COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION

L.K. v. The Netherlands

Communication No. 4/1991

16 March 1993

VIEWS

*Submitted by: L.K. */ [represented by counsel]*

State party: The Netherlands

Date of communication: 6 December 1991 (date of initial letter)

The Committee on the Elimination of Racial Discrimination, established under article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination,

Meeting on 16 March 1993,

Having decided, under rule 94, paragraph 7, of its rules of procedure to deal jointly with the question of admissibility and the merits of the communication,

Having ascertained that the communication meets the criteria for being declared admissible,

Having concluded its consideration of communication No. 4/1991, submitted to the Committee by L.K. under article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination,

Having taken into consideration all written information made available to it on behalf of L.K. and by the State party,

Bearing in mind rule 95 of its rules of procedure requiring it to formulate its opinion on the communication before it,

Adopts the following:

OPINION

1. The author of the communication (dated 6 December 1991) is L.K., a Moroccan citizen currently residing in Utrecht, the Netherlands. He claims to be a victim of violations by the Netherlands of articles 2, paragraph 1 (d); 4 litera (c), 5 litera (d) (i) and litera (e) (iii); and 6 of the International Convention on the Elimination of All Forms of Racial Discrimination. The author is represented by counsel.

The facts as found by the Committee:

2.1 On 9 August 1989, the author, who is partially disabled, visited a house for which a lease had been offered to him and his family, in the Nicholas Ruychaverstraat, a street with municipal subsidized housing in Utrecht. He was accompanied by a friend, A.B. When they arrived, some 20 people had gathered outside the house. During the visit, the author heard several of them both say and shout: "No more foreigners". Others intimated to him that if he were to accept the house, they would set fire to it and damage his car. The author and A.B. then returned to the Municipal Housing Office and asked the official responsible for the file to accompany them to the street. There, several local inhabitants told the official that they could not accept the author as their neighbour, owing to a presumed rule that no more than 5 per cent of the street's inhabitants should be foreigners. Told that no such rule existed, street residents drafted a petition, which noted that the author could not be accepted and recommended that another house be allocated to his family.

2.2 On the same day, the author filed a complaint with the municipal police of Utrecht, on the ground that he had been the victim of racial discrimination under article 137 (literae (c) and (d)) of the Criminal Code (Wetboek van Strafrecht). The complaint was directed against all those who had signed the petition and those who had gathered outside the house. He submits that initially, the police officer refused to register the complaint, and that it took mediation by a local anti-discrimination group before the police agreed to prepare a report.

2.3 The State party's version of the facts coincides to a large extent with that given by the author, with some differences. According to the State party, the author visited the house allocated to him by the Municipality of Utrecht twice, once on 8 August 1989, together with an official of the Utrecht Municipal Housing Department, and again on 9 August 1989 with a friend. During the first visit, the official started a conversation with a local resident, a woman, who objected to the author as a future tenant and neighbour. During the conversation, several other residents approached and made remarks such as "We've got enough foreigners in this street" and "They wave knives about and you don't even feel safe in your own street". While the author was no longer present when these remarks were made, the Housing Department official was told that the house would be set on fire as soon as the prior tenant's lease had expired. As to the second visit, it is submitted that when the author arrived at the house with a friend, A.B., a group of local residents had already gathered to protest against the potential arrival of another foreigner. When the author remained reluctant to reject the Housing Department's offer the residents collected signatures on a petition. Signed by a total of 28 local residents, it bore the inscription "Not accepted because of poverty? Another house for the family please?", and was forwarded to the Housing Department official.

2.4 In response to the complaint of 9 August 1989, the police prepared a report on the incident (Proces-Verbal No. 4239/89) on 25 September 1989; according to the State party, 17 out of the 28 residents who had signed the petition had been questioned by the police, and 11 could not be contacted before the police report was finalized.

