

ADEQUATE OR DECENT STANDARD OF LIVING - FOOD, CLOTHING, SHELTER

III. JURISPRUDENCE

CERD

- *L. R. et al. v. Slovakia* (31/2003), CERD, A/60/18 (7 March 2005) 119 at paras. 2.1-2.4, 10.2-10.10, 11 and 12.

...

2.1 On 20 March 2002, the councillors of the Dobšiná municipality adopted resolution No. 251-20/III-2002-MsZ, whereby they approved what the petitioners describe as a plan to construct low-cost housing for the Roma inhabitants of the town.^{a/} About 1,800 Roma live in the town in what are described as “appalling” conditions, with most dwellings comprising thatched huts or houses made of cardboard and without drinking water, toilets, or drainage or sewage systems. The councillors instructed the local mayor to prepare a project aimed at securing finance from a government fund set up expressly to alleviate Roma housing problems in the State party.

2.2 Thereupon, certain inhabitants of Dobšiná and surrounding villages established a five-member “petition committee”, led by the Dobšiná chairman of the Real Slovak National Party. The committee drafted a petition with the following text:

“I do not agree with the building of low-cost houses for people of Gypsy origin on the territory of Dobšiná, as it will lead to an influx of inadaptible citizens of Gypsy origin from the surrounding villages, even from other districts and regions.”^{b/}

The petition was signed by some 2,700 inhabitants of Dobšiná and deposited with the municipal council on 30 July 2002. On 5 August 2002, the council considered the petition and unanimously voted, “having considered the factual circumstances”, to cancel the earlier resolution by means of a second resolution which included an explicit reference to the petition.^{c/}

2.3 On 16 September 2002, in the light of the relevant law,^{d/} the petitioners’ counsel requested the Rožňava District Prosecutor to investigate and prosecute the authors of the discriminatory petition, and to reverse the council’s second resolution as it was based on a discriminatory petition. On 7 November 2002, the District Prosecutor rejected the request on the basis of purported absence of jurisdiction over the matter. The Prosecutor found that “...the resolution in question was passed by the Dobšiná Town Council exercising its self-governing powers; it does not constitute an administrative act performed by public administration and, as a result, the prosecution office does not have the competence to review

ADEQUATE OR DECENT STANDARD OF LIVING - FOOD, CLOTHING, SHELTER

the legality of this act or to take prosecutorial supervision measures in non-penal area”.

2.4 On 18 September 2002, the petitioners’ counsel applied to the Constitutional Court for an order determining that articles 12 and 33 of the Constitution, the Act on the Right of Petition and the Framework Convention for the Protection of National Minorities (Council of Europe) had been violated, cancelling the second resolution of the council and examining the legality of the petition. Further information was provided on two occasions at the request of the Court. On 5 February 2003, the Court, in closed session, held that the petitioners had provided no evidence that any fundamental rights had been violated by the petition or by the council’s second decision. It stated that as neither the petition nor the second resolution constituted legal acts, they were permissible under domestic law. It further stated that citizens have a right to petition regardless of its content.

...

10.2 The Committee observes, at the outset, that it must determine whether an act of racial discrimination, as defined in article 1 of the Convention, has occurred before it can decide which, if any, substantive obligations in the Convention to prevent, protect against and remedy such acts have been breached by the State party.

10.3 The Committee recalls that, subject to certain limitations not applicable in the present case, article 1 of the Convention defines racial discrimination as follows: “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin, which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field”.

10.4 The State party argues firstly that the challenged resolutions of the municipal council make no reference to Roma, and must thus be distinguished from the resolutions at issue in, for example, the *Koptova y/* case that were racially discriminatory on their face. The Committee recalls that the definition of racial discrimination in article 1 expressly extends beyond measures which are explicitly discriminatory to encompass measures that are not discriminatory at face value but are discriminatory in fact and effect, that is, if they amount to indirect discrimination. In assessing such indirect discrimination, the Committee must take full account of the particular context and circumstances of the petition, as by definition indirect discrimination can only be demonstrated circumstantially.

10.5 In the present case, the circumstances surrounding the adoption of the two resolutions by the municipal council of Dobšiná and the intervening petition presented to the council following its first resolution make abundantly clear that the petition was advanced by its proponents on the basis of ethnicity and was understood as such by the council as the primary, if not the exclusive basis for revoking its first resolution. As a result, the

ADEQUATE OR DECENT STANDARD OF LIVING - FOOD, CLOTHING, SHELTER

Committee considers that the petitioners have established a distinction, exclusion or restriction based on ethnicity, and dismisses this element of the State party's objection.

10.6 The State party argues, in the second instance, that the municipal council's resolution did not confer a direct and/or enforceable right to housing, but rather amounted to but one step in a complex process of policy development in the field of housing. The implication is that the second resolution of the council, even if motivated by ethnic grounds, thus did not amount to a measure "nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field", within the meaning of article 1, paragraph 1 *in fine*. The Committee observes that in complex contemporary societies the practical realization of, in particular, many economic, social and cultural rights, including those related to housing, will initially depend on and indeed require a series of administrative and policymaking steps by the State party's competent relevant authorities. In the present case, the council resolution clearly adopted a positive development policy for housing and tasked the mayor with pursuing subsequent measures by way of implementation.

