COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION

Narrainen v. Norway

Communication No. 3/1991

15 March 1994

CERD/C/44/D/3/1991

VIEWS

Submitted by: Michel L. N. Narrainen (represented by counsel)

State party concerned: Norway

Date of communication: 15 August 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 15 March 1994,

Having concluded its consideration of communication No. 3/1991, submitted to the Committee by Michel L. N. Narrainen 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 Michel L. N. Narrainen 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:

OPINION

1. The author of the communication (initial submission dated 15 August 1991) is Michel L. N. Narrainen, a Norwegian citizen born in 1942, currently detained in a penitentiary in Oslo. He claims to be a victim of violations by Norway of his rights under the International Convention on the Elimination of All Forms of Racial Discrimination, but does not invoke

specific provisions of the Convention.

The facts as found by the Committee

2.1 The author is of Tamil origin and was born in Mauritius; in 1972, he was naturalized and became a Norwegian citizen. On 25 January 1990, he was arrested in connection with a drug-related offence. On 8 February 1991, before the Eidsivating High Court (Court of Appeal - "Lagmannsretten"), a jury of 10 found him guilty of offences against section 162 of the Criminal Code (drug trafficking), and the author was sentenced to six and a half years' imprisonment. The author appealed to the Supreme Court, but leave to appeal was denied in early March 1991. On 17 February 1992, the author filed a petition for reopening of the case. By order of 8 July 1992, the Court of Appeal refused the request. The author again appealed the order to the Supreme Court which, on 24 September 1992, ruled that the case was not to be reopened.

2.2 The author contends that there was no case against him, except for the evidence given by another individual, S. B., already convicted of drug-related offences, who allegedly had been promised a reduction of his sentence in exchange for providing incriminating evidence against the author. In court, S. B. withdrew these allegations. In the same context, the author complains about the allegedly "racist" attitude of the investigating police officer, S. A., who reportedly made it clear that he "wished that people like me had never set foot in his country" (author's quote).

2.3 The author contends that under the terms of the initial indictment, he was accused of having travelled to the Netherlands in the early summer of 1989 to buy amphetamines. When he was able to produce evidence that, at the time in question, he was in Mauritius, the initial indictment allegedly was changed in court, after his own legal representative had contacted the prosecution and asked for the indictment to be changed. The author adds that it was impossible for him to have had any contacts with S. B. or his friends prior to or during the trial.

2.4 The author further contends that two jurors in the Court of Appeal were biased against him and that they openly stated that individuals such as the author, who lived on taxpayers' money, should be sent back to where they had come from. The remarks allegedly included slurs on the colour of the author's skin. Yet these jurors, although challenged, were not disqualified by the Court and participated in the deliberations of the verdict.

2.5 The State party gives the following version of the incident referred to by the author (see para. 2.4):

"The Court record shows that during a break in the court proceedings, a law student, Ms. S. R. H., overheard a private conversation between two members of the jury, Ms. A. M. J. and Ms. S. M. M. This conversation was referred to defence counsel, who requested that one of the jurors be dismissed. The court called the law student and two jurors to testify. (They) agreed on the facts: Ms. J. had expressed dismay at the defendant receiving NKr 9,000 a month without having to work for it, and had also said that he ought to be sent back to where

he came from. Ms. M. had said that the purpose of a case like this was to get more information about the drug trafficking. The law student, Ms. H., had at this point entered the conversation, saying that the purpose of a case like this was to determine whether the defendant was guilty. According to the three witnesses, the question of guilt had otherwise not been mentioned by any of them.

"Defence counsel requested that Ms. J. be dismissed from the jury because, according to section 108 of the Courts' Act, a juror could be disqualified if there are circumstances ... apt to impair confidence in his or her impartiality. The Prosecutor claimed that nothing had been said that could influence the members of the jury, and that everyone was entitled to have opinions. Discussing private opinions during a break (was) no ground for disqualification, and the case itself had not been discussed by the three persons.

"The Court unanimously decided that Ms. J. should not be disqualified because she had not discussed the question of guilt in the present case, and the views she had expressed were not uncommon in Norwegian society."

