Función Pública

Concept Consultation Room CE 1739 of 2006 Council of State - Consultation and Civil Service Room

COUNCIL OF STATE

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CONSULTATION ROOM AND CIVIL SERVICE

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Bogotá, DC, May fourth (4), two thousand and six (2006)

Filing No. 1739

REFERENCE: FOREIGNERS RESIDENT IN COLOMBIA. I participate in competitions to access career jobs and acquire the rights that it grants.

The Director of the Administrative Department of the Public Function, Dr. Fernando Grillo Pubiano, consulted the Chamber "about the possibility that foreigners residing in Colombia who have not acquired Colombian nationality and who are currently linked to the State in jobs public can participate in competitions to access jobs classified as career and acquire the rights to it".

To answer the Chamber CONSIDER:

In order to support the response to the query, the Chamber will first refer to the regulation on the entry and permanence of foreigners in Colombian territory; secondly, to the rights of foreigners in Colombia, specifically the right to work; and finally, the possibility that foreigners residing in the country have to participate in competitions, access public career positions and participate in the rights that it grants.

1. Conditions of entry and permanence of foreigners in Colombian territory

For the study of this first aspect, the Chamber takes up what was expressed in Consultation with filing 1653, whose publication was authorized on August 12, 2005, with the support of judgment C-1259 of 2001 of the Constitutional Court, in a matter also related to foreigners.

The Chamber said:

"1.2. Regulations on the control of foreigners and migration

In Public International Law, the control of foreigners and the migration issue are recognized as inherent to the exercise of State sovereignty.

1.2.1 Internal regulation:

In Ruling C-1259 of 2001, the Constitutional Court highlights:

"Now, given the importance that nationality has in the dynamics of modern States, as an emanation of the principle of sovereignty, they have the power to regulate the entry and stay of foreigners. This is understandable since every State must be aware of nationals of other countries who enter its territory, the purposes for which they do so and the activities they engage in, since this knowledge allows them to exercise adequate control that also meets the interests of their nationals."

In principle, it must be signed that each State has the sovereign right to allow or reject the entry of foreigners into its territory, and in the first case, to determine the conditions of said entry.

And further on he expresses the aforementioned concept:

"In Colombian law, the regulation currently in force on this sovereign right is found in Decree 4000 of November 30, 2004, "By which provisions are issued on the issuance of visas, control of foreigners and other provisions on migration".

The Decree in question is issued in exercise of the competence to "direct international relations" conferred by article 189,

numeral 2, of the Constitution to the President of the Republic as Head of State.

Without losing sight of the commitments acquired through international instruments, the matter dealt with in Decree 4000 of 2004 is a direct expression of the exercise of State sovereignty at the internal level, and is reaffirmed in its article 1, first and final paragraph. , according to which:

"It is the discretionary competence of the National Government, founded on the principle of State sovereignty, to authorize the entry and stay of foreigners in the country."

"Without prejudice to the provisions of international treaties, the entry, stay and/or exit of foreigners from the national territory will be governed by the provisions of this Decree and by the policies established by the National Government."

The second, third and fourth paragraphs of the same article, assign the powers in the matter to the Ministry of Foreign Affairs.

However, the entry and permanence of foreigners in Colombian territory are specified in authorizations or permits.

Decree 4000 of 2004, in article 5, defines a visa as "the authorization granted to a foreigner to enter and remain in the national territory granted by the Ministry of Foreign Affairs." In article 6 of the same, it refers to the "entry and permanence permit" that is the responsibility of issuing the Administrative Department of Security, DAS, in the cases of foreigners who do not require a visitor visa, in accordance with what is established in this regard by the Ministry of Foreign Affairs. Article 9 deals with the validity of visas and their causes for expiration, and article 10 regulates their cancellation.

Article 13 ibidem refers to the domicile in the following terms:

"For the purposes of this decree, the foreigner holding a resident visa is considered to have domicile in Colombia. Consequently, the term to be able to obtain Colombian nationality by adoption will be counted from the date of issuance of the corresponding resident visa ." (The bolds are not in the text).1

For the resident's visit, in accordance with this regulation, to the residence of the foreigner in Colombia must be added his desire to remain in the national territory so that it can be granted in any of its categories.

The Chamber highlights the guiding verb to establish and qualification of the action as final, because as will be seen later, they unequivocally correspond to the constituent elements of the concept of domicile in the Civil Code and in the constitutional and legal norms that regulate Colombian nationality." .

Regarding the domicile-residence relationship, the Chamber said in the aforementioned concept:

"From what has been said so far, it must be highlighted that the concept of "domicile" is, in the Constitution and in the Law, a determining condition of nationality and of the effects that derive from it; that it is unique and is the same, both for nationals as well as for foreigners, since the Civil Code and the legislation on nationality and on the control of foreigners and migration, define it as the desire to remain in Colombian territory.To which is added that, being the duty of foreigners to submit to Colombian Law to enter and remain in the country, can only be recognized and recognized as domiciled when they have been granted a resident visa, taking into account the direct relationship that this type of Visa has with the domicile by virtue of the provisions of Articles 13 and 48 of Decree 4000 of 2004.

