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HUMAN RIGHTS COMMITTEE
Seventy-eighth session
14 July - 8 August 2003

DECISION

Communication No. 972/2001

Submitted by:	George Kazantzis (represented by counsel, Mr. Sotiris Drakos)
Alleged victim:	The author
State party:	Cyprus
Date of communication:	23 February 1998 (initial submission)
Document references:	Special Rapporteur's rule 91 decision, transmitted to the State party on 17 May 2001 (not issued in document form)
Date of adoption of decision:	7 August 2003

[ANNEX]

* Made public by decision of the Human Rights Committee.

ANNEX

DECISION OF THE HUMAN RIGHTS COMMITTEE UNDER
THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT
ON CIVIL AND POLITICAL RIGHTS

Seventy-eighth session

concerning

Communication No. 972/2001[*]

Submitted by:	George Kazantzis (represented by counsel, Mr. Sotiris Drakos)
Alleged victim:	The author
State party:	Cyprus
Date of communication:	23 February 1998 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 7 August 2003

Adopts the following:

DECISION ON ADMISSIBILITY

1.1 The author of the communication, dated 3 March 1998, is Mr. George Kazantzis. He claims to be a victim of violations by the Republic of Cyprus of articles 2, 14, 17, 25 and 26 of the Covenant. He is represented by counsel.

[*] The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

The facts as presented

2.1 On 23 June 1997, the Supreme Council of Judicature invited applications from qualified advocates for two vacancies of the post of District Judge and one vacancy of the post of Judge of the Industrial Disputes Tribunal. The author applied for both posts on 30 July 1997. He was interviewed by the Supreme Council of Judicature for both posts on 9 September and 11 September 1997, respectively.

2.2 On 18 September 1997, the Supreme Council of Judicature decided that a candidate other than the author was most suitable for the post of Judge of the Industrial Disputes Tribunal. The Council also ascertained that there were four additional vacancies for the post of District Judge, in addition to the two vacancies in relation to which applications had already been invited. It decided not to fill two vacancies at the time, but rather to invite also applications for the four additional vacancies. It was decided that, concerning the four additional vacancies, candidates who had already submitted applications for the two vacant posts would be considered for all six vacancies. On 15 and 18 October 1997, all candidates, including the author, were interviewed.

2.3 On 21 October 1997, the Council evaluated the candidates, taking into account the reports on the abilities of each, by the President of the District Court in which the candidate was practicing as a lawyer, and decided to appoint the six candidates considered the most suitable for the post of District Judge. The author was not among those selected for appointment. Notice of the appointments decided by the Council was published in the Official Gazette of the Republic on 14 November 1997. The author was not personally notified of his non-appointment, nor the reasons therefor.

2.4 The author did not contest this issue before the local courts, as previous jurisprudence of the Supreme Court had held that no Cypriot court had jurisdiction over the decisions of the Supreme Council of Judicature. In Kourris v Supreme Council of Judicature,[1] the Supreme Court held, by a majority of three judges to two, that "… it follows that the Court has no jurisdiction to entertain a recourse…against any act, decision or omission of the said Council (of Judicature) because the functions of such Council *are very closely connected with the exercise of judicial power*." (emphasis original)

The complaint

3.1 The author claims that his non-appointment to a post of District Judge and the appointment of a person less qualified violated his right to "access, on general terms of equality, to public service",invoking article 25 of the Covenant, and, additionally, articles 17 and 26. The author alleged that he was properly qualified for the post of District Judge. He claims to have been afforded a two-minute interview, that the appointment of another applicant was based on grounds other than the actual interview.[2]

[1] (1972) 3 CLR 390.

[2] Note to the Committee: The author does not specify what the alleged "other" grounds of appointment were or what issues were canvassed in the interview.

3.2 The author further contends that he has been deprived of his right of access to court and to a fair trial in respect of his non-appointment, in violation of articles 2 and 14 of the Covenant.

The State party's submission on the admissibility and the merits of the communication

4.1 By submission of 2 July 2002, the State party argues that the communication is (i) inadmissible for failure to exhaust domestic remedies, (ii) inadmissible with regard to articles 17, 25(c) and 26, for failure to sufficiently substantiate the claims, and (iii) inadmissible *ratione materiae* with respect to article 14. It also submits on the merits that there is no violation of any of the articles of the Covenant invoked.

