ALIENS - MIGRANT WORKERS

III. JURISPRUDENCE

ICCPR

- *Oulajin and Kaiss. v. The Netherlands* (406/1990 and 426/1990), ICCPR, A/48/40 vol. II (23 October 1992) 131 (CCPR/C/46/D/406/1990/426/1990) at para. 7.5.

  ...
  7.5 The distinction made in the Child Benefit Act between own children and foster children precludes the granting of benefits for foster children who are not living with the applicant foster parent. In this connection, the authors allege that the application of this requirement is, in practice, discriminatory, since it affects migrant workers more than Dutch nationals. The Committee...observes…that the Child Benefit Act makes no distinction between Dutch nationals and non-nationals, such as migrant workers. The Committee considers that the scope of article 26 of the Covenant does not extend to differences resulting from the equal application of common rules in the allocation of benefits.

- *Karakurt v. Austria* (965/2000), ICCPR, A/57/40 vol. II (4 April 2002) 304 (CCPR/C/74/D/965/2000) at paras. 3.1-3.2, 3.4, 7.5, 8.2-8.4, 9, 10 and Individual Opinion by Sir Nigel Rodley and Mr. Martin Scheinin (partly dissenting).

  ...
  3.1 The author possesses (solely) Turkish citizenship, while holding an open-ended residence permit in Austria. He is an employee of the 'Association for the Support of Foreigners' in Linz, which employs 10 persons in total. On 24 May 1994, there was an election for the Association's work-council ('Betriebsrat') which has statutory rights and responsibilities to promote staff interests and to supervise compliance with work conditions. The author, who fulfilled the formal legal requirements of being over 19 years old and having been employed for over six months, and another employee, Mr Vladimir Polak, were both elected to the two available spaces on the work-council.

  3.2 On 1 July 1994, Mr Polak applied to the Linz Regional Court for the author to be stripped of his elected position on the grounds that he had no standing to be a candidate for the work-council. On 15 September 1994, the Court granted the application, on the basis that the relevant labour law, that is s. 53(1) Industrial Relations Act (Arbeitsverfassungsgesetz), limited the entitlement to stand for election to such work-councils to Austrian nationals or members of the European Economic Area (EEA). Accordingly, the author, satisfying neither criteria, was excluded from standing for the work-council.
  ...

3.4 On 21 December 1995, the Supreme Court discussed the author's appeal and denied the request for a constitutional reference. The Court considered that the work-council was not an 'association' within the meaning of Art. 11 ECHR. The work-council was not an association formed on a voluntary and private basis, but its organisation and functions were determined by law and was comparable to a chamber of trade. Nor were the staff as such an independent association, as they were not a group of persons associated on a voluntary basis. As to arguments of discrimination against foreigners, the Supreme Court, referring to the State party's obligations under the International Convention for the Elimination of All Forms of Racial Discrimination, considered the difference in treatment between Austrian nationals and foreigners to be justified both under the distinctions that the European economic treaties draw in labour matters between nationals and non-nationals, and also on account of the particular relationship between nationals and their home State. Moreover, as a foreigner's stay could be limited and subjected to administrative decision, the statutory period of membership in a work-council was potentially in conflict.

...

7.5 The Committee has taken note of the State party's reservation to article 26, according to which the State party understood this provision "to mean that it does not exclude different treatment of Austrian nationals and aliens, as is also permissible under article 1, paragraph 2, of the International Convention on the Elimination of All Forms of Racial Discrimination." The Committee considers itself precluded, as a consequence, from examining the communication insofar as it argues an unjustified distinction in the State party's law between Austrian nationals and the author. However, the Committee is not precluded from examining the claim relating to the further distinction made in the State party's law between aliens being EEA nationals and the author as another alien. In this respect the Committee finds the communication admissible and proceeds without delay to the examination of the merits.

...

8.2 As to the State party's argument that the claim is, in truth, one under article 25 of the Covenant, the Committee observes that the rights protected by that article are to participation in the public political life of the nation, and do not cover private employment matters such as the election of an employee to a private company's work-council. It accordingly finds article 25, and any adverse consequences possibly flowing for the author from it, not applicable to the facts of the present case.