The Chamber notes that only for the resident visa is the declaration of the intention to remain in the national territory required; For the other visas, the reason that the foreigner gives for entering the country allows us to infer that he lacks the desire to settle in it and, therefore, some other type of visa is granted. Therefore, foreigners holding any visa other than the resident visa are transients under the terms of article 75 of the Civil Code.

From the foregoing, another fundamental consequence for this concept can be deduced: the resident visa becomes proof of the desire to remain in Colombian territory for domicile purposes. It may happen that a foreigner who initially entered as a transient decides to reside in the country, for which he must request the corresponding change of visa and regularization of his situation, since he cannot, without violating migration regulations, ignore disregard them and oppose the State its factual situation, seeking to establish a right in it." (Bold out of the original text)

Concept 1653 also refers to the subject of the subjection of foreigners to Colombian Law:

The subjection of foreigners to Colombian Law:

The sovereignty that the State exercises with reference to its territorial or spatial element, has, among its various manifestations, that expressed in the principle of the Law in space, according to which all facts, acts, goods and people located in a territory are subject to the Law of that territory (positive sense); and therefore, the facts, acts, goods and people not located in a territory are not subject to the Law of this territory (negative sense).

The normative concretion of this principle in our legal system is found in:

*The second paragraph of the fourth article of the Political Constitution according to which both nationals and foreigners in Colombia have the duty to "obey the Constitution and the laws, and respect and obey the authorities."

*Art. 18 of the Civil Code, according to which: "The law is mandatory for both nationals and foreigners residing in Colombia."

*Art. 59 of Law 149 of 1888 which prescribes: "The laws oblige all the inhabitants of the country, including foreigners, whether domiciled or transient, except for these, the rights granted by public treaties."

Regarding the duties of foreigners in Colombia, the Constitutional Court in Sentence T-215-96, stated:

"This recognition generates at the same time the responsibility of the foreigner to fully and strictly comply with the duties and obligations that the same regulations enshrine for all residents in the territory of the Republic, as established, among other provisions, by the Article 4, second paragraph of the Charter which states: "It is the duty of nationals and foreigners in Colombia to abide by the Constitution and the laws, and to respect and obey the authorities."12

2. The rights of foreigners in Colombia.

As a corollary to the submission of foreigners to Colombian Law, the Political Constitution provides that they shall enjoy the same civil rights and social guarantees as Colombian nationals, with the possibility that for reasons of public order, the Law may subordinate to special conditions or deny the exercise of certain civil rights; or that by constitutional or legal provision, limitations are established for the exercise of guarantees; that yes reserving in principle the political rights to the nationals.

Says article 100 of the CP

"Article 100: Foreigners in Colombia will enjoy the same civil rights that are granted to Colombians. However, the Law may, for reasons of public order, subordinate to special conditions or deny the exercise of certain civil rights to foreigners.
Likewise, foreigners will enjoy, in the territory of the republic, the guarantees granted to nationals, except for the limitations established by the Constitution or the Law.

Political rights are reserved for nationals, but the law may grant foreigners residing in Colombia the right to vote in municipal or district elections and referendums."

Curiously, in article 100 of the Charter, the 1991 constituent uses, to refer to the rights of foreigners, a terminology different from the generic one used in the chapters that make up the title "Of rights, guarantees and rights". duties", because while it talks about fundamental rights (chapter 1), social, economic and cultural rights (chapter 2) and collective and environmental rights (chapter 3), which corresponds to the terminology that is generally used by international organizations to identify the different generations of rights; in that terminology from the old constitutional text of 1886 continues to be used with its different reforms, especially the one corresponding to 1936, whose Title III, articles 16 and following, specifically talks about "Civil rights and social guarantees"

Initially, with an eminently formal criterion, the doctrine tried to mold different terminology, establishing the conceptual correspondence between the two, as follows: Fundamental rights are defined as those that correspond to the individual as a person (for example, the rights to life, to privacy, to freedom of conscience and the like), are the so-called rights of the first generation, so called because in their essence they arose with the declaration of the man and the citizen in 1789.

Social guarantees, identified by other writers as civic rights, are those that are granted to the person as a member of the social group, (for example, the rights to work, association, unionization and the like), fundamentally correspond to the so-called rights economic and social or second generation, so called because they arise from the social demands of the post-world wars, of which it can be affirmed that in some way they included the so-called political rights.

The National Constitution of 1991, in its article 100, expressly wanted to separate political rights from the so-called social guarantees, by determining that, contrary to these, whose enjoyment in principle is granted to nationals and foreigners, those by nature are initially reserved for nationals. However, this conceptual clarity, of a formal nature, which, in contrast to the old terminology, is handled by the text of Article 100 of the Constitution, is not present when identifying the real nature of the different rights enshrined in the Constitution in the different chapters corresponding to the title of constitutional rights.

The eminently formal criterion will not allow explaining why related or related rights appear in different chapters within the text of the Constitution; Thus, for example, while the right to work (art. 25) and the right to unionize (art. 39 CP) initially form part of the chapter on fundamental rights; the constitutional context itself relates them to rights for purposes that appear in the chapter on social rights, such as the right to timely payment and periodic readjustment of legal pensions (art. 53), the right to professional and technical training (art. . 54 CP), the right to collective bargaining (art. 55), the right to strike (art. 56 CP), a circumstance that must be taken into account when interpreting the scope, protections, and limitations of each right.

