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Committee on the Elimination of Racial Discrimination
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Opinion

Communication No. 44/2009

Submitted by:	Nicolai Hermansen, Signe Edrich and Jonna Vilstrup (represented by Niels-Erik Hansen of the Documentation and Advisory Centre on Racial Discrimination (DACoRD))
Alleged victim:	The petitioners
State party:	Denmark
Date of communication:	25 February 2009 (initial submission)
Date of decision:	13 August 2010

[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-seventh session)

concerning

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Date of communication:	25 February 2009 (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 13 August 2010,

Adopts the following:

Decision on admissibility

1.1 The petitioners are Nicolai Hermansen, Signe Edrich and Jonna Vilstrup, all Danish citizens, born in Denmark. They claim to be victims of violations by Denmark of their rights under article 6 in relation to article 2, paragraph 1 (d); and article 5 (f) of the Convention on the Elimination of All Forms of Racial Discrimination (CERD). The petitioners are represented by Mr. Niels-Erik Hansen of the Documentation and Advisory Centre on Racial Discrimination (DACoRD).

1.2 In conformity with article 14, paragraph 6 (a), of the Convention, the Committee transmitted the communication to the State party on 23 June 2009.

The facts as submitted by the petitioners

2.1 The Danish Broadcasting Network DR aired the program "Kontant" on 3 January 2006. With a hidden camera, a journalist pretended he wanted to buy a flight ticket from Thai Travel in Copenhagen. He asked whether he would be offered a discount as a Thai. The sale person explained that according to an agreement with Thai Airways, it was possible to offer a discount of 1000 DK if he was ethnic Thai.

2.2 On 2 January 2006, one day before the broadcast of the programme, a representative of DACoRD, who was also interviewed in this programme, sent a letter to the Metropolitan police in Copenhagen informing them of the TV broadcast of the next day and already filing a complaint against Thai Airways and Thai Travel for discriminatory practices. On 4

January 2006, DACoRD informed the police, that a number of people had filed complaints because they felt discriminated against by Thai Airways/Thai Travel, as they did not benefit from the "Ethnic discount"[1]. According to the Copenhagen Metropolitan police, there was no evidence of the ethnic motive of this discount.

2.3 By letter of 6 December 2007, the police informed DACoRD that the local Director of Public Prosecutions for Copenhagen had decided on 4 December 2007 to discontinue the investigation against Thai Travel and Thai Airways under Act No 626 prohibiting all forms of discrimination.[2]. DACoRD appealed the decision to the General Director of Public Prosecution in Denmark on 17 December 2007. This appeal was rejected on 26 August 2008 on the basis that neither DACoRD nor the petitioners had a legal standing in such a case and therefore had no right to appeal. The Director of Public Prosecution explained that legitimate complaints were those brought by people who may be deemed to be parties to the proceedings. According to the Prosecutor, this is determined by the person's interest in the case and how closely this person is linked to the outcome of the case. This interest must be substantial, direct, personal and legal. According to the Prosecutor, the petitioners did not seem to have been denied discounts based on their ethnic origin or nationality. Those inquiries from DACoRD rather seemed to arise from a TV broadcast, where the objective was to see if cheaper prices could be given by Thai Airways. Since the petitioners did not seem to have personally been denied service on the same terms as others because of their ethnic origin or nationality, they could not be considered injured under Section 749, paragraph 3 of the Administration of Justice Act. The decision ended stating that it could not be appealed to a higher administrative body, in accordance with section 99, paragraph 3, of the Administration of Justice Act.

The complaint

3.1 The petitioners claim a violation by the State Party of their right to an effective remedy under article 6 of CERD in relation to article 2 paragraph 1 (d) and article 5 (f) of the Convention as they were denied a discount on the basis of their nationality or ethnic origin and were then not given access to an adequate remedy.

3.2 With regard to the police's initial decision to discontinue the investigation, which was based on lack of evidence, the petitioners reject it as the video-recording by a hidden camera clearly showed that some people were indeed offered the alleged "ethnic discount". The fact that both Thai Airways and Thai Travel denied the facts should not bar the Prosecutor from bringing the case to the City Court, which could have made its own assessment of the evidence. The petitioners underline that in Danish Law, the Prosecution has two years from the commission of the violation, to bring a case to Court. Because the decision by the local Prosecutor to discontinue the case took place one year and 11 months after the incriminated facts and that a maximum of four weeks is given to appeal that decision, the time-limit had already elapsed when the General Director of Public Prosecution became in the position to consider the appeal. The General Director of Public Prosecution therefore had no margin of manoeuvre to change that decision. However, instead of basing his decision on the same arguments than the police (lack of evidence), the

[1] About fifty persons filed complaints however DACoRD only received powers of attorney for eight persons. These complaints as well as airplane tickets proving lack of discounts were transmitted to the police.

