



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

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COMMITTEE ON THE ELIMINATION
OF RACIAL DISCRIMINATION
Seventy-first session
(30 July – 17 August 2007)

OPINION

Communication No. 40/2007

<u>Submitted by:</u>	Murat Er (represented by counsel, Ms. Line Bøgsted)
<u>Alleged victim:</u>	The petitioner
<u>State party:</u>	Denmark
<u>Date of communication:</u>	20 December 2006 (initial submission)
<u>Date of present decision:</u>	8 August 2007

[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-First session

concerning

Communication No. 40/2007

<u>Submitted by:</u>	Murat Er (represented by counsel, Ms. Line Bøgsted)
<u>Alleged victim:</u>	The petitioner
<u>State party:</u>	Denmark
<u>Date of communication:</u>	20 December 2006 (initial submission)
<u>Date of present decision:</u>	8 August 2007

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 8 August 2007

Having concluded its consideration of communication No. 40/2007, submitted to the Committee on the Elimination of Racial Discrimination on behalf of Mr. Murat Er 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:

OPINION

1. The communication, dated 20 December 2006, is submitted by Mr. Murat Er, a Danish citizen of Turkish origin born in 1973. He claims that Denmark has violated article 2,

paragraph 1(d); article 5, paragraph (e) (v); and article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). He is represented by counsel, Ms. Line Bøgsted.

Factual background

2.1 The petitioner was a carpenter student at Copenhagen Technical School at the time of the events. As part of the study programme, students were offered the possibility of doing traineeships in private companies. On 8 September 2003, the petitioner accidentally saw a note in a teacher's hands, where the words "not P" appeared next to the name of a potential employer applying for trainees to work in his company. When asked about the meaning of that note, the teacher explained to him that the P stood for "perkere" ("Pakis") and that it meant that the employer in question had instructed the school not to send Pakistani or Turkish students for training in that company. That same day, the petitioner complained orally to the school inspector, arguing that the school collaborated with employers that did not accept trainees of a certain ethnic origin. The inspector stated that it was the school's firm policy "not to accommodate wishes from employers only to accept ethnic Danes as trainees" and that he was not aware of cases where this had happened. On 10 September 2003, the petitioner filed a written complaint with the school management board. He claims that, ever since his complaint was filed, he has been treated badly by school staff and students and was assigned to projects which he would normally not be expected to carry out at the school.

2.2 From October to December 2003, the petitioner worked as a trainee in a small carpenter business. Upon his return to the school, he was informed that he had to start a new traineeship with another company four days later, although he was enrolled in a course that started two weeks later. A journeyman, with whom he worked at this new company, informed him that the School had asked the company if it would accept to send "a Black". Back at the school, he started a new course. On the second day of the course, he asked the teacher for help with some drawings, which he did not obtain. He contends that the frustration experienced as a result of the discriminatory treatment received at the school led to his dropping the course and becoming depressive. He sought medical help and was referred to Bispebjerg Hospital, where he was treated with antidepressants. He abandoned the idea of becoming a carpenter and started working as a home carer.

2.3 The petitioner contacted an independent institution, the Documentation and Advisory Centre on Racial Discrimination (DACoRD), and asked for assistance. He complained that the school had agreed to the employer's request and stated that he had experienced reprisals from the school staff since he had complained about this. DACoRD then filed a complaint on behalf of the petitioner to the Complaints Committee on Ethnic Equal Treatment (established under Act No. 374, of 28 May 2003, on Ethnic Equal Treatment), arguing that the school's practice consisting in agreeing to employers' requests to send only trainees of Danish origin constituted direct discrimination.

2.4 The Complaints Committee examined the case and exchanged correspondence with the school and with DACoRD. In the correspondence, the school admitted that unequal

treatment based on ethnicity might have occurred in isolated cases, but that this was not the general practice of the school. By decision of 1 September 2004, the Complaints Committee considered that, in that particular case, a staff member of the school had followed discriminatory instructions and thus violated section 3 of the Danish Act on Ethnic Equal Treatment. It specified, however, that section 3 was not violated by the school as such. The Committee further considered that section 8 of the referred Act (prohibition of reprisals for complaints aimed at enforcing the principle of equal treatment) did not appear to have been violated, although it noted that it did not have the competence to interrogate witnesses where evidence was lacking. It concluded that this issue was for the Danish tribunals to determine and recommended that free legal aid be granted for the case to be brought before a court.

