

COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION

Sadic v. Denmark

Communication No 25/2002

21 March 2003

CERD/C/62/D/25/2002

ADMISSIBILITY

Submitted by: Ahmad Najaati Sadic (represented by counsel)

Alleged victim: The petitioner

State party: Denmark

Date of communication: 25 May 2002

Decision on admissibility

1.1 The petitioner is Mr. Ahmad Najaati Sadic, a Danish citizen of Iraqi origin, born in 1955, who claims to be a victim of violations by Denmark of article 2, paragraph 1 (d), and article 6 of the Convention. He is represented by counsel, 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 16 August 2002.

Facts of the case

2.1 On 25 July 2000, the petitioner was working on a construction site in a public housing area in Randers, Denmark, for the company "Assentoft Painters and Decorators" owned by Jesper Christensen. When the petitioner approached Mr. Christensen to claim overdue payments, their conversation developed into an argument during which Mr. Christensen reportedly made the following comments to the petitioner: "Push off home, you Arab pig", "Immigrant pig", "Both you and all Arabs smell", "Disappear from here, God damned idiots and psychopaths." The argument between the complainant and Mr. Christensen was overheard by at least two other workers, Mr. Carsten Thomassen and Mr. Frank Lasse Hendriksen.

2.2 On 1 March 2001, the DRC, on behalf of the petitioner, informed the police in Åarhus of the incident, arguing that section 266 b 1/ of the Danish Criminal Code had been violated by the petitioner's by then former employer.

2.3 On 9 July 2001, Frank Lasse Henriksen was interviewed by telephone by the police of Randers. The interview report states:

"The witness stated that he was working when his boss, Mr. Christensen, came and presented a new apprentice; also present was the victim, Ahmad. A discussion/quarrel arose between Mr. Christensen and the victim, and the discussion concerned holiday pay, wages and missing wage slips [...]. [T]he witness went to Mr. Christensen, who at this point was angry about the quarrel with the victim, and felt - at least he said so - that, if the witness felt like the victim, he could consider himself sacked. The witness was so infuriated with the treatment that he took his boss at his word. Mr. Christensen now shouted that it was all just about an Arab bastard - which, in the witness' opinion, was far too rude. According to the witness, Mr. Christensen went far beyond the line. The witness was read the racist statements mentioned in the complaint and stated that they corresponded to what Mr. Christensen had called the victim. After this, the witness immediately left the workplace and has not worked for Mr. Christensen since [...]"

2.4 On 12 July 2001, Carsten Thomassen was interviewed by telephone by the police of Åarhus. The interview report states:

"On the relevant day, at about 10.30 a.m., Mr. Sadic and his boss were standing on the external gallery on the first floor - below the witness. The witness could hear that they were quarrelling about both work and money. However, the witness had only heard fragments of the quarrel, in which both parties had obviously become 'over-excited'. At some stage, the witness heard Mr. Christensen say something like: 'You can just go home' - 'black bastard'. The witness could not hear what Mr. Sadic said as he did not speak Danish very well and was difficult to understand - particularly when he was upset, as in that moment. However, to a large extent, the witness took the quarrel to be one that may arise once in a while at the workplace [...]"

2.5 Mr. Christensen was interviewed by the police of Randers on 23 July 2001, without any charges being brought against him and without prejudice to his right to refuse testimony. The interview report states:

"Mr. Christensen stated that, on the relevant day, he had a quarrel with the victim about payment for overtime [...]. Mr. Christensen and the victim [...] used abusive language [...]. Mr. Christensen never used [...] words like 'Arab bastard', 'Paki bastard', 'Arabs smell', etc., towards the victim. Mr. Christensen was confronted with the witness statement of Mr. Henriksen. To this, Mr. Christensen stated that he had previously sacked Mr. Henriksen due to disagreements. [...] After Mr. Henriksen had been sacked, he left the workplace and, consequently, cannot have overheard the conversation with the victim. [...] On the basis of the information presented, Mr. Christensen cannot admit [a] violation of section 266 b of

the Criminal Code. [...]."

