UNITED NATIONS

CERD

International Convention on the Elimination of all Forms of Racial Discrimination

Distr.
RESTRICTED*

CERD/C/59/D/19/2000
15 August 2001

Original: ENGLISH

COMMITTEE ON THE ELIMINATION
OF RACIAL DISCRIMINATION
Fifty-ninth session
30 July - 17 August 2001

DECISIONS

Communication No. 19/2000

Submitted by : Sarwar Seliman Mostafa
[represented by counsel]

Alleged victim: The petitioner

State Party: Denmark

Date of communication: 12 April 2000

Date of present decision: 9 August 2001

***** Made public by decision of the Committee on the Elimination of Racial Discrimination.

ANNEX

DECISION 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

- FIFTY-NINTH SESSION-

concerning

Communication No. 19/2000

Submitted by: Sarwar Seliman Mostafa
[represented by counsel]

Alleged victim: The petitioner

State party concerned: Denmark

Date of communication: 12 April 2000

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 10 August 2001,

Adopts the following:

Decision on admissibility

1. The petitioner (initial submission dated 12 April 2000) is Mr. Sarwar Seliman Mostafa, an Iraqi citizen currently residing in Denmark, together with his wife and daughter. He claims that his rights under article 6 of the Convention have been violated by Denmark. He is represented by counsel.

The facts as submitted by the petitioner

2.1 The petitioner was registered as an applicant for renting an apartment with the Danish housing company DAB (Dansk Almennyttigt Boligselskab). On 8 June 1998 the DAB informed him that an apartment was available and asked him whether he would be interested in it. The petitioner confirmed that he was interested. However, under the existing legislation the municipality of Hoje Tastrup had to approve the contract. In a letter of 16 June 1998 the municipality informed the petitioner that his application had not been approved due to « housing social criteria ».

2.2 In a letter of 22 June 1998, the petitioner asked the municipality to reconsider its decision. He stated that he had a good job as an engineer and also worked as an interpreter; his wife, who was also an engineer, was training as a kindergarten employee and they both spoke Danish; their daughter attended a Danish kindergarten.

2.3 In a letter dated 3 July 1998 the municipality informed the petitioner that the case would not be reopened and that his complaint had been forwarded to the Social Appeals Board (Det Sociale Ankenaevn).

2.4 On 8 July 1998, the petitioner contacted the non-governmental organization Documentary and Advisory Centre on Racial Discrimination (DRC). The petitioner informed the staff of the centre that when he contacted the municipality on 1 July 1998 and explained that he would submit a letter from the doctor's family supporting his application in view of the fact that his daughter suffered from asthma, the municipality officer replied that even if he sent the letter, his application would be rejected.

2.5 The petitioner reported the case to the police of Glostrup, which in a decision of 24 November 1998 refused to investigate the matter under the Danish Act on Racial Discrimination. In a decision of 29 April 1999 the State Attorney for Sealand concluded that there was no reason for changing the decision of the police. The petitioner also brought the case before the Parliamentary Ombudsman who, in a decision of 4 November 1998, indicated that the petitioner should wait for the decision of the Social Appeals Board.

2.6 In a letter dated 1 October 1998 the Social Appeals Board informed the petitioner that the Municipality of Hoje Tastrup had decided to change its previous decision rejecting the petitioner's application. Later on, on 12 October 1999, the Ministry of Housing and Urban Affairs informed the DRC that the family was invited to contact the municipality.

2.7 In a letter of 27 November 1999 the Social Appeals Board informed the DRC that the apartment to which Sarwar Seliman Mostafa was to be approved had been assigned to another person, therefore it would be impossible to give Sarwar Seliman Mostafa full satisfaction in his request as neither the Appeals Board nor the Municipality had legal authority to cancel a rental agreement made by the housing company. Furthermore, on 26 January 2000 the housing company informed the DRC that the applicable legislation did not make it possible for the company to change the decision which had been annulled by the Social Appeals Board.

