



**International Convention on  
the Elimination of all Forms  
of Racial Discrimination**

Distr.  
RESTRICTED\*

CERD/C/68/D/34/2004  
15 March 2006

Original: ENGLISH

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COMMITTEE ON THE ELIMINATION  
OF RACIAL DISCRIMINATION  
Sixty-eighth session  
20 February-10 March 2006

**OPINION**

**Communication No. 34/2004**

*Submitted by:* Mohammed Hassan Gelle (represented by counsel,  
the Documentation and Advisory Centre on Racial  
Discrimination)

*Alleged victim:* The petitioner

*State party:* Denmark

*Date of communication:* 17 May 2004 (initial submission)

*Date of present decision:* 6 March 2006

[ANNEX]

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

**Annex**

**OPINION OF THE COMMITTEE ON THE ELIMINATION OF  
RACIAL DISCRIMINATION UNDER ARTICLE 14 OF THE  
INTERNATIONAL CONVENTION ON THE ELIMINATION  
OF ALL FORMS OF RACIAL DISCRIMINATION**

**Sixty-eighth session**

**concerning**

**Communication No. 34/2004**

*Submitted by:* Mohammed Hassan Gelle (represented by counsel,  
the Documentation and Advisory Centre on Racial  
Discrimination)

*Alleged victim:* The petitioner

*State party:* Denmark

*Date of communication:* 17 May 2004 (initial submission)

*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* 6 March 2006

*Adopts the following:*

**Opinion**

1.1 The petitioner is Mr. Mohammed Hassan Gelle, a Danish citizen and resident of Somali origin, born in 1957. He claims to be a victim of violations by Denmark of articles 2, paragraph 1 (d), 4 and 6 of the Convention. He is represented by counsel, Mr. Niels-Erik Hansen of the Documentation and Advisory Centre on Racial Discrimination (DRC).

1.2 In conformity with article 14, paragraph 6 (a), of the Convention, the Committee transmitted the communication to the State party on 3 June 2004.

**Factual background:**

2.1 On 2 January 2003, the daily newspaper *Kristeligt Dagblad* published a letter to the editor by Ms. Pia Kjærsgaard, a member of the Danish Parliament (*Folketinget*) and leader of the Danish People's Party (*Dansk Folkeparti*). The letter was given the title "A crime against humanity" and stated:

“How many small girls will be mutilated before Lene Espersen, Minister of Justice (Conservative People’s Party), prohibits the crime? [...]

But Ms. Espersen has stated that she needs further information before she can introduce the bill. Therefore, she is now circulating the bill for consultation among 39 organisations that will be able to make objections.

Now, it is all according to the book that a Minister of Justice wants to consult various bodies about a bill of far-reaching importance. The courts, the Director of Public Prosecutions, the police etc. must be consulted.

But I must admit that I opened my eyes wide when, on Ms. Espersen’s list of 39 organisations, I saw the following: the Danish-Somali Association [...], the Council for Ethnic Minorities [...], the Danish Centre for Human Rights [...], the National Organisation for Ethnic Minorities [...] and the Documentation and Advisory Centre on Racial Discrimination [...].

I have to ask: What does a prohibition against mutilation and maltreatment have to do with racial discrimination? And why should the Danish-Somali Association have any influence on legislation concerning a crime mainly committed by Somalis? And is it the intention that the Somalis are to assess whether the prohibition against female mutilation violates their rights or infringes their culture?

To me, this corresponds to asking the association of paedophiles whether they have any objections to a prohibition against child sex or asking rapists whether they have any objections to an increase in the sentence for rape. For every day that passes until the period of consultation expires and the bill can be adopted, more and more small girls will be mutilated for the rest of their lives. In all decency, this crime should be stopped now. [...]

2.2 The petitioner considered that this comparison equated persons of Somali origin with paedophiles and rapists, thereby directly offending him. On 28 January 2003, the DRC, on the petitioner’s behalf, reported the incident to the Copenhagen police, alleging a violation of section 266 (b)<sup>1</sup> of the Criminal Code.

