



**International Convention on
the Elimination of All Forms
of Racial Discrimination**

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Committee on the Elimination of Racial Discrimination

Communication No. 51/2012

Opinion adopted by the Committee at its eighty-sixth session

<i>Submitted by:</i>	L.G. (represented by counsel, Benjamin K. Wagner)
<i>Alleged victim:</i>	The petitioner
<i>State party:</i>	Republic of Korea
<i>Date of the communication:</i>	12 December 2012 (initial submission)
<i>Date of the present decision:</i>	1 May 2015
<i>Subject matter:</i>	Mandatory HIV/AIDS and drugs tests required from foreign teachers of English
<i>Procedural issues:</i>	
<i>Substantive issues:</i>	Right to work, right to public health, access to effective remedy and obligation of the State party to act against racial discrimination
<i>Articles of the Convention:</i>	2, 5 and 6



Annex

Opinion 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 (eighty-sixth session)

concerning

Communication No. 51/2012*

Submitted by: L.G. (represented by counsel,
Benjamin K. Wagner)

Alleged victim: The petitioner

State party: Republic of Korea

Date of the communication: 12 December 2012 (initial submission)

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 1 May 2015,

Having concluded its consideration of communication No. 51/2012, submitted to the Committee on the Elimination of Racial Discrimination by L.G. under article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination,

Having taken into account all information made available to it by the petitioner of the communication, her counsel and the State party,

Adopts the following:

Opinion

1. The petitioner is L.G., a national of New Zealand who is currently residing in the United States of America. She claims to be the victim of a violation by the Republic of Korea of her rights under articles 2 (1) (c) and (d), 5 and 6 of the International Convention on the Elimination of All Forms of Racial Discrimination. She is represented by counsel.¹

The facts as submitted by the petitioner

2.1 In 2008–2009, the petitioner was employed as a native English-speaking teacher by the Ulsan Metropolitan Office of Education to work at Yaksu Elementary School in the

* The following members of the Committee participated in the examination of the present communication: Nourredine Amir, Alexei Avtonomov, Marc Bossuyt, José Francisco Cali Tzay, Anastasia Crickley, Fatimata-Binta Victoire Dah, Ion Diaconu, Afiwa-Kindena Hohoueto, Yong'an Huang, Patricia Nozipho January-Bardill, Anwar Kemal, Melhem Khalaf, Gun Kut, Dilip Lahiri, Pastor Elias Murillo Martínez, Carlos Manuel Vázquez and Yeung Kam John Yeung Sik Yuen.

¹ The Republic of Korea made a declaration under article 14 on 5 March 1997.

Ulsan area of the Republic of Korea. She had a one-year contract with the Ulsan Metropolitan Office of Education starting on 1 September 2008 and finishing on 31 August 2009. She held an E-2 visa — the working visa that is specifically for “native-speaker conversation instructors”, that is to say, foreigners who assist Korean teachers during foreign language lessons.²

2.2 The petitioner arrived in the Republic of Korea on 27 August 2008. After signing her employment contract on 1 September 2008, she was informed by the Ulsan Metropolitan Office of Education that, as of 2007, E-2 visa holders were required to undergo medical tests to detect HIV/AIDS and illegal drugs at a hospital designated by the Government before they could be registered as alien residents. This requirement does not apply to all foreigners coming to work in the Republic of Korea; it only applies to those who are granted E-2 visas, or E-6 visas (arts and entertainment), or E-9 visas (non-professional employment) or H-2 visas (working visit). The medical test was originally set out in a policy memorandum³ as a one-time requirement for the registration of aliens and not as an entry requirement. However, most of the provincial and metropolitan education offices throughout the Republic of Korea have been requiring foreign native-speaker teachers to repeat such medical tests every year in order to have their contracts renewed. No annual medical testing is required of teachers from the Republic of Korea. Nor is it required of foreign native-speaker teachers who are ethnic Koreans (who are mainly from Canada and the United States of America); they are considered to be “overseas Koreans” and are granted F-4 visas.⁴

2.3 According to the petitioner, the requirement to undergo tests for HIV/AIDS and illegal drugs use is in fact targeted at foreign English-language teachers (who represent 95 per cent of those tested under the above-mentioned requirement) because they have been widely stigmatized and negatively stereotyped in the Republic of Korea by public officials, the media and some civil society organizations: they are often described as unqualified teachers who are morally problematic, are prone to indecent or criminal behaviour and are purveyors of degenerate culture. The petitioner recalls that this hostility against English-language teachers materialized in 2005 with the setting up of the “Anti-English Spectrum” internet group,⁵ which depicts foreign English-language teachers as “philanderers”, “rapists” and “child molesters” and as “having HIV/AIDS” that they are “knowingly spreading”.⁶ Besides posting such inflammatory comments about foreign teachers of English on its website, this internet group is also conducting “investigations” targeting ethnically non-Korean teachers of English, watching and tracking them for months and posting their pictures online. The group has advocated and has petitioned the Government since 2006 for mandatory HIV tests for foreign teachers of English. Its defamatory rhetoric was never curbed by the authorities of the Republic of Korea. On the contrary, some of its defamatory clichés have been embraced by the authorities and have been repeated in various declarations made by public officials.