[2] Act No 626 adopted on 29 September 1987, provides in its section 1(1) that anyone "who within a trade or business, or a non-profit undertaking, on the ground of a person's race, colour, national or ethnic origin, religion or sexual orientation refuses to serve the person in question on the same conditions as others" is liable to a fine and/or imprisonment for up to six months. The provision prohibits increased prices and other less favourable conditions for persons of a certain race or the like.

General Director of Public Prosecution based it on the lack of standing of the petitioners and their Counsel.

3.3 The petitioners insist on the fact that in Denmark, there seems to be no effective remedy for victims of racial discrimination as they cannot rely on the protection of Act No. 626 of 29 September 1987. According to the petitioners, people who are being discriminated against through the practice of discrimination testing, are nonetheless victims under Act No. 626 and therefore have legal standing. The petitioners underline that in the Danish legal system, only the Public prosecution can trigger an action to Court based on Act No. 626. The petitioners have therefore exhausted domestic remedies.

State party's observations on admissibility and the merits

4.1 On 19 October 2009, the State party submitted observations on the admissibility and merits of the communication. It considers that the petition should be declared inadmissible *ratione personae* and *ratione materiae* under article 14, paragraph 1 of the Convention. It further submits that the petitioners have failed to exhaust domestic remedies in accordance with article 14, paragraph 7 (a) of the Convention. On the merits, the State party argues that there has been no violation of the Convention.

4.2 On the factual background, the State party submits that the TV broadcasted featured Thai travel, which, upon agreement with the airline Thai Airways, granted Thais and persons travelling together with Thais and certain persons with special ties to Thailand, a special discount of DKK 1, 000 when they bought certain airline tickets from Denmark to Thailand with that company. In the broadcast, the Centre Manager of DACoRD stated that the discount scheme was contrary to the Act on Prohibition against Differential Treatment owing to Race. He therefore invited all those who believed they had been discriminated against by not being offered the special discount to contact DACoRD. On 1 March 2006, after having received two letters from DACoRD, the first one being a complaint and the second one informing them that additional victims wished to complain, the Copenhagen police requested a copy of the said broadcast from the petitioners' Counsel to further investigate the matter. By letter of 7 March 2006, the Copenhagen Police informed DACoRD that the police had received the said broadcast and that the case was being investigated.

4.3 On 30 May 2006, the owner of Thai Travel was interviewed by the police without being charged. The owner stated that the travel agency had made an agreement with Thai Airways to sell tickets exclusively, which meant that she could sell the tickets at a slightly lower price, but that no "ethnic discount" was granted. Concerning the TV broadcast, she stated that the customer in question had been very insistent and had kept asking about the price and a possible "ethnic discount" despite her repeating that the price was the same for Danes and Thais. She eventually said that the customer could have a discount, but that this discount was the same for Danes and Thais. The latter statement did however not appear in the TV broadcast. On 15 June 2006, the police interviewed the Sales Manager of Thai Airways. He stated that no difference was made on the basis of nationality but that discounts were granted to agencies and major firms depending on the number of tickets purchased.

4.4 On 19 September 2006, the Complaints Committee for Ethnic Equal Treatment[3], which had taken up the case *ex officio*, found that an airline discount scheme implying

[3] The Complaints Committee for Ethnic Equal Treatment was established pursuant to section 10(2) of Act No. 374 of 28 May 2003. It is empowered to express its opinion as to whether the prohibition of discrimination on the grounds stated or the prohibition of victimisation has been violated. The Complaints Committee also has the competence to take up the case on its own initiative.

discounts on tickets for customers of Thai ethnic origin, customers with family ties with a person of Thai ethnic origin or customers who were members of the Thai-Danish Association for Jutland and Funen, was contrary to the prohibition of direct discrimination on the basis of racial or ethnic origin under Act No. 374 of 28 May 2003 on Ethnic Equal Treatment. It considered that the requirement to be a member of the Thai-Danish Association violated Act No. 374 if there were special conditions for becoming a member that implied a specific ethnic origin or close ties to this ethnic origin. Following this decision, Thai Airways abolished the discount scheme in question.

