

Ziad Ben Ahmed Habassi v. Denmark, Communication No. 10/1997, U.N. Doc. CERD/C/54/D/10/1997 (1999).

Communication No. 10/1997

Submitted by: Ziad Ben Ahmed Habassi [represented by counsel]

Alleged victim: The author

State party concerned: Denmark

Date of communication: 21 March 1997 (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 17 March 1999,

Having concluded its consideration of communication No. 10/1997, submitted to the Committee under article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination,

Having taken into consideration all written information made available to it by the author and the State party,

Bearing in mind rule 95 of its rules of procedure requiring it to formulate its opinion on the communication before it,

Adopts the following:

OPINION

1. The author of the communication is Ziad Ben Ahmed Habassi, a Tunisian citizen born in 1972 currently residing in Århus, Denmark. He claims to be a victim of violation by Denmark of article 2, paragraph 1 (d), and article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination. He is represented by counsel.

The facts as presented by the author

2.1 On 17 May 1996 the author visited the shop AScandinavian Car Styling@ to purchase an alarm set for his car. When he inquired about procedures for obtaining a loan he was informed that AScandinavian Car Styling@ cooperated with Sparbank Vest, a local bank, and was given a loan application form which he completed and returned immediately to the shop. The application form included, inter alia, a standard provision according to which the person applying for the loan declared himself or herself to be a Danish citizen. The author, who had a permanent residence permit in Denmark and was married to a Danish citizen, signed the form in spite of this provision.

2.2 Subsequently, Sparbank Vest informed the author that it would approve the loan only if he could produce a Danish passport or if his wife was indicated as applicant. The author was also informed that it was the general policy of the bank not to approve loans to nonnDanish citizens.

2.3 The author contacted the Documentary and Advisory Center for Racial Discrimination (DRC) in Copenhagen, an independent institution which had been in contact with Sparbank Vest on previous occasions about the bank's loan policy visnànvís foreigners. In a letter dated 10 January 1996 the DRC had requested Sparbank Vest to indicate the reasons for a loan policy requiring applicants to declare that they were Danish citizens. Sparbank Vest had informed the DRC, by letter

of 3 March 1996, that the requirement of citizenship mentioned in the application form was to be understood merely as a requirement of permanent residence in Denmark. Later, the DRC requested information from the bank about the number of foreigners who had actually obtained loans. On 9 April 1996 Sparbank Vest informed the DRC that the bank did not register whether a customer was a Danish citizen or not and therefore it was not in a position to provide the information requested. It also said that in cases of foreign applicants the bank made an evaluation taking into account whether the connection to Denmark had a temporary character. In the bank's experience, only by a permanent and stable connection to the country was it possible to provide the necessary service and ensure stable communication with the customer.

2.4 On 23 May 1996 the DRC reported the incident concerning the author to the police department in Skive on behalf of the author, alleging that the bank had violated the Danish Act on the prohibition of differential treatment on the basis of race. The DRC enclosed copies of its previous correspondence with Sparbank Vest. By letter dated 12 August 1996 the police informed the DRC that the investigation had been discontinued given the lack of evidence that an unlawful act had been committed. The letter indicated that the requirement of Danish citizenship had to be considered in connection with the possibility of enforcement and that the bank had given assurances that the provision would be deleted when printing new application forms.

2.5 On 21 August 1996 the DRC lodged a complaint with the State Prosecutor in Viborg, challenging the decision of the police department to consider the citizenship criterion legitimate. The author had a clear permanent connection to Denmark in view of the fact that he was married to a Danish citizen and had a regular job. The fact that the bank still insisted on documentation with regard to Danish citizenship constituted a discriminatory act which could not be justified by the bank's interest in enforcing its claim. The DRC also emphasized the fact that Sparbank Vest had not provided any information regarding foreign customers, despite the fact that such information was relevant to determine whether or not the loan policy was discriminatory. By letter dated 6 November 1996 the State Prosecutor informed the DRC that he did not see any reason to overrule the police decision.

2.6 The author indicates that the decision of the State Prosecutor is final, in accordance with section 101 of the Danish Administration of Justice Act. He also states that questions relating to bringing charges against individuals are entirely at the discretion of the police and, therefore, the author has no possibility of bringing the case before a court.

The complaint

3.1 Counsel claims that the facts stated above amount to violations of article 2, paragraph 1 (d), and article 6 of the Convention, according to which alleged cases of discrimination have to be investigated thoroughly by the national authorities. In the present case neither the police department of Skive nor the State Prosecutor examined whether the bank's loan policy constituted indirect discrimination on the basis of national origin and race. In particular, they should have examined the following issues: first, to what extent persons applying for loans were requested to show their passports; second, to what extent Sparbank Vest granted loans to non-Danish citizens; third, to what extent Sparbank Vest granted loans to Danish citizens living abroad.