2.8 The Social Appeals Board adopted its final decision on the matter on 15 March 2000. It concluded that the municipality's decision of 16 June 1998 was invalid, as Sarwar Seliman Mostafa did fulfil the conditions for approval to the housing facility.

The complaint

3. Counsel claims that the State party has breached its obligations under article 6 of the Convention. He states that, despite the decision of the Social Appeals Board, the petitioner has still not been provided with an appropriate apartment and that the Danish legislation does not provide for adequate satisfaction in cases like the one under consideration. Since neither the police of Glostrup nor the State Attorney were willing to interfere in the case, there is no possibility for the petitioner to make use of any further remedies at the national level.

Observations by the State party

4.1 By a submission of 13 December 2000, the State party challenges the admissibility of the communication. It recalls that on 1 September 1998 the municipality had decided to alter its decision of 16 June 1998 and informed the Social Appeals Board that it had decided to approve the petitioner

for the dwelling applied for or a corresponding one. As a result the Board considered that the appeal had become moot and, on 1 October 1998, notified the petitioner accordingly. However, in the light of, *inter alia*, a request from the Parliamentary Ombudsman, the Board decided subsequently to consider the appeal concerning the decision of 16 June 1998. In its decision of 15 March 2000 the Board found that the decision of 16 June 1998 was invalid, although it had been modified by the decision of 1 September 1998.

4.2 The State party further recalls that in a letter of 12 October 1999 addressed to the DRC, the Ministry of Housing and Urban Affairs stated that Hoje-Taastrup local authority's administration of the rules on approval of tenants for non-profit housing in general was contrary to the rules in force, as the local authority used unlawful criteria such as whether the tenant was a refugee or an immigrant. She indicated that, in the future, she would be very alert to the manner in which local authorities administered the approval scheme and continue her efforts to ensure that the local authorities do not violate national or international law regarding racial discrimination.

4.3 Having acknowledged that the decision of 16 June 1998 was unlawful according to Danish law, the State party examines the consequences of such acknowledgment, in light of the petitioner's claims under article 6 of the Convention. The State party understands those claims to mean that, as a result of the wrongful act and on the basis of article 6 of the Convention, the petitioner should (a) have had the apartment which he had been wrongfully refused; or (b) have had a similar dwelling assigned to him; or (c) have received financial compensation.

4.4 Options (a) and (b) are not possible. A non-profit housing organisation such as the DAB is not part of the local authority, but an independent legal entity whose activities are governed by specific rules. When a local authority refuses to approve a person as a tenant, the non-profit housing organisation will offer the apartment in question to another person on the waiting list. This means that the apartment will not be vacant when it is subsequently established that the local authority's refusal to approve the applicant was wrongful. Article 6 of the Convention cannot be interpreted to mean that the Convention would require specific performance in such a situation.

4.5 The State party interprets article 6 as having two parts. The first one concerns the provision of "effective protection and remedies" and the second one the provision of "adequate reparation or satisfaction". The first part imposes on the States parties a positive obligation to introduce remedies that are available, adequate and effective and that: (i) protect the citizens against acts of racial discrimination contrary to the Convention; (ii) make it possible for the citizens to have established whether they have been subjected to racial discrimination contrary to the Convention; and (iii) make it possible for the citizens to have the acts of racial discrimination brought to an end. The State party considers that this part of article 6 is not relevant for assessing whether the applicant is entitled to specific performance.

4.6 The second part applies to situations where a person has been subjected to racial discrimination. In such cases the States parties must ensure that the victim has access to "adequate reparation or satisfaction". That means that the act or omission constituting racial discrimination is brought to an end and that the consequences for the victim are remedied in such manner that the state of affairs prior to the violation is restored to the widest extent possible. There will always be cases in which it is not possible to restore the situation prior to a violation. This may be due to the fact, for example, that the racially discriminatory act or omission is delimited in time and place and therefore cannot be reversed (such as a racist statement), or that the interests of innocent third parties should also be protected. In such cases one has to determine whether there have been attempts to remedy the consequences for the victim of the racially discriminatory act or omission.

