



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

Distr.
RESTRICTED*

CERD/C/75/D/41/2008
21 August 2009

ENGLISH
Original: FRENCH

COMMITTEE ON THE ELIMINATION
OF RACIAL DISCRIMINATION
Seventy-fifth session
3-21 August 2009

OPINION

Communication No. 41/2008

Submitted by: Ahmed Farah Jama (represented by counsel)
Alleged victim: The petitioner
State party: Denmark
Date of communication: 14 January 2008 (initial submission)
Date of decision: 21 August 2009

[ANNEX]

* 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**

Seventy-fifth session

concerning

Communication No. 41/2008

Submitted by: Mr. Ahmed Farah Jama (represented by counsel)

Alleged victim: The petitioner

State party: Denmark

Date of communication: 14 January 2008 (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 21 August 2009,

Having concluded its consideration of communication No. 41/2008, submitted to the Committee on the Elimination of Racial Discrimination by Mr. Ahmed Farah Jama under article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination,

Having taken into account all information made available to it by the petitioner of the communication, his counsel and the State party,

Adopts the following:

OPINION¹

1.1 The petitioner is Mr. Ahmed Farah Jama, a Somali citizen living in Denmark, born in 1963. He claims to be a victim of violations by Denmark of article 2, paragraph 1 (d), article 4 and article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination. He is represented by counsel, Mr. Niels Erik Hansen.

¹ Pursuant to rule 90 of the Committee's rules of procedure, Committee member Mr. Peter did not participate in the adoption of the present opinion.

1.2 In conformity with article 14, paragraph 6 (a), of the Convention, the Committee transmitted the communication to the State party on 3 March 2008.

The facts as submitted by the petitioner

2.1 On 18 February 2007, the Danish newspaper *Sobdagsavisen* published an interview with Ms. Pia Merete Kjaersgaard, a member of parliament and the leader of the Danish People's Party. Among other issues, she referred to an incident which had taken place in 1998, when she was attacked in an area of Copenhagen called Norrebro by a group of individuals. In particular, she said: "Suddenly they came out in large numbers from the Somali clubs. There she is, they cried, and forced the door to the taxi open and then beat me ... I could have been killed; if they had entered I would have been beaten up. It was rage for blood." The petitioner claims that no Somalis were involved in the incident in question, and that this was a new false accusation by Ms. Kjaersgaard against the Somalis living in Denmark.

2.2 The petitioner filed a complaint requesting the police to investigate whether Ms. Kjaersgaard's statement constituted a crime under section 266b of the Criminal Code.² He claims that the persons who actually attacked Ms. Kjaersgaard were never arrested by the police and their identity and nationality were never established. Furthermore, at the time Ms. Kjaersgaard had not indicated that the authors of the attack were Somalis and none of the newspaper articles published or witnesses stated that Somalis were involved. He recalls that in the past Ms. Kjaersgaard had made public statements accusing Somalis of paedophilia and gang rape of Danish women.³

2.3 In a decision dated 25 June 2007, the Commissioner of Police, with the consent of the Regional Public Prosecutor, rejected the complaint, as it seemed unlikely that a crime had been committed. The decision indicated that the statement was a mere description of the acts that took place and that the context in which it was made had been taken into consideration. It also indicated that, because the Regional Public Prosecutor had been involved in the proceedings, any appeal against it should be forwarded to the Prosecutor-General.

² This provision reads as follows:

- (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 a 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.

³ See communication No. 34/2004, *Gelle v. Denmark*, Opinion adopted on 6 March 2006.

2.4 The petitioner appealed to the Director of Public Prosecutions on 10 July 2007. On 18 September 2007, the Director dismissed the case, as he considered that the petitioner had no right to appeal. He held that the petitioner had neither a personal nor a legal interest in the case and therefore could not be considered a party to it. Only the parties were entitled to appeal the decision. Those reporting the crime, those affected by the crime, witnesses and so on were considered parties only if they had a direct, personal and legal interest in the matter. Lobby organizations, companies or other entities or persons handling the interests of others or the interests of the general public on an idealistic, professional, organizational or similar basis could not normally be considered parties to a criminal case, unless they had received a power of attorney from a party. Accordingly, the Documentation and Advisory Centre on Racial Discrimination (DACoRD), which was acting on behalf of the petitioner, could not be considered entitled to appeal.