2.3 By letter of 26 September 2003, the Copenhagen police notified the DRC that, in accordance with section 749, paragraph 1,<sup>2</sup> of the Administration of Justice Act, it had decided not to open an investigation into the matter, since it could not reasonably be presumed that a criminal offence subject to public prosecution had been committed.<sup>3</sup> The letter stated:

“In my opinion, the letter to the editor *cannot* be taken to express that Somalis are lumped together with paedophiles and rapists and that the author thereby links Somalis with authors of serious crimes. Female

mutilation is an old Somali tradition that many today consider a crime due to the assault [...] against the woman. I understand Ms. Kjærsgaard's statements to mean that the criticism is aimed at the fact that the Minister wants to consult a group that many people believe to be committing a crime by performing this mutilation. Although the choice of paedophiles and rapists must be considered offensive examples, I find that there is no violation within the meaning of section 266 b."

2.4 On 6 October 2003, the DRC, on the petitioner's behalf, appealed the decision to the Regional Public Prosecutor who, on 18 November 2004, upheld the decision of the Copenhagen police:

"I have also based my decision on the fact that the statements do not refer to all Somalis as criminals or other wise as equal to paedophiles or rapists, but only argue against the fact that a Somali association is to be consulted about a bill criminalizing offences committed particularly in the country of origin of Somalis, [which is] why Ms. Kjærsgaard finds that Somalis cannot be presumed to comment objectively on the bill, just as paedophiles and rapists cannot be presumed to comment objectively on the criminalization of paedophilia and rape. The statements in question can also be taken to mean that Somalis are only compared with paedophiles and rapists as concerns the reasonableness of allowing them to comment on laws that affect them directly, and not as concerns their criminal conduct.

Moreover, I have based my decision on the fact that the statements in the letter to the editor were made by a Member of Parliament in connection with a current political debate and express the general political views of a party represented in Parliament.

According to their context in the letter to the editor, the statements concern the consultation of the Danish-Somali Association among others, in connection with the bill prohibiting female mutilation.

Although the statements are general and very sharp and may offend or outrage some people, I have considered it essential [...] that the statements were made as part of a political debate, which, as a matter of principle, affords quite wide limits for the use of unilateral statements in support of a particular political view. According to the *travaux préparatoires* of section 266 (b) of the Criminal Code, it was particularly intended not to lay down narrow limits on the topics that can become the subject of political debate, or on the way the topics are dealt with in detail.

To give you a better understanding of section 266 b, I can inform you that the Director of Public Prosecutions has previously refused prosecution for violation of this provision in respect of statements of a similar kind. [...]

My decision is final and cannot be appealed, cf. section 101 (2), second sentence, of the Administration of Justice Act.”<sup>4</sup>

**The complaint:**

3.1 The petitioner claims that the Regional Public Prosecutor’s argument that Members of Parliament enjoy an “extended right to freedom of speech” in the political debate was not reflected in the preparatory works of section 266 (b) of the Criminal Code, which gives effect to the State party’s obligations under the Convention. In 1995, a new paragraph 2 was amended to section 266 (b), providing that “the fact that the offence is in the nature of propaganda activities shall be considered an aggravating circumstance.” During the reading of the bill in Parliament, it was stated that, in such aggravated circumstances, prosecutors should not exercise the same restraint in prosecuting incidents of racial discrimination as in the past.

3.2 The petitioner submits that, during the examination of the State party’s thirteenth periodic report to the Committee, the Danish delegation stated that “a systematic” or “a more extensive dissemination of statements may speak in favour of applying section 266 (b) (2).”

3.3 The petitioner quotes further statements by Pia Kjærsgaard, including one published in a weekly newsletter of 25 April 2000: “Thus a fundamentalist Muslim does in fact not know how to act cultivated and in accordance with Danish democratic traditions. He simply does not have a clue about what it means. Commonly acknowledged principles such as speaking the truth and behaving with dignity and culture – also towards those whom you do not sympathize with – are unfamiliar ground to people like M.Z.”

3.4 The petitioner claims a full investigation of the incident and compensation as remedies for the alleged violation of articles 2, paragraph 1 (d), 4 and 6 of the Convention.

