the post of researcher to the Board. The vacancy announcement now stipulated that the Board was looking for a person to work on the MARS-project (Medical Access and Result System), to assist in the collection and the processing of material from investigations and studies and in the evaluation of the public health and medical care structure. The work would involve contacts with medical experts, to draw up catalogues and prepare material for multimedia presentations. As to the qualifications, the announcement now required "a basic academic degree *or equivalent*, as well as experience in the subject area". Other requirements included the ability to cooperate and work in a team, power of initiative, and ease of oral and written expression. Good knowledge of English was required.

2.5 A total of 83 individuals applied for the re-advertised post, inter alia the author and S.L. The National Board of Health and Welfare invited four of them for an interview, including the author and S.L. Their qualifications were assessed thoroughly. On 20 May 1996, the Board decided once again to appoint S.L. as a researcher to the Board. On 6 June 1996, the author filed another appeal with the Government against this decision, claiming that she was better qualified than S.L. and referring to the fact that she had more relevant academic education and greater work experience.

2.6 The National Board of Health and Welfare prepared a detailed opinion to the Government on the issue. In its opinion, it justified the change of criteria in the re-advertisement of the vacancy and emphasized that the selection process had been careful. The Board observed that on the basis of this process, it was concluded that S.L. was deemed to have the best qualifications for the post, including personal suitability; the Board added that S.L. had by then earned an academic degree in behavioural science. The author was considered the least qualified of the four applicants who had been shortlisted.

2.7 On 12 September 1996, the Government rejected the author's appeal, without giving reasons. The author appealed against this decision as well; in January 1997, this appeal was also dismissed, on the ground that the Government had, by its decision of September 1996, finalized the examination of the matter and therefore concluded proceedings.

The complaint

3.1 The author complains that she has been discriminated against in her search for employment on the basis of her national origin and her status as an immigrant. In that context she claims that:

- major parts of vacancy announcements of the type she applied for are tailor-made for an individual who is already chosen in advance, usually a Swedish citizen born in the country;

- qualification requirements are higher for immigrants than they are for Swedes;

- employers generally discriminate against immigrants in their employment policy, in that they will choose Swedes who in principle are over-qualified for a certain job, whereas they will reject immigrants who are over-qualified for the same post. During the interviews for the re-advertised post, the author claims, she was told that she was over-qualified;

- during the interviews for the vacant post with the National Board of Health and Public Welfare, the interviewers allegedly displayed an openly negative attitude vis-à-vis the author. In fact, the author dismisses the entire interview as “false play”.

3.2 The author claims that the only possibility to solve her situation and that of immigrants in Sweden who seek employment in general would be to take measures of affirmative action, such as establishing quotas for immigrants for high-level posts, so that immigrants with higher education may obtain a possibility to work.

3.3 The author rejects as another sign of discrimination vis-à-vis her as an immigrant that the National Board considered her the least qualified and suitable of the four applicants shortlisted for the re-advertised post. She reiterates that her academic qualifications were far superior to those of S.L. (Master’s degree as compared to bachelor degree).

The State party’s observations

4.1 In its submission under rule 92 of the Committee’s rules of procedure the State party challenges the admissibility of the communication.

4.2 The State party notes that the relevant sources of legal protection against ethnic discrimination in Sweden are the Instrument of Government, the Act of Public Employment and the Act against Ethnic Discrimination. The Instrument of Government lays down the basic principle that public power shall be exercised with respect for the equal worth of all (Chapter One, Section 2). Courts, public authorities and other performing functions within the public administration shall observe, in their work, the equality of all before the law and maintain objectivity and impartiality. When deciding on appointments within the State administration, only objective factors such as experience and competence shall be taken into account.

4.3 The Act of Public Employment reiterates the principles laid down in the Instrument of Government to the extent that when making appointments to administrative positions, the guiding factors shall be experience and competence. As a general rule, competence is valued higher than experience. Authorities must also consider objective factors that correspond to objectives of the overall labour market, equal opportunities, social and employment policies. Decisions concerning the filling of vacant posts are excluded from the normal requirement that administrative authorities must provide reasons for their decisions. The rationale for this exception is concern for the unsuccessful applicant(s), sparing him/her/them the negative evaluation such reasons might imply. Under Section 35 of the Government Agencies and Institutions Ordinance, appeals against the authorities' decisions may be filed with the Government. An appeal against a decision by the National Board of Health and Welfare in matters of employment can also be filed with the Government, under Section 14 of the 1996 Ordinance relating to the National Board of Health and Welfare. There are no further remedies available against the Government's decision.

