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**Human Rights Committee**

 Decision adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2039/2011[[1]](#footnote-2)\* [[2]](#footnote-3)\*\*

*Submitted by:* A.N. (represented by counsel, Niels-Erik Hansen)

*Alleged victim:* The author

*State Party:* Denmark

*Date of communication:* 31 December 2009

*Document references:* Decision taken pursuant to rule 97 of the Committee’s rules of procedure, transmitted to the State party on 12 April 2011(not issued in document form)

*Date of adoption of decision:* 30 March 2016

*Subject matter:* Hate speech against Muslim community

*Procedural issues*: Non-substantiation of claims; victim status; non-exhaustion of domestic remedies

*Substantive issues:* Prohibition of advocacy of religious hatred; rights of religious minorities; right to an effective remedy

*Articles of the Covenant:* 2, 20 (2), 27

*Articles of the Optional Protocol:* 1, 2, 5 (2) (b)

1. The author of the communication is A.N., a Muslim residing in Denmark. He claims to be victim of a violation by Denmark of articles 2, 20 (2) and 27 of the Covenant. He is represented by counsel. The Optional Protocol entered into force for the State party on 23 March 1976.

 Factual background

2.1 In September 2005, member of Parliament for the Danish People’s Party (DPP) Louise Frevert published on her website a set of articles under the headline “articles no one dares to publish”. The referred articles contained statements accusing Muslims of believing to have a right “to rape Danish girls and knock down Danish citizens” and proposed “deporting young immigrants to Russian prisons”, adding that “even this solution is a short-term one, because when they return, they will be even more determined to kill Danes.” The articles also compared Islam with cancer. This publication received high media attention and, as a result, Frevert’s webmaster E.T. was interviewed in a news broadcast on 1 October 2005. At the interview, he stated that he was responsible for having uploaded the articles onto Frevert’s website.

2.2 On 30 September 2005, the ngo Documentation and Advisory Centre on Racial Discrimination (DACoRD), acting on behalf of the author, filed a complaint against Louise Frevert to the Copenhagen police alleging a violation of section 266b) of the Danish Criminal Code, which prohibits hate speech.[[3]](#footnote-4) On 4 and 10 October 2005, the Copenhagen police interviewed E.T. and charged him with a violation of section 266b). At the interview, he stated that he had accidentally uploaded the disputed articles onto Frevert’s website as he was uploading other material. On 11 October 2005, the Copenhagen police interviewed Frevert under caution. At the interview, she explained that the disputed articles had neither been edited nor approved by her, that they had been uploaded onto her website without her consent, and that she only learned about them when she started to receive phone calls from several reporters while she was in the UK.

2.3 By letter of 13 October 2005, the Commissioner of the Copenhagen police notified DACoRD that investigations against Frevert had been discontinued since “it could not be found with the certainty required for conviction that Louise Frevert had intended to disseminate the quotations in question” as both she and her webmaster had stated that she was unaware of the content of the articles. The Regional Public Prosecutor upheld this decision on appeal on 13 December 2005, with no further appeal being allowed.

2.4 By letter of 30 December 2005, the Copenhagen police forwarded the case file concerning E.T. to the Helsingor Police for further investigations. On 19 January 2006, the Helsingor Police recommended that the Regional Public Prosecutor withdraw charges against E.T. on the basis that it could not be proved, in light of the latter’s statements, that the articles had been published intentionally. On 8 February 2006, the Regional Public Prosecutor requested the Chief Constable of Helsingor to pursue further investigations, including IT examinations.

2.5 On 10 February 2006, DACoRD submitted a communication to the Committee on the Elimination of Racial Discrimination (CERD) on behalf of the author. In its decision of 8 August 2007, this Committee declared the communication inadmissible for falling outside the scope of the Convention on the Elimination of All Forms of Racial Discrimination.[[4]](#footnote-5)

2.6 On 4 January 2007, DACoRD filed a complaint against E.T. to the Copenhagen police.

2.7 On 3 February 2009, the North Zealand Police (former Chief Constable of Helsingor) submitted the outcome of the additional investigations on E.T., based on further interviews and forensic IT examinations of the server administrator logs, and maintained the recommendation to withdraw charges. On 18 March 2009, the Regional Prosecutor submitted the case to the Director of Public Prosecutions, also recommending withdrawing charges. On 5 May 2009, the Director of Public Prosecutions decided to withdraw charges against E.T., on the basis of insufficient evidence proving that he had intended to publish the articles. On 4 June 2009, DACoRD appealed this decision to the Ministry of Justice. On 2 July 2009, the Ministry of Justice rejected the appeal by considering that the author was not entitled to complain because the statements made about Muslims in the articles were of a general nature and affected a large and indefinite number of persons, and “the author had failed to justify any particular interest in the outcome of the case other than a personal, moral and emotional one.” This decision was final. The author notes that domestic remedies have been exhausted given that the public prosecuting authority has the exclusive competence to bring cases to court based on section 266b) of the Criminal Code.