4.2 As to the issue of exhaustion of domestic remedies, the State party points out that by virtue of article 157 of the Constitution, "the appointment, promotion, transfer, termination of appointment, dismissal and disciplinary matters of judicial officers, are exclusively within the competence of the Supreme Council of Judicature". Since 1964, the Supreme Council of Judicature is constituted by all judges of the Supreme Court. Under article 146 of the Constitution, the Supreme Court may consider a challenge by an adversely-affected individual to the legality of "decisions, acts, or omissions, of organs, authorities, or persons exercising executive or administrative authority", if brought within 75 days of the date of publication of the decision. The Court may, inter alia, declare that the impugned decision is wholly or partly null and void.

4.3 The State party observes that in the Kourris case relied on by the author, a judicial officer holding the post of District Judge sought a declaration under article 146 of the Constitution that a decision of the Supreme Council of Judicature to promote other Judges instead of the applicant to the post of Acting President of the District Courts was null and void. The Court relied on the fact that the remedy afforded by article 146 related to matters within the province of the administration and not within the province of the judiciary, and was not therefore available in respect of the matters complained of by the applicant, as these were the province of the judiciary and emanated from an organ, the Supreme Court of Judicature, which was an organ within the judicial, rather than administrative, structure of the State. The Court held that, although the function of the Supreme Council of Judicature could not be described as "judicial" in the strict sense because it did not involve litigation, in view of the essential nature of its function which was so closely connected with the exercise of the judicial power, no recourse was available under article 146 against any decision of the Council in the exercise of its article 157 powers.

4.4 In the light of this judgment and of a further 2001 Supreme Court decision in the case of Karatsis v Supreme Council of Judicature, the State party contends that the issue of the Supreme Court's jurisdiction to adjudicate future applications made to it for annulment of decisions of the Supreme Council of Judicature has not been determined in perpetuity. The State party contends that both the above judgments were issued at first instance and were not tested on appeal, and that the judgment in Kourris was a majority decision. It thus argues that had the author actually filed such an application, he would have had the opportunity to reargue and re-examine the matter of jurisdiction by the Court. In the State party's view, a judgment can only be

said to have the effect of depriving a particular individual from having access to Court concerning a specific grievance if it has been issued in his own case.

4.5 The State party argues that further remedies are available to the author. The Kourris court itself pointed out that "even though an aggrieved judicial officer in the position of the present applicant does not possess a right of recourse under article 146.1, there exists in a proper case, the possibility of having his complaint examined by the Supreme Council of Judicature, because the Council, like any other collective organ, has the right to review, if necessary, its own decisions." The author has made no such application.

4.6 The State party also argues, with reference to Supreme Court jurisprudence, that the author could have instituted a civil action before the District Courts arguing a violation of Part II of the Constitution. Article 15 protects the right to privacy and family life, article 30 the right of access to court and article 28 equality before the law and non-discrimination. The author's claims with respect to articles 17, 14 and 26 respectively are thus guaranteed and protected through effective remedies available under domestic law.

4.7 The State party argues that these remedies are available to the author and are effective. Mere doubts as to their utility cannot absolve an author from exhausting available domestic remedies. Thus, the communication is inadmissible for failure to exhaust domestic remedies under article 5, paragraph 2 (b), of the Covenant.

4.8 The State party argues that the author's claims relating articles 17, 25(c) and 26 of the Covenant have not been substantiated in any way and are accordingly inadmissible under article 2 of the Optional Protocol. The State party refers to the Committee's jurisprudence that article 25(c) does not entitle every citizen to obtain guaranteed employment in the public service, but rather to access public service on general terms of equality.[3] There is no evidence before the Committee sustaining any violation of this right of equal access. As to article 26, the State party points out that not all differences in treatment are discriminatory; rather, differentiations based on reasonable and objective criteria do not amount to prohibited discrimination within the meaning of this article.