The complaint

3.1 The petitioner claims that the absence of a proper investigation by the police and the Regional Public Prosecutor constitutes a violation of article 2, paragraph 1 (d), and article 6 of the Convention. The argument in the decision of 25 June 2007 that Ms. Kjaersgaard's statement was a mere description of the acts that took place in 1998 implied that the police had not even consulted their own files on the case. If they had, they would have learned that the suspect in the 1998 incident was a white male.

3.2 The petitioner further claims that the State party did not fulfil its obligation, under article 4 of the Convention, to take effective action regarding an act of hate speech against Somalis living in Denmark. He considers that the act in question constitutes racist propaganda and therefore falls within the scope of section 266b (2) of the Criminal Code. Furthermore, he refers to a statement made by a police officer to the media according to which it was uncontested that people had swarmed out of the Somali clubs when Ms. Kjaersgaard was attacked in 1998. By confirming the false accusation made by Ms. Kjaersgaard, this statement may also constitute a violation of article 4, as it would make the accusations more credible and stir up hatred against Somalis living in Denmark.

3.3 Finally, the petitioner claims that the denial of his right to appeal violates his right to an effective remedy. The ongoing public statements against Somalis have a negative effect on his daily life in Denmark. A study published by the Danish Board for Ethnic Equality in 1999 indicated that Somalis living in Denmark constituted the ethnic group most likely to suffer from racist attacks in the street (verbal abuse, violent attacks, spitting in the face, etc.). As a black person of Somali origin, he has to be on the alert when he enters into public spaces, fearing racist attacks and abuse. Thus, he considers himself a victim in the present case and has a personal interest in it.

State party's observations on admissibility and the merits

4.1 On 3 June 2008, the State party submitted observations on the admissibility and merits of the communication. It argues that the petitioner has failed to establish a prima facie case for the purpose of admissibility and that he did not exhaust domestic remedies.

4.2 The State party states that on 16 March 2007 the Documentation and Advisory Centre on Racial Discrimination, on behalf of the petitioner, reported Ms. Kjaersgaard to the police for violation of section 266b of the Criminal Code. On 25 June 2007, the Commissioner of the West Copenhagen Police decided, pursuant to section 749 (1) of the Danish Administration of Justice Act, not to initiate an investigation. The Commissioner indicated that Ms. Kjaersgaard's statement did not "constitute an aggravated insult and degradation of a group of persons that can be considered to fall within the scope of section 266b of the Criminal Code. I have emphasized in particular the nature of the statement, which is a description of a specific sequence of events, as well as the context in which it was made (...). Hence, as the statement cannot be considered to fall within the scope of section 266b of the Criminal Code, there is no basis for initiating any investigation". The decision was issued after endorsement by the Regional Public Prosecutor for North Zealand and West Copenhagen.

4.3 As a result of the appeal filed by DACoRD on behalf of the petitioner, the Director of Public Prosecutions obtained an opinion from the Regional Public Prosecutor dated 20 July 2007. The Prosecutor stated, inter alia, that in his view the statements did not fall within the scope of section 266b of the Criminal Code, whether or not it could actually be proved who had assaulted Ms. Kjaersgaard in 1998. Accordingly, it would have made no difference to his decision on the matter if he had had police reports on the 1998 incident or on the questioning of Ms. Kjaersgaard at his disposal.

4.4 The communication should be declared inadmissible in its entirety because the petitioner has failed to establish a prima facie case. One of the themes of the interview with Ms. Kjaersgaard to the *Søndagsavisen* dealt with what it is like to have to live under police protection and, in that connection, the 1998 incident was mentioned. The statements are in the nature of a description of a specific sequence of events, as part of a description of how Ms. Kjaersgaard perceived the incident. She only stated in the interview that the attackers came out from "the Somali clubs", but did not express any attitude or make any degrading statement about persons of Somali origin. The statements in question therefore cannot be considered racially discriminating, and they thus fall outside the scope of article 2, paragraph 1 (d), article 4 and article 6 of the Convention.

4.5 In the communication to the Committee, the petitioner referred to a statement of Ms. Kjaersgaard ("I could have been killed; if they had got in, I would have been beaten to a pulp at least. It was a killing rage.") This statement was not included in the complaint lodged by the petitioner with the police, nor was it subsequently reported to the Danish authorities. Since the applicant has thus not exhausted domestic remedies in this respect, this part of the communication should be declared inadmissible.