3.2 Counsel further claims that in cases such as the one under consideration there might be a reasonable justification for permanent residence. However, if loans were actually granted to Danish citizens who did not have their permanent residence in Denmark, the criterion of citizenship would in fact constitute racial discrimination, in accordance with article 1, subparagraph 1, of the Convention. It would be especially relevant for the police to investigate whether an intentional or an unintentional act of discrimination in violation of the Convention had taken place.

State party's submission on admissibility and counsel's comments

4.1 In a submission dated 28 April 1998 the State party notes that according to section 1 (1) of Act No. 626 (Act against Discrimination) any person who, while performing occupational or non-profit activities, refuses to serve a person on the same conditions as others due to that person's race, colour, national or ethnic origin, religion or sexual orientation is liable to a fine or imprisonment. Violation of the Act is subject to public prosecution, i.e. private individuals cannot bring a case before the courts.

4.2 If the prosecutor considers that no offence has been committed, or that it will not be possible to bring evidence sufficient for conviction and, therefore, discontinues the investigation, the injured party still has the possibility of bringing a civil action claiming compensation for pecuniary or nonpecuniary damage. An action claiming compensation for pecuniary damage is not relevant in the present case, since the loan was actually granted with the applicant's wife listed as borrower and the applicant as spouse. It would, however, have been relevant to bring a civil declaratory action against the bank claiming that it acted against the law when it refused the loan application. Such action is recognized in domestic caselaw. Accordingly, the State party considers that a civil action is a possible remedy which the applicant should have made use of and that the nonuse of this remedy renders the case inadmissible.

4.3 The State party also argues that the author had the possibility of complaining to the Ombudsman of the Danish Parliament about the decision of the prosecutor. The fact that the prosecutors are part of the public administration means that their activities are subject to the Ombudsman's power to investigate whether they pursue unlawful aims, whether they make arbitrary or unreasonable decisions or whether they commit errors or omissions in other ways in the performance of their duties. The result of a complaint to the Ombudsman may be that the police and the prosecutor reopen the investigation.

4.4 The State party also argues that the communication is manifestly illfounded. Its objections, however, are explained in its assessment of the merits of the case.

5.1 Counsel contends that the State party fails to indicate on which provision of the Danish Act on Tort it bases its claim that civil action can be taken against Sparbank Vest. He assumes that the State party refers to section 26 of the Act. However, to his knowledge, no cases relating to racial discrimination have ever been decided by Danish courts on the basis of that section. Accordingly, there is no evidence in Danish caselaw to support the interpretation given by the State party.

5.2 Counsel also contends that a private party may only be liable under section 26 if there is an act which infringes national law. In the present case, however, the relevant bodies within the prosecution system did not find any reason to

investigate; it would, therefore, have been very difficult to convince a court that there was any basis for liability on the part of Sparbank Vest. In those circumstances a theoretical remedy based on section 26 of the Danish Act on Tort does not seem to be an effective remedy within the meaning of the Convention.

5.3 With respect to the possibility of filing a complaint with the Ombudsman, counsel argues that such remedy is irrelevant, since the Ombudsman's decisions are not legally binding.

The Committee's admissibility decision

6.1 During its fiftythird session in August 1998 the Committee examined the admissibility of the communication. It duly considered the State party's contention that the author had failed to exhaust domestic remedies but concluded that the civil remedies proposed by the State party could not be considered an adequate avenue of redress. The complaint which was filed first with the police department and subsequently with the State Prosecutor alleged the commission of a criminal offence and sought a conviction under the Danish Act against Discrimination. The same objective could not be achieved by instituting a civil action, which would lead only to compensation for damages.

6.2 At the same time the Committee was not convinced that a civil action would have any prospect of success, given that the State Prosecutor had not considered it pertinent to initiate criminal proceedings regarding the applicant's claim. Nor was there much evidence in the information brought to the attention of the Committee that a complaint before the Ombudsman would result in the case being reopened. Any decision to institute criminal proceedings would still be subject to the discretion of the State Prosecutor. No possibilities would then be left for the complainant to file a case before a court.

6.3 Accordingly, on 17 August 1998, the Committee declared the communication admissible.

The State party's observations on the merits

7.1 The State party submits that Mr. Habassi complained to the police on 28 May 1996. On 12 August 1996 the police interviewed the credit manager of Sparbank Vest in Skive, who was notified of Mr. Habassi's complaint. According to the police

report the manager stated that all loan applicants signed the same type of application form and that the Danish Bankers Association had decided that the phrase 'I am a Danish national' would be deleted when the application forms were reprinted. No further investigative steps were taken. By letter dated 12 August 1996 the Chief Constable in Skive informed the DRC that it had decided to discontinue the investigation, since it could not reasonably be assumed that a criminal offence subject to public prosecution had been committed. The letter also provided details on the possibility of filing an action for damages and enclosed guidelines on how to file a complaint. By letter of the same date the Chief Constable also informed Sparbank Vest that the investigation had been discontinued.