3.5 The petitioner claims that he has exhausted all available effective remedies, given that, under section 749, paragraph 1, of the Danish Administration of Justice Act, the police has full discretion whether or not to open criminal proceedings, subject to appeal to the Regional Public Prosecutor, whose decision is final and cannot be appealed to another administrative authority (as explicitly stated in the Regional Public Prosecutor’s decision of 18 November 2004) or to a court. Direct legal action against Ms. Kjærsgaard would have been futile in the light of the rejection of his criminal complaint and of a judgment dated 5 February 1999 of the Eastern High Court of Denmark, which held that an incident of racial discrimination does not in itself amount to a violation of the honour and reputation of a person under section 26<sup>5</sup> of the Torts Act.

**State party’s observations on admissibility and merits and petitioner’s comments:**

4.1 On 6 September 2004, the State party made its submissions on the admissibility and, subsidiarily, on the merits of the communication.

4.2 On admissibility, the State party submits that the petitioner failed to establish a *prima facie* case for purposes of admissibility,<sup>6</sup> since the statements in Ms. Kjærsgaard's letter to the editor of the *Kristeligt Dagblad*, rather than comparing Somalis with paedophiles or rapists, reflected her criticism of the Minister's decision to consult an association in the legislative process which, in her opinion, could not be considered objective with regard to the proposed bill. It concludes that the statements were racially non-discriminatory, thus falling outside the scope of application of articles 2, paragraph 1 (d), 4 and 6 of the Convention.

4.3 The State party further submits that the communication is inadmissible under article 14, paragraph 7 (a), of the Convention, as the petitioner has not exhausted all available domestic remedies: Article 63 of the Danish Constitution provides that decisions of administrative authorities may be challenged before the courts. Therefore, the petitioner would have been required to challenge the validity of the Regional Public Prosecutor's decision not to initiate a criminal investigation at court. Given that the petitioner considers himself directly offended by Ms. Kjærsgaard's statements, he could also have initiated criminal proceedings under section 267, paragraph 1,<sup>7</sup> of the Criminal Code, which generally criminalizes defamatory statements. Pursuant to section 275, paragraph 1,<sup>8</sup> these offences are subject to private prosecution, a remedy that was considered to be effective by the Committee in *Sadic v. Denmark*.

4.4 Subsidiarily, on the merits, the State party disputes that there was a violation of articles 2, paragraph 1 (d), and 6 of the Convention, because the Danish authorities' evaluation of Ms. Kjærsgaard's statements fully satisfied the requirement that an investigation must be carried out with due diligence and expedition and must be sufficient to determine whether or not an act of racial discrimination has taken place.<sup>9</sup> It did not follow from the Convention that prosecution must be initiated in all cases reported to the police. Rather, it was fully in accordance with the Convention to dismiss a report, e. g. in the absence of a sufficient basis for assuming that prosecution would lead to conviction. In the present case, the decisive issue of whether Ms. Kjærsgaard's statements fell under section 266 (b) of the Criminal Code did not give rise to any questions of evidence. The Regional Public Prosecutor merely had to make a legal evaluation, which he did both thoroughly and adequately.

4.5 The State party reiterates that Ms. Kjærsgaard's statements were devoid of any racist content. Thus, it is immaterial whether they were made by a Member of Parliament in the context of a current political debate on female genital mutilation. Therefore, no issue of an "extended" right to freedom of speech of Members of Parliament, allegedly encompassing even racist remarks, arises under article 4 of the Convention.

4.6 The State party adds that section 266 (b) satisfies the requirement in the Convention to criminalize racial discrimination<sup>10</sup> and that Danish law provides sufficient remedies against acts of racial discrimination.

5.1 On 25 October 2004, the petitioner replied that the title of Ms. Kjærsgaard's letter to the editor of the *Kristeligt Dagblad* ("A crime against humanity") sweepingly and unjustly accuses persons of Somali origin living in Denmark of practicing female

genital mutilation. Given that the offensive character of Ms. Kjærsgaard's statements was explicitly acknowledged by the Danish authorities (see paras. 2.3 and 2.4), the State party should withdraw its argument that the communication was *prima facie* inadmissible.