2.6 By letter of 24 August 2001, the Chief Constable of the Århus police informed the DRC that the investigation of the case had been discontinued, stating that it could not reasonably be presumed that a criminal offence subject to ex officio prosecution had been committed. The discontinuation of the investigation was mainly based on the fact that the argument between the petitioner and Mr. Christensen had taken place at work, "where only two other persons were present". Apart from the question whether or not Mr. Christensen had made the statements in question, the Chief Constable found that, in any event, these statements had not been made publicly or with the intention of wider dissemination. As to a claim for damages, the petitioner was advised to pursue civil proceedings.

2.7 On 28 September 2001, the petitioner appealed the decision to discontinue investigations before the Regional Public Prosecutor in Viborg, arguing that the petitioner's former employer had made his statements on a construction site in a public housing area and, therefore, had at least accepted the possibility that other people would hear his comments. Moreover, the petitioner referred to several judgements of Danish courts which construed the requirement, in section 266 b of the Criminal Code, of statements being made publicly quite broadly. He challenged the Chief Constable's finding that only two other persons were present at the incident. The petitioner quoted from a written statement in which Mr. Thomassen asserted that "[o]n Tuesday, 25 July 2000, at about 10.30 a.m., I, Carsten Thomassen, was standing together with three other colleagues [...] on the external gallery for a short break, when, to our great surprise, we overheard a conversation/quarrel between the master [...] and Ahmad".

2.8 By letter of 27 November 2001, the Regional Public Prosecutor of Viborg dismissed the appeal, arguing that, although it could not be established with certainty that only two other persons were present at the incident, the statements by Mr. Christensen were made in connection with a dispute between the petitioner and his employer at a stage where both parties had become over-excited and that the witnesses were some distance away from the exact place of the quarrel and only heard fragments of the dispute. Given that "this was only a loud-voiced quarrel which others happened to overhear - at a distance [...]", the Regional Public Prosecutor concluded that the employer's statements could not be considered public. Since the argument was not likely to disturb the public peace or cause a nuisance to other people present, the police regulations had not been violated either. The petitioner was thus advised to pursue any claim for damages through civil proceedings. The decision of the Regional Public Prosecutor was final and could not be appealed.

The complaint

3.1 The petitioner claims that he has exhausted domestic remedies, as there is no possibility to appeal the decision of the Regional Public Prosecutor and he cannot bring the case before the Danish courts. He submits that, under section 275 of the Danish Criminal Code, violations of section 266 b are subject only to prosecution ex officio and that direct legal action against his former employer would have been without prospect, given that the police and the Regional Public Prosecutor had rejected his complaint. In support of the latter claim, the petitioner submits that, pursuant to a decision of the Eastern High Court dated 5 February 1999, 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 Liability for Damages Act.

3.2 The petitioner claims that the State party has violated its obligations under articles 2, paragraph 1 (d), and 6 of the Convention by not investigating effectively to what extent the construction site was accessible to the public, how many people were present at the incident and to what extent it would have been possible for others to overhear the employer's statements. The petitioner argues that, following the decision of the Committee in *L.K. v. The Netherlands* (case No. 4/1991, Opinion adopted on 16 March 1993), States parties have a positive obligation under the above provisions to take effective action against reported incidents of racial discrimination.

3.3 By reference to another case decided by the Committee (*Kashif Ahmad v. Denmark*) (case No. 16/1999, Opinion adopted on 13 March 2000) [in which racist comments were made in a hallway outside a classroom], the petitioner submits that the State party did not claim in that case that the statements had not been made publicly and that a violation was found by the Committee. He furthermore refers to two cases in which Danish courts found violations of section 266 b of the Criminal Code in what he considers similar circumstances.

3.4 The petitioner asks the Committee to request the State party to carry out a full investigation into the incident reported by him and to award him financial compensation, in accordance with article 6 of the Convention.

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

4.1 By note verbale of 20 November 2002, 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 exhaust domestic remedies. Contrary to violations of section 266 b, which are subject to prosecution ex officio, violations of section 267 2/ of the Criminal Code - the general provision on defamatory statements which supplements section 266 b - are prosecuted only at the request of the individual concerned, pursuant to section 275 3/ of the Criminal Code. The petitioner could have requested the institution of criminal proceedings under section 267 against his employer and, by doing so, could have obtained a decision on whether his former employer had made the reported statements and, subject to fulfilling the conditions of section 267, a conviction of Mr. Christensen.