8.3 In assessing the differentiation in the light of article 26, the Committee recalls its constant jurisprudence that not all distinctions made by a State party's law are inconsistent with this provision, if they are justified on reasonable and objective grounds.7/

8.4 In the present case, the State party has granted the author, a non-Austrian/EEA national, the right to work in its territory for an open-ended period. The question therefore is whether there are reasonable and objective grounds justifying exclusion of the author from a close and natural incident of employment in the State party otherwise available to EEA nationals,

namely the right to stand for election to the relevant work-council, on the basis of his citizenship alone. Although the Committee had found in one case (No. 658/1995, *Van Oord v. The Netherlands*) that an international agreement that confers preferential treatment to nationals of a State party to that agreement might constitute an objective and reasonable ground for differentiation, no general rule can be drawn therefrom to the effect that such an agreement in itself constitutes a sufficient ground with regard to the requirements of article 26 of the Covenant. Rather, it is necessary to judge every case on its own facts. With regard to the case at hand, the Committee has to take into account the function of a member of a work council, i.e., to promote staff interests and to supervise compliance with work conditions (see para. 3.1). In view of this, it is not reasonable to base a distinction between aliens concerning their capacity to stand for election for a work council solely on their different nationality. Accordingly, the Committee finds that the author has been the subject of discrimination in violation of article 26.

9. The Human Rights Committee ... is of the view that the facts before it disclose a violation of article 26 of the Covenant.

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, consisting of modifying the applicable law so that no improper differentiation is made between persons in the author's situation and EEA nationals.

Notes

...

7/ See, for example, *Broeks v. The Netherlands* (Communication 172/1984), *Sprenger v. The Netherlands* (Communication 395/1990) and *Kavanagh v. Ireland* (819/1998).

...

Individual Opinion by Sir Nigel Rodley and Mr. Martin Scheinin (partly dissenting)

We share the Committee's views that there was a violation of article 26 of the Covenant. However, we take the position that the State party's reservation under that provision should not be understood to preclude the Committee's competence to examine the issue whether the distinction between Austrian nationals and aliens is contrary to article 26.

Both the wording of the reservation and the State party's submission in the present case refer to Austria's intention to harmonise its obligations under the Covenant with those it has undertaken pursuant to the Convention for the Elimination of All Forms of Racial Discrimination (CERD). Hence, the effect of the reservation, interpreted according to the ordinary meaning of its terms, is that the Committee is precluded from assessing whether a distinction made between Austrian nationals and aliens amounts to such discrimination on

grounds of "race, colour, descent or national or ethnic origin"1/ that is incompatible with article 26 of the Covenant.

However, in its practice the Committee has not addressed distinctions based on citizenship from the perspective of race colour, ethnicity or similar notions but as a self-standing issue under article 26.2/ In our view distinctions based on citizenship fall under the notion of "other status" in article 26 and not under any of the grounds of discrimination covered by article 1, paragraph 1, of the CERD.

Consequently, the Austrian reservation to article 26 does not affect the Committee's competence to examine whether a distinction made between citizens and aliens amounts to prohibited discrimination under article 26 of the Covenant on other grounds that those covered also by the CERD. Consequently, the Committee is not prevented from assessing whether a distinction based on citizenship is per se incompatible with article 26 in the current case.

For us, therefore, the issue before the Committee is that of the compatibility with its obligations under article 26 of the State party's legislation as applied in the present case preventing an alien from standing for elective office in a work-council. Nothing in the State party's response persuades us that the restriction is either reasonable or objective. Therein lies the State party's violation of article 26 of the Covenant.

Notes

1/ The terms used in article 1, paragraph 1, of the CERD. Article 1, paragraph 2, of the CERD makes it clear that citizenship is not covered by the notion of "national origin".

2/ Ibrahima Gueye and 742 other retired Senegalese members of the *French Army v. France* (Communication No. 196/1985).