An eminently formal qualification and classification of rights is incomplete and inappropriate, because it fails to explain why, for example, article 44 of the Charter, which is part of chapter II "On social, economic and cultural rights", is textually does not refer to the fundamental rights of children, nor why Article 94 of the Constitution, which includes an amendment to the Constitution of the United States initially transcribed by the Constitution of Venezuela, states that "The enumeration of the rights and guarantees contained in the Constitution and in current international agreements, it should not be understood as a denial of others that, being inherent to the human person, do not appear expressly in them."It is clear, in accordance with the provisions of articles 2, 5 and concordant of the Constitution, which **Concept Consultation Room CE**

What is inherent to the person must be understood as a fundamental right, even if it does not appear in the enumeration of rights, as is the case with dignity, which, although it does not appear expressly stated as a right, does transcend as a principle in article 1 of the Constitution and it appears as a reference in other provisions of the Upper Text.

Regarding the merely auxiliary nature of the formal enunciation of rights, the author Manuel José Cepeda says, paraphrasing some pronouncements of the Constitutional Court:

"The judge is faced with what the doctrine calls an "indeterminate legal concept": fundamental constitutional rights, which may or may not be at the same time or be simultaneously in one way or another, but their meaning is always defined under the circumstances of time, manner and place".

Conclusions that are well worth enumerating are deduced from the above discussion:

1. Fundamental rights are not exclusively those of Chapter I of Title II

2. The purely formal criteria to identify fundamental rights are an auxiliary guide but not the main one, neither decisive nor sufficient. Therefore, even rights included in Chapter I of Title II may not be "fundamental", as is the case with the right to peace, which despite its profound meaning, is a collective right.

3. The concept of "fundamental rights" is different from the concept of "rights of immediate application", to which Article 85 of the Constitution refers.

4. There may be fundamental rights not expressly stated in the Constitution, since those that are inherent to the human person are by nature fundamental (art. 94 of the Constitution)

5. Not all the rights mentioned or defined in the Constitution are fundamental, even if this is the fundamental law of the Republic.

6. It is up to the judges to indicate which are the fundamental rights

7. The international treaties on human rights ratified by Colombia are an auxiliary guide for this doctrinal task.

8. The fundamental nature of a right is not related to its greater importance compared to other rights considered non-fundamental, but to its legal nature and the circumstances of time, manner and place"2 .

In accordance with the foregoing, it must be stated that although Article 100 of the Charter, when referring to foreigners, manages three categories of rights (civil, social and political) to enable different legal treatments, the necessary consistency of this Text with the statements on rights contained in the respective titles of chapter II of the Constitution, leads to the conclusion that it is not possible to start from a merely formal interpretation, to establish, within its terminology, to which group of law each of the categories indicated in the aforementioned article, since it is the circumstances of time, manner and place, which will allow the interpreter to determine their specific nature, under the concept of a dynamic interpretation thereof.

The same criterion was used by the Court in Judgment T-604 of December 14, 1992 when analyzing the scope of Article 40 Superior on citizen participation, whose text to the letter says:

"Article 40 of the Political Constitution: Every citizen has the right to participate in the formation, exercise and control of political power. To make this right effective, you can:

1. Choose and be chosen

2. Take part in elections, plebiscites, referendums, popular consultations and other forms of democratic participation.

3. Build parties, movements and political groups without any limitation; form part of them freely and disseminate their ideas and programs.

4. Revoke the mandate of those elected in the cases and in the manner established by the Constitution and the Law.

5. Have initiative in public corporations

6. Files public actions in defense of the Constitution and the Law

7. Access to the performance of public functions and positions, except for Colombians by birth or adoption, who have dual nationality. The Law will regulate this exception and determine the cases to which it must be applied.

The authorities will guarantee the adequate and effective participation of women in the decision-making levels of the Administration."

Said the Court:

"In constitutional matters, the norms prior to the Constitution must be interpreted in accordance with the superior mandates of the letter.
The normative value of the Constitution imposes on the interpreter who applies legal, pre-constitutional provisions, the duty to integrate

harmonically the various orders. The participation of all in the decisions that affect them and in the economic, political, administrative, and cultural life of the Nation in an essential purpose of the state".

Indeed, although in principle it could not be explained satisfactorily, the reasons why Superior Article 40, despite referring to rights of a political nature, are formally located within the title of fundamental rights, is basically due to the fact that Materially speaking, the aforementioned provision transcends the meaning of the strictly political, to present itself as a superior manifestation of the fundamental right to democratic participation, which even leads to the fact that, by virtue of its systematic interpretation with other constitutional or inherent rights of the person, some of its statements are broadened in their meaning, extending the rights enshrined therein, to people who are not citizens, as is the case, for example, with certain forms of democratic participation in which everyone can participate. For example, according to article 84 of the Contentious-Administrative Code "Any person may request by himself, or through a representative, that the nullity of administrative acts be declared" in defense of the Constitution or the Law; also in accordance with article 86 of the Constitution "Every person will have protection action to claim before the judges, at any time and place, through a preferential and summary procedure, the immediate protection of their fundamental constitutional rights" The same right for actions grants the Constitution to any person in the so-called compliance actions, popular actions and group actions.