4.9 Finally, the State party argues that the author's claim under article 14, paragraph 1, is inadmissible *ratione materiae* with the Covenant, as the author's dispute with the State does not concern a matter, whose determination in a suit at law falls within the scope of article 14, paragraph 1, of the Covenant. In view of the close similarity with article 6, paragraph 1, of the European Convention on Human Rights, the State party points to the jurisprudence of the European organs that article 6, paragraph 1, of the European Convention does not extend to confer right of access to court concerning disputes as to appointment to certain branches of the public service, including the judiciary. In 1983, the European Commission of Human Rights held that disputes over appointment, promotion, dismissal concerning the judiciary are matters outside the scope of article 6, paragraph 1, of the Convention.[4] In 1999, the European Court of Human

[3] The State party refers to Kall v Poland Case No 552/1993, Views adopted on 14 July 1997.
[4] X v Portugal (1983) 32 DR 258.

Rights, considering that there was some uncertainty as to the scope of article 6, paragraph 1, of the European Convention on Human Rights concerning disputes as to appointment, promotion and dismissal from the public service, held that the criterion to be adopted by the Court should be a functional one, based on the nature of the duties and responsibilities involved in the relevant post.[5] The Court considered that, in each case, it must be ascertained whether the "post entails – in the light of the nature and the duties and responsibilities appertaining to it – direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities". The judiciary falls squarely within this category, and challenges such as the author's are thus beyond the scope of article 6, paragraph 1.

4.10 As to the merits, the State party argues that the above observations disclose that there is no violation of any of the Covenant rights invoked.

The author's comments on the State party's submissions

5.1 By letter of 27 March 2003, the author rejects the State party's submissions. As to an action under article 146 of the Constitution, it would be unrealistic and violate the principle of judicial independence for the Supreme Court to challenge a decision which all its members, sitting together as the Supreme Council of Judicature, had reached. Such a remedy would therefore be ineffective and need not be exhausted. Moreover, the Kourris decision undersigned by five judges of the Supreme Court established a precedent binding all courts, including the District Courts as well as the first instance jurisdiction of the Supreme Court under article 146, and thus the outcome of any such petition made by the applicant to the Supreme Court would be a foregone conclusion. The author argues that, contrary to the State party's submission, Kourris was an appellate decision, and that he would have had to wait until his case reached an equivalent appellate level before a different decision from that reached in Kourris even became theoretically possible.

5.2 On the merits, the alleges that his application to the Supreme Council on Judicature was not considered on an equal basis with other applicants and that the main basis for appointments in Cyprus is what he calls nepotism. There are no adequate rules governing these issues, much less criteria or regulations or standards established by the Supreme Council of Judicature covering the appointment or promotion of Judges, who are appointed solely on time of tenure of practice irrespective of qualifications or suitability. The author did not receive any communication from the Supreme Council of Judicature on the reasons for his non-appointment. Under such circumstances, he considers himself deprived of the right or the opportunity to have access on general terms of equality to public service in his country.

5.3 The author argues that the State party has failed to guarantee his right to be equal before the law and/or to have an equal and effective protection against discrimination, especially on the basis of social origin. He thus considers his claims to be substantiated.

[5] Pellegrin v France Application 28541/1995; judgment of 8 December 1999.

5.4 Finally, the author points out that the rights guaranteed by article 25 (c) and 26 of the Covenant are not guaranteed by the European Convention of Human Rights, and thus the decisions of the European organs offer no guidance on these points. In the author's view, once there is a right guaranteed by the Covenant and that there is no avenue of domestic recourse, the claim must be admitted.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2(a), of the Optional Protocol.

6.3 As to the issue of exhaustion of domestic remedies, the Committee observes that the Kourris judgment of the Supreme Court was a binding precedent to the effect the Supreme Council of Judicature's exercise of powers under article 157 of the Constitution are not susceptible to challenge before judicial fora. In the Committee's view, the State party has not shown that there is any likelihood that the Supreme Court would come to any other decision if the question were again to arise before it, and thus the remedy invoked by the State party must be regarded, on the basis of settled jurisprudence, as not being effective. Likewise, a District Court would be similarly bound by the Supreme Court's precedent. As to the possibility of review by the Supreme Council of Judicature its own decision, the Committee recalls that it does not generally require, without more, an author to re-petition a body that has already pronounced itself in his or her case. The State party having advanced no reasons as to why the author may reasonably expect the Supreme Council of Judicature to come to another conclusionif the author again applied to it, the Committee is not able to conclude that this proposed remedy would be effective, for the purposes of article 5, paragraph 2(b), of the Optional Protocol. As a result, the Committee considers it is not precluded from considering the communication by the requirements of article 5, paragraph 2 (b), of the Optional Protocol.