4.4 Labour disputes may also be tried under the Act against Ethnic Discrimination of 1994, which aims at prohibiting discrimination in working life. Under the Act, ethnic discrimination takes place when a person or group of persons is/are treated unfairly in relation to others, or are in any way subjected to unjust or insulting treatment on the grounds of race, colour, national or ethnic origin or religious belief.

4.5 Pursuant to the terms of the Act, the Government has appointed an Ombudsman against Ethnic Discrimination whose mandate is to ensure that ethnic discrimination does not occur in the labour market or other areas of society. The Ombudsman should assist anyone subjected to ethnic discrimination, and help safeguard the applicant's rights. He must make special efforts to prevent job applicants from being subjected to ethnic discrimination (Section 4). If so directed by the Ombudsman, an employer is required to attend meetings and supply information pertaining to the employers' relations with job applicants and employees. Should the employer fail to comply with the Ombudsman's directives, the latter may levy a fine (Sections 6 and 7).

4.6 This legislation, which applies to the overall labour market, has two major thrusts. The first is the prohibition of discrimination in relation to applicants for vacancies, which is relevant to the present case. The other prohibition of discrimination covers the treatment of employees. The provision which covers the treatment of job applicants provides that any employer must treat all applicants for a post equally, and that when appointing an applicant, he may not subject other applicants to unfair treatment on account of their race, colour, national or ethnic origin or religious belief (Section 8). This provision applies if the employer chooses someone other than the individual subjected to discrimination. Discriminatory behaviour in the recruitment process is not per se covered by the prohibition, but if, as a result, this behaviour has led to the employment of another person, the employer will be held accountable for his actions. For any treatment to constitute unlawful discrimination, it must have been motivated by differences which are not based on objective criteria. Employment considerations made by the employer must appear to be acceptable and rational to an outsider if it is to be shown that objective reasons motivated the

employer's decision. Any employer who violates the prohibition of discrimination is liable to pay damages. Job applicants who are victims of discrimination may be awarded damages, to be paid by the employer.

4.7 Under Section 16 of the Act against Ethnic Discrimination, cases of discrimination in employment will be examined pursuant to the Act on Litigation in Labour Disputes. Disputes shall be handled before the Labour Court, as a court of first and last instance, if they are brought by an employer's organization or an employees' organization, or by the Ombudsman. If the dispute is brought by an individual employer or a job applicant it shall be heard and adjudicated by a District Court. Appeals may be lodged with the Labour Court, which is the final instance.

4.8 The State party submits that the author has failed to exhaust available domestic remedies, as required by article 14, paragraph 7 (a), of the Convention. It contends that contrary to the views apparently held by the author, it is possible to file actions before a court in cases of ethnic discrimination and damages based on ethnic discrimination in working life. Such an action would have been based on article 24 of the Act on Ethnic Discrimination.

4.9 The State party notes that the author does not appear to have had any contact with the office of the Ombudsman against Discrimination, although the Ombudsman would be entitled to lodge a case about discrimination and damages on her behalf. Thus, Swedish law provides for effective judicial remedies in the author's situation. It would have been possible for the author to file an action based on non-observance of the Act on Ethnic Discrimination before the courts, and there is nothing to indicate that her complaint would not have been examined properly and thoroughly, in accordance with applicable procedures. For the Government, therefore, the case is inadmissible for failure to exhaust available domestic remedies.

4.10 Regarding the question of legal aid that might be available to persons wishing to file a case with a court the State party indicates that under the 1972 and 1997 Legal Aid Acts it is possible to give legal aid to any natural person in a legal matter if he or she is deemed to be in need of such assistance and his or her annual income does not exceed a specific limit. In legal aid matters the claimant shall contribute to the cost in proportion to his or her ability. Legal aid may, however, not be given if it is not deemed reasonable having regard to the importance and nature of the matter and the value of the subject being disputed as well as all other circumstances in the case. Such a situation could occur if a petition does not contain reasons for the claim as prescribed by law or if the claim otherwise is deemed to be manifestly unfounded.