The analysis of the aforementioned article 40 of the Constitution of 1991, allows to identify among the Fundamental rights that every citizen has "to participate in the formation, exercise and control of political power", that of access to the performance of public functions and positions, with the exceptions established by the standard.

Within this same order of ideas, it is necessary to observe that while article 25 of the National Constitution guarantees every person the right to have a job in decent and fair conditions, a fundamental right interpreted by the Constitutional Court also as a social guarantee; In the same Superior text, the citizen is only granted the political right to access the performance of public functions and positions, which could mean a contract between the statements of both Superior texts, if it were not because an interpretation of article 40 in accordance with the constitutional systematics, allows to determine which are the true scope of this ordinal, and specifically, to elucidate the apparent contradiction between the right of every person to carry out a lawful job and the right that only assists the citizen to carry out public positions and functions.

For the purposes of determining the true scope of the provisions of ordinal 7 of article 40 of the Charter and its meaning in relation to the subject matter of consultation, the Chamber enters to determine the difference between public function and public office, to later rule on the possibility that the foreigner residing in Colombia can access one or the other, or both.

2.1 Conceptual differentiation between public functions and positions

In modern administrative law, the concept of public function seems to be understood in two ways. Or as "the set of regimes applicable to the general staff of the administration"3 , or as a procedure for the fulfillment of the tasks of the State.

From the first point of view, as Professor Libardo Rodríguez says, "the subject refers to the study of what can be called the "employment relationship between the administration and its servants"4

In the same sense, the treatise writer Diego Younes Moreno expresses himself, who affirms:

"The organization of the public function both in Colombia and in other countries of the world obeys the notion of system. This term (system) encompasses the idea of a set of interrelated variables, which pursue a specific purpose.

In our cases, such variables are represented by the different bodies or entities that in one way or another are in charge of some of the various competencies regarding the management of human resources at the service of the state. This task (management of human resources at the service of the state) is usually called "public function" in the vocabulary of some specialists or "civil service" in that of others"5 .

Under these considerations, the differentiation that seems to derive from the statement of ordinal 7 of article 40 of the National Constitution, between public functions and public office, seems to lack significance, since the function is nothing more than the set of public offices, whatever they may be. the nature, denomination and form that these have, which is why, according to the aforementioned author, "all of them make up the so-called Labor Administrative Law"; in public function.

It is important to note that Law 909 of 2005 uses this conceptual system to refer to the public function, when in article 1 it provides that "in accordance with the provisions of the Political Constitution and the Law, the public function includes following public jobs: a).
Public career jobs; b). Public jobs of free appointment and removal; c). Fixed-term jobs; d). Temporary jobs"; later in article 2, when pointing out the principles of public service, in reality they refer to a large part of the principles that guide the exercise of public office.

This conception, which could be called, purely labor, of the public function, is also present in other provisions of the
Law, such as article 9 according to which "public employment is the basic nucleus of the structure of the public function"

From the second point of view, that is, the public function conceived as part of the procedure that the State must exhaust to fulfill its tasks or duties, the subject is analyzed from the dynamic concept of public administration, which identifies the State as a group political partner that carries out a series of activities to achieve its essential purpose, which is the achievement of the community good

While the study of the nature of the State as a structure is the subject of constitutional theory and, in a certain sense, of political science, and the analysis of the concept of common good, is primarily the responsibility of disciplines such as political philosophy and is specifically the subject of reflection for the Axiology, Administrative Law in its dynamic conception, is the discipline to which corresponds the study and identification of the procedures that the State develops for the fulfillment of its tasks or commitments.

For this analysis, we start from the very foundation of ontology, which is the classification of objects into universal categories, transferring this epistemological scheme to the administration, so that all the tasks of the State can be grouped into a few that understand and cover all the tasks that every state fulfills, regardless of its structure and ideology.

Based on this conception, it is frequent in the doctrine to group the activities of the State into six large categories that integrate absolutely everything that a State deals with, thus: Giving itself its own fundamental organization, regulating international relations, regulating the conduct of associates, have their own patrimony, provide public services and promote the activities of those administered.
With different emphases, according to its ideological structure and its administrative organization, necessarily everything that a State does, any State, must anthologically be located in one of these six great categories.

However, some authors also maintain that in order to execute these tasks, the State must necessarily exhaust a procedure that must be made up of one or several stages, each of which constitutes a Public Function.

Thus, the exercise of public functions is linked to compliance with the necessary procedures to achieve the fulfillment of state tasks, a notion that must also be used to differentiate between public function (stage of the procedure) and public service (State task). .