5.2 The petitioner argues that the possibility, under article 63 of the Danish Constitution, to challenge the decision of the Regional Public Prosecutor judicially is not an effective remedy within the meaning of article 6 of the Convention, because the deadline for initiating criminal proceedings under section 266 (b) of the Criminal Code would have expired by the time the courts refer the matter back to the police. The Committee must have been unaware of this fact when deciding on the case of *Quereshi v. Denmark*.<sup>11</sup> The Danish authorities' assumption that Members of Parliament enjoy an "extended" right to freedom of speech in the context of a political debate was not confirmed by the Danish courts and therefore requires clarification by the Committee.

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

#### **Consideration of admissibility**

6.1 Before considering any claims contained in a petition, 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.

6.2 With regard to the State party's objection that the petitioner failed to establish a *prima facie* case for purposes of admissibility, the Committee observes that Ms. Kjærsgaard's statements were not of such an inoffensive character as to *ab initio* fall outside the scope of articles 2, paragraph 1 (d), 4 and 6 of the Convention. It follows that the petitioner has sufficiently substantiated his claims, for purposes of admissibility.

6.3 On the issue of exhaustion of domestic remedies, the Committee recalls that the petitioner brought a complaint under section 266 (b) of the Criminal Code, which was rejected by the Copenhagen police and, on appeal, by the Regional Public Prosecutor. It notes that the Regional Public Prosecutor stated that his decision of 18 November 2004 was final and not subject to appeal, either to the Director of Public Prosecutions or to the Minister of Justice.

6.4 As to the State party's argument that the petitioner could have challenged the decision of the Regional Public Prosecutor not to initiate a criminal investigation under section 266(b) of the Criminal Code before the courts, in accordance with article 63 of the Danish Constitution, the Committee notes the petitioner's uncontested claim that the statutory deadline for initiating criminal proceedings under section 266 (b) would have expired by the time the courts refer the matter back to the police. Against this background, the Committee considers that judicial review of the Regional Public Prosecutor's decision under article 63 of the Constitution would not have provided the petitioner with an effective remedy.

6.5 On the State party's argument that the petitioner should have initiated private prosecution under the general provision on defamatory statements (section 267 of the

Criminal Code), the Committee recalls that, in its Opinion in *Sadic v. Denmark*,<sup>12</sup> it had indeed required the petitioner in *that* case to pursue such a course. In that case, however, the facts fell outside the scope of section 266 (b) of the Criminal Code, on the basis that the disputed comments were essentially private. In that light, section 267, which could capture the conduct in question complemented the scope of protection of section 266 (b) and was a reasonable course more appropriate to the facts of that case. In the present case, however, the statements were made squarely in the public arena, which is the central focus of both the Convention and section 266 (b). It would thus be unreasonable to expect the petitioner to initiate separate proceedings under the general provisions of section 267, after having unsuccessfully invoked section 266 (b) in respect of circumstances directly implicating the language and object of that provision.<sup>13</sup>

6.6 As to the possibility of instituting civil proceedings under section 26 of the Torts Act, the Committee notes the petitioner's argument that the Eastern High Court of Denmark, in a previous judgment, held that an incident of racial discrimination does not in itself constitute a violation of the honour and reputation of a person. Although mere doubts about the effectiveness of available civil remedies do not absolve a petitioner from pursuing them,<sup>14</sup> the Committee observes that by instituting a civil action the petitioner would not have achieved the objective pursued with his complaint under section 266 (b) of the Criminal Code to the police and subsequently to the Regional Public Prosecutor, i.e. Ms. Kjærsgaard's conviction by a criminal tribunal.<sup>15</sup> It follows that the institution of civil proceedings under section 26 of the Torts Act cannot be considered an effective remedy that needs to be exhausted for purposes of article 14, paragraph 7 (a), of the Convention, insofar as the petitioner seeks a full criminal investigation of Ms. Kjærsgaard's statements.

6.7 In the absence of any further objections to the admissibility of the petitioner's claims, the Committee declares the petition admissible, insofar as it relates to the State party's alleged failure fully to investigate the incident.