2.5 A civil claim was filed in the City Court of Copenhagen, seeking compensation of DKK 100,000 (13,500€ approximately) for moral damages incurred as a result of ethnic discrimination. On 29 November 2005, the City Court considered that the evidence produced did not prove that either the school or its staff members were willing to meet discriminatory requests from employers and that, therefore, there was no reason to set aside the inspector's statement. It further found that the petitioner was not among the students to whom a traineeship was to be allocated on 8 September 2003 as he was undergoing an aptitude test between 1 September and 1 October after having failed the first main course and could only subsequently be considered for a traineeship, which he obtained as of 6 October 2003. It concluded that the petitioner could not be considered to have been subjected to differential treatment on the basis of his race or ethnic origin, nor that he was a victim of reprisals by the defendant because of the complaint filed by him. The petitioner contends that, under Act on Ethnic Equal Treatment, the burden of proof should have been on the staff member and not on him.

2.6 The petitioner appealed the judgement of the Copenhagen City Court to the High Court of Eastern Denmark. He did not obtain legal aid to appeal the case and DACoRD subsequently assisted him to appeal the case. One of the witnesses called before the High Court was a school staff member in charge of contacts between the school and potential employers. He stated that he had chosen not to send a student of ethnic origin other than Danish to the company, because "the school had received before negative feedbacks from students of other ethnic origin who had been training with the company. They had felt maltreated because employees at the company had used abusive language." The school argued that the complainant had not experienced reprisals as a consequence of his complaint, but that he simply was not qualified enough to be sent for training. In the petitioner's view, this argumentation is irrelevant, since the school had already admitted to have refrained from sending students of an ethnic background other than Danish to certain employers. The High Court decided that it had not been proved that the complainant had been subjected to discrimination or had experienced reprisals as a consequence of his complaint and confirmed the judgement of the City Court. According to the complainant, the High Court based its decision on the statement made by the school that the complainant did not have the necessary qualifications to be sent to training. The school was acquitted and the complainant was required to pay the procedural costs amounting to DKK 25.000 (3,300€ approximately). This amount was covered by DACoRD.

2.7 Under Danish law, a case can only be tried twice before national courts. If the case is of significant importance, there is the possibility to apply for leave to appeal to the Supreme Court. After the judgement of the High Court of Eastern Denmark, the complainant indeed applied for leave to appeal. On 5 December 2006, his application was dismissed.

The complaint

3.1 The petitioner claims that Denmark has violated article 2, paragraph 1 (d); article 5 (e) (v); and article 6 of the Convention.

3.2 He contends that, as a consequence of the school's discriminatory practice, he was not offered the same possibilities of education and training as his fellow students and no remedies were allegedly available to address this situation effectively, in violation of article 5 (e)(v) of the Convention. Furthermore, he experienced a financial loss as a result of national procedures.

3.3 The petitioner claims that Danish national legislation does not offer effective protection to victims of discrimination based on ethnicity, as required by article 2, subparagraph 1 (d) of the Convention, and does not meet the requirements of article 6. According to the petitioner, this resulted in his claims being dismissed. He further claims that the legislation is not interpreted by Danish courts in accordance with the Convention, since the concept of shared burden of proof and the right to obtain an assessment of whether discrimination based on ethnicity has taken place are not enforced.

State party's observations on the admissibility and merits of the communication

4.1 On 17 April 2007, the State party submitted observations on the admissibility and merits of the case. It claims that the communication is inadmissible *ratione personae* because the petitioner is not a "victim" for the purposes of article 14 of the Convention. It refers to the Human Rights Committee's case-law on article 1 of the Optional Protocol to the International Covenant on Civil and Political Rights on "victim status".¹ Under this case-law, the victim must show that an act or an omission of a State party has already adversely affected his or her enjoyment of a right or that such an effect is imminent, for example, on the basis of existing law and/or judicial or administrative practice. The State party submits that its alleged failure to provide effective protection and effective remedies against the reported act of racial discrimination does not constitute an imminent violation of the petitioner's rights under the articles of the Convention invoked.