The complaint

3.1 The author claims that racist considerations played a significant part in his conviction, as the evidence against him would not have supported a guilty verdict. He adds that he could not have expected to obtain a fair and impartial trial, as "all members of the jury came from a certain part of Oslo where racism is at its peak". He asserts that this situation violated his rights under the International Convention on the Elimination of All Forms of Racial Discrimination.

3.2 The author claims that other factors should be taken into consideration in assessing whether he was the victim of racial discrimination. In this context, he mentions the amount of time spent in custody prior to the trial (381 days), out of which a total of nine months were allegedly spent in isolation, and the quality of his legal representation: thus, although he was assigned legal counsel free of charge, his representative "was more of a prosecutor than a lawyer of the defence." Finally, the author considers that a previous drug-related conviction, in 1983, was disproportionably and unreasonably used as character evidence against him during the trial in 1991.

The State party's information and observations and the author's comments

4.1 The State party considers that the communication should be declared inadmissible as manifestly ill-founded, "in accordance with the established practice in similar international human rights monitoring bodies".

4.2 As to the author's claim that he was denied his right to equal treatment before the courts because the jurors were selected from a part of Oslo known for a prevalence of racist opinions, the State party notes that no documentation has been adduced in support of this contention. Author's counsel only requested that one juror be disqualified; for the rest of the jurors, it is submitted that the matter should have been raised in court, and domestic

remedies cannot be deemed exhausted in their respect.

4.3 After explaining the operation of section 108 of the Courts' Act (governing the disqualification of jurors), the State party points out that it is not uncommon for jurors to have negative feelings towards the defendant in a criminal case, but that this does not imply that they are incapable of giving the defendant a fair hearing. In the case in question, the views expressed by the jurors were of a general nature, and the court's decision not to disqualify the juror was unanimous.

4.4 As to the author's claim of unfairly expeditious dismissal of his appeal to the Supreme Court, the State party notes that under section 335, subsection 2, of the Code of Criminal Procedure, no appeal may be filed with the Supreme Court if it merely concerns the evaluation of evidence in the case. In the author's case, the appeal was based on two grounds: the issue of the jury's impartiality (as a procedural error) and the severity of the prison term imposed on the author. The State party notes that under section 349 of the Code of Criminal Procedure, leave to appeal should not be granted if the Appeals Board is unanimous that an appeal would not succeed. Under section 360, procedural errors shall only be taken into consideration if they are deemed to have affected the substance of the judgement. In the author's case, the issue of the length of the prison term was considered, but as the answer to whether the Supreme Court should hear the appeal was negative, it was deemed unlikely that the sentence would be reduced. Concluding on this issue, the State party insists that there is no indication that the author was not given the same opportunities to defend his case before the courts as other individuals, in connection both with the appeal and the request for a reopening of the case, regardless of race, colour of skin, ethnic origin, etc.

4.5 As to the length of the pretrial detention, the State party explains that a little over one year of pretrial custody is not unusual in cases involving drug-related offences. According to the State party, the delay of nine months from arrest to the dispatch of the indictment to the Court of Appeal was partly attributable to the author himself, since he changed his lawyer several times while in custody, which in turn delayed the preparations for the main hearing. The State party submits that nothing indicates that the author was kept in custody longer than other suspects merely because of his origin; this part of the complaint therefore is also said to be inadmissible as manifestly ill-founded.

4.6 Finally, the State party dismisses as manifestly ill-founded the author's complaint about the quality of his legal representation. Under section 107 of the Code of Criminal Procedure, a court-appointed lawyer is remunerated by the State; the author had the opportunity to choose his own counsel throughout the judicial proceedings, and it cannot be said that he was subjected to racial discrimination in this respect.

5.1 In his comments, the author challenges the State party's submission on various procedural and factual grounds. He claims that the State party's version of the judicial proceedings is one-sided, because it is adapted from the court book, which according to him reveals little of substance. He further asserts that in a letter to the Registry of the Supreme Court, the prosecutor himself admitted that the only prosecution witness against Mr. Narrainen acknowledged in court to have been pressed by the investigating officer to make

a false and incriminating statement. As this virtually destroyed the probative value of the prosecution's case, the author concludes that he was convicted on the basis of racist ideas and serious errors committed by the investigating authorities.

5.2 The author reiterates that several factors in his case, including the gathering and the evaluation of evidence, the omission of important statements in the court book, the absence of serious preparation of his defence by the court-appointed lawyers, the handling of his appeal, all underline that he was denied a fair and impartial hearing, and that his conviction was based on racist considerations.