2.5 In the meantime, the author's lawyer had apprised the prosecutor at the District Court of Utrecht of the matter and requested access to all the documents in the file. On 2 October 1989, the prosecutor forwarded these documents, but on 23 November 1989 he informed the author that the matter had not been registered as a criminal case with his office, because it was not certain that a criminal offence had taken place. On 4 January 1990, therefore, counsel requested the Court of Appeal of Amsterdam (Gerechtshof) to order the prosecution of the "group of residents of the Nicholas Ruychaverstraat in Utrecht" for racial discrimination, pursuant to article 12 of the Code of Criminal Procedure.

2.6 Counsel submits that, after several months, he was informed that the Registry of the Court of Appeal had indeed received the case file on 15 January 1990. On an unspecified date but shortly thereafter, the Prosecutor-General at the Court of Appeal had requested further information from the District Court Prosecutor, which was supplied rapidly. However, it was not until 10 April 1991 that counsel was able to consult the supplementary information, although he had sought to obtain it on several occasions between 15 February 1990 and 15 February 1991. It was only after he threatened to apply for an immediate judgement in tort proceedings against the prosecutor at the Court of Appeal that the case was put on the Court agenda for 10 April 1991. On 5 March 1991, the Prosecutor-General at the Court of Appeal asked the Court to declare the complaint unfounded or to refuse to hear it on public interest grounds.

2.7 Before the Court of Appeal, it transpired that only two of the street's inhabitants had actually been summoned to appear; they did not appear personally but were represented. By judgement of 10 June 1991, the Court of Appeal dismissed the author's request. It held **inter alia** that the petition was not a document of deliberately insulting nature, nor a document that was inciting to racial discrimination within the meaning of article 137, literae (c) and (e), of the Criminal Code. In this context, the Court of Appeal held that the heading to the petition - which, taking into account statements made during the hearing and to the police, should be interpreted as meaning "Not accepted because of a fight? Another house for the family please?" - could not be considered to be insulting or as an incitement to racial discrimination, however regrettable and undesirable it might have been.

2.8 Under article 12 of the Code of Criminal Procedure, counsel requested the Prosecutor-General at the Supreme Court to seek the annulment of the decision of the Court of Appeal, in the interest of law. On 9 July 1991, the request was rejected. As a last resort, counsel wrote to the Minister of Justice, asking him to order the prosecutor to initiate proceedings in the case. The Minister replied that he could not grant the request, as the Court of Appeal had fully reviewed the case and there was no scope for further proceedings under article 12 of the Code of Criminal Procedure. However, the Minister asked the Chief Public Prosecutor in Utrecht to raise the problems encountered by the author in tripartite consultations between the Chief Public Prosecutor, the Mayor and the Chief of the Municipal Police of Utrecht. At

such tripartite consultations on 21 January 1992, it was agreed that anti-discrimination policy would receive priority attention.

The complaint:

3.1 The author submits that the remarks and statements of the residents of the street constitute acts of racial discrimination within the meaning of article 1, paragraph 1, of the Convention, as well as of article 137, literae (c), (d), and (e), of the Dutch Criminal Code; the latter provisions prohibit public insults of a group of people solely on the basis of their race, public incitement of hatred against people on account of their race, and the publication of documents containing racial insults of a group of people.

3.2 The author contends that the judicial authorities and the public prosecutor did not properly examine all the relevant facts of the case or at least did not formulate a motivated decision in respect of his complaint. In particular, he submits that the police investigation was neither thorough nor complete. Thus, A.B. was not questioned; and street residents were only questioned in connection with the petition, not with the events outside the house visited by the author on 8/9 August 1989. Secondly, the author contends that the decision of the prosecutor not to institute criminal proceedings remained unmotivated. Thirdly, the prosecutor is said to have made misleading statements in an interview to a local newspaper in December 1989, in respect of the purported intentions of the street residents vis-à-vis the author. Fourthly, the Prosecutor-General at the Court of Appeal is said to have unjustifiably prolonged the proceedings by remaining inactive for over one year. Finally, the Court of Appeal itself is said to have relied on incomplete evidence.