¹ The State party invokes the Human Rights Committee's Views in *E.W. et al v the Netherlands* (Communication No. 429/1990), adopted on 8 April 1993, para. 6.4; *Bordes and Temeharo v France* (Communication No. 645/1995), adopted on 22 July 1996, para. 5.5; and *Aalbersberg et al v the Netherlands* (Communication 1440/2005), adopted on 12 July 2006, para. 6.3.

4.2 The State party claims that the complaint is based on the Copenhagen Technical School's alleged practice of complying with discriminatory requests from certain employers who apparently refused to accept trainees with an ethnic origin other than Danish for traineeships. However, the State party contends that the petitioner was never in a position where he was directly and individually subjected to and/or affected by this alleged discriminatory practice and therefore has no legal interest in contesting it. It notes that the reason why the applicant did not start his traineeship in September 2003 was, as established by both the Copenhagen City Court and the High Court of Eastern Denmark, solely his lack of professional qualifications. He had failed the examination after his first year of training and was thus ineligible for a traineeship in September 2003 but had to undergo a one-month aptitude test at the School. It concludes that the School's treatment of the applicant with regard to the traineeship was merely based on objective criteria. In the State party's view, this statement is confirmed by the fact that the petitioner started a traineeship on 6 October 2003, after having completed the relevant aptitude test.

4.3 The State party maintains that, even if it were concluded that the School and/or certain staff members acted in a racially discriminatory manner in some cases when allocating traineeships to students, there was no discrimination in the petitioner's case and had thus no existing or imminent effects on the applicant's enjoyment of his rights under the Convention.

4.4 On the merits, the State party contends that both the protection offered to the applicant and the remedies available to address his claim of racial discrimination fully satisfy the Convention's requirements under articles 2, paragraph 1 (d); 5 (e) (v) and 6. It notes that the Convention does not guarantee a specific outcome of the complaints of alleged discrimination but rather sets out certain requirements for the national authorities' processing of such cases. The judgements of both the City Court and the High Court are based on the Danish Act on Ethnic Equal Treatment, which offers comprehensive protection against racial discrimination under Danish law. It notes that this Act entered into force on 1 July 2003 to implement EU Council Directive 2000/43/EC, yet it is not the only instrument that recognises the principle of equal treatment. The State party adapted its legislation back in 1971 to meet its obligations pursuant to the Convention.²

4.5 According to the State party, the petitioner's submissions, particularly his claims under article 2, paragraph 1 (d) and article 6 of the Convention, are phrased in abstract and general terms. It recalls the Human Rights Committee's established practice that, when examining individual complaints under the Optional Protocol, it is not its task to decide in abstract whether or not the national law of a State party is compatible with the Covenant, but only to consider whether there is or has been a violation of the Covenant in the particular case

² The State party refers to its initial and second report to CERD (CERD/C/R.50/Add.3 and CERD/C/R.77/Add.2)

submitted to it.³ It further recalls that the issue is to determine whether the applicant was offered effective protection and remedies against an alleged and concrete act of racial discrimination. It considers that the more general and abstract issues raised by the petitioner should more rightly be dealt with by the Committee, in connection with the examination of Denmark's periodic report under article 9 of the Convention.

4.6 The State party recalls that article 2, paragraph 1 (d), is a policy statement and that the obligation contained therein is, by its nature, a general principle. In the State party's view, this article does not impose concrete obligations on the State party and, even less, specific requirements on the wording of a possible national statute on racial discrimination. On the contrary, State parties enjoy a significant margin of appreciation in this regard. Concerning article 5 (e) (v), the State party notes that, although being more concrete in obliging States parties to guarantee equality before the law in relation to education and training, it also leaves a significant margin of appreciation to them with regard to the implementation of this obligation.

4.7 The State party notes that the Act on Ethnic Equal Treatment offers individuals a level of protection against racial discrimination which, in certain aspects, such as the rule of shared burden of proof of section 7 and the explicit protection against victimisation of section 8, goes further than the protection required by the Convention. It notes that this law was effectively implemented by both national courts in examining the petitioner's case. It further notes that both the City Court and the High Court thoroughly assessed the evidence submitted and heard the petitioner and all key witnesses. Therefore, these Courts had an adequate and informed basis for assessing whether the petitioner had been a victim of racial discrimination. The State party adds that the petitioner's complaint was also examined by the Complaints Committee for Ethnic Equal treatment and, even if it does not constitute an "effective remedy within the meaning of article 6, by the Technical School at a Manager's meeting, which resulted in a warning to the training instructor and a written reply to the petitioner.