10.7 In the Committee's view, it would be inconsistent with the purpose of the Convention, and elevate formalism over substance, to consider that the final step in the actual implementation of a particular human right or fundamental freedom must occur in a non-discriminatory manner, while the necessary preliminary decision-making elements directly connected to that implementation were to be severed and be free from scrutiny. As a result, the Committee considers that the council resolutions in question, taking initially an important policy and practical step towards realization of the right to housing, followed by its revocation and replacement with a weaker measure, taken together, do indeed amount to the impairment of the recognition or exercise on an equal basis of the human right to housing, protected by article 5, paragraph (e) (iii), of the Convention and further in article 11 of the International Covenant on Economic, Social and Cultural Rights. The Committee thus dismisses the State party's objection on this point.

10.8 In light of this finding that an act of racial discrimination has occurred, the Committee recalls its jurisprudence [n/]...to the effect that acts of municipal councils, including the adoption of public resolutions of legal character such as in the present case, amount to acts of public authorities within the meaning of Convention provisions. It follows that the racial discrimination in question is attributable to the State party.

10.9 Accordingly, the Committee finds that the State party is in breach of its obligation under article 2, paragraph 1 (a), of the Convention to engage in no act of racial discrimination and to ensure that all public authorities act in conformity with this obligation. The Committee also finds that the State party is in breach of its obligation to guarantee the right

ADEQUATE OR DECENT STANDARD OF LIVING - FOOD, CLOTHING, SHELTER

of everyone to equality before the law in the enjoyment of the right to housing, contrary to article 5, paragraph (e) (iii), of the Convention.

10.10 With respect to the claim under article 6, the Committee observes that, at a minimum, this obligation requires the State party's legal system to afford a remedy in cases where an act of racial discrimination within the meaning of the Convention has been made out, whether before the national courts or, in this case, the Committee. The Committee having established the existence of an act of racial discrimination, it must follow that the failure of the State party's courts to provide an effective remedy discloses a consequential violation of article 6 of the Convention.

...

11. The Committee on the Elimination of Racial Discrimination...is of the view that the facts before it disclose violations of article 2, paragraph 1 (a), article 5, paragraph (e) (iii), and article 6 of the Convention.

12. In accordance with article 6 of the Convention, the State party is under an obligation to provide the petitioners with an effective remedy. In particular, the State party should take measures to ensure that the petitioners are placed in the same position that they were in upon adoption of the first resolution by the municipal council. The State party is also under an obligation to ensure that similar violations do not occur in the future.

Notes

a/ The State party provides, with its submissions on the merits of the petition, the following full text of the resolution:

“On its 25th extraordinary session held on 20 March 2002 the Town Council of the town of Dobšiná adopted the following resolution from discussed reports and points:

RESOLUTION 251-20/III-2002-MsZ

After discussing the proposal by Lord Mayor Ing. Ján Vozár concerning the building of low-cost housing the Town Council of Dobšiná

Approves

the low-cost housing - family houses or apartment houses - development policy and

Recommends

ADEQUATE OR DECENT STANDARD OF LIVING - FOOD, CLOTHING, SHELTER

the Lord Mayor to deal with the preparation of project documentation and acquisition of funds for this development from State subsidies.”

b/ Petitioners’ translation, which reflects exactly the text of the petition set out in the translated judgement of the Constitutional Court provided by the State party annexed to its submissions on the merits. The State party suggests in its submissions on the merits that a more appropriate translation would be: “I do not agree with the construction of flats for the citizens of Gypsy nationality (ethnicity) within the territory of the town of Dobšiná, as there is a danger of influx of citizens of Gypsy nationality from surrounding area [sic] and even from other districts and regions.”

c/ The State party provides, with its submissions on the merits of the petition, the following full text of the resolution:

“RESOLUTION 288/5/VIII-2002-MsZ

I. After discussing the petition of 30 July 2002 and after determining the facts, the Town Council of Dobšiná, through the Resolution of the Town Council is in compliance with the law, on the basis of the citizens’ petition

Cancel

Resolution 251-20/III-2002-MsZ approving the low-cost housing - family houses or apartment houses - development policy.

II. Tasks

The Town Council commissions with elaborating a proposal for solving the existence of inadapted citizens in the town of Dobšiná and then to discuss it in the bodies of the town and at a public meeting of the citizens.

Deadline: November 2002

Responsible: Chairpersons of commissions.”

d/ The petitioners refer to:

(i) Article 1 of the Act on the Right of Petition, which provides:

“A petition cannot call for a violation of the Constitution of the Slovak Republic and its laws, nor deny or restrict individual rights”;

ADEQUATE OR DECENT STANDARD OF LIVING - FOOD, CLOTHING, SHELTER

(ii) Article 12 of the Constitution, which provides:

(1) All human beings are free and equal in dignity and in rights. Their fundamental rights and freedoms are sanctioned; inalienable, imprescriptible and irreversible.