2.4 The petitioner notes that the medical testing policy was enacted in 2007 in the wake of the public announcement by the Government of a crackdown on E-2 visa holders, which was made 10 days after the highly publicized arrest in Thailand of a Canadian paedophile

² The petitioner advises that there are some 22,000 holders of E-2 visas in the Republic of Korea and that 95 per cent of them are native English-speakers teaching their mother tongue. United States and Canadian citizens account for 50 per cent and 20 per cent of E-2 visa holders, respectively.

³ Not a piece of legislation.

⁴ Specific visas granted to so-called “overseas Koreans”.

⁵ See <http://cafe.naver.com/englishspectrum>.

⁶ John M. Glionna, “Korea activists target foreign English teachers”, *Los Angeles Times*, 31 January 2010.

who had previously been teaching English in the Republic of Korea. Officially, such medical tests were aimed at protecting children and young students and at alleviating the anxiety of citizens in the aftermath of this episode. The petitioner observes that the Canadian teacher of English who was arrested had been working in the Republic of Korea on an E-7 visa (a “special activities” visa), did not have HIV/AIDS, did not appear to have consumed illegal drugs and did not have a criminal record prior to his arrest in Thailand. The petitioner also notes that the leader of the “Anti-English Spectrum” group was invited by the Government to participate as an expert in the consultations that led to the enactment of the mandatory medical testing policy for foreign native-speaker teachers.

2.5 On 2 September 2008, the petitioner underwent the mandatory medical testing for HIV/AIDS and illegal drugs. On 4 September 2008, the test results, which were negative, were handed by hospital staff to the petitioner’s Korean colleague, who was acting as an interpreter and who informed her of the results. The petitioner knew that she had been tested for HIV/AIDS and illegal drugs (amphetamines and opiate drugs). However, in April 2010, during the arbitration procedure, she found out that she had also been tested without her knowledge or consent for cannabinoids and syphilis.⁷

2.6 The school management expressed its satisfaction with the petitioner’s teaching performance. In April 2009, the petitioner was invited by the Ulsan Metropolitan Office of Education to stay for another year.⁸ She was given a copy of the 2009/10 employment contract terms and she orally agreed to stay under the same contractual conditions. On 14 May 2009, she was informed by her Korean co-teacher⁹ that she would have to undergo new tests for HIV/AIDS and illegal drug use if she wanted to renew her contract. The petitioner notes that the 2009/10 employment contract that she had been given and had reviewed did not mention anything about testing for HIV/AIDS and illegal drugs as a condition of her employment.¹⁰ On 19 May 2009, the Ulsan Metropolitan Office of Education conducted an observation and evaluation of the petitioner’s work in her class, and her performance was again deemed satisfactory.

2.7 On 25 May 2009, the petitioner submitted a letter to the Ulsan Metropolitan Office of Education¹¹ explaining that, as a matter of principle, she refused to undergo the required medical tests again, as such tests were of a discriminatory nature and an affront to her dignity. She added that, while she was willing to undergo any health check that was also required of her Korean fellow teachers, she would not undergo medical tests required only of foreigners. She noted that such tests stemmed from a government policy and were not even prescribed by law, and that they contributed to promoting xenophobic beliefs that foreigners “do drugs”, “have diseases” and “are sex offenders”.

2.8 On 26 May 2009, she received a reply from a representative of the Ministry of Education saying that the status of and employment procedures for teachers from the Republic of Korea and foreign temporary teachers were different,¹² and that it was within the competence of the Ministry to decide on the procedures and the check-ups with regard

⁷ The petitioner provided a copy of her medical test results dated 2 September 2008, in Korean. She explains that the colleagues, from the Republic of Korea, who had told her about the test results did not mention these additional tests, which were in the copy that she had been given.

⁸ The petitioner submitted copies in English of the letters of recommendation written by various representatives of the school, in which she is praised for her performance as a teacher.

⁹ The petitioner always taught English to the students alongside a teacher from the Republic of Korea, called the co-teacher.

¹⁰ The petitioner provided a copy of her employment contract, in English.

¹¹ The petitioner provided a copy.

¹² Teachers who are from the Republic of Korea are governmental officials with permanent contracts and more responsibilities than temporary language teachers.

to the recruitment of foreign native-speaker teachers. It was also stated in the letter that there was no discriminatory intent behind the different treatment, but that the medical tests were necessary in order to identify foreigners who were taking drugs and had HIV/AIDS, as such persons were not qualified to be teachers. Furthermore, the tests were in line with the terms of employment, which provided for contracts to be renewed upon mutual written agreement between the employer and the employee. The letter finished by saying that the petitioner was free to refuse to undergo the medical tests but that, in that case, the Ulsan Metropolitan Office of Education would not agree to renew her contract.

2.9 On 8 July 2009, the petitioner submitted a complaint to the National Human Rights Commission of Korea. In her complaint, she requested the Commission to investigate whether the policy of the Ulsan Metropolitan Office of Education regarding mandatory medical tests for foreign native-speaker teachers was in accordance with the National Human Rights Commission Act. She requested the Commission, if it determined that the policy constituted unreasonable discrimination under the Act, to issue a relevant recommendation to the Ulsan Metropolitan Office of Education.