4.6 It appears that the petitioner considers himself to be a victim of a racist attack and that he has an interest in the case because the ongoing statements affect his life in a negative way. According to section 267 (1) of the Criminal Code, any person who violates the personal honour of another by offensive words or conduct or by making or spreading allegations of an act likely to disparage him in the eyes of his fellow citizens, is liable to a fine or to imprisonment for a term not exceeding four months. Further, according to section 268, if an allegation has been made or disseminated in bad faith, or if the author had no reasonable ground to regard it as true, he is guilty of defamation. Pursuant to section 275 (1) of the Criminal Code, these offences are subject to private prosecution. The State party recalls the Committee's Opinion in

communication No. 25/2002, *Sadic v. Denmark*, in which the Committee recognized that the institution of proceedings under section 267 (1) of the Criminal Code could be regarded as an effective remedy which the petitioner had failed to exhaust. It also recalls communication No. 34/2004, *Gelle v. Denmark*, where the Committee held that the case in question concerned statements that were made squarely in the public arena and that it would thus be unreasonable to expect the petitioner to institute separate proceedings under the general provision of section 267, after having unsuccessfully invoked section 266b in respect of circumstances directly implicating the language and object of that provision. Finally, the State party recalls the decision of the Human Rights Committee declaring inadmissible communication No. 1487/2006, *Ahmad v. Denmark*, concerning the publication of an article called “The Face of Muhammad” in a Danish newspaper on 30 September 2005. The Director of Public Prosecutions decided against bringing criminal prosecutions in respect of the publications at issue pursuant to sections 140 and 266b of the Criminal Code. Subsequently, Mr. Ahmad, on behalf of the Islamic Community of Denmark, instituted private criminal proceedings against the editors of the newspaper under sections 267 and 268 of the Code. Eventually, the editors were acquitted. The judgement was subsequently appealed to the High Court, where the case was still pending when the Human Rights Committee declared it inadmissible for failure to exhaust domestic remedies. According to the State party, this decision should be taken into account when assessing whether the present communication should be declared inadmissible. It does not follow from article 2, paragraph 1 (d), and article 6 of the Convention that the petitioner is entitled to a specific remedy. The crucial factor is that a remedy is available.

4.7 Regarding the merits, the State party finds that no violation of article 2, paragraph 1 (d), article 4 or article 6 took place. The assessment carried out by the Commissioner of the West Copenhagen Police fully satisfies the requirements that can be inferred from the Convention as interpreted in the Committee’s practice. The question in the present case was solely whether Ms. Kjaersgaard’s statements could be considered to fall within the scope of section 266b of the Criminal Code. There were thus no problems with the evidence and the public prosecutor simply had to perform a legal assessment of the statements in question. This legal assessment was thorough and adequate, although it did not have the outcome sought by the petitioner. In his refusal to initiate an investigation, the public prosecutor placed particular emphasis on the nature of Ms. Kjaersgaard’s statements as a description of a specific sequence of events and on the fact that the statements were made as part of Ms. Kjaersgaard’s description of the 1998 events.

4.8 According to the guidelines on the investigation of violations of section 266b of the Criminal Code, issued by the Director of Public Prosecutions, “in cases where a report of a violation of section 266b of the Criminal Code is lodged with the police, the person who issued the written or oral statement should normally be interviewed, inter alia, to clarify the purpose of the statement, unless it is obvious that section 266b of the Criminal Code has not been violated”. The reason why the case files concerning the 1998 incident were not reviewed and that Ms. Kjaersgaard was not interviewed is that the statements did not fall within the scope of the said section, regardless of whether it could be proved who had allegedly assaulted her in 1998. Ms. Kjaersgaard simply stated that her attackers came out from “the Somali clubs”, and did not make any disparaging or degrading remarks about persons of Somali origin. In that light, obtaining the police reports on the 1998 incident was irrelevant to the decision on the matter. Nothing in the present case could provide the public prosecutor with a basis for establishing that Ms. Kjaersgaard had criminal intent to make disparaging statements about a specific group of

people. Consequently, the public prosecutor's handling of the case satisfies the requirements that can be inferred from article 2, paragraph 1 (d), and article 6 of the Convention, taken together with the Committee's practice.

