

## MINISTRY OF FOREIGN AFFAIRS OF DENMARK

The Secretariat of the United Nations  
Office of the High Commissioner for Human Rights  
Human Rights Committee

Asiatisk Plads 2  
DK-1448 Copenhagen K  
Denmark  
Phone +45 33 92 00 00  
Fax +45 32 54 05 33  
E-mail: [um@um.dk](mailto:um@um.dk)  
<http://www.um.dk>



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**Regarding the Committee on the Elimination of Racial Discrimination's Follow-up Procedure in relation to Communication No. 46/2009, Mahali Dawas and Yousef Shava v. Denmark (doc CERD/C/80/D/46/2009)**

In its Opinion of 6 March 2012 on Communication No. 46/2009, Mahali Dawas and Yousef Shava v. Denmark, the Committee on the Elimination of Racial Discrimination (hereinafter "the Committee") concluded that Article 2, paragraph 1 (d), and Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter "the Convention") had been violated.

On that background the Committee recommended that the Government grants the petitioners adequate compensation for the material and moral injury caused by the above-mentioned violations of the Convention. The Committee further recommended the Government to review its policy and procedures concerning the prosecution in cases of alleged racial discrimination or racially motivated violence, in the light of its obligations under Article 4 of the Convention. Finally, the Committee requested the Government to give wide publicity to the Committee's Opinion.

In his note verbal (reference G/SO 237/211 DNK (21)) of 12 March 2012, the Secretariat of the United Nations, Office of the High Commissioner for Human Rights, requested the Danish Government to provide the Committee with information on measures taken by the Danish Government to give effect to the Committee's Opinion.

Having thoroughly analysed the Committee's Opinion, the Government respectfully suggests that the Opinion seems to be based on certain

unfortunate misunderstandings regarding the facts of the case and the relevant provisions of Danish law.

The Government believes that these misunderstandings have been decisive for the Committee's finding that the Convention had been violated in the relevant case.

### Paragraph 7.2 of the Opinion

As regards the first misunderstanding that the Government wishes to emphasise, reference is made to paragraph 7.2 of the Opinion, in which the Committee concludes that the possibly racist nature of the offence was set aside by the Danish authorities at the level of the criminal investigation, and therefore was not adjudicated at trial.

The following appears from paragraph 7.2:

"The Committee recalls that it is not its role to review the interpretation of facts and national law made by domestic courts, unless the decisions were manifestly arbitrary, or otherwise amounted to a denial of justice. In the present case, the Committee observes that further to the investigation of the offence by the police, the Prosecution requested that criminal proceedings against four suspects be undertaken as summary proceedings based on the defendants' guilty pleas, and decided to revise charges from a violation of section 245 (1), which criminalizes specific acts of a particularly heinous, brutal or dangerous nature, and which incurs a maximum penalty of six years' imprisonment, to a violation of section 244 of the Criminal Code, which criminalizes general acts of violence and incurs a lighter penalty of maximum three years. The defendants were finally sentenced to 50 days' imprisonment (suspended). The Committee observes that because of the summary proceedings and revised charges, the possibly racist nature of the offence was already set aside at the level of the criminal investigation, and was not adjudicated at trial."

In the Government's opinion, the assessment of the Committee on this point is based on several unfortunate misunderstandings.

### *Revised charge*

It is an unfortunate misunderstanding to conclude that the revision of the charge from violation of section 245(1) to violation of section 244 of the Criminal Code (*straffeloven*) was of significance to the examination of the possibly racist nature of the incident. Under Danish law, an *objective* assessment of the gravity of the violence committed is crucial for determining whether an offender should be prosecuted under the general provision of violence laid down in section 244 or under the provision of aggravated violence laid down in section 245(1). In order to apply section 245(1), the prosecution service must be able to prove that the

assault was particularly heinous, brutal or dangerous or that the defendant was guilty of cruelty. In that connection, any particular motives for exercising the violence, including whether it was racially motivated or otherwise had a racist undertone, are of no significance.

