

COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION

Documentation and Advisory Centre on Racial Discrimination v. Denmark

Communication No. 28/2003

19 August 2003

CERD/C/63/D/28/2003*

ADMISSIBILITY

Submitted by: The Documentation and Advisory Centre on Racial Discrimination

Alleged victim: The petitioner

State Party: Denmark

Date of communication: 3 December 2002 (initial submission)

Decision on admissibility

1.1 The petitioner is the Documentation and Advisory Centre on Racial Discrimination, represented by Ms. Fakhra Mohammad, born on 6 May 1960, who is the head of the board of trustees of the Centre. The petitioner alleges violations by Denmark of articles 2, paragraph 1(d), 4, 5 and 6 of the Convention.

1.2 In conformity with article 14, paragraph 6 (a), of the Convention, the Committee transmitted the communication to the State party on 14 April 2003.

The facts as submitted by the petitioner:

1.1 On 27 January 2002, a private company, Torben Jensen A/S, published a job advertisement in the Danish newspaper Jyllands Posten. The advertisement read as follows:

The construction company BAC SIA seeks
Danish foreman

who, in cooperation with a Latvian construction expert, will be assigned the general responsibility of renovating and constructing a larger agricultural building approximately 80 kilometers from

Riga.

1.2 By letter of 30 January 2002, the petitioner reported the incident to the Chief Constable of the police in Vejle, the district where Torben Jensen A/S was located. In the letter, the petitioner alleged a violation by the company of Section 5 1/ of Act No. 459 of 12 June 1996 on prohibition against discrimination in respect of employment and occupation etc. on the labour market, arguing that the words Danish foreman in the advertisement amounted to discrimination on the ground of national or ethnic origin.

2.3 On 5 February 2002, the police interviewed Mr. E.H., accountant of Torben Jensen A/C . On the basis of this interview, the Chief Constable, by letter of 13 March 2002, informed the petitioner that he had decided to dismiss the complaint:

In my decision, I have notably given weight to the fact that, based on the police s questioning of Torben Jensen, and, moreover, from reading the advertisement, it is, in my view, quite clear that there is no violation of the said Act. What is sought for the position in Latvia is a Danish resident, and this person could easily be of an ethnicity other than Danish. In the worst case, it is a matter of an unfortunate choice of words, but not of a content which constitutes grounds for further action in this case.

2.4 On 22 March 2002, the petitioner appealed the Chief Constable s decision to the Regional Public Prosecutor of Sønderborg. According to the petitioner, it was irrelevant whether the company had actually intended to recruit a Danish resident, as the decisive question under Section 5 of Act No. 459 was whether the wording of the job advertisement could be perceived as indicating a preference for a foreman of Danish origin. Since Section 5 also criminalizes negligence, this provision would also be violated, if the unintended effect of the advertisement had been to exclude a group defined by one of the criteria enumerated in Section 1, paragraph 1, 2/ of the same Act from applying for the job. However, the Chief Constable did not appear to have investigated this possibility. Moreover, the petitioner contested that the term Danish foreman was supposed to refer to a Danish resident, as such residence could not be regarded a logical requirement for the construction job in Latvia and because it followed from the publication of the advertisement in a Danish newspaper that the group of recipients would essentially be limited to Danish residents in any event.

2.5 By letter of 3 June 2002, the Regional Public Prosecutor of Sønderborg informed the petitioner that he had dismissed the appeal, based on the same reasons as those mentioned in the decision of the Chief Constable.

2.6 On 3 December 2002, the Documentation and Advisory Centre on Racial Discrimination [represented] by Fakhra Mohammad, head of the board of trustees , submitted the present communication.

The complaint:

3.1 The petitioner claims that, as the head of the board of trustees, Ms. Fakhra Mohammad represents

the [Documentation and Advisory Centre] when complaints are filed in her name . Although neither Ms. Fakhra Mohammad nor any other person of non-Danish origin applied for the advertised job, she should be considered a victim of the discriminatory advertisement, since it would have been futile for her to apply for the post. Moreover, the petitioner itself should be recognized as having status of victim under article 14 of the Convention, since it represents a large group of persons of non-Danish origin discriminated against by the job advertisement in question . In support of this claim, the petitioner states that both the police and the Regional Public Prosecutor have accepted it as a party to domestic proceedings.