2.10 On 9 July 2009, the petitioner also requested the Korean Commercial Arbitration Board to initiate mediation between herself and the Ulsan Metropolitan Office of Education, as such a procedure was provided for, in her 2008/09 employment contract, for the resolution of disputes between the parties. On 24 August 2009, the Ulsan Metropolitan Office of Education submitted a letter as part of the mediation procedure, in which it denied the allegation of discrimination. It stated, among other things, that “in Korea, teachers are considered as very respectable and dignified jobs for which persons should have moral consciousness and humanities (sic)”. According to the Ulsan Metropolitan Office of Education, while this is ensured for Korean teachers through their training and education at university, “in the case of foreign teachers, it is so hard to judge only by their application form, degree transcript and so on. Therefore, [the Ulsan Metropolitan Office of Education] chose to do the check-up including the test of HIV and TBPE¹³ as one way to judge [their] moral consciousness and humanities”. The letter went on to say that “as often announced these days... foreign teachers in Korea commit many narcotic-related crimes”, and that medical tests were therefore to be considered as “a way to select healthy teachers, both in body and mind”. No solution came out of the mediation procedure.¹⁴ The Ulsan Metropolitan Office of Education refused to allow the petitioner to continue teaching without the required medical tests. She therefore left the Republic of Korea, on 3 September 2009.

2.11 On 10 December 2009, the petitioner, represented by counsel, initiated an arbitration procedure with the Arbitral Tribunal of the Korean Commercial Arbitration Board.¹⁵ The petitioner sued the Ulsan Metropolitan Office of Education for unjust imposition of discriminatory contractual terms which are forbidden under Korean law. She also sought compensation for breach of her 2009/10 employment contract. In that connection, she claimed that since the two parties had mutually agreed, orally, to renew her contract in compliance with the terms of her 2008/09 contract, the 2009/10 contract was already valid. She therefore considered that the Ulsan Metropolitan Office of Education had breached the contract because of her refusal to undergo the medical tests, even though such tests were not referred to in any part of the contract as a condition of her employment. The petitioner

¹³ A test for drugs.

¹⁴ The petitioner does not provide further details as to the outcome of the procedure.

¹⁵ The Arbitral Tribunal of the Korean Commercial Arbitration Board, in the form of a single arbitrator, was the competent instance to receive the petitioner’s complaint, in accordance with the terms of her working contract with the Ulsan Metropolitan Office of Education. Arbitral decisions of the Korean Commercial Arbitration Board have the same force as judicial decisions once they become final.

also argued that she had suffered emotional damage after discovering that the Ulsan Metropolitan Office of Education had arranged for syphilis and cannabinoids testing without her express prior consent, despite such consent being required under the law of the Republic of Korea. She further argued that such tests were an invasion of her privacy and amounted to an illegal and possibly criminal search. On 15 and 30 April 2010, Human Rights Watch and Amnesty International submitted amicus curiae briefs for the arbitration procedure before the Korean Commercial Arbitration Board, in support of the petitioner.

2.12 On 4 March, 16 April and 24 June 2010, the Ulsan Metropolitan Office of Education submitted defence briefs. Among other things, it explained that there was a societal demand for foreign teachers to be tested for drugs because some of them did not have adequate teaching capacity and were involved in illegal behaviours. It also stated that a cultural peculiarity of the Republic of Korea demanded that educators have the highest moral standards, whereas the use of drugs was very common in countries such as Canada, the United Kingdom and the United States of America, where the foreign teachers of English came from. It therefore considered that it was necessary to check that foreign teachers were not drug users at the time of their recruitment but also to verify on a regular basis that they had not started taking drugs during their stay in the Republic of Korea.¹⁶ It also explained that the HIV/AIDS testing was deemed necessary in the light of the low rate of infection in the Republic of Korea and the dangerous nature of the virus. On the issue of the loss of employment, it disputed that a 2009/10 employment contract had been concluded between the parties before the petitioner refused to undergo the medical tests. According to the Ulsan Metropolitan Office of Education, the mutual agreement between the parties could only come into force after satisfactory results had been obtained from the petitioner's medical tests, which was one of the various administrative steps for renewing the contract of a native-speaker conversation instructor.

2.13 The petitioner provided the National Human Rights Commission of Korea with a copy of the letter that had been submitted by the Ulsan Metropolitan Office of Education in the context of the mediation procedure, as evidence that its policy was not reasonable and it did not have an objective justification for the differential treatment of foreign teachers. On 5 April 2010, the petitioner's complaint to the National Human Rights Commission of Korea was dismissed, after a six-month delay.¹⁷ Although the petitioner had initially been promised that her complaint would be fully investigated, the Commission finally notified the complainant that it had "carefully investigated the complaint case that L.G. filed, and concluded that regarding the claim about health checks including HIV test, the Commission deems it inappropriate to investigate [it] as an individual complaint. Therefore, the Commission has decided to close the claim... However, the Commission has decided to transfer the claim to the Policy and Education Bureau for seeking various ways of policy review such as consultation with the relevant authorities, presentation of opinions to the educational institutions and so forth".¹⁸

2.14 On 30 June 2011, the arbitrator at the Korean Commercial Arbitration Board dismissed the petitioner's case against the Ulsan Metropolitan Office of Education as being "without merit". In the arbitrator's decision, it was held that the "petitioner's insistence" on being treated in an identical manner to native Korean teachers was unjustifiable, as the two

¹⁶ The Ulsan Metropolitan Office of Education suggests that foreign teachers of English are used to taking drugs at their social gatherings in the Republic of Korea.