6.4 As to the author's claims of a violation of articles 17, 25 and 26 of the Covenant, the Committee notes that the author claims that his application had been treated unequally, with a person less qualified than the author being appointed by the Supreme Council of Judicature to the post of District judge. The Committee notes that article 25(c) of the Covenant confers a right of access, on general terms of equality, to public service, and thus, in principle, the claim falls within the scope of this provision in this respect. The Committee observes, however, that the author has provided no details as to the reasons the successful judge was appointed beyond a general allegation of nepotism, as to why his candidacy was superior in relevant respects or to any of the further matters which the Committee would be required to consider before it could resolve such a claim. Accordingly, the Committee considers that the author has failed to

substantiate his claims under these articles for purposes of admissibility, and that they are inadmissible under article 2 of the Optional Protocol.

6.5 As to the author's claim under article 14, paragraph 1, the Committee observes that, in contrast to the situation in Casanovas v France[6] and Chira Vargas v Peru[7] concerning removal from public employment, the issue in dispute concerns the denial by a body exercising a non-judicial task of an application for employment in the judiciary. The Committee recalls that the concept of "suit at law" under article 14, paragraph 1, is based on the nature of the right in question rather than the status of one of the parties.[8] It considers that the procedure of appointing judges, albeit subject to the right in article 25(c) to access to public service on general terms of equality as well as the right in article 2, paragraph 3, to an effective remedy, does not additionally come within the purview of a determination of rights and obligations in a suit at law, within the meaning of article 14, paragraph 1, of the Covenant. This part of the communication is therefore inadmissible *ratione materiae*, under Article 3 of the Optional Protocol.

6.6 The author has invoked article 2 of the Covenant together with articles 17, 25(c) and 26. This raises the question as to whether the fact that the author had no possibility to challenge his non-appointment as a judge amounted to a violation of the right to an effective remedy as provided for by article 2, paragraphs 3 (a) and (b), of the Covenant. Article 2, paragraph 3, requires that in addition to effective protection of Covenant rights States parties must ensure that individuals also have accessible, effective and enforceable remedies to vindicate those rights. The Committee recalls that article 2 can only be invoked by individuals in conjunction with other articles of the Covenant,[9] and observes that article 2, paragraph 3(a), stipulates that each State party undertakes 'to ensure that any person whose rights or freedoms are violated shall have an effective remedy'. A literal reading of this provision seems to require that an actual breach of one of the guarantees of the Covenant be formally established as a necessary prerequisite to obtain remedies such as reparation or rehabilitation. However, article 2, paragraph 3(b), obliges States parties to ensure determination of the right to such remedy by a competent judicial, administrative or legislative authority, a guarantee which would be void if it were not available where a violation had not yet been established. While a State party cannot be reasonably required, on the basis of article 2, paragraph 3(b), to make such procedures available no matter how unmeritorious such claims may be, article 2, paragraph 3, provides protection to alleged victims if their claims are sufficiently well-founded to be arguable under the Covenant. Considering that the author of the present communication has failed to substantiate, for purposes of admissibility, his claims under articles 17, 25 and 26, his allegation of a violation of article 2 of the Covenant is also inadmissible under article 2 of the Optional Protocol.

[6] Case No 441/1990, Views adopted on 19 July 1994.
[7] Case No 906/2000, Views adopted on 22 July 2002.
[8] Y.L. v Canada Case No 112/81, Decision adopted on 8 April 1986, at paragraph 9.2; and Casanovas v France, op.cit, at paragraph 5.2.
[9] S.E. v Argentina Case No 275/88, Decision adopted on 26 March 1990, at paragraph 5.3.

7. The Committee therefore decides:

(a) That the communication is inadmissible under articles 2 and 3 of the Optional Protocol;

(b) That this decision shall be communicated to the author and to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]