4.7 The present case is one of those where it is impossible to restore the situation prior to the violation. The apartment for which the petitioner was wrongfully refused approval as a tenant has been let to a third party and regard for the interests of such party is a crucial argument against subsequently calling into question the legal relationship between that party and the non-profit housing organisation. To the extent that the petitioner claims that on the basis of article 6 he is entitled to specific performance, the State party finds that the communication should be declared inadmissible on the ground that no prima facie case of violation of the Convention has been established in respect of this part of the communication.

4.8 Furthermore, neither the Social Appeals Board nor any other authority have the possibility of assigning another dwelling to a person whom a local authority has wrongfully refused to approve as a tenant of a non-profit dwelling. Apart from cases where a local authority can assign a non-profit dwelling for the purpose of solving urgent social problems, it is the non-profit housing organisation itself who allocates vacant dwellings to applicants. In practice, the person in question will remain on the waiting list and will have an apartment offered when one becomes vacant, whereupon the local authority will approve the person, unless new circumstances have arisen as a result of which the person no longer satisfies the conditions for approval. In this case, however, the petitioner had chosen to have his name removed from the waiting list of the DAB in Hoje-Taastrup.

4.9 Regardless of the wrongful conduct of the Hoje-Taastrup municipality, it was the petitioner's own choice not to remain on the list, as a result of which it became impossible for the DAB to offer him another dwelling. To the extent that the petitioner claims that as a consequence of article 6 of the Convention he should have been offered another and corresponding dwelling without otherwise satisfying the general conditions for obtaining one, including being on the waiting list, the communication should be declared inadmissible, as no prima facie case of violation of the Convention has been established in respect of this part of the communication.

4.10 As for the question of damages, the State party argues that the issue has not been brought before the Danish courts and, therefore, the petitioner has failed to exhaust domestic remedies. For this purpose it is irrelevant that the police and the public prosecutor rejected the petitioner's claims.

4.11 The local authority's refusal to approve the petitioner as a tenant raised two different issues: First, whether the refusal constituted a criminal offence and second whether the refusal was otherwise wrongful, including whether the local authority had used unlawful criteria such as the petitioner's race, colour, descent or national or ethnic origin. The police and the public prosecutor only had to assess the first issue, while the second one was assessed by other authorities, including the Social Appeals Board.

4.12 The State party claims that the decisions of the police and the public prosecutor were decisive in the context of the criminal proceedings, but did not in any way preclude the petitioner from instituting civil proceedings. In connection with such proceedings the petitioner would have been able to refer, inter alia, to the decision of the Social Appeals Board and the opinion of the Ministry of Housing and Urban Affairs. If the petitioner believes that he has suffered a pecuniary or non-pecuniary loss, the institution of civil proceedings will be an effective remedy. Damages do not depend, directly or indirectly, on the outcome of criminal proceedings.

4.13 It follows from the general rules of Danish law on damages in tort that administrative authorities may incur liability in damages for actionable acts and omissions. It is therefore possible to claim damages for losses suffered by a person because of an invalid administrative decision. Cases in dispute are dealt with by ordinary courts in connection with civil proceedings against the administrative authority in question.

Counsel's comments

5.1 Counsel argues that the fact that neither the Social Appeals Board nor any other authority have the possibility to assign another appropriate dwelling to a person who has wrongfully been refused approval as a tenant of a non-profit dwelling only demonstrates the failure of Danish legislation to provide effective reparation in a case like the one under consideration.

5.2 Counsel refers to the State party's statement in paragraph 4.8 above that the person in question would remain on the waiting list and have an apartment offered when one becomes vacant. He claims that the petitioner was not aware of that practice and that the letter of 1 September 1998 from the Municipality of Hoje-Taastrup to the Social Appeals Board was never sent to the petitioner or the DRC.