It may be added that it is quite common in Denmark that the police first charge a person with aggravated violence under section 245(1) of the Criminal Code if there is a suspicion that particularly dangerous violence has been committed, for example because weapons have been used. Then, if it later turns out that it is not possible to prove on the basis of the evidence available in the case that the violence was of a "particularly dangerous nature", the prosecution service will revise the charge to violence under section 244 of the Criminal Code.

In this connection, it is observed that it follows from Danish law that the prosecution service is subject to a principle of objectivity as laid down in section 96 of the Danish Administration of Justice Act (*retsplejeloven*), which implies that the prosecution service may bring charges only for those offences which it believes that it will be able to prove at trial. In a situation like the one outlined above, the prosecution service is thus under an obligation to revise the charge to general violence.

Additionally, it is observed that the special rule on increased penalty provided by section 81(1)(vi) of the Criminal Code, according to which it must be considered an aggravating circumstance if an offence is based on the ethnic origin, religion or sexual orientation or the like of others, applies irrespective of whether charges are brought under section 244 or section 245(1) of the Criminal Code.

Therefore, the revised charges did not contribute to setting aside the possibly racist nature of the assault at the level of the criminal investigation as stated by the Committee.

#### *Severity of the sentence*

As to the issue of the severity of the sentence, the Committee seems to find that the sentence of 50 days of imprisonment (suspended) imposed on the offenders was a relatively lenient sentence.

However, this finding does not accurately reflect Danish case-law. It seems that the Committee has not fully taken into account that the penalties usually imposed in the Danish penal system are typically substantially below the maximum penalty. Hence, the normal penalty for an of-

fender with no previous convictions who is convicted under section 244 of the Criminal Code of violence by, *e.g.*, blows or kicks, will typically be about 30 to 40 days' imprisonment, notwithstanding that the maximum penalty provided by section 244 is three years' imprisonment. Similarly, the normal penalty for a person with no previous convictions, convicted under section 245(1) of the Criminal Code of aggravated violence by the use of, *e.g.*, a striking weapon, will typically be between 60 days and five months' imprisonment even though the maximum penalty is up to six years' imprisonment. In this context it should be noted that the sentencing in assault cases is based on a concrete evaluation of all the circumstances of the case. The nature of the assault is an important factor in this evaluation. Other factors are *i.a.* the events leading up to the assault, the victim's injuries and the charged person's personal circumstances.

In this light, the sentence of 50 days' imprisonment imposed on the offenders cannot be assessed as a lenient sentence according to Danish case-law. The fact that the offenders' prison sentences were made suspended does not reflect a mild view of the incident by the courts either. According to Danish criminal law, it is thus a general principle that prison sentences are made suspended if the offenders' personal circumstances make it appropriate.

Some of the important criteria, as provided by sections 81 and 82 of the Criminal Code, are whether the offender has any previous convictions and whether the offender is a juvenile. Accordingly, offenders under the age of 18 are not often sentenced to unsuspended imprisonment under Danish law. This principle is reflected in international standards of law, including Article 37 (b) of the Convention on the Rights of the Child, from which it appears, *i.a.*, that the imprisonment of a child must be used only as a measure of last resort and for the shortest appropriate period of time.

In the present case, the offenders were between 15 and 17 years old and had no prior convictions.

#### *Summary proceedings based on guilty pleas*

Additionally, the Government observes that the finding of the Committee to the effect that it became of crucial significance to the examination of the possibly racist nature of the offence in the specific case that the prosecution service prosecuted the case in summary proceedings based on guilty pleas is not correct.

The crucial reason why no claim for a more severe penalty under section 81(1)(vi) of the Criminal Code was made, and why the question of whether the assault was racially motivated was not included in the charge, was that the prosecution service assessed, on the basis of all the witness statements and the video recording available of the incident, that it would *not* be possible at trial to prove that the assault had been racially motivated. In this connection, reference is made to the section above on the principle of objectivity set out in section 96 of the Administration of Justice Act.