### **Consideration of the merits**

7.1 Acting under article 14, paragraph 7 (a), of the International Convention on the Elimination of All Forms of Racial Discrimination, the Committee has considered the information submitted by the petitioner and the State party.

7.2 The issue before the Committee is whether the State party fulfilled its positive obligation to take effective action against reported incidents of racial discrimination, having regard to the extent to which it investigated the petitioner's complaint under section 266 (b) of the Criminal Code. This provision criminalizes public statements by which a group of people are threatened, insulted or degraded on account of their race, colour, national or ethnic origin, religion or sexual inclination.

7.3 The Committee observes that it does not suffice, for purposes of article 4 of the Convention, merely to declare acts of racial discrimination punishable on paper. Rather, criminal laws and other legal provisions prohibiting racial discrimination must also be effectively implemented by the competent national tribunals and other State institutions. This obligation is implicit in article 4 of the Convention, under which State



parties “undertake to adopt immediate and positive measures” to eradicate all incitement to, or acts of, racial discrimination. It is also reflected in other provisions of the Convention, such as article 2, paragraph 1(d), which requires States to “prohibit and bring to an end, by all appropriate means,” racial discrimination, and article 6, guaranteeing to everyone “effective protection and remedies” against acts of racial discrimination.

7.4 The Committee notes that the Regional Public Prosecutor dismissed the petitioner’s complaint on the ground that Ms. Kjærsgaard’s letter to the editor did not refer to all Somalis as criminals or otherwise as equal to paedophiles or rapists, but only argued against the fact that a Somali association is to be consulted about a bill criminalizing offences committed particularly in the country of origin of Somalis. While this is a possible interpretation of Ms. Kjærsgaard’s statements, they could however also be understood as degrading or insulting to an entire group of people, i.e. persons of Somali descent, on account of their national or ethnic origin and not because of their views, opinions or actions regarding the offending practice of female genital mutilation. While strongly condemning the practice of female genital mutilation, the Committee recalls that Ms. Kjærsgaard’s choice of “paedophiles” and “rapists” as examples for her comparison were perceived as offensive not only by the petitioner, but also were acknowledged to be offensive in character in the letter of 26 September 2003 from the Copenhagen police. The Committee notes that although these offensive references to “paedophiles” and “rapists” deepen the hurt experienced by the petitioner, it remains the fact that Ms. Kjærsgaard’s remarks can be understood to generalize negatively about an entire group of people based solely on their ethnic or national origin and without regard to their particular views, opinions or actions regarding the subject of female genital mutilation. It further recalls that the Regional Public Prosecutor and the police from the outset excluded the applicability of section 266 (b) to Ms. Kjærsgaard’s case, without basing this assumption on any measures of investigation.

7.5 Similarly, the Committee considers that the fact that Ms. Kjærsgaard’s statements were made in the context of a political debate does not absolve the State party from its obligation to investigate whether or not her statements amounted to racial discrimination. It reiterates that the exercise of the right to freedom of expression carries special duties and responsibilities, in particular the obligation not to disseminate racist ideas,<sup>16</sup> and recalls that General Recommendation 30 recommends that States parties take “resolute action to counter any tendency to target, stigmatize, stereotype or profile, on the basis of race, colour, descent, and national or ethnic origin, members of ‘non-citizen’ population groups, especially by politicians [...]”<sup>17</sup>

7.6 In the light of the State party’s failure to carry out an effective investigation to determine whether or not an act of racial discrimination had taken place, the Committee concludes that articles 2, paragraph 1(d), and 4 of the Convention have been violated. The lack of an effective investigation into the petitioner’s complaint under section 266 (b) of the Criminal Code also violated his right, under article 6 of the Convention, to effective protection and remedies against the reported act of racial discrimination.

8. The Committee on the Elimination of Racial Discrimination, acting under article 14, paragraph 7, of the Convention on the Elimination of All Forms of Racial Discrimination, is of the view that the facts before it disclose violations of article 2, paragraph 1 (d), article 4 and article 6 of the Convention.