¹⁷ The National Human Rights Commission of Korea must consider complaints within a specific time frame, which was not respected in the petitioner's case.

¹⁸ The petitioner provided a copy of the English version of the decision of the National Human Rights Commission of Korea. She also advises that at least 50 complaints about the same matter were dismissed on the same grounds by the National Human Rights Commission of Korea.

categories of teachers did not have the same legal status and they could therefore be evaluated on the basis of different standards. It was also held that the petitioner did not provide any conclusive evidence to demonstrate that the medical tests required by the Ulsan Metropolitan Office of Education were prohibited under the law of the Republic of Korea, or that such a requirement was unfair or discriminatory in comparison to the requirements imposed on other foreign native-English-speaking conversation instructors. Finally, it was held that medical testing was required during the recruitment procedure to enable the petitioner to be considered for employment, but that it was not a requirement under the proposed working contract itself. The arbitrator therefore considered that when the petitioner refused to undergo the tests, she withdrew her interest in being considered for the said position, and that no valid 2009/10 contract had been entered into between the petitioner and the Ulsan Metropolitan Office of Education. The request by the Ulsan Metropolitan Office of Education that the petitioner undergo medical tests could therefore not have been a breach of contract.

2.15 It was held, in the arbitrator's decision, that the petitioner did not manage to prove that the additional tests for syphilis and cannabinoids had been ordered by the Ulsan Metropolitan Office of Education. The arbitrator went on to say that, in any case, there was no obligation to inform the petitioner about those tests as, under the law of the Republic of Korea, only nationals of the Republic of Korea had the right to receive sufficient explanations and information from health and medical personnel regarding medical treatment and to decide on that basis whether or not to agree to the treatment.¹⁹ Even if it was considered that there was an obligation to inform the petitioner that additional tests would be performed, the arbitrator said that it was for the health and medical personnel to provide such an explanation and not the Ulsan Metropolitan Office of Education. Finally, the arbitrator held that the Ulsan Metropolitan Office of Education had no duty to ascertain which tests would be carried out on the petitioner, to inform her about which tests would be carried out on her or to obtain her consent for such tests. Finally, the arbitrator held that the petitioner did not prove that she had suffered any mental anguish as a result of the additional tests, given that the tests fell within the broad categories of sexually transmitted disease tests and drugs tests for which she already knew that she was being tested.

2.16 The petitioner claims that all effective and available domestic remedies in the Republic of Korea were exhausted as the arbitral decision rendered by the Korean Commercial Arbitration Board was final.

The complaint

3.1 According to the petitioner, the policy of the Ulsan Metropolitan Office of Education requiring regular mandatory HIV/AIDS and drugs testing for foreign native-speaker teachers amounts to racial discrimination as defined by article 1 of the Convention.

3.2 The petitioner alleges that the requirement of an HIV/AIDS test is to be considered in the context of wide discriminatory practices in the State party towards foreigners and towards persons living with HIV/AIDS. The petitioner claims that the mandatory HIV/AIDS testing of foreign teachers of English was put in place not because of public health concerns, fears of accidental transmission or public ignorance about the routes of infection, but because of negative beliefs about the moral character of foreign teachers. She considers that it is a way to stigmatize and to express hostility towards this disliked group of non-ethnic-Korean foreigners. She also considers that this symbolic HIV/AIDS stigma is based on judgemental attitudes towards those perceived to have put themselves at risk of infection through immoral behaviour and that the stigma corresponds to the portrayal of

¹⁹ The arbitrator refers to article 12 of the Framework Act on Health and Medical Services.

foreign teachers of English in the Republic of Korea. Stigma and discrimination are interrelated and serve to reinforce and legitimize each other.²⁰ The petitioner submits that the entry and stay restrictions related to HIV/AIDS status that are in force in the State party are not justified by public health goals²¹ and are discriminatory. She considers that the mandatory testing contributes to reinforcing the stigma and the double discrimination against migrants and foreigners living with HIV/AIDS, by prejudicially implying that non-nationals are a danger and that they will act irresponsibly by transmitting the infection within the national population.

3.3 The petitioner observes that the Ulsan Metropolitan Office of Education tries to justify its policy of testing foreign teachers of English for possible use of drugs because of the alleged high frequency of drug use in their countries of origin. However, the Republic of Korea is presented in a misleading manner by the Ministry of Education as a “drug-free country”, and that idea is used to justify why drugs tests are not necessary for Korean teachers. The petitioner recalls that the number of drug users in the Republic of Korea is estimated at between 200,000 and 300,000, and that it was officially reported in 2007 that 10,649 persons had been arrested in connection with the use of drugs, out of whom only 298 were foreigners and only 24 were foreign teachers of English.²² The petitioner also argues that the Ulsan Metropolitan Office of Education has recognized that the drugs tests serve symbolic purposes, namely to respond to the public concern that stems from the negative stereotyping of foreign teachers of English as frequent drug users. The test allegedly improves the credibility of foreign teachers of English and makes them understand the rigorous attitude towards drug use in the Republic of Korea. The petitioner argues that the mandatory repeated testing cannot achieve such aims and that it can therefore only be explained in terms of a general discriminatory attitude against foreign teachers of English in the country. The fact that the one-off testing requirement for the alien registration procedure became an annual testing requirement in 15 out of 16 provincial offices of education bears witness to the increased stigmatization of foreign teachers of English.