3.2 The petitioner claims to have exhausted domestic remedies, as there is no possibility to appeal the decision of the Regional Public Prosecutor of 3 June 2002, and since the case cannot be brought before the Danish courts. Direct legal actions against Torben Jensen A/S would be ineffective, given that the police and the Regional Public Prosecutor both rejected the complaint. Moreover, the Eastern High Court, in a decision of 5 February 1999, held that an incident of racial discrimination does not in itself constitute a violation of the honour and reputation of a person, within the meaning of Section 26 of the Act on Civil Liability.

3.3 The petitioner claims that the State party has violated its obligations under articles 4 and 6 of the Convention, as it failed to investigate whether the job advertisement constituted an act of racial discrimination, punishable under Section 5 of Act No. 459, and instead admitted the company's explanation that what was meant by Danish foreman was a person residing in Denmark. In particular, the State party should have investigated the following questions: (1) whether the person eventually employed was of Danish national/ethnic origin or not; (2) whether the intended meaning of the advertisement should be taken into account; (3) whether the explanation provided by Torben Jensen A/C was logical; (4) whether the publishing of the advertisement constituted indirect discrimination; and (5) whether the publishing of the advertisement was punishable as negligence.

3.4 The petitioner argues that the company's alleged intention to recruit a Danish resident was irrelevant, since the objective meaning of the term Danish in the advertisement clearly related to the national/ethnic origin of the person sought. The de facto effect of the advertisement thus was to deprive applicants of non-Danish origin of equal opportunities. Whether this effect was intended or not played no role, since Section 5 of Act No. 459 also criminalized negligence. Moreover, it followed from Section 1, paragraph 1, of the Act that Section 5 also covered indirect discrimination, a modality which the Danish authorities had equally failed to investigate.

3.5 In addition, the petitioner contests that the term Danish foreman was used as a synonym for Danish resident by the company, and reiterates the arguments already stated before the Regional Public Prosecutor (see para. 2.4 above).

The State party's submission on the admissibility and merits of the communication:

4.1 By note verbale of 7 July 2003, the State party made its submissions on the admissibility and, subsidiarily, on the merits of the communication.

4.2 On admissibility, the State party denies that the petitioner has legal standing to submit a communication, under article 14, paragraph 1, of the Convention, as it is a legal entity and not an individual or group of individuals. As such, the petitioner is not in a position to claim that it is the victim of a violation of any of the rights set forth in the Convention. Furthermore, the petitioner failed to present its power of attorney from one or more individuals, claiming to be victims of such a violation, which would authorize it to submit a communication on their behalf. The State party concludes that the communication is inadmissible *ratione personae* under article 14, paragraph 1, of the Convention.

4.3 While conceding that the decision of the Regional Public Prosecutor, acting on appeal cannot be appealed to a higher authority, and that private parties cannot bring charges under Section 5 of Act No. 459 before the courts, the State party denies that the petitioner has exhausted available domestic remedies, since such remedies have to be exhausted by the petitioners themselves and not by other organizations or individuals. The fact that the petitioner participated in domestic proceedings by lodging a complaint with the Danish authorities was irrelevant, given that the petitioner, being a legal person, had no victim status under the Convention. The State party concludes that the communication is also inadmissible under article 14, paragraph 7 (a), of the Convention.

4.4 The State party further argues that the determination made by the Chief Constable and the Regional Public Prosecutor that the requirements of Section 5 of Act No. 459 were not met in the present case was primarily a matter of interpretation and application of domestic legislation, which the Committee has no competence to review. The communication is therefore also incompatible *ratione materiae* with the Convention.

4.5 Subsidiarily and on the merits, the State party submits that the petitioner has failed to substantiate that the Danish legislation as such was not in conformity with its obligations under article 4 of the Convention. On the contrary, the communication was based on the assumption that the Danish authorities did not apply Act No. 459 correctly.