3.3 Author's counsel asserts that the above reveals violations of articles 2, paragraph 1 (d), juncto 4 and 6; he observes that articles 4 and 6 must be read together with the first sentence and paragraph 1 litera (d) of article 2, which leads to the conclusion that the obligations of States parties to the Convention are not met if racial discrimination is merely criminalized. Counsel submits that although the freedom to prosecute or not to prosecute, known as the expediency principle, is not set aside by the Convention, the State party, by ratifying the Convention, accepted to treat instances of racial discrimination with particular attention, **inter alia**, by ensuring the speedy disposal of such cases by domestic judicial instances.

The State party's information and observations and counsel's comments:

4.1 The State party does not formulate objections to the admissibility of the communication and concedes that the author has exhausted available domestic remedies. It also acknowledges that article 137, literae (c), (d), and (e), of the Criminal Code are in principle applicable to the behaviour of the street's residents.

4.2 In respect of the contention that the police investigations of the case were incomplete, the State party argues that it is incorrect to claim that the residents of the street were questioned only about the petition. A number of residents made statements about the remark that a fire would be set if the author moved into the house. The State party also contends that although lapse of time makes it impossible to establish why A.B. was not called to give

evidence before the Court of Appeal, it is "doubtful ... whether a statement from him would have shed a different light on the case. After all, no one disputes that the remarks objected to were made".

4.3 The State party similarly rejects the contention that the prosecutor did not sufficiently motivate the decision not to prosecute and that the interview given by the press officer of the prosecutor's office to an Utrecht newspaper on 6 December 1989 was incomplete and erroneous. Firstly, it observes that the decision not to prosecute was explained at length in the letter dated 25 June 1990 from the public prosecutor in Utrecht to the Prosecutor-General at the Amsterdam Court of Appeal, in the context of the author's complaint filed under article 12 of the Code of Criminal Procedure. Secondly, the interview of 6 December 1989 did not purport to reflect the opinion of the Public Prosecutor's Office but that of the residents of the street.

4.4 In respect of the contention that the proceedings before the Court of Appeal were unduly delayed, the State party considers that although the completion of the report by the Prosecutor-General took longer than anticipated and might be desirable, a delay of 15 months between lodging of the complaint and its hearing by the Court of Appeal did not reduce the effectiveness of the remedy; accordingly, the delay cannot be considered to constitute a violation of the Convention.

4.5 The State party observes that the Dutch legislation meets the requirements of article 2, paragraph 1 (d), of the Convention, by making racial discrimination a criminal offence under articles 137, litera (c) **et seq**. of the Criminal Code. For any criminal offence to be prosecuted, however, there must be sufficient evidence to warrant prosecution. In the Government's opinion, there can be no question of a violation of articles 4 and 6 of the Convention because, as set out in the public prosecutor's letter of 25 June 1990, it had not been sufficiently established that any criminal offence had been committed on 8 and 9 August 1989, or who had been involved.

4.6 In the State party's opinion, the fact that racial discrimination has been criminalized under the Criminal Code is sufficient to establish compliance with the obligation in article 4 of the Convention, since this provision cannot be read to mean that proceedings are instituted in respect of every type of conduct to which the provision may apply. In this context, the State party notes that decisions to prosecute are taken in accordance with the expediency principle, and refers to the Committee's opinion on communication 1/1984 addressing the meaning of this very principle. a/ The author was able to avail himself of an effective remedy, in accordance with article 6 of the Convention, because he could and did file a complaint pursuant to article 12 of the Code of Criminal Procedure, against the prosecutor's refusal to prosecute. The State party emphasizes that the review of the case by the Court of Appeal was comprehensive and not limited in scope.

4.7 Finally, the State party denies that it violated article 5 (d) (i) and (e) (iii) of the Convention **vis-à-vis** the author; the author's right to freely choose his place of residence was never impaired, either before or after the events of August 1989. In this context, the State party refers to the Committee's Opinion on communication No. 2/1989, where it was held

that the rights enshrined in article 5 (e) of the Convention are subject to progressive implementation, and that it was "not within the Committee's mandate to see to it that these rights are established" but rather to monitor the implementation of these rights, once they have been granted on equal terms. b/ The State party points out that "appropriate rules have been drawn up to ensure an equitable distribution of housing ...", and that these rules were applied to the author's case.