4.9 The State party rejects the claim that by confirming the false accusation made by Ms. Kjaersgaard, the police may also be in violation of article 4. The fact that the Commissioner dismissed the report cannot be taken to mean that it was determined whether the statements about the 1998 incident were true or false. In fact, the Commissioner did not give any opinion on this matter because he considered that the statements fell outside the scope of section 266b.

4.10 Regarding the petitioner's claim that neither he nor DACoRD was able to appeal the Commissioner's decision, the Convention does not imply a right for citizens to appeal the decisions of national administrative authorities to a higher administrative body. Nor does the Convention address the question of when a citizen should be able to appeal a decision to a superior administrative body. Hence, the Convention cannot be considered a bar to a general rule to the effect that it is normally only the parties to a case or others with a direct, essential, individual and legal interest in the case who are entitled to appeal a decision about criminal prosecution.

4.11 The State party refers to Notice No. 9/2006 issued by the Director of Public Prosecutions, according to which police commissioners must notify him of all cases in which a report of a violation of section 266b is dismissed. This reporting scheme builds on the ability of the Director of Public Prosecutions, as part of his general supervisory powers, to take a matter up for consideration to ensure proper and uniform enforcement of section 266b. In the present case, the Director found no basis for exceptionally disregarding the fact that neither DACoRD nor the applicant was entitled to appeal the decision. Furthermore, in its appeal, DACoRD did not give any reason, either in its own right or on behalf of the petitioner, as to why it considered itself entitled to appeal. The State party concludes that the petitioner did have access to an effective remedy.

Petitioner's comments on the State party's submission

5.1 On 18 August 2008, the petitioner commented on the State party's submission. He held that Ms. Kjaersgaard's description of the 1998 events was incorrect, as nobody (Somalis or non-Somalis) came out of the Somali clubs when she arrived in her taxi. No Somalis were involved, either as bystanders or aggressors, and no Somalis participated in the planning and execution of the attack. Refugees from Somalia have been one of the main targets, along with other groups, of the ongoing racist propaganda of the Danish People's Party. In spite of this, the police did not acknowledge that the statement was false.

5.2 In connection with the claims related to articles 2 and 6 of the Convention, the police should have interviewed Ms. Kjaersgaard in the course of the investigation in order to clarify why her statement was different from that made in 1998. At that time she had not indicated that her attackers came out of the Somali clubs. Furthermore, he insists that in being denied the right to appeal he was also denied the right to an effective remedy.

5.3 The petitioner disagrees with the State party's argument that no prima facie case has been established. As to the argument that domestic remedies were not exhausted in connection with

Ms. Kjaersgaard's statement that "she could have been killed", the petitioner confirms that no such statement was included in his report to the police. However, the police could have included it in its investigation, as it was mentioned in the article in question. The decision by the police not to investigate further means that they did not find a violation in connection with that phrase either.

5.4 The petitioner argues that his case is not comparable to communication No. 1487/2006, *Ahmad v. Denmark*, submitted to the Human Rights Committee. This communication concerns religious discrimination against Islam and thus does not fall within the scope of the Convention. Furthermore, in communication No. 1487/2006, the legal standing of the authors in connection with the appeal was never questioned.

5.5 Regarding the State party's observations on the merits, the petitioner rejects the argument that Ms. Kjaersgaard's statement does not fall within the scope of section 266b of the Criminal Code. False accusations against an ethnic group have always been covered by that provision, as well as by article 4 of the Convention. If the public prosecutor had consulted the 1998 file, it would not have been "obvious", as the State party suggested, that the statement did not fall within the scope of section 266b.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Committee on the Elimination of All Forms of Racial Discrimination must decide, pursuant to article 14, paragraph 7 (a), of the Convention, whether or not the communication is admissible.

6.2 With regard to the State party's objection that the petitioner failed to establish a prima facie case for the purposes of admissibility, the Committee observes that Ms. Kjaersgaard's statement was not of such a character as to fall ab initio outside the scope of article 2, paragraph 1 (d), article 4 and article 6 of the Convention. The Committee also notes the petitioner's claim that the ongoing public statements against Somalis have a negative effect on his daily life and considers that he satisfies the "victim" requirement within the meaning of article 14, paragraph 1, of the Convention. It thus follows that the petitioner has sufficiently substantiated his claims for the purposes of admissibility.