4.6 The State party argues that, while requiring that an investigation must be carried out with due diligence and expedition and must be sufficient to determine whether or not an incident of racial discrimination has occurred, article 6 of the Convention does not guarantee the initiation, let alone a specific outcome, of such an investigation in all cases reported to the police. If no basis can be found to initiate an investigation, it is not contrary to the Convention to dismiss a complaint. In the present case, the decisions of the Danish authorities were based on sufficient information, namely the interview of the company's accountant by the Police Constable. This was also reflected by the fact that the petitioner did not consider further information necessary to determine that the advertisement was in violation of Section 5 of Act No. 459. However, the above question again related to the interpretation and practical application of the Danish legislation, thus falling outside the Committee's competence.

4.7 With regard to the specific questions raised by the petitioner (see para. 3.3 above), the State party argues: (1) that the employment of a person of Danish origin or ethnicity in Denmark cannot in itself be considered to substantiate an allegation of discrimination; (2) that the intention of Torben Jensen A/C was relevant to the interpretation of the wording of the advertisement, while its legal assessment falls outside the

traditional field of police investigation; (3) that the question of whether the explanation provided by the company was convincing also is not a matter of traditional police investigation, but rather a matter of assessing critically the information already provided by the police, as well as by the petitioner; that the questions whether the advertisement constituted (4) indirect discrimination or (5) negligence, punishable under Section 5 of the Act, was not for the police to investigate, since it related to the application and interpretation of Danish legislation, and can therefore not be reviewed by the Committee.

4.8 Without prejudice to the above arguments, the State party submits that the Chief Constable and the Regional Public Prosecutor of Sønderborg made a correct assessment when they considered that the adjective "Danish" in the advertisement referred to Danish residents, since the nature of the relationship to Denmark required by that wording was not precisely determined. The advertisement was therefore not covered by Section 5 of the Act, given that a Danish resident may be of any ethnicity or national origin.

4.9 The State party concludes that article 6 has not been violated, as the petitioner had access to effective remedies, resulting in decisions of the Danish authorities, which were taken on an adequate and informed basis in accordance with the requirements of the Convention.

Comments by the petitioner

5.1 By submission of 18 July 2003, the petitioner commented on the State party's observations and extended the claim contained in the communication of 3 December 2002 to the effect that the State party's alleged failure to carry out an effective investigation also amounted to a violation of articles 5 and 2, paragraph 1 (d), in addition to the initial claim of a violation of articles 4 and 6, of the Convention.

5.2 While conceding that the communication was submitted by Fakhra Mohammad acting as the head of the board of trustees of the Documentation and Advisory Centre and therefore by a legal person, the petitioner contests the State party's conclusion that legal entities cannot file communications, nor claim victim status, under article 14 of the Convention.² The petitioner argues that it follows from the travaux préparatoires to the Convention that the words "individuals or groups of individuals" in article 14, paragraph 1, should be interpreted broadly so as to be able to include non-governmental organizations among those entitled to bring a complaint before the Committee.

5.3 As to its status of victim, the petitioner submits that such status cannot, under Section 5 of Act No. 459, be restricted to one or more individuals, since that provision generally criminalizes discrimination of non-Danish applicants in job advertisements, thereby protecting everyone of non-Danish origin against such discrimination. Given the petitioner's specific mandate to assist victims of racial discrimination, the ethnic composition of its board of trustees 2, as well as its record in representing alleged victims of racial discrimination before the Committee, it should be considered as a victim or as representing an unspecified number of unidentified victims of a violation of Section 5 of the Act and, accordingly, of articles 2, 4, 5 and 6 of the Convention. The petitioner concludes that the communication is admissible *ratione personae* under article 14 of the Convention, reiterating that the Chief Constable and the Regional Public Prosecutor recognized it as a party to domestic proceedings (either as a victim or as having a particular interest in the outcome of the case), which was reflected by the fact that its appeal to the Regional Public Prosecutor had

not been dismissed on procedural grounds.

5.4 The petitioner submits that it has exhausted all available domestic remedies, in its capacity as petitioner or, respectively, as representative of a large group of non-identifiable petitioners . The petitioner also argues that the communication is admissible *ratione materiae*, as it does not relate to the legal assessment of the alleged incident, but to the absence of an effective investigation by the Danish authorities, which would have provided an adequate factual basis for such an assessment.