Within this same order of ideas, Professor Bergeron in his work the "Functioning of the State"6 d.activités, , defines the public function as "a series liées les unes aux autres en processus d.action, et unifiées par leer commune participation a la vie d.un organisme"

From these concepts, constitutional doctrine uses various epistemological systems to identify and describe the functions. For example, the aforementioned author simply establishes the link between the function and the work of the State as opposed to the concepts of control and relationship7 , to conclude, as Carré de Malberg8 does, by implementing a "doctrine qui differencie los fonctions d.apres leer but", according to which the constituent, administrative, legislative, judicial, fiscal control, public ministry, electoral, planning and defense and security functions are identified.

In the same sense, Professor Robert Dahl pronounces himself, for whom the public function is the set of political activities that take place within a system, taking into account that precisely the set of functions within the system constitutes its government9 .

In Colombia, in general terms, the Political Constitution (Art. 113 and following) manages this new dynamic conception of the functions of the State, including most of those established by the doctrine, although not all, for example, the functions of planning and security continue to be structurally and functionally linked to the administrative function.

Likewise, Article 209 of the Constitution, by defining the principles that guide and support the exercise of the administrative function, includes the doctrinal elements that allow linking the concept of public function to the achievement of the purposes of the State.

Now, from the organicist perspective, outlined from the theoretical orientation of Jellinek10 and developed in the administrative field from authors such as Renato Alessi11, the dynamic exercise of public functions, including, of course, the administrative function, is initially assigned to bodies made up of powers, assets and holders, being the holders of the different bodies, that is, those with the power to want on behalf of the administration, the servers that in the strict sense exercise "public function", so that the other servers are linked to public office, without it being possible to affirm, from this theoretical perspective, that they technically perform a public function.

2.2 The concepts of public office and public function in the Colombian Constitution

Initially it must be affirmed that in principle the Colombian Constitution of 1991 seems to consider the concept of Public Function in the first meaning explained in this analysis, since TITLE V "OF THE ORGANIZATION OF THE STATE" when addressing in CHAPTER II the topic OF THE FUNCTION PUBLIC, it does so fundamentally "with labor criteria", in order to determine the need for all employment to have functions detailed by Law or regulation (Art. 122); identify the different classes of public servants (Art. 123), as well as their responsibility (Art. 124), to later refer to the different classes of jobs (Art. 125), the incapacities, incompatibles and prohibitions to public servants (Arts 126 to 129), to later refer to the National Civil Service Commission and the labor regime of notaries, registrars and their employees.

However, the interpreter also finds constitutional provisions, from which it could be affirmed that indeed the Superior text wanted to distinguish those cases in which the public labor exercise involves the performance of a public function, from those others in which it is simply It presents the exercise of a public office, without in a strict sense implying a public function.

The first hint of differentiation seems to be observed in Article 99 Superior which literally says:

"Political Constitution Art. 99. Being a practicing citizen is a prior and indispensable condition to exercise suffrage, to be elected and to hold public office that has attached authority or jurisdiction"

The transcribed Constitutional norm is clear when determining the special status of a practicing citizen to hold positions that carry implicit authority and jurisdiction, that is, jobs that, in the functional concept explained above, imply ownership and consequent exercise of public function; implying that for other public jobs, which do not entail in a technical sense the exercise of authority and jurisdiction, whatever their nature and form of connection, only the requirements that the Law deals with for the respective position must be met, in a manner that if legally it is not required to be a Colombian national for its exercise, this means that resident foreigners, who, by principle of equality and dignity, are holders of the fundamental right can be linked to it, by the different forms provided by the Law. to work.

Also the Constitutional text, makes the difference between public function and public office, in ordinal 7 of article 40 already mentioned in this study, which literally provides:

"Constitutional Policy Art. 40 Every citizen has the right to participate in the formation, exercise and control of political power. To make this right effective you can:

7. Access to the performance of public functions and positions, except nationals, by birth or adoption, who have dual nationality. The Law will regulate this exception and determine the cases to which it must be applied.

This provision seems to imply that both the exercise of public functions and public office are reserved by the Constitution to nationals; However, what has already been said regarding the interpretation of the constitutional statements on rights cannot be forgotten, in the sense that, although in principle the fundamental rights enshrined in Article 40 Superior are intended for nationals, a systematic interpretation, which goes beyond merely formal hermeneutics, allows us to conclude that although initially said rights are of a political nature, the interpreter according to the circumstances of time, manner and place and the complementary constitutional and legal regulations, can overcome the strictly formal macro and grant other scopes to the norm in question, considering them, as the Constitutional Court has done, even for some respects, as social guarantees, of which not only nationals but foreigners, especially residents, are holders.

3. The work of foreigners in Colombia

This Chamber also referred to the issue of migrant workers in the aforementioned filing, in the following terms:

"1.2.2. The "International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families", done in New York on December 18, 1990.

This international instrument is incorporated into domestic law by virtue of its approval by Law 146 of 1994 and was ratified by Colombia on May 24, 1995.

The States Parties, invoking "particularly the Universal Declaration of Human Rights (1), the International Covenant on Economic, Social and Cultural Rights (2), the International Covenant on Civil and Political Rights 2/, the International Convention on the Elimination of all forms of Racial Discrimination (3), the Convention on the Elimination of all forms of Discrimination against Women (4) and the Convention on the Rights of the Child (5)", as well as several of the instruments of the International Organization of Labor, among other international treaties and conventions, acquire a commitment regarding "migrant workers and their families without distinction of any kind based on sex, race, color, language, religion or belief, political or other opinion, national origin, ethnic or social status, nationality, age, economic situation, assets, marital status, birth or any other condition".