4.8 According to the State party, the fact that the applicant was not granted legal aid in the High Court proceedings does not imply that these proceedings cannot be considered an effective remedy.

4.9 With regard to the petitioner's claim that the Danish courts do not interpret Danish legislation in accordance with the Convention, the State party notes that this is a general statement and does not refer to the petitioner's own case.⁴ It further notes that, in any event, it is not the Committee's task to review the interpretation of Danish law made by national courts. Nevertheless, the State party contends that both national courts in the petitioner's case

³ The State party refers to the Human Rights Committee's Views in *MacIsaac v Canada* (Communication No. 55/1979), adopted on 14 October 1982, para. 10.

⁴ The State party invokes the Committee's Views in *Michel Narrainen v Norway* (Communication No. 3/1991), adopted on 15 March 1994, paras. 9.4 and 9.5.

delivered reasoned decisions and applied the rule of shared burden of proof. It recalls that this rule, recognised in section 7 of the Danish Act on Ethnic Equal Treatment, provides for a more favourable burden of proof for alleged victims of discrimination than the Convention. It provides that if a person presents facts from which it may be presumed that there has been direct or indirect discrimination, it is incumbent on the other party to prove that there has been no breach of the principle of equal treatment. By contrast, under the Convention, it is up to the applicant to provide *prima facie* evidence that he or she is a victim of a violation of the Convention.⁵ The State party concludes that the fact that the petitioner's complaint under the Act invoked was unsuccessful does not imply that this instrument is ineffective.

Petitioner's comments

5.1 On 28 May 2007, the petitioner challenged the State party's argument that because he did not prove that he was more qualified than the 14 students who obtained a traineeship in September 2003 he is a victim. He notes that, when a traineeship was earmarked for "Danes", the number of traineeships left to students of non-Danish origin was reduced accordingly, being discriminated *de facto* irrespective of whether they could in the end obtain one of the remaining internships or not. He claims that this fact was not taken into consideration by the High Court, which only decided on the issue of whether the petitioner was qualified and thus eligible for the traineeship in September 2003. He contends that, by not making any assessment on whether or not race discrimination took place, the Danish Court violated his right to an effective remedy guaranteed by articles 2 and 6, in relation to article 5 (e) (v), of the Convention.

5.2 The petitioner contends that the fact that the teacher at the Copenhagen Technical School admitted before the High Court that he chose not to send a student of non-Danish origin to the company shows that the principle of equal treatment was violated.

Issues and proceedings before the Committee

Decision on 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 The Committee notes the State party's allegation that the communication is inadmissible *ratione personae* because the petitioner does not qualify as a victim under 14 of the Convention. It further notes the Human Rights Committee's Views invoked by the State party with regard to the "victim status" and the State party's contention that the petitioner

⁵ The State party invokes the Committee's Views in *C.P. v Denmark* (Communication No. 5/1994), adopted on 15 March 1995, paras. 6.2 and 6.3; and *K.R.C. v Denmark* (Communication No. 23/2002, adopted on 14 August 2002, para. 6.2.

was not individually affected by the school's alleged discriminatory practice of complying with employers' requests to exclude non-ethnic Danish students from being recruited as trainees because he did not qualify for a traineeship in September 2003 and that he therefore has no legal interest in contesting it.

6.3 The Committee does not see any reason not to adopt a similar approach to the concept of "victim status" as in the Human Rights Committee's Views referred to above, as it has done in previous occasions.⁶ In the case under examination, it notes that the existence of an alleged discriminatory school practice consisting in fulfilling employers' requests to exclude non-ethnic Danish students from traineeships would be in itself sufficient to justify that all non-ethnic Danish students at the school be considered as potential victims of this practice, irrespective of whether they qualify as trainees according to the school's rules. The mere fact that such a practice existed in the school would be, in the Committee's view, enough to consider that all non ethnic Danish students, who are bound to be eligible for traineeships at some point during their study programme, be considered as potential victims under article 14, paragraph 1, of the Convention. Therefore, the Committee concludes that the petitioner has established that he belongs to a category of potential victims for the purposes of submitting his complaint before the Committee.