6.3 Regarding the petitioner's claim that he was not given the opportunity to appeal the decision of the police commissioner, the Committee does not consider it within its mandate to assess the decisions of domestic authorities regarding the appeals procedure in criminal matters. This part of the communication is therefore inadmissible *ratione materiae* under article 14, paragraph 1, of the Convention.

6.4 On the issue of exhaustion of domestic remedies, the State party claims that part of Ms. Kjaersgaard's statement was not included in the petitioner's report to the police, in particular the sentences: "I could have been killed; if they had got in, I would have been beaten to a pulp at least. It was a killing rage." The Committee considers, however, that these sentences are closely linked to those in which she referred to the authors of the attack. Even if they were not referred to specifically by the petitioner, they are part of the claim which constituted the gist of his report

to the police. Accordingly the Committee does not share the State party's view that the petitioner did not exhaust domestic remedies with respect to that part of the statement.

6.5 The Committee takes note of the State party's argument that the applicant is not entitled to a specific remedy, and that private prosecution is possible under sections 267 (1) and 268 of the Criminal Code. The Committee notes, however, that the statements were made in the public arena, which is the central focus of both the Convention and section 266b of the Criminal Code, and that the petitioner's choice of remedy was not a controversial issue at the national level. It would thus be unreasonable to require the petitioner to initiate also proceedings under sections 267 (1) and 268, after having unsuccessfully invoked section 266b in respect of circumstances directly implicating the language and object of that provision.⁴

6.6 In the absence of any further objections to the admissibility of the communication, the Committee declares the communication 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 266b 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 recalls its earlier jurisprudence⁵ according to which, it does not suffice, for the 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 States 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, which guarantees to everyone effective protection and remedies against any acts of racial discrimination.

⁴ See communication No. 33/2003, *Quereshi v. Denmark*, Opinion adopted on 9 March 2005, para. 6.3, and communication No. 34/2004, *Gelle v. Denmark*, Opinion adopted on 6 March 2006, para. 6.3.

⁵ See communication No. 34/2004, *Gelle v. Denmark*, Opinion adopted on 6 March 2006, paras. 7.2 and 7.3.

7.4 The Committee notes the petitioner's claim that the reference in Ms. Kjaersgaard's statement, in the newspaper interview published on 17 February 2007, to the fact that her aggressors in the 1998 incident came out of the Somali clubs constituted an act of racial discrimination, as no Somalis were involved in the incident in question. The Committee also notes that the Commissioner of the West Copenhagen Police asserts that he examined the claim and concluded that Ms. Kjaersgaard's statement was merely a description of a specific sequence of events, in that she stated that the aggressors came out of the Somali clubs but did not make any disparaging or degrading remarks about persons of Somali origin. The Committee considers that, on the basis of the information before it, the statement concerned, despite its ambiguity, cannot necessarily be interpreted as expressly claiming that persons of Somali origin were responsible for the attack in question. Consequently, without wishing to comment on Ms. Kjaersgaard's intentions in making the statement, the Committee cannot conclude that her statement falls within the scope of article 2, paragraph 1 (d), and article 4 of the Convention, or that the investigation conducted by the national authorities into the 1998 incident did not meet the requirements of an effective remedy under the Convention.

8. In the circumstances, the Committee on the Elimination of Racial Discrimination, acting under article 14, paragraph 7 (a), of the International Convention on the Elimination of All Forms of Racial Discrimination, considers that it is not in a position to state that there has been a violation of the Convention by the State party.

9. On the basis of rule 95, paragraph 1, of its rules of procedure, the Committee would nevertheless like to draw attention to earlier recommendations formulated in the course of its consideration of individual communications, in which it called on States parties to:

- Ensure that the police and judicial authorities conduct thorough investigations into allegations of acts of racial discrimination as referred to in article 4 of the Convention⁶
- Draw the attention of politicians and members of political parties to the particular duties and responsibilities incumbent upon them pursuant to article 4 of the Convention with regard to their speeches, articles or other forms of expression in the media⁷

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

⁶ Communication No. 29/2003, *Dragan Durmic v. Serbia and Montenegro*, Opinion adopted on 6 March 2006.

⁷ Communication No. 27/2002, *Kamal Quereshi v. Denmark*, Opinion adopted on 19 August 2003; communication No. 36/2006, *P.S.N. v. Denmark*, Opinion adopted on 8 August 2007; communication No. 37/2006, *A.W.R.A.P. v. Denmark*, Opinion adopted on 8 August 2007.