The Committee's admissibility decision

6.1 During its forty-second session, in March 1993, the Committee examined the admissibility of the case. It duly considered the State party's contention that the author's complaint was inadmissible as his allegations were either unsubstantiated or unfounded but concluded that the communication satisfied the conditions for admissibility laid down in rule 91 of the Committee's rules of procedure.

6.2 On 16 March 1993, the Committee therefore declared the communication admissible in so far as it might raise issues under article 5 (a) of the Convention.

The State party's observations on the merits and counsel's comments

7.1 The State party dismisses as incorrect the author's allegation that the members of the jury in his trial came from those parts of Oslo where racism is rampant and that they had neo-Nazi affiliations. It notes that the list of jurors in the case was drawn up in accordance with chapter 5 of the Courts Act, that neither prosecutor nor counsel for the defence objected to the way the list was drawn up, and that counsel challenged two jurors whose names appeared on the initial list. Six of the jurors came from areas outside Oslo, and four from different parts of Oslo. The State party notes that no part of Oslo can be described as particularly racist, and that neither the courts nor the Government have any knowledge about the affiliation of jurors with political parties. However, the procedure for jury selection makes it unlikely that jurors from fringe parties will be chosen, as jurors are drawn by lot from lists that are provided by municipal politicians.

7.2 As to the impartiality of the jurors, the State party reiterates its earlier observation (see para. 2.5 above). It adds that the person who had made the inimical remarks during court recess, Ms. J., is a salaried worker who, in 1990, earned less income than the author received in terms of social benefits during the same year. In these circumstances, the State party submits, the rather general remarks of Ms. J. were "a not very surprising reaction to a matter that must have seemed unjust to her."

7.3 The State party recalls that the issue of whether the fact that the remark was made meant that Mr. Narrainen did not receive a fair trial was examined in detail by the Interlocutory Appeals Committee of the Supreme Court since, under section 360, paragraph 2 lit. 3, of the Norwegian Code of Criminal Procedure, a judgement is declared null and void by the

Supreme court if it is found that one of the jurors was disqualified. According to the State party, the fact that the Interlocutory Appeals Committee denied leave to appeal to the Supreme Court implies that the Board considered it obvious that there were no circumstances in the case likely to impair confidence in the impartiality of Ms. J. It is noted that in deciding whether leave to appeal to the Supreme Court shall be granted or not, the Interlocutory Appeals Committee also relies on international instruments such as the International Convention on the Elimination of All Forms of Racial Discrimination as relevant sources of law.

7.4 In respect of the assessment of evidence in the case, the State party explains the rationale for trying cases involving crimes punishable with imprisonment of six years or more at first instance before the High Court. In such cases, the court is constituted of 3 professional judges and a jury of 10; the jury decides on the question of guilt. A judgement of the High Court may be appealed to the Supreme Court, but errors in the evaluation of evidence in relation to the question of guilt are not permissible grounds of appeal (sect. 335, para. 2, of the Code of Criminal Procedure). The State party explains that "it is important that serous criminal cases are dealt with in a reassuring manner from the beginning. This is why such cases are dealt with in the High Court, with a jury, at first instance. The jury decides on the guilt. This is common practice, based on the principle that a defendant shall be judged by equals ... This principle would be of little value if the jury's assessment of evidence ... could be overruled by the professional judges in the Supreme Court".

7.5 As to the admissibility of the evidence placed before the High Court and the alleged pressure exerted by the police on witness S. B. to make a false statement, the State party recalls that Norwegian courts assess evidence freely. That Mr. Narrainen was convicted indicates that, in the case, the jurors did not believe S. B. when he retracted his earlier statement and claimed that the author was innocent. In this context, the State party submits that the most likely explanation for S. B.'s attitude in court was his fear of reprisals if he upheld his earlier statement; it notes that S. B., himself a detainee at the prison of Bergen, was placed under pressure to withdraw his initial statement at around the time the author himself arrived at the prison, and that he was afraid of reprisals. Still in the same context, the State party dismisses as incorrect or misleading parts of the author's statements reproduced in paragraph 5.1 above.