4.5 On 8 May 2007, the Copenhagen Police contacted DACoRD to identify and interview any victims in the case. At that point, one year and four months had passed since DACoRD had informed the police that it would submit complaints on behalf of those victims. DACoRD stated that 26 persons had contacted the association following the TV broadcast stating that they wanted their money back as they felt defrauded by the companies in question. They claimed compensation amounting to the difference between the ticket prices with and without discount. DACoRD insisted that if the criminal proceedings did not result in compensation to the victims, it would institute civil proceedings against the two companies. On 10 May 2007, the Copenhagen Police interviewed Mr. Hermansen and Ms. Edrich, two of the petitioners, who had seen the TV broadcast and decided to contact DACoRD to receive compensation for not having received the said discount. On 8 June 2007, the case was handed over to the public prosecutor for a legal assessment. On 27 August 2007, DACoRD forwarded a power of attorney for Jonna Vilstrup, the third petitioner in the case before the Committee. On 19 September 2007, the Commissioner of the Copenhagen Police transmitted the case to the Regional Public Prosecutor for Copenhagen and Nornholm with the recommendation that the investigation of the case should be discontinued pursuant to section 749(2)[4] of the Danish Administration of Justice Act.

4.6 On 4 December 2007, the Regional Public Prosecutor followed the recommendation of the Police Commissioner. He considered that it could not reasonably be presumed that a criminal offence subject to prosecution had been committed. On 17 December 2007, DACoRD, who had been notified of this decision on 6 December 2007, appealed to the Director of Public Prosecutions. The Director of Public Prosecutions took his decision on 26 August 2008, where he considered that the petitioners did not seem to have been denied a discount on grounds of their ethnic origin or their nationality in connection with a specific inquiry addressed to Thai Travel or Thai Airways but have contacted DACoRD because they saw the TV forecast and thought they could obtain their tickets at a lower price. As these persons did not seem to be personally denied access to service on the same conditions as others on grounds of their ethnic origin or nationality, they could not be considered to have an essential, direct, individual and legal interest and thus could not be entitled to appeal. He ended his argument by stating that DACoRD was a lobby organisation, who could normally not be considered a party to a criminal case.

4.7 In spite of the arguments developed above, the Director of Public Prosecution decided to consider the appeal on the merits with reference to the Complaints Committee's opinion.[5] He insisted that this decision was made under Act No. 374 of 28 May 2003 on Ethnic Equal Treatment, which does not carry any criminal sanctions and therefore does not fall within the competence of the police and public prosecutors. The assessment of evidence in such cases is also subject to other principles than violations under Act No. 626 of 29

[4] According to section 749(2) of the Administration of Justice Act, the Commissioner of Police can recommend to the Regional Public Prosecutor the discontinuance of a case for lack of basis to continue the investigation.

[5] See para. 4.4 above.

September 1987 on Prohibition of Differential Treatment owing to Race. He ended by noting that Thai Airways had changed its discount scheme following the decision by the Complaints Committee and as such the *actus reus*[6] requirement of section 1 of the Act on Prohibition of Differential Treatment owing to Race could not be satisfied. There was therefore no basis for continuing the investigation since no criminal offence subject to public prosecution had been committed.

4.8 The State party argues that the Act on the Prohibition of Differential Treatment owing to Race is governed by Danish Criminal law and the principle of objectivity that governs the function of public prosecutors implies that no person will be prosecuted unless the public prosecutor deems it likely that prosecution will lead to conviction.

4.9 The Act on Ethnic Equal Treatment on the other hand affords civil law protection against discrimination and in that way supplements the Act on the Prohibition of Differential Treatment owing to Race. The protection it affords goes further in certain aspects than the Act on the Prohibition of Differential Treatment owing to Race as the rule on the shared burden of proof applies in order to ensure an effective application of the principle of equal treatment[7].The Act also includes access to compensation for non-pecuniary damage[8]. As for the Complaints Committee, which has recently been replaced by the Board of Equal Treatment[9], it can be an alternative to ordinary courts and thus review complaints of discrimination under the Act on Ethnic Equal Treatment, although it has no power to award compensation for pecuniary loss.

4.10 With regard to the complaint brought by the petitioners, the State party submits that the communication should be declared inadmissible *ratione personae* for lack of victim status. Referring to the Human Rights Committee CERD's jurisprudence[10], the State party states that for a person to be considered a victim, he or she must show either that an act or omission of a State party has already adversely affected his or her enjoyment of a right, or that such effect is imminent, on the basis of existing law and/or judicial or administrative practice. In the present case, the State party denies the petitioners the status of victim as they were neither directly nor indirectly individually subjected to and/or affected by the alleged discriminatory price policy of Thai Airways or Thai Travel. The State party emphasizes that in the case of Ms Vilstrup, she purchased a plane ticket with Thai Airways from Denmark to Australia when the "ethnic discount" at stake only concerned flights to Thailand. For that reason alone, the State party considers that this petitioner cannot be considered a victim in this case. As for the two other petitioners, Mr. Ermansen and Ms. Edrich, they travelled to Thailand for an amount of 6,330 DKK when the "ethnic discount" led to a ticket price of DKK 7,960. Therefore, the two petitioners cannot be considered victims.