### **Paragraph 7.3 of the Opinion**

Similarly, the Government is of the opinion that paragraph 7.3 of the Committee's Opinion contains essential misunderstandings of fact. The Committee states in paragraph 7.3:

"The Committee observes that it is undisputed that 35 offenders attacked the petitioners' house on 21 June 2004, and that the petitioners were on several occasions exposed to offensive language of a racist nature both within and outside the context of their assault. Nor is it contested that the police reported the incident to the Security and Intelligence Service, pursuant to the Memorandum on notification of potentially racially or religiously motivated criminal incidents. The Committee notes that the State party failed to submit any information on the outcome of this notification, in particular whether any investigation was undertaken to ascertain whether the attack qualified as incitement to, or an act of racial discrimination."

In the Government's opinion, the Committee finds various facts undisputed in the relevant paragraph, notwithstanding that those facts were contested during the proceedings. The Committee therefore arrives at a manifestly different view of the facts concerning the assault on the petitioners than the one taken by the Danish authorities, including the courts, in their assessment of the evidence of the case.

As stated below, the Government considers it a problem, and contrary to the fundamental procedural principles governing the Committee's examination of communications, that the Committee has found that there was a basis for making an entirely different factual assessment of the events, notwithstanding that it has only had limited insight into the facts of the case compared with the national authorities.

Moreover, the Government finds that the importance attached by the Committee in paragraph 7.3 to the lack of outcome of the Danish authorities' notification of the incident to the Danish Security and Intelligence Service is based on a misunderstanding.

*Misunderstandings of fact*

The Government rejects the Committee's observation that it is undisputed that the petitioners were attacked by 35 offenders and that they were exposed to offensive language of a racist nature on several occasions both within and outside the context of the assault. On the contrary, as described in the Government's observations of 22 March 2010, these facts are indeed contested.

While it is correct that one witness initially explained to the police that he believed that 35 young people had been present during the incident, this number was disputed by most other witnesses, who described the number of people present during the incident as considerably lower. In the civil proceedings, the court thus found that the number was about 20 to 30 persons. Moreover, from the witness statements it seems clear that few of these people (only the four convicted offenders) actually took part in the assault, whereas the rest were just spectators.

In view of this, the Government is of the opinion that the Committee's description of 35 young people assaulting the petitioners in their own home is misleading and gives an entirely wrong picture of the incident.

Similarly misleading is the statement made by the Committee in its Opinion that it is undisputed that the petitioners were exposed to offensive language of a racist nature on several occasions both within and outside the context of their assault.

As stated in the Government's observations, neither of the petitioners pointed to any racial motivation for the assault in their original statements. On the contrary, the petitioners emphasised that the incident mainly concerned disagreements related to noise from the neighbours and a wrecked crash helmet.

It should also be noted that the entire incident was recorded on video tape, which was subsequently reviewed by the police, and on the basis of which any use of offensive language of a racist nature could easily have been proved. However, as stated by the petitioner Yousef Shava himself and reproduced in the judgment of the High Court of Eastern Denmark, no racist expressions appeared on the video tape.

As to the question of whether racist expressions were made by the offenders towards the petitioners outside the context of the assault, the Government observes that the only piece of information on this point is

that a sign stating “no blacks allowed” had hung on the offenders’ door at some time. However, as appears from both the police investigation and the judgment of 3 October 2008 from the High Court of Eastern Denmark, it had not been possible to establish the detailed circumstances about this sign, including which neighbour had hung up the sign, and whether it was addressed to the petitioners.

*Not the role of the Committee to review the interpretation of facts*

The Danish Government is surprised that, notwithstanding that the Committee has only had limited access to the information of the case compared with the national authorities, the Committee has apparently considered that it had a basis for arriving at a factual assessment of what happened in connection with the incident completely different from the assessment arrived at by the Danish authorities, including the courts.