Author's comments

5.1 With respect to the requirement of exhaustion of domestic remedies, the author notes that she was not informed about any remedies other than appeals directed to the Government. Thus, the decision of 12 September 1996 informing her of the Government's dismissal of her appeal did not mention the possibility of an appeal to the Labour Court, either with the assistance of a union or that of the office of the Ombudsman. Nor did the Government inform

her of this possibility after she appealed the decision of 12 September 1996. The author emphatically asserts that she considered Government organs "the last authorities" in her case with respect to appellate remedies. She states that after reading an article in the newspaper on the possibility of appealing to the Labour Court she contacted her Union. The latter, however, would not take up her case.

5.2 According to the author, an appeal for assistance to the Office of the Ombudsman against Ethnic Discrimination would have been futile. She asserts that the Ombudsman himself has never filed any case on behalf of an individual with the Labour Court, and that he himself has voiced serious doubts about the applicability and effectiveness of the Act against Ethnic Discrimination of 1994. She further states that she had applied for assistance from the Ombudsman on several other occasions but without success.

5.3 As to an appeal to a District Court, the author notes that this would not have been an effective remedy either. She states that in 1993 she applied for a job she did not obtain. She brought the case before a District Court claiming discrimination and requested legal aid. The District Court decided that it had no competence to examine decisions on appointments in the labour market and dismissed the case as well as the legal aid request in December 1994. By then the Act against Ethnic Discrimination which, according to the State party, provides job applicants with the possibility of filing cases before district courts, was already in force. The court's decision also indicated that the case had no prospects of success.

5.4 Moreover, the author asserts that an appeal would have incurred financial outlays which she, as an unemployed person, could not afford. In her view, if resort to a tribunal is not free of charge, she has no judicial remedy. Even so, for her, the issue is not how many judicial instances she may appeal to, but whether the existing law against ethnic discrimination may offer her a remedy; in her opinion, it does not.

Admissibility considerations

6.1 Before considering any claims contained in a communication, the Committee on the Elimination of Racial Discrimination must decide, pursuant to article 14, paragraph 7 (a) of the Convention, whether or not the current communication is admissible.

6.2 The State party contends that the author's claims are inadmissible for failure to exhaust domestic remedies, since she could have (a) sought the intercession of the Ombudsman against Ethnic Discrimination in her case; and/or (b) challenged the decision not to appoint her to the vacant post in a District Court with a possibility of appeal to the Labour Court. The author has replied that she was never informed about the possibility of the latter avenue and that appeals to the Ombudsman and the courts would in any event have failed, since the applicable legislation is deficient.

6.3 The Committee notes that the author was aware of the possibility of a complaint to the Ombudsman against Ethnic Discrimination; she did not avail herself of this possibility, considering it to be futile, and because of alleged previous negative experiences with his office. She learned about the

possibility of filing an action with the Labour Court and started preparations to this effect but desisted, apparently because her trade union did not support her in this endeavour as it did not find merits in her claim. She further considers that there was no real possibility of obtaining redress in a District Court because of a negative experience regarding a previous case that she had filed with a District Court.

6.4 The Committee concludes that, notwithstanding the reservations that the author might have regarding the effectiveness of the current legislation to prevent racial discrimination in the labour market, it was incumbent upon her to pursue the remedies available, including a complaint before a District Court. Mere doubts about the effectiveness of such remedies, or the belief that the resort to them may incur costs, do not absolve a complainant from pursuing them.

6.5 In the light of the above the Committee considers that the author has failed to meet the requirements of article 14, paragraph 7 (a) of the Convention.

7. The Committee on the Elimination of Racial Discrimination therefore decides:

(a) that the communication is inadmissible;

(b) that this decision shall be communicated to the State party and the author of the communication.

[Done in English, French, Russian and Spanish, the English text being the original version.]