Articles 2 and 3 deal with defining the "migrant worker" and listing who is not included within this concept.

The Chamber draws attention in Article 5 of the Convention in question, due to the identity it maintains with Decree 4000 of 2004 regarding the criteria and treatment of the situation of the migrant worker and their families regarding their subjection to the legislation of the State you are in:

"For the purposes of this convention, migrant workers and members of their families:

to. They will be considered documented or in a regular situation if they have been authorized to enter, remain and carry out a remunerated activity in the State of employment in accordance with the laws of that State and international agreements to which that State is a party;

b. They will be considered undocumented or in an irregular situation if they do not meet the conditions established in subsection a. of this article". (Underlined)

For the rest, the articles of this Convention reiterate with reference to migrant workers and their families, the rights and duties that assist them in the territories in which they are located."

It is necessary to conclude that Colombia, having approved the aforementioned Convention, is obliged to comply with each and every one of the precepts enshrined therein, hence the identity that is presented with the contents of Decree 4000 of 2004 in relation to the treatment of migrant workers, who are essentially assisted by the right to work and have equal treatment under conditions and opportunities, with the considerations or conditions that the Constitution or Laws in defense of Colombian nationals may establish.

On the fundamental right to work that migrant workers have and the possibility that the legislator establishes certain

regulations to determine their "special" equality with the national worker, the Constitutional Court ruled in judgment C-1259 of 2001, in the following terms:

"(...) The Political Charter broadly regulates the rights of foreigners and does so to the point of allowing them to acquire Colombian nationality, recognizing them with the limitations imposed by the Law, the civil rights and guarantees granted to Colombians and enable the legislator to recognize their right to vote.This broad regulation corresponds to the sovereignty that the Colombian State owns and that it must exercise without ignoring the rights that foreigners protect as human beings and regardless of the State of which they are nationals , since those rights constitute a limit to their powers and a parameter for the exercise of their discretionary powers".

And later the Court affirms:

"However, the same constituent, although it does not establish a differentiated treatment between national and foreign workers, does admit the possibility that it be determined by the legislator.

In addition, when it comes to subordinating civil rights to special conditions or denying their exercise, the constituent subjects the legislative instance to reasons of public order, that is, to some unavoidable parameters that must be respected as a manifestation of the limits that the The rationality of modern constitutionalism imposes on the sovereignty of the different States and the consequent modern discretion with which each State must regulate the entry and permanence of foreigners in its territory. On the other hand, when it comes to recognizing the guarantees granted to nationals to foreigners, the constituent has established that they will proceed with the limitations established in the Constitution and in the Law. Finally, despite the fact that political rights are reserved to For nationals, the possibility of the Law recognizing foreigners the right to vote in municipal or district elections and referendums has been foreseen.

Then, it is noted that the recognition of the rights of foreigners does not imply that in our legal system the possibility of developing a differential treatment in relation to nationals is prohibited. Recognizing this reality, the Court has stated:

"Article 13 establishes the obligation of the State to treat everyone on equal terms. Obviously, this rule does not mean that differentiations cannot be made when regulating the different areas in which coexistence takes place, but rather that it operates the manner of a general principle of State action, which implies that there must always be a reasonable justification for the establishment of differential treatment Not in all cases the right to equality operates in the same way and with similar roots for nationals and foreigners This implies that when the authorities debate about the treatment that should be given to foreigners in a particular situation, for the purpose of preserving the right to equality, they will have to determine in the first instance what is the scope in which the regulation is established. , in order to establish whether it allows differentiation between foreigners and nationals.

Therefore, the intensity of the equality examination on cases in which the rights of foreigners are compromised will depend on the type of right and the specific situation to be analyzed"12 .

And the Constitutional Court adds:

"In this direction, this Corporation has also highlighted how the civil rights of foreigners can be subjected, by the legislator, to special conditions or how some of them can be denied because the constituent has provided for that possibility on condition that they do not affect rights fundamentals.13

In accordance with what has been exposed, then, the mere existence of a differentiated legal treatment between national workers and foreign workers does not have to be considered unconstitutional since the Political Charter, collecting the content that today is given to equality as a superior value, as a principle and as a right, it has contemplated the possibility of establishing a differentiated treatment. The important thing is, then, to determine if this differential treatment is legitimate or if it is proscribed by the Basic Text. For them, the difference of the factual assumptions must be established, the presence of an end that explains the difference in treatment, the constitutional validity of that end, the effectiveness of the relationship between the factual assumptions, the norm and the end and, finally , the proportionality of that relationship of effectiveness". (Bold outside the text).

4. Possibility of foreign workers residing in the country to participate in competitions, access career positions and participate in the rights that it grants.