4.11 The State party further submits that the part of the claim on the petitioners' right to appeal should be considered inadmissible *ratione materiae*. It refers to CERD jurisprudence where it did not consider within its mandate to assess the decisions of domestic authorities regarding the appeals procedure in criminal matters, and therefore considered this part of

[6] *Actus reus* is the voluntary and wrongful act or omission that constitutes the physical components of a crime. Because a person cannot be punished for bad thoughts alone, there can be no criminal liability without *actus reus*.

[7] According to the rule of shared burden of proof, the alleged victim only needs to report the alleged facts and it will then be left to the other party to prove that no direct or indirect discrimination has occurred.

[8] This provision ensures a wider possibility of obtaining compensation than the general rule under section 26 of the Danish Liability in Damages Act.

[9] This Committee has been replaced by the Board on 1 January 2009.

[10] Communication No. 40/2007, *Murat Er v. Denmark*, Opinion adopted on 8 August 2007, para. 6.3

the communication inadmissible *ratione materiae*[11]. In any event, in the present case, the Director of Public Prosecutions in fact did consider the appeal on its merits as outlined above (para. 4.7).

4.12 The State party further submits that the communication should be declared inadmissible for non-exhaustion of domestic remedies as filing a complaint under the Act on Prohibition of Differential Treatment owing to Race was not the only effective remedy available to the petitioners. As mentioned above[12], the Complaints Committee for Ethnic Equal Treatment had already established in its decision of 19 September 2006 that the discount scheme in question was contrary to the Act on Ethnic Equal Treatment. On the basis of that decision, the petitioners could have instituted civil proceedings before the Danish Courts to obtain compensation for non pecuniary damage under section 9 of the Act on Ethnic Equal Treatment and compensation for pecuniary damage under the general rules of the Danish law on damages. The petitioners were well aware of that avenue but decided not to use it. The State party adds that the petitioners also had the option to submit an individual complaint to the Complaints Committee for Ethnic Equal Treatment (or after 1 January 2009 to the Board of Equal Treatment) since it has the objective to provide free-of-charge and flexible alternatives to ordinary courts. The State party recognizes however that the decisions of this Committee are non-binding. Going through the Complaints Committee would have on the other hand facilitated the petitioners' access to courts with free legal aid. By neither instituting civil proceedings nor seizing the Complaints Committee, the petitioners allegedly failed to exhaust available domestic remedies.

4.13 On the merits, the State party argues that article 2, paragraph 1(d) of the Convention does not impose any concrete obligations on States parties, who therefore have a margin of appreciation in this domain. It also submits that all States parties are given a margin of appreciation with regard to the implementation of the rights of the Convention, including those provided for in article 5(f).

4.14 As for the petitioners' allegations under article 2, paragraph 1(d) and article 6, the State party argues that the Copenhagen Police carried out an expeditious, thorough and proper investigation of the case which included a review of the TV broadcast, interviews of the owner of Thai Travel and the Sales Manager of Thai Airways and an interview of Mr. Hermansen, one of the petitioners. The State party insists on the fact that the Convention imposes on States parties to carry out a thorough investigation on alleged acts of racial discrimination but does not impose a specific outcome to these investigations. The State party adds that the length of the proceedings is also due to the petitioners since it took DACoRD one year and four months to submit the relevant powers of attorney.

4.15 The State party submits that under article 6, the Convention does not imply a right for individuals to appeal the decisions of national administrative authorities to a higher administrative body. The general rule remains that only parties to a case are to be given the possibility to appeal a decision on criminal prosecution. The State party notes that the Complaints Committee for Ethnic Equal Treatment was an effective remedy for the petitioners in this case as they had taken the matter *ex officio* and made a decision on the discount scheme, which led to its cancellation.

Petitioners' comments on the State party's submission

5.1 On 26 January 2010, the petitioners commented on the State party's submission and considered that they were customers during the period where this discriminatory practice

[11] Communication No. 41/2008, *Ahmed Farah Jama v. Denmark*, Opinion adopted on 21 August 2009, para. 6.3

[12] See para. 4.4 above

still existed and therefore allegedly suffered personally from direct discrimination due to race and ethnic origin, in violation of article 5(f) of the Convention.