4.3 The State party contends that the institution of criminal proceedings under section 267 of the Criminal Code is an effective remedy. Moreover, the decision of the Danish authorities to discontinue investigations under section 266 b was without prejudice to the effectiveness of that remedy, since neither the Chief Constable nor the Regional Public Prosecutor had taken any position on the question whether Mr. Christensen had made the statements complained of. The State party argues that, for the same reason, the discontinuation of investigations under section 266 b did not preclude a legal action for non-pecuniary damages against his former employer, under section 26 of the Liability for Damages Act. 4/

4.4 The State party argues that the communication is incompatible with the Convention ratione materiae, since the central claim is that the Danish authorities did not interpret and apply section 266 b of the Criminal Code correctly. The concrete elements which, according to the petitioner, should have been investigated all relate to the conditions for punishment under section 266 b, i.e. the place where the statements were made, the number of persons who heard or might have heard Mr. Christensen's statements, etc. in the State party's opinion, the legal assessment by the Chief Constable and the Regional Public Prosecutor of Viborg that the requirements of section 266 b were not met in the present case is primarily a matter which relates to interpretation and application of domestic legislation and which the Committee has no competence to review.

4.5 On the basis of the above arguments, the State party concludes that the communication should be declared inadmissible under article 14, paragraphs 1 and 7 (a), of the Convention.

4.6 Subsidiarily and on the merits, the State party submits that the Danish authorities took the petitioner's complaint seriously, as they initiated investigations and interviewed witnesses, as well as the petitioner's former employer, as a result of the complaint. It concludes that the processing and assessment of the complaint by the Chief Constable and the Regional Public Prosecutor therefore fully complies with the State party's obligations under article 2, paragraph 1, and article 6 of the Convention.

4.7 With regard to the requirement that a statement should be made "publicly or with the intention of wider dissemination", the State party admits that grey zones in the delimitation between public and private are unavoidable and argues that it should therefore be for the national authorities to assess whether these requirements have been met in a specific case.

4.8 The State party submits that the two judgements adduced in support of his arguments by the petitioner could not be relied upon because, in one case, the judgement contained no specific information on the number of persons present in the news store and, in the other case, the court observed that "many persons must have overheard [...] the incident".

4.9 The State party argues, moreover, that section 266 b of the Criminal Code is not the only provision designed to ensure compliance with the State party's obligations under the Convention, since it is supplemented by other provisions, including section 267 of the same Code.

4.10 The State party concludes that, even if the Committee were to declare the communication admissible, it does in any event not disclose a violation of the Convention.

Comments by the petitioner

5.1 The petitioner submits that section 267 of the Criminal Code, as well as section 26 of the Liability for Damages Act, do not address the issue of racial discrimination and therefore do not provide an effective remedy against acts of racial discrimination, as required by article 2, paragraph 1 (d), and article 6 of the Convention. He claims that the only relevant remedy is section 266 b of the Criminal Code, indicating that, in previous cases, it was not held by the Committee that, in order to exhaust domestic remedies, a petitioner should have initiated criminal proceedings under

section 267 of the Criminal Code or civil proceedings under section 26 of the Liability for Damages Act.

5.2 As to the requirements of section 266 b of the Criminal Code, the petitioner reiterates that Danish courts found violations of that provision in the past even where only one other person apart from the victim(s) had been present during an incident of racial discrimination. He also refers to the Opinion in *Kashif Ahmad v. Denmark* (case No. 16/1999, para. 6.1), where the Committee found a violation of article 6 of the Convention on the basis "that the author was insulted in public", since the relevant statements were made "in a school corridor and in the presence of several witnesses".

5.3 Based on the written statement of Mr. Thomassen, the petitioner claims that at least five persons overheard his argument with his employer and that the police failed to contact the other three colleagues mentioned in that statement.

5.4 The petitioner rejects the State party's argument that the core of his communication is related to the interpretation of domestic legislation and the evaluation of facts and evidence. He argues that the lack of an effective investigation is closely connected to the fact that the Danish authorities concluded that his complaint fell outside the scope of section 266 b of the Criminal Code.