(2) Fundamental rights shall be guaranteed in the Slovak Republic to everyone regardless of sex, race, colour, language, belief and religion, political affiliation or other conviction, national or social origin, nationality or ethnic origin, property, descent or any other status. No one shall be aggrieved, discriminated against or favoured on any of these grounds.

(3) Everyone has the right to decide freely which national group he or she is a member of. Any influence and all manners of pressure that may affect or lead to a denial of a person's original nationality shall be prohibited.

(4) No injury may be inflicted on anyone, because of exercising his or her fundamental rights and freedoms;

(iii) Article 33 of the Constitution, which provides:

“Membership in any national minority or ethnic group may not be used to the detriment of any individual”; and

(iv) The Act on the Public Prosecution Office, which provides that the Prosecutor has a duty to oversee compliance by public administration bodies with laws and regulations, and to review the legality of binding regulations issued by public administration bodies.

...

n/ [See *Koptova v. Slovak Republic*, case No. 13/1998, Opinion of 8 August 2000], at para. 6.6.

...

y/ [*Koptova v. Slovak Republic*, case No. 13/1998, Opinion of 8 August 2000].

ICCPR

- *Kelly v. Jamaica* (253/1987), ICCPR, A/46/40 (8 April 1991) 241 (CCPR/C/41/D/253/1987) at para. 5.7.

...

5.7 Inasmuch as the author's claim under article 10 is concerned, the Committee reaffirms that the obligation to treat individuals with respect for the inherent dignity of the human person encompasses the provision of *inter alia*, adequate medical care during detention. a/ The provision of basic sanitary facilities to detained persons equally falls within the ambit of article 10. The Committee further considers that the provision of inadequate food to

ADEQUATE OR DECENT STANDARD OF LIVING - FOOD, CLOTHING, SHELTER

detained individuals and the total absence of recreational facilities does not, save under exceptional circumstances, meet the requirements of article 10. In the author's case, the State party has not refuted the author's allegation that he contracted health problems as a result of a lack of basic medical care, and that he is only allowed out of his cell for 30 minutes each day. As a result, his right under article 10, paragraph 1, of the Covenant has been violated.

Notes

a/ See final views in para. 12.7 of communication No.232/1987 (*Daniel Pinto v. Trinidad and Tobago*), adopted on 20 July 1990.

- *Kalenga v. Zambia* (326/1988), ICCPR, A/48/40 vol. II (27 July 1993) 68 (CCPR/C/48/D/326/1988) at para. 6.5.

...

6.5 As to Mr. Kalenga's claim of inhuman and degrading treatment in detention, the Committee notes that the author has provided information in substantiation of his allegation, in particular concerning the denial of recreational facilities, the occasional deprivation of food and failure to provide medical assistance when needed. Although the author has not shown that such treatment was cruel, inhuman and degrading within the meaning of article 7, the Committee considers that the State party has violated the author's right under article 10, paragraph 1, to be treated with humanity and respect for the inherent dignity of his person.

- *Mika Miha v. Equatorial Guinea* (414/1990), ICCPR, A/49/40 vol. II (8 July 1994) 96 (CCPR/C/51/D/414/1990) at para. 6.4.

...

6.4 The author has claimed, and the State party has not refuted, that he was deprived of food and water for several days after his arrest on 16 August 1988, tortured during two days after his transfer to the prison of Bata and left without medical assistance for several weeks thereafter. The author has given a detailed account of the treatment he was subjected to and submitted copies of medical reports that support his conclusion. On the basis of this information, the Committee concludes that he was subjected to torture at the prison of Bata, in violation of article 7; it further observes that the deprivation of food and water after 16 August 1988, as well as the denial of medical attention after the ill-treatment in or outside

ADEQUATE OR DECENT STANDARD OF LIVING - FOOD, CLOTHING, SHELTER

of the prison of Bata, amounts to cruel and inhuman treatment within the meaning of article 7, as well as to a violation of article 10, paragraph 1.

- *Hill et al. v. Spain* (526/1993), ICCPR, A/52/40 vol. II (2 April 1997) 5 (CCPR/C/59/D/526/1993) at paras. 2.7 and 13.

...

2.7 After having been held in police custody for 10 days, for five of which they were allegedly left without food only warm water to drink, they were transferred to a prison in Valencia.

...

13. With respect to the author's allegations regarding their treatment during detention, particularly during the first 10 days when they were in police custody (para. 2.7), the Committee notes that the information and documents submitted by the State party do not refute the author's claim that they were not given any food during the first five days of police detention. The Committee concludes that such treatment amounts to a violation of article 10 of the Covenant.

For dissenting opinion in this context, see Hill et al. v. Spain (526/1993), ICCPR, A/52/40 vol. II (2 April 1997) 5 (CCPR/C/59/D/526/1993) at Individual Opinion by Nisuke Ando, 20.