7.6 The State rejects as incorrect the author's claim that S. B. was promised a reduced sentence in exchange for providing incriminating evidence against the author, as neither the police nor the public prosecutor are competent to engage in any plea bargaining with the accused. The State party similarly rejects as unfounded the author's claim that S. B. was "promised a cosy place to serve his sentence" in exchange for information on the author: in fact, S. B. was confined to the main prison for the Rogaland area, where, according to his own statement, he was subjected to considerable pressure from other prisoners, including the author.

7.7 Concerning the use of a previous conviction as evidence against Mr. Narrainen, the State party submits that it is normal under Norwegian criminal law to admit such evidence, and that there is absolutely no evidence that the admission of the evidence had any connection

with the author's ethnic origin.

7.8 With regard to the alleged illegal change in the author's indictment, the State party refers to section 38, paragraph 2, of the Code of Criminal Procedure, which stipulates that "with regard to the penal provision applicable to the matter, the Court is not bound by the indictment ... The same applies with regard to punishment and other sanctions applicable." A change in the determination of which provision is applicable to the same offence can also be made by the prosecutor's office (sect. 254, para. 3, of the Code of Criminal Procedure); this is what occurred in the author's case. The State party explains that the reason why the applicable provision may be changed, after indictment but before start of the trial, is that the defendant is not being charged with a new offence; it is simply a question of choosing the appropriate provision applicable to the same facts.

7.9 Finally, as to the duration of Mr. Narrainen's pretrial detention, the State party reiterates its comments detailed in paragraph 4.5 above. As to the quality of his counsel, it recalls that since the author "was imprisoned in Oslo, he had the opportunity to choose between many highly qualified lawyers". It explains that when the court has appointed a legal aid representative, it will not appoint another one unless asked to do so by the defendant; therefore, any lawyer assisting Mr. Narrainen must have been chosen pursuant to his requests. The State party concludes that there is no reason to believe that Mr. Narrainen did not receive the same legal services as any other accused. Rather, he was given every opportunity to request a new representative every time he was dissatisfied with his previous one, thereby using the "safeguard provisions" of the criminal procedure system to the full.

8.1 In his comments on the State party's submission, counsel provides detailed information about the composition of juries under the criminal justice system. According to recent statistics, 43 per cent of foreign nationals residing in Norway live in Oslo or neighbouring boroughs. Of the foreign-born Norwegian citizens some 60,516, of whom half come from Latin America, Asia and Africa, lived in Oslo. Between 10 and 15 percent of all persons living in Oslo have cultural and ethnic backgrounds that differ from the rest of the population.

8.2 Counsel observes that few if any foreigners or foreign-born Norwegians figure in lists from which jury members are selected. Eidsivating High Court was unwilling to provide him with a copy of the jury lists from the Oslo area, on the ground that the lists, comprising some 4,000 names, contain private data that should not be made public. According to counsel, Norwegian court practice clearly shows that Norwegian juries are all white - in interviews with prosecutors, lawyers and convicted prisoners, no one remembered ever having met a coloured member of a jury. This information is corroborated by a newspaper report, dated 24 February 1994, which screens the lists of jurors provided by the city of Oslo. It states that out of 2,306 individuals, no more than 25 have a foreign background, and most of the foreign names are English, German or American ones. It further notes that according to official statistics, 38,000 foreign nationals aged 20 or more live in Oslo; another 67,000 persons were either born abroad or have foreign parents.

8.3 Counsel notes that the reason for the lack of equal representation of ethnic groups in

juries may be explained by the fact that local political parties appear reluctant to nominate members of such groups and the fact that five years of residence in Norway and proficiency in Norwegian are prerequisites for jury duty. Counsel opines that this situation should prompt the Norwegian high courts to give special attention to ensuring a fair trial for coloured defendants.

8.4 As to the alleged impartiality of the jurors, counsel subscribes to the analysis of the allegedly racist remark of Ms. J. made by the lawyer who appealed on the author's behalf to the Supreme Court. In his brief to the Interlocutory Appeals Committee, this lawyer argued, by reference to section 135 (a) of the Criminal Code which prohibits public expressions of racism, that remarks such as Ms. J.'s aimed at an accused person are particularly reprehensible if made during the proceedings in front of a member of the audience, and if made in a case such as the author's, who was foreign-born. To this lawyer, Ms. J., when repeating her statement from the witness stand, gave the clear impression of harbouring racial prejudices against persons of foreign origin.