The Government observes in that connection that, as emphasised by the Committee itself in paragraph 7.2 of the Opinion, it is not the role of the Committee to review the interpretation of facts and national law made by domestic courts unless the decisions were manifestly arbitrary, or otherwise amounted to a denial of justice. This fundamental principle is reiterated, *i.a.*, in the Committee’s Opinion No. 40/2007, *Er v. Denmark*, paragraph 7.2, in which the Committee refers to several opinions from the Human Rights Committee, including No. 811/1998, *Mulai v. Republic of Guyana*, paragraph 5.3.

In that connection, the Government completely rejects any description of the decisions made in the case by the police, the prosecution service and the Danish courts, including the High Court, as being manifestly arbitrary, or a denial of justice. For further details, see below.

*Notification to the Security and Intelligence Service*

As stated above, the Committee’s statement in paragraph 7.3 to the effect that the State party failed to submit information on the outcome of the notification of the Security and Intelligence Service, in particular whether any investigation was undertaken to ascertain whether the attack qualified as incitement to, or an act of racial discrimination, is further due to a misunderstanding.

The Government did not *fail* to submit such information. The fact is that such notification is merely an element of a notification scheme, and the purpose of the notification to the Security and Intelligence Service was

therefore not at all to set in motion a new investigation or the like by the Security and Intelligence Service. See also the Government's observations.

The purpose of the notification scheme is thus *exclusively* to gather intelligence on criminal incidents with a potentially extremist motive. Such intelligence is to give the Security and Intelligence Service a basis for identifying and assessing potential signs of organised and systematic criminal activities, such as hate crimes, that might arise from extremist attitudes. This intelligence assessment is made by relating suspicious incidents notified to other data gathered by the Security and Intelligence Service.

The threshold for notification of incidents to the Security and Intelligence Service is substantially lower than the requirements applicable to prosecution and conviction. Accordingly, "any incident with a *potentially* racist or religious motive" must be notified. Hence, it is not inherently contradictory that the authorities in this case found an inadequate basis for prosecuting the offenders under the provision of section 81(1)(vi) of the Criminal Code, which prescribes increased sentences for racially motivated crimes, but nevertheless notified the incident to the Security and Intelligence Service.

As explained above and in the Government's observations, such notification to the Security and Intelligence Service thus only serves an intelligence gathering purpose and is therefore not meant to generate a specific response by the Security and Intelligence Service, *i.e.*, the initiation of a separate investigation of the incident.

#### **Paragraph 7.5 of the Opinion**

In paragraph 7.5, the Committee reaches the overall conclusion that the investigation conducted by the Danish authorities into the events was incomplete. As stated above concerning paragraphs 7.2 and 7.3 of the Opinion, this conclusion is based on several misunderstandings and misconceptions regarding the facts of the case and the relevant provisions of Danish law.

Referring to its observations, the Government additionally observes that it finds it difficult to see what further investigative steps the police could in fact have taken to shed further light on the incident. As appears from the case documents, all identified witnesses were thoroughly interviewed by the police, some of them even several times. In addition, a video re-



ording of the entire incident was available and was viewed by the police before it was returned to the petitioners.

The Government further observes that, also on this point, the Committee seems to have attached considerable importance to the information that 35 persons had allegedly taken active part in the assault, notwithstanding that, as stated above, this can obviously not be considered a fact.

### Conclusion

In conclusion, the Government is of the opinion that the Committee's Opinion is based on serious misunderstandings of fact and law on several essential points, and that these unfortunate misunderstandings have been decisive for the Committee's conclusion that the Convention has been violated.

On this background, the Danish Government would urge the Committee to reconsider its Opinion taking into account the points raised above.

The Danish Government remains at the disposal of the Committee for any further information or comments.

A copy of this letter has been forwarded to Niels-Erik Hansen, counsel for the petitioners.

Yours sincerely,

  
Michael Braad  
Head of Department  
International Law