3.4 The petitioner argues that the State party failed to abide by the principles enshrined in the Convention and recalled by the Committee in paragraph 12 of its general recommendation No. 30 (2004) on discrimination against non-citizens, according to which State parties are requested to “take resolute action to counter any tendency to target, stigmatize, stereotype or profile, on the basis of race, colour, descent, and national or ethnic origin, members of “non-citizen” population groups, especially by politicians, officials, educators and the media, on the Internet and other electronic communications networks and in society at large”. The petitioner argues that the Ulsan Metropolitan Office of Education had the opportunity to judge “moral consciousness” through her teaching performance, which had been positively evaluated both by the school management and by the representatives of the Ulsan Metropolitan Office of Education themselves. There was no reasonable or objective basis for suspecting that the applicant was physically or mentally incapacitated by drugs or disease. It was the petitioner’s foreigner status alone that made the Ulsan Metropolitan Office of Education suspicious that she may have HIV/AIDS or use

²⁰ The petitioner refers to the UNAIDS best practice collection entitled “HIV-related stigma, discrimination and human rights violations: case studies of successful programmes” (p. 11), in which it is stated that: “Stigma lies at the root of discriminatory actions, leading people to engage in actions or omissions that harm or deny services or entitlements to others. Discrimination can be described as the enactment of stigma. In turn, discrimination encourages and reinforces stigma.”

²¹ The petitioner has submitted a letter prepared by Human Rights Watch further detailing this point.

²² The petitioner quotes data provided by the Narcotics Division of the Supreme Prosecutors’ Office, dated 30 December 2008.

illegal drugs. While the Ulsan Metropolitan Office of Education's aim of employing only ethically and morally qualified teachers may be reasonable, the procedure adopted is not proportional to the aim pursued, and less invasive ways of evaluating the petitioner's "moral consciousness" could have been adopted.

3.5 The petitioner claims that the failure of the various State and non-State institutions²³ to fulfil their normative duty "to review governmental, national and local policies" and "to amend, rescind or nullify" policies has "the effect of creating or perpetuating racial discrimination", in breach of article 2 (1) (c) of the Convention. In that respect, the Korean Commercial Arbitration Board was the competent authority under the arbitration clause of the petitioner's working contract. It had the duty to determine "the rights and obligations of the parties... in accordance with the law of the Republic of Korea", which includes the Convention. The petitioner considers that the Korean Commercial Arbitration Board applied an improper burden of proof on the petitioner, who had established a prima facie case that she had been a victim of racial discrimination. She therefore argues that it was for the respondent (the Ulsan Metropolitan Office of Education) to provide evidence of an objective and reasonable justification for the differential treatment, as stated by the Committee.²⁴ She recalls that in spite of her referrals to the Convention as a valid source of law directly applicable in the Republic of Korea and her claim that the burden of proof should be on the Ulsan Metropolitan Office of Education, the arbitrator from the Korean Commercial Arbitration Board chose to disregard the Convention. In addition, she recalls that the Committee has made it clear that where a non-citizen has established a prima facie case of discrimination and where circumstances suggest that citizenship is being used as a proxy for racial discrimination, a proper investigation should be initiated as to the real reasons behind the policy that is being challenged, in order to ascertain whether criteria involving racial discrimination are being applied.²⁵ Nevertheless, the petitioner considers that, although she had specifically made a request to that effect, the arbitrator did not investigate the reasons behind the mandatory testing policy for foreign native-speaker teachers.

3.6 The petitioner also considers that the National Human Rights Commission of Korea had the mandate to conduct an investigation and determine whether the policy of the Ulsan Metropolitan Office of Education constituted discrimination, and to issue a recommendation on that issue. The petitioner recalls that in the past, the Commission had issued a recommendation in which it was stated that hepatitis B testing for employment purposes was discriminatory, and had recommended that such testing be prohibited.²⁶ The Commission also considered that the deportation of a foreigner on the basis of his or her positive HIV/AIDS status was likely to be an infringement of that person's right to equal treatment.²⁷ The petitioner therefore considers that the failure of the Commission to investigate her complaint has resulted in the denial of an effective remedy within the meaning of article 6, read in conjunction with article 2 (1) (c) and (d), of the Convention.

²³ The petitioner refers to actions and inactions of (a) the Ulsan Metropolitan Office of Education; (b) the Ministry of Education; (c) the National Human Rights Commission of Korea; and (d) the Korean Commercial Arbitration Board.

²⁴ The petitioner refers to the Committee's general recommendation No. 30 (2004) on discrimination against non-citizens, para. 24.

²⁵ The petitioner quotes communication No. 10/1997, *Habassi v. Denmark*, opinion adopted on 17 March 1999, para. 9.3.

²⁶ The petitioner does not provide the details of the case; she only refers to a press release about the case by the National Human Rights Commission of Korea entitled "Not employing HBV carriers is discrimination", 9 July 2009.

²⁷ The petitioner refers to the so-called "Heo case", without providing references.