The National Constitution indicates that in Colombia foreigners will enjoy, in the territory of the republic, the guarantees granted to nationals, except for the limitations established by the Constitution or the Law (Art. 100 CP); It establishes as a general rule that jobs in State bodies and entities are career and that admission to it will be made after fulfilling the requirements established by Law to determine the merits and qualities of the applicants. (Art. 125 PC)

In development, among others, of the previous constitutional mandates, Law 909 of September 23, 2004 was approved "by which norms are issued that regulate public employment, the administrative career, public management and other provisions are dictated". in which two apparently contradictory provisions are enshrined, since while a provision provides that only citizens who prove the requirements determined in the calls can participate in the contests; The other states that the competitions for admission to administrative career jobs will be open to all people who prove the requirements for their performance.

The rules in question say:

Article 28 of Law 909 of 2004:

"Article 28. Principle that guides entry and promotion to public administrative career jobs.

b. Free competition and equal income. All citizens who accredit the requirements determined in the calls may participate in the contests without any discrimination" (bold outside the text)

Article 29 of Law 909 of 2004:

"Article 29. Contests: Contests for entry and promotion to public administrative career jobs will be open to all people who prove the requirements for their performance."

Although article 28 of the Law, when announcing the principles that guide entry and promotion to public administrative career jobs, reserves that possibility for citizens, creating a different treatment with respect to resident foreigners, the instrumental norm contained in the Article 29 of the same law, by granting the possibility of participation and access to all persons who meet the requirements for the performance of the position, agrees entirely with the norms contained in international conventions and in decree 4000 of 2004 that guarantee migratory work, especially for foreigners with resident visas.

In accordance with the provisions of this concept, in order to determine the differentiated scope of articles 28 and 29 of Law 909 of 2004, it is necessary to return to the concepts analyzed and implement them through a systematic and agreed reading of articles 40 and 99. of the Political Constitution, to conclude that in accordance with the constitutional message, it must be understood that the legislator wanted in some way to reflect the difference between the dynamic concept of public function and the purely labor concept of public office, in order to reserve national citizens (by birth or by adoption according to the different normative provisions) the exercise of jobs that in a technical-administrative sense involve the exercise of public function insofar as they mean the performance of jurisdiction or civil authority, giving the possibility, so that in accordance with the qualities that the Law or regulations require for other public positions, these can be performed by nationals or foreigners, in development of the principle of constitutional equality and respect for the fundamental right of all people to work.

On the nature of public merit competitions and the legitimacy of foreigners to participate in them, the Court has ruled
Constitutional on various occasions, as follows:

Constitutional Court, ruling T-256 of 1995:

"The aforementioned public tender can be defined, as the complex procedure previously regulated by the administration, by indicating the bases or clearly defined norms, by virtue of which the person or persons is selected among several participants who have been summoned and results. who by reason of their merits and qualities acquire the right to be appointed to public office.

The procedure as a whole is aimed at achieving the stated purpose, on the basis of strict compliance with the rules or regulations of the contest, the publicity of the call for the contest, free competition, and equal treatment and opportunities for those who participate in it.

When the administration indicates the bases of the contest, these become mandatory rules for both the participants and the administration; that is to say, that through these rules the administration is self-linked and self-controlled, in the sense that it must respect them and that its activity, in terms of the selection of applicants who qualify to access the corresponding job or jobs, is previously regulated. , so you cannot exercise discretion in making that selection.

Therefore, when the administration departs from or ignores the rules of the contest or breaks the impartiality with which it must act, or manipulates the results of the contest, lacks good faith (art. 83 CP), it incurs in violation of the principles that govern the administrative activity (equality, morality, efficiency and impartiality), and by the end, it can violate the fundamental rights to due process, equality and work of those who participate in the contest and their interests are injured by the irregular conduct of that".

In the same sense, the Constitutional Court itself pronounced in Judgment SU 133 of 1998, unifying doctrine on the subject whose final part says:

The purpose of the contest is ultimately that the existing vacancy is filled with the best option, that is, with the one of the contestants who has obtained the highest score. Through it, the merit of the applicant to be elected or appointed is evaluated and qualified.

Pursuant to the exposed doctrine, the Constitutional Court analyzed the case of a foreigner residing in Colombia, of Bulgarian nationality, who participated in a contest convened by the Colombian Symphony Orchestra, to fill the public office of Class "A" Piccolo Flute, who obtained the highest score after the respective evaluation, and who, however, was denied his right to the position, under the argument that in any case a Colombian citizen should be preferred.

The Court said in judgment T-380 of 1998:

"For the Court, it is clear then that the plaintiff's right to equality was violated. Indeed, Article 13 of the Political Charter

establishes that "all people are born free and equal before the Law, shall receive the same protection and treatment by the authorities, and shall enjoy the same rights, freedoms and opportunities without any discrimination for reasons of sex, race, national or family origin, language , religion, political or philosophical opinion (bold outside the text of the Charter, but included in the text of the Court).

Likewise, article 100 ibidem was ignored, according to which foreigners in Colombia will enjoy the same civil rights and guarantees that are granted to Colombians, with the warning that the Law may, for reasons of public order, subordinate to special conditions, or deny the exercise of certain civil rights to foreigners. It is evident that the higher standard guarantees foreigners the right to equal treatment, and legal protection of the rights and guarantees granted to Colombians."14

Immediately afterwards, the Constitutional Court notes:

"Finally, and as a result of the plaintiff's actions, the gentleman (Bulgarian musician) was denied his fundamental right to work, since he could not access the position for which he competed, despite fully complying with the requirements. The Article 25 of the Constitution provides that "everyone has the right to work in decent and fair conditions."