7.2 The State party recalls that on 21 August 1996 the DRC complained about the Chief Constable's decision to the District Public Prosecutor in Viborg. DRC stated in its complaint that it found it worrying that the Chief Constable apparently considered the requirement of nationality motivated by the need to ensure enforcement to be a lawful criterion. Mr. Habassi had a Danish civil registration number and a national register address in Denmark. That in itself ought to have been sufficient to prove his ties with Denmark. In addition, he stated on the loan application that he received a salary and had a Danish spouse. The bank's practice of demanding documentation about nationality was a discriminatory act which could not be justified by considerations of enforcement.

7.3 DRC also stated that for Mr. Habassi it was immaterial whether the refusal of the bank was based on negative attitudes towards ethnic minorities (for instance that they are poor debtors) or on genuine concern on the part of the bank about enforcement. The salient fact was that despite having satisfied all the conditions for being granted a loan, he was required (probably because of his foreign-sounding name) to provide further documentation. It was therefore Mr. Habassi's Middle East background that was the cause of the refusal and not the more formal criterion of nationality. The bank's statement that the requirement of Danish nationality would be removed from the application forms did not alter the fact that Mr. Habassi had been exposed to unlawful differential treatment against which the Danish authorities had a duty to offer protection pursuant to the Convention.

7.4 The State party also recalls that the District Public Prosecutor found no basis for reversing the Chief Constable's decision and argued, in particular, that neither the Act against Discrimination nor the Convention include nationality as an independent ground of discrimination. Against this background it must be assumed that discrimination against foreign nationals only violates the Act to the extent that it could be assimilated to discrimination on the basis of national origin or one of the other grounds listed in section 1 (1). According to the legislative history of the Act, it had to be presumed that certain forms of differential treatment could be considered lawful if they pursued a legitimate aim seen in the light of the purpose of the Act. In the processing of loan applications the applicant's ties with Denmark may be of importance, among other things, for assessing the possibility of enforcement of the creditor's claim. In consideration of this the data concerning the applicant's nationality were objectively justified.

7.5 The State party argues that the police investigation in the present case satisfies the requirement that can be inferred from the Convention and the Committee's practice. According to the Administration of Justice Act the police initiates an investigation when it can be reasonably assumed that a criminal offence subject to public prosecution has been committed. The purpose of the investigation is to clarify whether the conditions for imposing criminal liability or other criminal sanctions have been fulfilled. The police will reject an information laid if no basis is found for initiating an investigation. If there is no basis for continuing an investigation already initiated, the decision to discontinue it can also be made by the police, provided no provisional charge has been made.

7.6 In the State party's opinion, there is no basis for criticizing the Chief Constable's and the District Public Prosecutor's decisions, which were taken after an investigation had actually been carried out. The police took the information seriously and its decision was not unsubstantiated. The decision was not only based on the information forwarded by the author, including the written correspondence with the bank about its credit policy, but also on interviews with the author and a credit manager of the bank.

7.7 The State party refers to the Committee's opinion regarding communication 4/1991 in which the Committee stated that

When threats of racial violence are made and especially when they are made in public and by a group, it is incumbent upon the State to investigate with due diligence and expedition (1) It argues, however, that the present case is of a different nature and therefore the Committee cannot reasonably set out the same requirements to investigate as in the said opinion. Even if the requirement that it is incumbent on the police to investigate with due diligence and expedition were to apply in the present case, where the loan application was actually granted, the State party considers that the requirement was met. Although the information laid did not lead to prosecution, the handling of it by the police did afford the applicant effective protection and remedies within the meaning of article 2, paragraph 1 (d), and article 6 of the Convention.

7.8 The State party further contends that there is no basis either for criticizing the legal assessment made by the prosecutor. It is noted in this connection that not every differentiation of treatment is unlawful discrimination within the meaning of the Convention. In General Recommendation XIV on article 1, paragraph 1, of the Convention the Committee stated that Aa differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate (...). In considering the criteria that may have been employed, the Committee will acknowledge that particular actions may have varied purposes. In seeking to determine whether an action has an effect contrary to the Convention it will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent or national or ethnic origin.@ The decisions of both the Chief Constable and the District Public Prosecutor show that the decisions were based on the fact that differentiation of treatment that pursues a legitimate aim and respects the requirement of proportionality is not prohibited discrimination.

7.9 Finally, the State party dismisses the author's claims that questions relating to the pursuance by the police of charges against individuals are entirely up to the discretion of the police and that there is no possibility of bringing the case before the Danish courts. Firstly, it is possible to complain to the relevant District Public Prosecutor; secondly, the applicant had the possibility of filing a civil action against the bank; and thirdly, the applicant had the possibility of complaining to the Ombudsman. The effect of such complaint to the Ombudsman

may be that the police and the prosecutor reopen the investigation.