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 petitioner brought a complaint under section 266 b of the Criminal Code before the police and the Regional Public Prosecutor; and that these authorities, after having interviewed two witnesses and the petitioner's former employer, decided to discontinue criminal proceedings under section 266 b, as they considered that the requirements of this provision were not satisfied. It has taken note of the State party's argument that, despite the discontinuation of proceedings under section 266 b of the Criminal Code, the petitioner could have requested the institution of criminal proceedings against his former employer under the general provision on defamatory statements (sect. 267 of the Criminal Code). The petitioner does not deny the availability of this remedy, but questions its effectiveness in relation to incidents of racial discrimination.

6.3 The Committee observes that the notion of "effective remedy", within the meaning of article 6 of the Convention, is not limited to criminal proceedings based on provisions which specifically, expressly and exclusively penalize acts of racial discrimination. In particular, the Committee does not consider it contrary to articles 2, paragraph 1 (d), and 6 of the Convention if, as in the State party's case, the provisions of criminal law specifically adopted to outlaw acts of racial discrimination are supplemented by a general provision criminalizing defamatory statements which is applicable to racist statements even if they are not covered by specific legislation.

6.4 As to the petitioner's argument that criminal proceedings against his former employer under

section 267 would have been without prospect because the authorities had already rejected his complaint under section 266 b of the Criminal Code, the Committee notes, on the basis of the material before it, that the requirements for prosecution under section 266 b are not identical to those for prosecution under section 267 of the Criminal Code. It therefore does not appear that the Danish authorities' decision to discontinue proceedings under section 266 b on the ground of lack of evidence as to whether the employer's statements were made publicly or with the intention of wider dissemination have prejudiced a request by the petitioner to institute criminal proceedings under section 267 (together with section 275) of the Criminal Code. The Committee therefore considers that the institution of such proceedings can be regarded as an effective remedy which the petitioner failed to exhaust.

6.5 As to the question of damages, the Committee recalls the State party's argument that the petitioner did not institute civil proceedings against his former employer under section 26 of the Liability for Damages Act and therefore did not exhaust domestic remedies. With regard to the petitioner's arguments that a previous decision of the Eastern High Court held that an incident of racial discrimination does not in itself constitute a violation of the honour and reputation of a person, the Committee considers that mere doubts about the effectiveness of available civil remedies do not absolve a petitioner from pursuing them (see communication No. 19/2000, *Sarwar Seliman Mostafa v. Denmark*, decision adopted on 10 August 2001, para. 7.4).

6.6 Accordingly, the Committee considers that, by not exhausting the available domestic remedies, the petitioner has failed to meet the requirements of article 14, paragraph 7 (a), of the Convention.

6.7 The Committee on the Elimination of Racial Discrimination therefore decides:

- (a) That the communication is inadmissible;
- (b) That this decision shall be communicated to the State party and to the petitioner.

6.8 However, the Committee invites the State party to reconsider its legislation, since the restrictive condition of "broad publicity" or "wider dissemination" required by article 266 b of the Danish Criminal Code for the criminalization of racial insults does not appear to be fully in conformity with the requirements of articles 4 and 6 of the Convention.

[Done in Arabic, Chinese, English, French, Russian and Spanish, the English text being the original.]

Notes

1/ Section 266 b of the Criminal Code reads, in pertinent parts: "(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 four months.

(2) [.....]

(3) [.....]."

2/ Section 267 of the Criminal Code reads, in pertinent parts: "(1) Any person who violates the honour of another [person] by offensive words or conduct, or by making or spreading allegations of an act likely to disparage [that person] in the esteem of his or her fellow citizens, shall be liable to a fine or to imprisonment [...] not exceeding four months.

(2) [.....]

(3) [.....]."

3/ Section 275 of the Criminal Code reads, in pertinent parts: "(1) The offences contained in this Part shall be prosecuted at the request of the individual concerned, except for the offences referred to in sections [...] 266 b.

(2) [.....]."

4/ Section 26, paragraph 1, of the Liability for Damages 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."