THE CONCEPT:

Although in principle the exercise of functions and public positions is reserved for Colombian nationals, when by Constitution or Law the quality of Colombian national is not required to hold a specific public position, foreigners residing in Colombia who have not acquired Colombian nationality They can participate in competitions to access public positions classified as career and acquire the rights to it.

Transcribe to the Director of the Administrative Department of the Public Function and to the Legal Secretariat of the Presidency of the Republic.

ENRIQUE JOSÉ ARBOLEDO P.

President of the Chamber

GUSTAVO APONTE SANTOS

LUIS FERNANDO ALVAREZ J.

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Room Secretary

COUNCIL OF STATE

CONSULTATION ROOM AND CIVIL SERVICE

VOTE SAVING

Counselor Speaker: Enrique José Arboleda Perdomo

Bogotá DC, May 16, two thousand and six (2006)

Filing No. 1739

Reference: Foreigners Resident in Colombia. Participation in a contest to access administrative career jobs and acquire the rights of this.

With the customary respect, I allow myself to state that I do not share the answers given in the concept identified in the reference, since I consider that the conclusion should have been the opposite, that is, that as according to the Political Constitution, the general rule is that the functions and public positions are reserved for Colombian nationals and by exceptions they can be held by foreigners, in case of silence or regulatory vacuum, the general rule must be applied and not the exception.

The response given to the Director of the Administrative Department of the Public Service, from which I distance myself, states that "when the quality of Colombian national is not required by the Constitution or law to hold a certain public office, foreigners can participate in the contests to access public office", a conclusion that is contrary to what, in my opinion, should have been reflected.

In legal theory, exceptions to a rule of general content are exhaustive and have a restrictive interpretation, so that when the law is silent on a specific case that fits within the general rule, it must be applied and not the exception.

Applying the previous assertion to the consulted situation, when the constitution or the law does not expressly require the quality of Colombian, it must be understood that this condition is required, since the rule consists in that the positions and functions are reserved for nationals. ; Assuming the opposite leads to the opposite premise, that is, that the general rule is that nationality is not required.

In addition to the previous argument extracted from legal logic, it is necessary to refer to the political meaning and purpose of the Constitution itself, since it is obvious that public positions and functions are reserved for nationals, since as indicated in article 40 of the Charter, in its exercise, the right to form political power is being used, which implies that, in addition to work skills, the sense of belonging to the national community, with loyalties, common purposes and other sociological and psychological aspects that constitute Colombian nationality. It is not teleologically correct that the general rule can be that these functions are performed by people whose moral and political loyalties have been acquired and shaped in other countries and for other societies different from ours.

ENRIQUE JOSÉ ARBOLEDA PERDOMO

FOOTNOTES:

1Title IV regulates the "Classes and Categories of visas". In accordance with article 21, visas are: 1. courtesy; 2. business; 3. of crew member; 4. Temporary, worker, spouse, or permanent partner of a Colombian national, father or mother of a Colombian national, religious, special refugee or isolated student; 5. as a resident, as a resident as a family member of a Colombian national, as a qualified resident, as a resident investor; 6. visitor, tourism, technical visitor, temporary visitor. All have in common their temporality, except the resident visa whose validity is indefinite, although it expires in the event that the holder is absent from the country for more than two continuous years."

2Manuel José Cepeda "Fundamental Rights in the Constitution of 1991" ed. Themis pg. 5 Year 1992.

3Libardo Rodríguez R. "General and Colombian Administrative Law Edt. Temis p. 175. Year 1995.

4L. Rodriguez. Ob. Cit.

5Diego Younes Moreno "Labor Administrative Law". Edit. Themis. Page 1. Year 1995.

6Gérard Bergeron "Le fonctionement de I.Etat", Librarie Armand Colin. 1965. P. 82 et seq.

7 Ob. Cit, Pg. 82

8R. Carre de Malberg "Contribution to the Théorie Generale de I.Etat" Center National de la Recherche Scientifique, 1986. p. 263.

9Robert A. Dahl "L.analyse politique contemporaine" Ed. Robert Laffont, 1970. p. 39.

10Geog Jellinek "General Theory of the State" Ed. Maipú. 1970. p. 409 ff.

11Renato Alessi, "Administrative Law Institutions", ed. Bosch, 1970. p. 73 et seq.

12 Constitutional Court. Judgment C-768-95. MP Eduardo Cifuentes Munoz.

13 Constitutional Court. Judgment C-179-94 MP Carlos Gaviria Díaz.

14 Article 15 of Agreement 0011 of 1979 of the Colombian Institute of Culture "Colcultura" that regulates the administration of the artistic staff of the Colombian Symphony Orchestra stipulates that "admission to vacant positions in the Colombian Symphony Orchestra, except for Directors and Concertmasters , will be determined by the contest system". Article 22 of the same Agreement provides that "under equal conditions, preference will always be given to the applicant of Colombian nationality."