

## HUMAN RIGHTS COMMITTEE

### Karakurt v. Austria

Communication No. 965/2000

4 April 2002

CCPR/C/74/D/965/2000

### VIEWS

*Submitted by:* Mr. Mümtaz Karakurt (represented by counsel, Dr. Ernst Eypeltauer)

*State party concerned:* Austria

*Date of registered communication:* 13 December 2000 (initial submission)

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

Meeting on 4 April 2002,

Having concluded its consideration of communication No. 965/2000, submitted to the Human Rights Committee by Mr. Mümtaz Karakurt under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

#### **Views under article 5, paragraph 4, of the Optional Protocol**

1. The author of the communication, dated 13 December 2000, is Mümtaz Karakurt, a Turkish national, born 15 June 1962. He alleges to be a victim of a breach by the Republic of Austria of article 26 of the Covenant. He is represented by counsel.

2. The State party has made two relevant reservations which affect consideration of the present case. Upon its ratification of the Covenant on 10 September 1978, the State party entered a reservation to the effect, inter alia, that: "Article 26 is understood 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."<sup>1</sup> Upon its ratification of the Optional Protocol on 10 December 1987, the State party entered a reservation to the effect that: "On the understanding that, further to the provisions of article 5 (2) of the Protocol, the Committee provided for in Article 28 of the Covenant shall not consider any communication from an individual unless it has been ascertained that the same matter has not been examined by the European Commission on Human Rights established by the European Convention for the Protection of Human Rights and Fundamental Freedoms."

### **The facts as presented by the author**

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.

3.3 On 15 March 1995 the Linz Court of Appeal dismissed the author's appeal and upheld the lower Court's reasoning. It also held that no violation of Art. 11 of the European Convention on Human Rights (ECHR) was involved, considering that the right to join trade unions had not been interfered with. On 21 April 1995, the author appealed to the Supreme Court, including a request for a constitutional reference (including in terms of the ECHR) of s.53(1) of the Act by the Constitutional Court.

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.

3.5 On 24 July 1996 the author applied to the European Court of Human Rights. On 14 September 1999, the Third Chamber of the Court, by a majority, found application 32441/96 manifestly ill-founded and accordingly inadmissible. The Court held that the work-council, as an elected body exercising functions of staff participation, could not be considered an 'association' within article 11 ECHR, or that the statutory provisions in question interfered with any such rights under this article.

### **The complaint**

4.1 The author contends that s.53(1) of the Act and the State party's Courts' decisions applying that provision violate his rights to equality before the law and to be free of discrimination, contained in article 26 of the Covenant. The author refers to the Committee's findings of violations of gender-specific legislation in *Broeks v Netherlands*<sup>2</sup> and *Zwaan-de Vries v Netherlands*<sup>3</sup> in this connection. The author contends that the distinction made in the State party's law regarding eligibility to be elected to a work-council as between Austrian/EEA nationals and other nationals has no rational or objective foundation.

4.2 The author contends that where an employee receives the trust, in the form of the vote, of fellow employees to represent their interests upon the work-council, that choice should not be denied by law simply on the basis of citizenship. It is argued that there can be no justification for the law's assumption that an Austrian/EEA national can better represent employee's interests. Nor, according to the author, does the law limit the exclusion of non-nationals to, for instance, those who do not have a valid residence period for the term of office or are not fluent in the German language, and so the exclusion is overbroad. It is contended that the reservation of the State party to article 26 of the Covenant should not be interpreted as legitimising any unequal treatment between nationals and non-nationals.

4.3 As to issues of admissibility, the author concedes the State party's reservation to article 5 of the Optional Protocol, but argues that the Committee's competence to consider this communication is not excluded as the European Court only considered the 'association' issue under article 11 ECHR and did not examine issues of discrimination and equality before the law. The author points out that article 26 of the Covenant finds no equivalent in the European Convention, and so the communication should be held admissible.

### **The State party's observations on admissibility and merits**

5.1 The State party, by submissions of 31 July 2001 and 14 March 2002, contests both the admissibility and the merits of the communication.

5.2 As to admissibility, the State party argues that the European Court of Human Rights has already considered the same matter, and that accordingly, by virtue of the State party's reservation to article 5 of the Optional Protocol, the Committee is precluded from examining the communication.

5.3 As to the merits, the State party advances three arguments as to why there is no violation of the Covenant. Firstly, the State party argues that the claim, properly conceived, is a claim under article 26 in conjunction with article 25, as the right to be elected to work-councils is a political right to conduct public affairs under article 25. Article 25, however, as confirmed in the Committee's General Comment 18, explicitly acknowledges the right of States parties to differentiate on the grounds of citizenship in recognising this right. Accordingly, the Covenant does not prevent the State party from granting only its citizens the right to participate in the conduct of political affairs, and for this reason alone the claims must fail.

5.4 Secondly, the State party submits that the Committee is precluded by its reservation to article 26 of the Covenant from considering the communication. The State party argues that it has excluded any obligation to treat equally nationals and non-nationals, thereby harmonising its obligations under the Covenant with those it has assumed under the International Covenant on the Elimination of All Forms of Racial Discrimination (see article 1, paragraph 2). Accordingly, it has assumed no obligation under article 26 to confer the treatment accorded nationals also to foreigners, and the author has no right under article 26 to be treated in the same way as Austrian nationals in respect of eligibility to stand for election to the work-council.