5.2 The petitioners argue that the report to the Police was filed without delay but it then took two years to the Regional Prosecutor to discontinue the investigation On the compliance with article 5(f), the petitioners refer to a State party's Periodic report submitted to CERD, which revealed that only a small number of the total number of complaints filed with the police went to court and that most of them were closed or discontinued for lack of evidence. In the petitioners' view, the decision by the Complaints Committee dated 19 September 2006, which could be made with the evidence provided, is in complete contradiction with the decision by the police to close the investigation precisely for lack of evidence. On the expediency of the procedure, the petitioners insist that it took the police more than a year to request the powers of attorney needed[13]. They consider that the investigation carried out did not meet the requirement of expediency and could therefore not be considered in compliance with CERD General Recommendation No. 31.

5.3 On the victim status, the petitioners recall the jurisprudence of the European Court of Human Rights, the Human Rights Committee and CERD[14], who have recognized the status of potential victims and the possibility for some organisations to represent these victims. The petitioners recognize that in principle, the State party has complied with article 4 of the Convention as well as with article 5(f) since it has adopted criminal legislation to implement them. In practice however, victims of violations of these provisions are allowed to report to the police but are then barred from appealing the decision made by the police.

5.4 On the exhaustion of domestic remedies, the petitioners insist on the fact that despite the decision by the Complaints Committee, the Public Prosecutor discontinued the investigation of the case, thus barring them from the possibility to go to Court and have the assessment of evidence made by a court of law. The petitioners reject the State party's argument that they could have instituted civil proceedings or could have submitted a complaint to the Complaints Committee in order to exhaust domestic remedies. On the first argument, they submit that the criminal proceedings gave them the possibility to obtain full remedy as it would give them access to the court free of charge and provide them with compensation. Civil proceedings are more expensive and would probably not lead to a positive outcome once the criminal procedure was discontinued for lack of evidence. As for the procedure before the Complaints Committee, it would not provide more remedies than the criminal procedure and the decisions of that Committee are non-binding. The petitioners finally stress that under Danish law, violations of article 5(f) of the Convention are a criminal offence and as such, complaints should be filed with the Danish police.

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.

[13] The complaint was filed in January 2006 and the Metropolitan police asked for the Powers of attorney on 8 May 2007.

[14] ECHR, Open Door and Dublin Well *Women v. Ireland*, Judgement of 29 October 1992, Appl. Nos. 14234/88 and 14235/88, Ser. A 246-A; HRC Communication No. 488/1992, *Toonen v. Australia*, Views adopted on 31 March 1994, para. 5.1; CERD Communication No. 30/2003 *The Jewish Community of Oslo et al. v. Norway*, Opinion of 15 August 2005, para. 7.3.

6.2 The Committee notes the State party's allegation that the communication is inadmissible *ratione personae* for lack of victim status as the petitioners were neither directly nor indirectly individually subjected to and/or affected by the alleged discriminatory practice of Thai Airways and Thai Travel. It notes that according to the State party, Ms. Jonna Vilstrup, one of the petitioners, had purchased a plane ticket with Thai Airways from Denmark to Australia when the "ethnic discount" at stake only concerned flights to Thailand. The Committee further notes that according to the State party, Mr. Ermansen and Ms. Signe Edrich could also not be considered victims as they travelled for a price which was lower than the price granted through the "ethnic discount". This information has not been challenged by the petitioners. The Committee considers that since Ms. Jonna Vilstrup purchased a ticket which was never submitted to the discount scheme in question, she can not be considered a victim of the alleged racially discriminatory act. As for Mr. Ermansen and Ms. Signe Edrich, the price they had to pay for their tickets was lower than the price granted through the "ethnic discount". The Committee further observes that the "ethnic discount" scheme no longer exists as it has been cancelled by Thai Airways following the decision by the Complaint Committee for Ethnic Equal Treatment on 19 September 2006. The Committee therefore considers that the petitioners can neither qualify as victims since they have not actually been disadvantaged by the incriminated facts nor can they qualify as potential victims since the incriminated facts can no longer produce any effects. The communication is therefore inadmissible *ratione personae* under article 14, paragraph 1 of the Convention.

6.3 Having come to this conclusion the Committee does not consider it necessary to address the other issues raised by the parties regarding the admissibility of the communication.

7. The Committee on the Elimination of Racial Discrimination therefore decides:

(a) That the communication is inadmissible *ratione personae* under article 14, paragraph 1, of the Convention.

(b) That this decision shall be communicated to the State party and to the petitioners.

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