5.1 In his comments, counsel challenges several of the State party's observations. Thus, he denies that the police inquiry was methodical and asserts that A.B. could and indeed would have pointed out those who made threatening and discriminatory remarks on 9 August 1989, had he been called to give evidence. Counsel further submits that he was not able to consult the public prosecutor's decision of 25 June 1990 not to institute criminal proceedings until 10 April 1991, the date of the hearing before the Court of Appeal.

5.2 Counsel takes issue with the State party's version of the prosecutor's interview of 6 December 1989 and asserts that if the press officer related the version of the street residents without any comment whatsoever, she thereby suggested that their account corresponded to what had in fact occurred. Finally, counsel reaffirms that the judicial authorities made no effort to handle the case expeditiously. He notes that criminal proceedings in The Netherlands should duly take into account the principles enshrined in article 6 of the European Convention on the Protection of Human Rights, of which the obligation to avoid undue delays in proceedings is one.

Issues and proceedings before the Committee:

6.1 Before considering any claims contained in a communication, the Committee on the Elimination of Racial Discrimination must, in accordance with rule 91 of its rules of procedure, decide whether or not it is admissible under the Convention. Under rule 94, paragraph 7, the Committee may, in appropriate cases and with the consent of the parties concerned, join consideration of the admissibility and of the merits of a communication. The Committee notes that the State party does not raise objections to the admissibility of the communication, and that it has formulated detailed observations in respect of the substance of the matter under consideration. In the circumstances, the Committee decides to join consideration of admissibility and consideration of the merits of the communication.

6.2 The Committee has ascertained, as it is required to do under rule 91, that the communication meets the admissibility criteria set out therein. It is, therefore, declared admissible.

6.3 The Committee finds on the basis of the information before it that the remarks and threats made on 8 and 9 August 1989 to L.K. constituted incitement to racial discrimination and to acts of violence against persons of another colour or ethnic origin, contrary to article 4 (a) of the International Convention on the Elimination of All Forms of Racial Discrimination, and that the investigation into these incidents by the police and prosecution authorities was incomplete.

6.4 The Committee cannot accept any claim that the enactment of law making racial discrimination a criminal act in itself represents full compliance with the obligations of States parties under the Convention.

6.5 The Committee reaffirms its view as stated in its Opinion on Communication No. 1/1984 of 10 August 1987 (Yilmaz-Dogan v. The Netherlands) that "the freedom to prosecute criminal offenses - commonly known as the expediency principle - is governed by considerations of public policy and notes that the Convention cannot be interpreted as challenging the **raison d'être** of that principle. Notwithstanding, it should be applied in each case of alleged racial discrimination in the light of the guarantees laid down in the Convention".

6.6 When threats of racial violence are made, and especially when they are made in public and by a group, it is incumbent upon the State to investigate with due diligence and expedition. In the instant case, the State party failed to do this.

6.7 The Committee finds that in view of the inadequate response to the incidents, the police and judicial proceedings in this case did not afford the applicant effective protection and remedies within the meaning of article 6 of the Convention.

6.8 The Committee recommends that the State party review its policy and procedures concerning the decision to prosecute in cases of alleged racial discrimination, in the light of its obligations under article 4 of the Convention.

6.9 The Committee further recommends that the State party provide the applicant with relief commensurate with the moral damage he has suffered.

7. Pursuant to rule 95, paragraph 5, of its rules of procedure, the Committee invites the State party, in its next periodic report under article 9, paragraph 1, of the Convention, to inform the Committee about any action it has taken with respect to the recommendations set out in paragraphs 6.8 and 6.9 above.

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* At his request, the name of the author is not disclosed.

a/ Yilmaz-Dogan v. The Netherlands, Opinion of 10 August 1988, paragraph 9.4.

b/ D.T. Diop v. France, Opinion of 18 March 1991, paragraph 6.4.