5.5 Thirdly, the State party submits that, if the Committee reaches an assessment of whether the difference in treatment between the author and Austrian/EEA nationals is justified, the differentiation is based on reasonable and objective grounds. The State party argues that the privilege accorded EEA nationals is the result of an international law obligation entered into by the State party on the basis of reciprocity, and pursues the legitimate aim of abolishing differences in treatment of workers within European Community/EEA Member States. The State party refers to the jurisprudence of the Committee<sup>4</sup> for the proposition that a privileged position of members of certain states created by an agreement of international law is permissible from the perspective of article 26. The Committee observed that creating distinguishable categories of privileged persons on the basis of reciprocity operated on a reasonable and objective basis.

5.6 The State party refers to the decision of its Supreme Court of 21 December 1995, which, relying on the jurisprudence of the European Court of Human Rights on the justification for treating Community nationals preferentially, held that the European Accession Treaty constituted an objective justification for different legal status of Austrian/EEA nationals and nationals of third countries.

5.7 The State party points out in conclusion that the issue of whether, as a matter of directly applicable European law, Turkish employees have the right to stand for election to work-councils, is a matter currently being litigated before the European Court of Justice<sup>5</sup>. It emphasises however that even if the outcome is that there is such a right, which would satisfy the object of the author's current complaint, the distinction in the current law between Austrian/EEA nationals and others remains objectively justified and accordingly consistent with article 26.

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

6.1 The author, by submissions of 19 September 2001, rejects the State party's arguments on both admissibility and merits.

6.2 As to admissibility, the author emphasises that the claim brought before the European Court related to the right of association protected in article 11 of the European Convention on Human Rights, while the claim now brought is one of discrimination and equality before the law under article 26 of the Covenant. Accordingly, the author, referring generally to the Committee's jurisprudence, claims that it is not the "same matter" now before the Committee as has already been before the European Court. In any event, the author argues that a rejection of the communication as manifestly ill-founded cannot be considered an "examination" of the matter, within the meaning of the State party's reservation.

6.3 As to the merits, the author argues that article 25 has no relevance to this case, concerning public matters rather than issues of organisational employment structures in the private sector. As the work-council concerns central representation of the employees of a private sector organisation, there is no public dimension which would attract article 25 and the claim falls to be considered alone by the general principles of article 26.

6.4 The author repeats his contention that article 26 imposes a general obligation on the State party to avoid legal and practical discrimination in its law, and argues that no reasonable and objective grounds for the differentiation exist. A reasonable differentiation would, rather than imposing a blanket prohibition on non-Austrian/EEA nationals, permit such nationals possessing, like the author, sufficient linguistic and legal capacities the right to stand for work-council election. The mere existence of the European association provision and the current proceedings before the European Court of Justice are said to underscore the problematic nature of the current blanket differentiation in this employment field between Austrian/EEA nationals and other nationals performing the same labour tasks.

## **Issues and proceedings before the Committee**

7.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 87 of its rules of procedure, whether the claim is admissible under the Optional Protocol to the Covenant.

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

7.3 As required under article 5, paragraph 2(b), of the Optional Protocol, the Committee has ascertained that domestic remedies have been exhausted.

7.4 As to the State party's contention that its reservation to article 5 of the Optional Protocol excludes the Committee's competence to consider the communication, the Committee notes that the concept of the "same matter" within the meaning of article 5(2) (a) of the Optional Protocol must be understood as referring to one and the same claim of the violation of a particular right concerning the same individual.<sup>6</sup> In this case, the author is advancing free-standing claims of discrimination and equality before the law, which were not, and indeed could not have been, made before the European organs. Accordingly, the Committee does not consider itself precluded by the State party's reservation

to the Optional Protocol from considering the communication.

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.

### **Examination of the merits**

8.1 The Committee has considered the communication in the light of all the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

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.<sup>7</sup>

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 (N°. 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, acting under article 5, paragraph 4, of the Optional Protocol

to the International Covenant on Civil and Political Rights, 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.

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognised the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the Covenant, and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive, within ninety days, information from the State party about the measures taken to give effect to the Committee's Views. The State party is requested to publish the Committee's Views.

## Notes

<sup>1</sup> Article 1, paragraph 2, of the Convention provides as follows: "2. This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State party to this Convention between citizens and non-citizens."

<sup>2</sup> Communication No. 172/1984.

<sup>3</sup> Communication No. 182/1984.

<sup>4</sup> *Van Oord v. the Netherlands*, Communication No. 658/1995.

<sup>5</sup> The litigation revolves around the interpretation of Article 10, paragraph 1, of Association Council Decision No. 1/80, which requires Community Member States to grant Turkish employees belonging to their regular labour market a status vis-à-vis Community workers, excluding discrimination on the grounds of nationality, with regard to remuneration and "other working conditions". The Federal Ministry for Labour, Health and Social Affairs took the view, on its interpretation of the relevant jurisprudence of the European Court of Justice, that the Article was directly enforceable, and that the right to stand for work-council election was an 'other working condition'. That interpretation favourable to persons in the author's situation was challenged in the Constitutional Court, which has now referred the matter to the European Court of Justice for decision.

<sup>6</sup> See the Committee's views in *Blom v. Sweden* (Communication 191/1985), *Sánchez López v. Spain* (Communication 777/1997).

<sup>7</sup> 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 Committee Members 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"<sup>1</sup> 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.<sup>2</sup> 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 than 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

<sup>1</sup> 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".

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