Counsel's comments

8.1 Counsel contends that the police interviewed the author but had only a brief telephone conversation with the bank. No detailed investigation, for example about the requirements concerning Danish citizens living abroad, was carried out. The police did not at all examine whether the case amounted to indirect discrimination within the meaning of the Convention. The Committee, however, stressed the duty of States parties to duly investigate reported incidents of racial discrimination in its concluding observations regarding communication 4/1991.

8.2 The State party states that the requirement of Danish citizenship was only to be seen in connection with the assessment of the ties with Denmark of the person applying for a loan in correlation, therefore, with the possibilities of subsequent judicial recovery of the amount of the loan in case of default. Counsel underlines that such reason was not mentioned by the credit manager of Sparbank Vest, as reflected in the police report. The report says that the police assistant E.P. had contacted the credit director of Sparbank Vest who was of the opinion that the bank had not done anything illegal in connection with the loan application in question, since all applicants signed the same type of application form with the formulation 'That I am a Danish citizen'. The bank did not mention any particular reason for its practice. It did not, in particular, declare that there was a requirement of residence due to the possibility of enforcing claims against debtors. It appears, therefore, that the reason in question had been made up by the police in Skive on their own initiative. Even if the reason came from the bank itself it appears to be highly irrelevant for an evaluation of whether the requirements of the Convention have been met.

8.3 It is clear that Danish citizenship is not a guarantee for subsequent judicial recovery of the defaulted amount if the Danish citizen lives, for example, in Tunisia. The application of a criterion of citizenship for the reason given by the police would indeed be a serious indication that indirect discrimination on grounds prohibited by the Convention had taken place. The possibilities of subsequent judicial recovery would rather justify a criterion of residence. However, with respect to such criterion counsel draws the attention of the

Committee to a letter of 6 April 1995 addressed to the DRC in which the Minister of Business Affairs (Erhvervsministeren) expresses the view that a credit policy according to which no credit is granted to persons unless they have lived in Denmark for at least five years would be contrary to the discrimination rules. It is the author's conclusion that the police did not at all attempt to clarify with the bank the real reason behind the requirement of citizenship.

8.4 Counsel states that, according to the State party, the decisions of the Chief Constable and the State Prosecutor were based on the fact that differentiation of treatment that pursues a legitimate aim and respects the requirements of proportionality is not prohibited discrimination. He argues, however, that the authorities did not in fact examine whether a legitimate aim was pursued by the bank and that in cases of alleged discrimination the decision whether or not to initiate proceedings must be taken after a thorough investigation of the alleged cases of discrimination.

Examination of the merits

9.1 The Committee has considered the author'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.

9.2 Financial means are often needed to facilitate integration in society. To have access to the credit market and be allowed to apply for a financial loan on the same conditions as those which are valid for the majority in the society is, therefore, an important issue.

9.3 In the present case the author was refused a loan by a Danish bank on the sole ground of his non-Danish nationality and was told that the nationality requirement was motivated by the need to ensure that the loan was repaid. In the opinion of the Committee, however, nationality is not the most appropriate requisite when investigating a person's will or capacity to reimburse a loan. The applicant's permanent residence or the place where his employment, property or family ties are to be found may be more relevant in this context. A citizen may move abroad or have all his property in another country and thus evade all attempts to enforce a claim of repayment. Accordingly, the Committee finds that, on the

basis of article 2, paragraph (d), of the Convention, it is appropriate to initiate a proper investigation into the real reasons behind the bank's loan policy vis-à-vis foreign residents, in order to ascertain whether or not criteria involving racial discrimination, within the meaning of article 1 of the Convention, are being applied.

9.4 The Committee notes that the author, considering the incident an offence under the Danish Act against Discrimination, reported it to the police. First the police and subsequently the State Prosecutor in Viborg accepted the explanations provided by a representative of the bank and decided not to investigate the case further. In the Committee's opinion, however, the steps taken by the police and the State Prosecutor were insufficient to determine whether or not an act of racial discrimination had taken place.

10. In the circumstances, the Committee is of the view that the author was denied effective remedy within the meaning of article 6 of the Convention in connection with article 2 (d).

11.1 The Committee recommends that the State party take measures to counteract racial discrimination in the loan market.

11.2 The Committee further recommends that the State party provide the applicant with reparation or satisfaction commensurate with any damage he has suffered.

12. Pursuant to rule 95, paragraph 5, of its rules of procedure, the Committee would wish to receive information, as appropriate and in due course, on any relevant measures taken by the State party with respect to the recommendations set out in paragraphs 11.1 and 11.2.

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

Notes

1. // L.K. v. The Netherlands, CERD/C/42/D/4/1991, para. 6.6.