3.7 The petitioner also claims that the State party's failure to amend, rescind or nullify the policy of the Ulsan Metropolitan Office of Education amounts to a violation of her rights enshrined in article 5 (e) (i) and (iv) read alone and in conjunction with article 2 (1) (c) and (d) of the Convention. In that connection, she argues that she was denied her right to work because the discriminatory HIV/AIDS and drugs retesting policy had directly led to the loss of her employment. Furthermore, she claims that her right to public health was breached, because mandatory HIV/AIDS and drugs tests for foreign teachers are not carried out for the purpose of diagnosis or treatment but rather in order to conduct body searches on non-citizens living and working in the country. Testing positive may lead to loss of employment, the loss of a working visa and a possible deportation, thereby seriously undermining the rights of non-citizens. She also argues that because the medical tests for syphilis and cannabinoids were conducted solely on the basis of her racial origin and without her informed consent, they amounted to a violation of her right to public health under the Convention.

State party's observations on admissibility and the merits

4.1 On 12 April 2013, the State party submitted its observations on the admissibility and the merits of the communication. The State party specifically mentions that it does not raise any objection to the admissibility of the communication, pursuant to article 14 of the Convention and rule 92 (3) of the Committee's rules of procedure.

4.2 The State party notes that the Government operates the English Program in Korea, through which native English-speakers are invited to work as teaching assistants in public schools. It also notes that the manual prepared by the National Institute for International Education, which is affiliated to the Ministry of Education, provides guidelines to metropolitan and provincial education offices for the recruitment of foreign teachers of English and the renewal of their contracts. It stresses that the most recent version of the manual, which was published in 2010, does not specify that foreign teachers must submit the results of HIV/AIDS and drugs tests undertaken in the Republic of Korea in order to have their contracts renewed. The State party claims that, since 2010, annual medical testing, including for HIV/AIDS and illegal drugs, is no longer required in order for foreign native-speaker teachers to continue teaching and to renew their contracts with the Ulsan Metropolitan Office of Education. The State party concludes that the policies of the Ministry of Education and the Ulsan Metropolitan Office of Education referred to in the petitioner's complaint are no longer in place and that the complaint is therefore without merits.

4.3 The State party notes that the arbitral award in the petitioner's case against the Ulsan Metropolitan Office of Education was rendered by the Korean Commercial Arbitration Board, in accordance with the Arbitration Act of the Republic of Korea, and that since becoming final,²⁸ the award has had the same legal force on the parties as a court's final ruling on the petitioner's claims. The State party claims that it is beyond its authority to review the arbitral award or to intervene in arbitral proceedings, and considers that the award conclusively resolved the dispute between the parties.

²⁸ The State party advises that the only recourse against such an arbitral award is to file a complaint before a court and request abrogation of the award pursuant to article 36 of the Arbitration Act. The abrogation can be approved if it appears that the award is in conflict with the good morals or other public policy of the Republic of Korea. It also advises that the arbitral award is final because the petitioner did not file such complaint within the assigned time limit.

4.4 Finally, the State party observes that the decision of the National Human Rights Commission of Korea to reject the applicant's complaint was made in compliance with the National Human Rights Commission of Korea Act.²⁹

Petitioner's comments on the State party's observations on admissibility and the merits

5.1 On 21 June 2013, the petitioner submitted her comments on the observations of the State party, in which she reiterated her previous arguments. Furthermore, she considers that the State party acknowledged the violations of her rights under the Convention when it stated that mandatory in-country retesting of foreign teachers for HIV/AIDS and illegal drugs was no longer in place as of 2010. She welcomes the guarantee of non-repetition presented by the State party, which may benefit thousands of foreign native-speaker teachers living and working in the country. Nevertheless, she recalls that she presented an individual complaint to the Committee about the breach of her rights by the State party and points out that the mere discontinuance of the said policy does not constitute a complete remedy for those violations. She claims that she is entitled to appropriate compensation for the losses that she suffered. She requests the Committee to urge the State party to provide financial compensation for her loss of employment and to issue a public apology for the humiliation and loss of dignity that she was forced to endure as a result of standing up for her rights in the face of the discriminatory treatment that she had suffered.

5.2 The petitioner observes that it has been a constant practice of the State party to avoid providing the reasons for the HIV/AIDS and drugs testing policy, including when questioned on that particular issue at the 2008 and 2012 universal periodic reviews³⁰ and by the Committee itself during its 2012 consideration of the State party report.³¹ She considers that this attitude persisted when the State party refused to investigate the reasons behind the mandatory policy, as she had requested in her complaint to the national authorities.

5.3 The petitioner reiterates that if the discriminatory policy had not been implemented, she would have been employed for the 2009/10 school year, and that she was wrongfully deprived of her job and was forced to leave the Republic of Korea on 3 September 2009 as she did not have a valid working visa. She recalls that such mandatory HIV/AIDS tests and their consequences on potential employment are not in compliance with the relevant international standards. She stresses that the International Labour Organization firmly rejects HIV screenings and clearly states that there is "no justification for asking job applicants or workers to disclose HIV-related personal information"³² and that "there should be no discrimination against or stigmatization of workers, in particular jobseekers and job applicants, on the grounds of real or perceived HIV status or the fact that they belong to regions of the world or segments of the population perceived to be at greater risk of or more vulnerable to HIV infection".³³ Such standards are corroborated by various other

²⁹ The State party does not elaborate further.