5.3 Counsel disagrees with the State party's statement that it was possible for the petitioner to claim damages for losses suffered or for tort and says that Danish courts have refused to apply rules on damages in tort in cases of discrimination. The fact that a person has been subjected to discrimination does not automatically entitle that person to damages in tort. In this respect he provides copy of a decision of 4 August 2000 concerning a case in which discrimination was established where the Copenhagen City Court did not find that the act of discrimination entitled the victims to damages in tort. Counsel reiterates that all domestic remedies have been exhausted.

5.4 Counsel further submits that the Convention is not incorporated into domestic law and expresses doubts as to whether the Danish courts would apply the Convention in a dispute between private parties.

Additional information by the State party

6.1 In response to a request by the Committee to furnish additional information on effective remedies available to the author for the implementation of the decision of the Social Appeals Board dated 15 March 2000, or for receiving compensation, the State party, by note of 6 July 2001, affirms that the institution of a civil action against the Hoje-Taastrup local authority for compensation for pecuniary or non-pecuniary damage is an available and effective remedy. The author had the possibility of instituting an action before the ordinary courts based on the Hoje-Taastrup local authority's decision of 16 June 1998 and invoking the Convention on the Elimination of All Forms of Racial Discrimination. In this connection the State party refers to the practical effect of the Committee's recommendation in a prior case No. 17/1999 *Babak Jebelli v. Denmark*, which illustrates that Danish courts interpret and apply section 26 of the Act on Liability in Damages Act in the light of Article 6 of the Convention. Accordingly, the State party concludes that the communication should be declared inadmissible because the author has not exhausted available and effective domestic remedies.

6.2 On 18 July 2001, counsel informed the Committee that he had no further comments to the additional information from the State party.

Admissibility considerations

7.1 Before considering the substance of a communication, the Committee on the Elimination of Racial Discrimination examines whether or not the communication is admissible, pursuant to article

14, paragraph 7(a) of the Convention and rules 86 and 91 of its rules of procedure,.

7.2 The Committee notes that the petitioner brought his claim before the police and the State Attorney who, in a decision of 29 April 1999, refused to investigate the matter under the Danish Act on Racial Discrimination. Parallel to that, the Social Appeals Board examined the case and concluded, on 15 March 2000, that the decision of the Municipality not to approve the author as a tenant was invalid. In the meantime, the municipality had decided to alter its previous decision and approve the petitioner for the apartment applied for or an equivalent one. The Social Appeals Board informed the petitioner of the new municipality's decision by letter of 1 October 1998.

7.3 The Committee notes that, despite the new decision of the municipality and the one of the Social Appeals Board, the petitioner was not provided with an apartment equivalent to the one initially applied for, nor granted compensation for the damages caused to him as a result of the first decision of the municipality. The Committee notes, however, that the petitioner did not meet one of the conditions required to be assigned an equivalent apartment, namely, to remain on the waiting list. This failure cannot be attributed to the State party. In the circumstances, the petitioner could not obtain redress in the form of assignment of the original or of an equivalent dwelling. He could, however, have sought compensation.

7.4 As to the question of damages, the State party argues that the petitioner did not institute civil proceedings and, therefore, has not exhausted domestic remedies. Despite the arguments given by the petitioner and the reference to previous jurisprudence of the Danish courts, the Committee considers that doubts about the effectiveness of such proceedings cannot absolve a petitioner from pursuing them. Accordingly, the Committee considers that, by not exhausting the available domestic remedies, the petitioner has failed to meet the requirements or article 14, paragraph 7(a) of the Convention.

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

(a) That the communication is inadmissible;

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

9. In accordance with rule 93, paragraph 2, of the Committee's rules of procedure, a decision taken by the Committee that a communication is inadmissible may be reviewed at a later date by the Committee upon a written request by the petitioner concerned. Such written request shall contain documentary evidence to the effect that the reasons for inadmissibility referred to in paragraph 7 (a) of article 14 are no longer applicable.

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