9. The Committee on the Elimination of Racial Discrimination recommends that the State party should grant the petitioner adequate compensation for the moral injury caused by the above-mentioned violations of the Convention. Taking into account the Act of 16 March 2004, which, inter alia, introduced a new provision in section 81 of the Criminal Code whereby racial motivation constitutes an aggravating circumstance, the Committee also recommends that the State party should ensure that the existing legislation is effectively applied so that similar violations do not occur in the future. The State party is also requested to give wide publicity to the Committee's opinion, including among prosecutors and judicial bodies.

10. The Committee wishes to receive from Denmark, within six months, information about the measures taken to give effect to the Committee's opinion.

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

#### Notes

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<sup>1</sup> Section 266 (b) of the Danish Criminal Code reads: (1) Any person who, publicly or with the intention of wider dissemination, makes a statement or imparts other information by which a group of people are threatened, insulted or degraded on account of their race, colour, national or ethnic origin, religion or sexual inclination shall be liable to a fine or to imprisonment for any term not exceeding two years. (2) When the sentence is meted out, the fact that the offence is in the nature of propaganda activities shall be considered an aggravating circumstance."

<sup>2</sup> Section 749 of the Administration of Justice Act reads, in pertinent parts: "(1) The police shall dismiss a report lodged if it deems that there is no basis for initiating an investigation. (2) [...] (3) If the report is dismissed or the investigation is discontinued, those who may be presumed to have a reasonable interest therein must be notified. The decision can be appealed to the superior public prosecutor [...]."

<sup>3</sup> Cf. section 742, paragraph 2, of the Administration of Justice Act.

<sup>4</sup> Section 101, paragraph 2, of the Administration of Justice Act reads, in pertinent parts: "The decisions of the Regional Public Prosecutors on appeals cannot be appealed to the Director of Public Prosecutions or to the Minister of Justice."

<sup>5</sup> Section 26, paragraph 1, of the Torts Act reads: “(1) A person who is liable for unlawful violation of another person’s freedom, peace, character or person shall pay compensation to the injured party for non-pecuniary damage.”

<sup>6</sup> The State party refers to Communication No. 5/1994, *C.P. v. Denmark*, at paragraphs 6.2 and 6.3, as an example of a case which was declared inadmissible by the Committee on that ground.

<sup>7</sup> Section 267, paragraph 1, of the Criminal Code reads: “Any person who violates the personal honour of another [person] by offensive words or conduct or by making or spreading allegations of an act likely to disparage him in the esteem of his fellow citizens, shall be liable to a fine or to imprisonment for any term not exceeding four months.”

<sup>8</sup> Section 275, paragraph 1, of the Criminal Code reads: “The offences contained in this Part shall be subject to prosecution, except for the offences referred to in sections [...] 266 b.”

<sup>9</sup> The State party refers, inter alia, to Communication No. 10/1997, *Habassi v. Denmark*, Opinion adopted on 17 March 1999, and to Communication No. 16/1999, *Ahmad v. Denmark*, Opinion adopted on 13 March 2000.

<sup>10</sup> The State party refers to its 14th (CERD/C/362/Add.1, at paras. 135-143) and 15th (CERD/C/408/Add.1, at paras. 30-45) periodic reports to the Committee, describing the background and practical application of section 266 (b).

<sup>11</sup> Communication No. 27/2002 (see above, at note **Error! Bookmark not defined.**).

<sup>12</sup> See Communication No. 25/2002, *Ahmad Najaati Sadic v. Denmark*, Decision on admissibility adopted on 19 March 2003, at paragraphs 6.2-6.4.

<sup>13</sup> See Communication No. 33/2003, *Kamal Quereshi v. Denmark (II)*, Opinion adopted on 9 March 2005, at paragraph 6.3.

<sup>14</sup> See Communication No. 19/2000, *Sarwar Seliman Mostafa v. Denmark*, Decision on admissibility adopted on 10 August 2001, at paragraph 7.4.

<sup>15</sup> See Communication No. 32/2003, *Emir Sefic v. Denmark*, Opinion adopted on 7 March 2005, at paragraph 6.2.

<sup>16</sup> CERD, General Recommendation XV: Organized violence based on ethnic origin (art. 4), at paragraph 4.

<sup>17</sup> CERD, General Recommendation 30: Discrimination against non-citizens, at paragraph 12.