³⁰ In 2008 the United Kingdom of Great Britain and Northern Ireland asked a specific question about the mandatory testing of E-2 visa holders, and in 2012 Canada raised concerns about the HIV and drug testing of E-2 visa holders. However, the State party did not provide any element of an answer to those questions.

³¹ Committee on the Elimination of Racial Discrimination, eighty-first session; the petitioner refers to the public webcast.

³² International Labour Organization, *ILO Code of Practice on HIV/AIDS and the World of Work* (2001), articles 4.2 and 4.7.

³³ International Labour Organization, *Recommendation concerning HIV and AIDS and the World of Work (No. 200)*, section III (3) (c).

entities, as seen in the inter-agency guidelines.³⁴ The petitioner therefore reiterates that the mandatory HIV/AIDS test policy was a violation of her right to work and her right to just and favourable conditions of work as enshrined in article 5 (e) (i) of the Convention, as well as of the rights of all foreign native-speaker teachers.

5.4 The petitioner recalls that, in the 1990s, the State party abandoned mandatory HIV testing for sex workers and for the so-called hygiene-related workers³⁵ because it had proved to be inefficient. However, in the State party, HIV/AIDS testing is considered to be an indicator of the moral consciousness of foreign teachers. Such a misplaced moral basis for mandatory testing contributes to the strong stigma surrounding the disease and gives the false impression that only non-Koreans are at risk. The petitioner considers that ensuring HIV status confidentiality is part of the individual's right to privacy and contributes to maintaining public health, as it is only when individuals do not fear disclosure of their HIV-positive status and the related stigma that they will voluntarily get tested and treated.

5.5 The petitioner notes that the stigmatization of foreign teachers of English as having HIV/AIDS was supported in social media and by public officials before the introduction of the mandatory testing, based on the simple fact that a large number of foreign teachers of English were undergoing HIV/AIDS tests on a voluntary basis. Therefore, public health services' ultimate aim of having each person check his or her HIV/AIDS status on a voluntary basis was stigmatized, to the prejudice of foreign teachers of English. The petitioner considers that this mandatory testing policy is a breach of the right to public health as provided for in article 5 (e) (iv) of the Convention.

5.6 Race, mother tongue and morality are characteristics that are deeply interrelated, the petitioner argues, because of the State party's historical ethnic and cultural homogeneity. She considers that this explains why negative stereotypes of foreigners are widespread. She cites examples of the widespread stigmatization of foreign native-speaker teachers, who are generally perceived as being white male westerners who have social problems and take drugs. She refers to media articles depicting white teachers of English as sexual predators who are a threat to Korean society in general and to Korean women in particular.³⁶

5.7 She contests the decision of the National Human Rights Commission of Korea to refuse to treat her complaint and recalls that more than 50 similar complaints had been presented to the Commission by foreign teachers of English and had been similarly rejected.

5.8 Furthermore, the petitioner states that, despite the assertion made by the State party that the mandatory HIV/AIDS and drugs tests are no longer required at the national level in order for foreign native-speaker teachers to have their working contracts with the provincial

³⁴ Office of the United Nations High Commissioner for Human Rights and the Joint United Nations Programme on HIV/AIDS, *International Guidelines on HIV/AIDS and Human Rights* (United Nations publication, July 2006, Sales No. E.06.XIV.4).

³⁵ For example food factories, hotels, beauty salons, coffee shops.

³⁶ The petitioner quotes the following articles and television programmes: *Is Korea their Paradise? Report on the Real Conditions of Blond-haired, Blue-eyed Teachers*, a television programme on Chosun Ilbo aired on 21 February 2005; *White English Teacher Threatens Korean Women with AIDS*, a television programme on Chosun Ilbo aired on 28 May 2007; *From Molestation to AIDS Threats, the Shocking Perversions of Some English Teachers: Beware the "Ugly White Teacher"*, a television programme on Sports Chosun aired on 27 May 2006; *The Shocking Truth about Relationships with Foreigners*, an MBC television programme aired on June 2012, which depicts white Western teachers of English as sexual predators who infect Korean women with HIV and abandon them; and "Tips for targeting Korean women spread by foreign English instructor spread quickly: treat them as sex toys and throw them away when they are finished", published in *Ilyosisa News* on 24 August 2012.

offices of education renewed, as long as domestic legislation does not explicitly prevent such mandatory tests for hiring purposes, provincial offices of education throughout the country will be permitted to require them. She affirms that it is a matter of public knowledge and a source of constant complaint among the non-citizen community in the Republic of Korea³⁷ that such tests continued to be used until at least 2013. Therefore, according to the petitioner, the failure of the State party to amend, rescind or nullify the mandatory testing policy amounts to a continuing violation of article 2 (1) (c) of the Convention.

Issues and proceedings before the Committee

Consideration of admissibility

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

6.2 The Committee notes that the State party has raised no objections to the admissibility of the communication as the petitioner has met the requirements of article 14 of the Convention.

6.3 Not finding any obstacles to the admissibility of the present communication, the Committee declares it admissible and proceeds to its examination on the merits.