Consideration on the merits

7.1 The Committee has considered the petitioner's case in the light of all the submissions and documentary evidence produced by the parties, as required under article 14, paragraph 7 (a), of the Convention and rule 95 of its rules of procedure. It bases its findings on the following considerations.

7.2 The petitioner claims that Danish national legislation does not offer effective protection to victims of ethnic discrimination as required by article 2, paragraph 1 (d), of the Convention, and that Danish courts do not interpret national legislation in accordance with the Convention. The Committee notes the State party's allegation that the petitioner's claims are abstract and do not refer to his own case. It considers that it is not the Committee's task to decide in abstract whether or not national legislation is compatible with the Convention but to consider whether there has been a violation in the particular case.⁷ It is also not the Committee's task to review the interpretation of national law made by national courts unless the decisions were manifestly arbitrary or otherwise amounted to a denial of justice.⁸ In light

⁶ In this regard, see the Committee's Opinion in *The Jewish community of Oslo and others v Norway* (Communication No. 30/2003, adopted on 15 August 2005, para. 7.3 *in fine*).

⁷ *Vid.* the Human Rights Committee's Views in *MacIsaac v Canada* (Communication No. 55/1979), adopted on 14 October 1982, para. 10

⁸ *Vid.* the Human Rights Committee's Views in Communications Nos. 811/1998, *Mulai v Republic of Guyana*, para. 5.3; 867/1999, *Smartt v Republic of Guyana*, para. 5.7; 917/2000, *Arutyunyan v Uzbekistan*, para. 5.7, among others.

of the text of the judgements of both the City Court of Copenhagen and the High Court of Eastern Denmark, the Committee notes that the petitioner's claims were examined in accordance with the law that specifically regulates and penalises acts of racial or ethnic discrimination and that the decisions were reasoned and based on that law. The Committee therefore considers that this claim has not been sufficiently substantiated.

7.3 In respect of the author's claim that, as a result of the school's practice, he was not offered the same possibilities of education and training as his fellow students, the Committee observes that the uncontroversial fact that one of the teachers at the school admitted having accepted an employer's application containing the note "not P" next to his name and knowing that this meant that students of non-Danish ethnic origin were not to be sent to that company for traineeship is in itself enough to ascertain the existence of a *de facto* discrimination towards all non-ethnic Danish students, including the petitioner. The school's allegation that the rejection of the petitioner's application for traineeship in September 2003 was based on his academic records does not exclude that he would have been denied the opportunity of training in that company in any case on the basis of his ethnic origin. Indeed, irrespective of his academic records, his chances in applying for an internship were more limited than other students because of his ethnicity. This constitutes, in the Committee's view, an act of racial discrimination and a violation of the petitioner's right to enjoyment of his right to education and training under article 5, paragraph e (v) of the Convention.

7.4 With regard to the petitioner's allegation that the State party failed to provide effective remedies within the meaning of article 6 of the Convention, the Committee notes that both national Courts based their decisions on the fact that he did not qualify for an internship for reasons other than the alleged discriminatory practice against non-ethnic Danes –namely, that he had failed a course-. It considers that this does not absolve the State party from its obligation to investigate whether or not the note "not P" written on the employer's application and reported to be a sign recognised by a school teacher as implying exclusion of certain students from a traineeship on the basis of their ethnic origin, amounted to racial discrimination.⁹ 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 6 of the Convention have been violated.

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, is of the opinion that the facts as submitted disclose a violation of articles 2, paragraph 1 (d); 5, paragraph (e) (v); and 6 of the Convention by the State party.

9. The Committee on the Elimination of Racial Discrimination recommends that the State party grant the petitioner adequate compensation for the moral injury caused by the above-

⁹ In this regard, see the Committee's Opinion in *Mohammed Hassn Gelle v Denmark*, Communication No. 34/2004, adopted on 6 March 2006, para.7.5.

mentioned violations of the Convention. 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, within ninety days, information from the Government of Denmark about the measures taken to give effect to the Committee's Opinion.

[Adopted in English, French, Spanish and Russian, the English 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.]