5.5 With regard to the alleged violations of articles 2, 4, 5 and 6 of the Convention, the petitioner similarly bases the claim on the lack of an effective investigation into the matter, rather than on the legal assessment by the Danish authorities. However, it is argued that the Chief Constable would not have reached the conclusion that a Danish resident was sought for the advertised post in Latvia, irrespective of the national or ethnic origin of that person, if he had initiated a formal investigation, rather than merely relying on an informal interview of the accountant of Torben Jensen A/C , on the report filed by the petitioner and on the wording of the job advertisement. Such an investigation should have clarified who had eventually been recruited for the advertised post, since such clarification would at least have indicated whether an act of discrimination had occurred, and would have provided an adequate basis to determine whether the advertisement constituted indirect discrimination.

Issues and proceedings before the Committee

6.1 Before considering the substance of a communication, the Committee on the Elimination of Racial Discrimination must, in accordance with rule 91 of its rules of procedure, examine whether or not the communication is admissible.

6.2 The Committee notes that the communication has been submitted by the Documentation and Advisory Centre on Racial Discrimination. It further notes that, in its submissions of 18 July 2003, the petitioner clarified that Ms. Fakhra Mohammad, acting as the head of the board of trustees, represented the Documentation and Advisory Centre when initially submitting the communication.

6.3 The Committee takes note of the State party's objection that, as a legal person rather than an individual or a group of individuals, the petitioner is not entitled to submit a communication or to claim victim status under article 14, paragraph 1. It equally notes the petitioner's argument that article 14, paragraph 1, should be interpreted broadly to enable non-governmental organizations to bring a complaint before the Committee, and that it should be considered as a victim of a violation of articles 2, 4, 5 and 6 of the Convention or, respectively, as representing a large group of unidentified victims , i.e. persons of non-Danish origin who were discriminated against by the job advertisement in question.

6.4 The Committee does not exclude the possibility that a group of persons representing, for example, the interests of a racial or ethnic group, may submit an individual communication, provided that it is able to prove that it has been an alleged victim of a violation of the Convention or that one of its members has been a victim, and if it is able at the same time to provide due authorization to this effect.

6.5 The Committee notes that, according to the petitioner, no member of the board of trustees applied for the job. Moreover, the petitioner has not argued that any of the members of the board, or any other identifiable person whom the petitioner would be authorized to represent, had a genuine interest in, or showed the necessary qualifications for, the vacancy.

6.6 While Section 5 of Act No. 459 prohibits discrimination of all persons of non-Danish origin in job advertisements, whether they apply for a vacancy or not, it does not automatically follow that persons not directly and personally affected by such discrimination may claim to be victims of a violation of any of the rights guaranteed in the Convention. Any other conclusion would open the door for popular actions (*actio popularis*) against the relevant legislation of States parties.

6.7 In the absence of any identifiable victims personally affected by the allegedly discriminatory job advertisement, whom the petitioner would be authorized to represent, the Committee concludes that the petitioner has failed to substantiate, for purposes of article 14, paragraph 1, its claim that it constitutes or represents a group of individuals claiming to be the victim of a violation by Denmark of articles 2, paragraph 1 (d), 4, 5 and 6 of the Convention.

7. The Committee on the Elimination of Racial Discrimination therefore decides:

(a) That the communication is inadmissible *ratione personae* under article 14, paragraph 1, of the Convention.

(b) That this decision shall be communicated to the State party and to the petitioner.

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

* Made public by decision of the Committee on the Elimination of Racial Discrimination.

Notes:

1/ Section 5 of Act No. 459 of 5 July 1996 reads: Advertisements may not indicate that a person of a particular race, colour, religion, political opinion, sexual orientation or national, social or ethnic origin is sought or preferred. Nor must it be indicated that a person with the characteristics mentioned in the first clause of this Section is not wanted.

2/ Section 1, paragraph 1, of Act No. 459 reads: For the purpose of this Act, the term discrimination means any direct or indirect discrimination on the basis of race, colour, religion, political opinion, sexual orientation or national, social or ethnic origin.