8.5 Counsel further doubts that, given the extremely heavy workload of the Interlocutory Appeals Committee, which handles an average of 16 cases per day, the Appeals Committee really had the time to take into consideration all the relevant factors of the author's case, including those concerning racial discrimination under international law. He further notes that the parties are not represented before the Interlocutory Appeals Committee, which, moreover, does not give any reasons for its decision(s).

8.6 Concerning the evaluation of evidence in the case, counsel notes that Mr. Narrainen was convicted on the basis of one police report and the testimonies of the police officers who had taken the statement of S. B. That this lack of other substantial evidence against Mr. Narrainen raised doubts about his guilt was demonstrated by the fact that one of the three judges in the case found that the guilt of the accused had not been proven beyond reasonable doubt. Counsel argues that it cannot be excluded that some of the jurors had similar doubts; in the circumstances, the presence in the jury of a person who had displayed evidence of bias against the author may easily have tipped the balance.

8.7 In the light of the above, counsel claims that the Norwegian courts violated article 5 (a) of the Convention through the judgement of the High Court of 6 February 1991 and the decision of the Interlocutory Appeals Committee of 7 March 1991. While the juror's remark may not in itself have amounted to a violation of the Convention, the fact that Ms. J. was not removed from the jury constituted a violation of article 5 (a). In this context, counsel refers to the Committee's Opinion in the case of **L. K. v. Netherlands**, a/ where it was held that the enactment of legislation making racial discrimination a criminal offence does not in itself represent full compliance with the obligations of States parties under the Convention.

8.8 Counsel concludes that the way in which Norwegian juries are constituted does not ensure racial equality, that the remark made by Ms. J. to another juror was evidence of bias against the author because of his origin and colour, and that neither the High Court nor the Interlocutory Appeals Committee devoted appropriate attention to counsel's claim of racial discrimination or properly evaluated the possibility of a violation of Norway's obligations

under the Convention.

Examination of the merits

9.1 The Committee has considered the author's case in the light of all the submissions and documentary evidence produced by the parties. It bases its findings on the following considerations.

9.2 The Committee considers that in the present case the principal issue before it is whether the proceedings against Mr. Narrainen respected his right, under article 5 (a) of the Convention, to equal treatment before the tribunals, without distinction as to race, colour or national or ethnic origin. The Committee notes that the rule laid down in article 5 (a) applies to all types of judicial proceedings, including trial by jury. Other allegations put forward by the author of the communication are in the Committee's view outside the scope of the Convention.

9.3 If members of a jury are suspected of displaying or voicing racial bias against the accused, it is incumbent upon the national judicial authorities to investigate the issue and to disqualify the juror if there is a suspicion that the juror might be biased.

9.4 In the present case, the inimical remarks made by juror Ms. J. were brought to the attention of the Eidsivating High Court, which duly suspended the proceedings, investigated the issue and heard testimony about the allegedly inimical statement of Ms. J. In the view of the Committee, the statement of Ms. J. may be seen as an indication of racial prejudice and, in the light of the provision of article 5 (a) of the Convention, the Committee is of the opinion that this remark might have been regarded as sufficient to disqualify the juror. However, the competent judicial bodies of Norway examined the nature of the contested remarks and their potential implications for the course of the trial.

9.5 Taking into account that it is neither the function of the Committee to interpret the Norwegian rules on criminal procedure concerning the disqualification of jurors, nor to decide as to whether the juror had to be disqualified on that basis, the Committee is unable to conclude, on the basis of the information before it, that a breach of the Convention has occurred. However, in the light of the observations made in paragraph 9.4, the Committee makes the following recommendations pursuant to article 14, paragraph 7, of the Convention.

10. The Committee recommends to the State party that every effort should be made to prevent any form of racial bias from entering into judicial proceedings which might result in adversely affecting the administration of justice on the basis of equality and non-discrimination. Consequently, the Committee recommends that in criminal cases like the one it has examined due attention be given to the impartiality of juries, in line with the principles underlying article 5 (a) of the Convention.

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a/ Communication No. 4/1991 (**L.K. v. Netherlands**), Opinion adopted on 16 March 1993, paragraph 6.4.