Consideration of the merits

7.1 The Committee has considered the present communication in the light of all the submissions and documentary evidence produced by the parties, as required under article 14 (7) (a) of the Convention and rule 95 of its rules of procedure.

7.2 The main issue before the Committee is whether the State party fulfilled its positive obligations to take effective action following the report by the petitioner that the employment requirements policy of the Ulsan Metropolitan Office of Education was based on racial discrimination, and that the resulting loss of employment was also discriminatory.

7.3 The Committee notes that the petitioners had brought a prima facie case of racial discrimination to the attention of the competent authorities of the State party, claiming before the Korean Commercial Arbitration Board and the National Human Rights Commission of Korea that the policy of mandatory testing for HIV/AIDS and illegal drugs was exclusively based on negative stereotypes and stigmatization of native English-speaking teachers, which are grounded on the teachers' ethnic origin. The Committee observes that the National Human Rights Commission of Korea declined to investigate the petitioner's complaint and that no assessment of the compliance of the contested testing policy with the Convention was made by the Korean Commercial Arbitration Board or any other authority of the State party. In the light of the State party's failure to carry out an assessment in the petitioner's case in order to determine whether criteria involving racial discrimination within the meaning of article 1 of the Convention were at the origin of the policy of mandatory testing for HIV/AIDS and illegal drugs use, the Committee concludes that the petitioner's rights under articles 2 (1) (c) and (d) and 6 of the Convention have been violated.³⁸

³⁷ The petitioner refers to an online public survey conducted in May and June 2013 that polled 201 foreign teachers of English in the Republic of Korea.

³⁸ See *Habassi v. Denmark*, para. 9.3; and communication No. 40/2007, *Er v. Denmark*, opinion adopted on 8 August 2007, para. 7.4.

7.4 The Committee notes the petitioner's claim that, as a result of her refusal to undergo the contested mandatory testing for a second time, she was denied the opportunity to continue to work at the school, in violation of article 5 (e) (i) of the Convention. It observes that foreign teachers of English who are ethnically Korean, and Korean teachers, are exempted from such testing, and that the testing is therefore not decided on the basis of a distinction between citizens and non-citizens but rather on the basis of ethnic origin. The Committee also observes that mandatory HIV/AIDS testing for employment purposes, as well as for entry, stay and residence purposes, is considered to be in contradiction of international standards, as such measures appear to be ineffective for public health purposes, discriminatory, and harmful to the enjoyment of fundamental rights.³⁹ The Committee further notes that the State party did not provide any reasons to justify the mandatory testing policy. It notes that during the Korean Commercial Arbitration Board's arbitration proceedings, some officials of the Ulsan Metropolitan Office of Education confirmed that tests for HIV/AIDS and illegal drugs use were viewed as a means of checking the values and morality of foreign teachers of English. In this context, the Committee recalls its general recommendation No. 30, in which it recommends that States parties take "resolute action to counter any tendency to target, stigmatize, stereotype or profile, on the basis of race, colour, descent, and national or ethnic origin, members of "non-citizen" population groups, especially by politicians".⁴⁰ It is not contested by the State party that, in fine, the only reason why the petitioner did not have her working contract renewed was that she refused to undergo the retesting for HIV/AIDS and illegal drugs use. The Committee considers that the mandatory testing policy limited to foreign teachers of English who are not ethnic Koreans does not appear to be justified on public health grounds or any other ground, and is a breach of the right to work without distinction as to race, colour, or national or ethnic origin, in violation of the State party's obligation to guarantee equality in respect of the right to work as enshrined in article 5 (e) (i) of the Convention.

7.5 In the light of the above findings, the Committee will not examine separately the petitioner's allegations under article 5 (e) (iv) of the Convention.

8. In the circumstances of the case, the Committee on the Elimination of Racial Discrimination, acting under article 14 (7) (a) of the International Convention on the Elimination of All Forms of Racial Discrimination, considers that the facts before it disclose a violation of articles 2 (1) (c) and (d), 5 (e) (i) and 6 of the Convention by the State party.

9. The Committee recommends that the State party grant the petitioner adequate compensation for the moral and material damages caused by the above-mentioned violations of the Convention, including compensation for the lost wages during the one year she was prevented from working. It also recommends that the State Party takes the appropriate measures to review regulations and policies enacted at the State or local level relating to the employment of foreigners, and that it abolish, both in law and in practice, any piece of legislation, regulation, policy or measure that has the effect of creating or perpetuating racial discrimination. The Committee recommends to the State party to counter any manifestations of xenophobia, such as stereotyping or stigmatizing, of foreigners by public officials, the media and the public at large, including, as appropriate, through public campaigns, official statements and codes of conduct for politicians and the media. The State party is also requested to give wide publicity to the Committee's opinion,

³⁹ Commission on Human Rights resolution on the protection of human rights in the context of human immunodeficiency virus (HIV) and acquired immune deficiency syndrome (AIDS), of 3 March 1995 (E/CN.4/RES/1995/44); and International Labour Organization, *Recommendation concerning HIV and AIDS and the World of Work (No. 200)*.

⁴⁰ See the Committee's general recommendation No. 30, para. 12.

including among prosecutors and judicial bodies, and to translate it into the official language of the State party.

10. The Committee wishes to receive, within 90 days, information from the State party about the measures taken to give effect to the Committee's opinion.