 The complaint

3.1 The author claims to be victim of a violation by the State party of articles 2, 20 (2) and 27 of the Covenant. He contends that the State party has failed to take effective measures against yet another incident of hate speech against Muslims in Denmark by DPP members of Parliament, despite the specific provision in the Criminal Code prohibiting this kind of acts (article 266 b) of the Danish Criminal Code).The statements in the disputed articles, which are part of a DPP campaign to build up hatred against Danish Muslims, are a personal insult to him and constitute discrimination against him. These statements create a hostile islamophobic environment and put him at risk of assault, for example, when working in the street, by people who are influenced by these statements. A study published by the Danish Board for Ethnic Equality in 1999 indicated that people from Turkey, Lebanon and Somalia (all of them mainly Muslims) living in Denmark suffered from racist attacks in the street. The Board was dismantled in 2002 and no further studies have been carried out since then. The lack of updated figures on racist attacks is the responsibility of the Danish State.

3.2 The author claims that, by denying him the right to appeal the decision of the Director of Public Prosecutions to discontinue the investigations, his right to an effective remedy against the attacks suffered has been violated. He has an interest in this case because the defamatory statements affect his daily life in Denmark in a negative way. Being a Muslim, it hurts his feelings and offends him to be repeatedly accused by DPP members of having committed crimes; it prevents him from being able to integrate into Danish society, puts him in danger of racist attacks and reduces his chances of being admitted into the Danish labour market or seeking housing. He is a victim of these statements as a member of a group or class of persons negatively affected by a decision, namely Muslims living in Denmark. Furthermore, although some lower ranking DPP members have been convicted for violations of section 266b) of the Criminal Code, none of the leading members have been prosecuted. Such cases never reach the courts as they can only be brought by public prosecutors.

 State party’s observations on admissibility and merits

4.1 On 12 October 2011, the State party noted that article 20 of the Covenant establishes an obligation to enact legislation prohibiting national, racial or religious advocacy and, therefore, this provision cannot be invoked under the Optional Protocol as it cannot be interpreted as providing for direct protection for individuals. The State party added that the Committee still had not made a determination on the applicability of article 20 to individual cases.[[5]](#footnote-6)

4.2 The author failed to sufficiently substantiate his claim under article 20 for the purposes of admissibility. Legislation has been put in place specifically criminalising hate speech and making it an aggravating circumstance when the conduct is considered as propaganda. Additionally, a reporting scheme has been established by the Danish Prosecution Service to ensure uniform charging practices nationally and supervise the processing of cases regarding alleged violations of section 266b) of the Criminal Code. In this regard, special updated guidelines have been adopted by the Director of Public Prosecutions in its Instruction 2/2011.[[6]](#footnote-7) In the present case, police and public prosecutors took effective action against the incidents of alleged hate speech reported by the author and investigated the matter properly and thoroughly, including through various interviews and forensic IT investigations of the server data. In order to convict a person of hate speech, it is necessary to prove intent to show hatred, which could not be proven in the present case. There have been several prosecutions for violations of section 266b) of the Criminal Code by politicians’ statements relating to Muslims and/or Islam, including propaganda activities.[[7]](#footnote-8)

4.3 Concerning the author’s claim under article 27, the State party contends that the author failed to explain in which manner this article was relevant to the present case. The decision not to prosecute on the basis of Ms. Frevert’s website did not deprive Muslims of their right to enjoy their own culture or to profess and practise their own religion.

4.4 With regard to the author’s claim under article 2, the State party argued that such provision does not provide for an independent protection but must be invoked together with other substantive provisions of the Covenant. Given that the author failed to substantiate his claims under articles 20 and 27, his claim under article 2 should also be declared inadmissible as unsubstantiated. Furthermore, article 2 does not grant the author or his representative a right to appeal an administrative decision as it is usually only the “victims” who are entitled to appeal a decision regarding criminal prosecution to a higher-level administrative body. Pursuant to section 721 of the Danish Administration of Justice Act, criminal charges may be withdrawn where it is considered that conviction cannot be expected or where the proceedings will entail difficulties, costs or trial periods which are not commensurate with the sanction. If the Director of Public Prosecutions decides not to press charges, those who are presumed to be the victims or to have a special interest in the case are notified thereof in order to allow them to appeal against this decision. In the present case, both the public prosecutor as well as the Ministry of Justice found that the author was not a victim within the meaning of section 266b) of the Criminal Code and did not have an essential, direct, individual and legal interest in the outcome of the case so that he could be considered as entitled to appeal.

4.5 The communication was also inadmissible for non-exhaustion of domestic remedies because the author could have filed a criminal complaint against Ms. Frevert and Mr. E.T. for the allegedly defamatory statements under section 267 of the Danish Criminal Code, which prohibits defamatory statements, including racist statements. The offenses under article 267 are subject to private prosecution as established by section 275 of the Criminal Code.[[8]](#footnote-9) The State party invoked the Committee’s inadmissibility decision in *Kasem Said Ahmad et al v Denmark[[9]](#footnote-10)* to support that, in cases such as the present one, authors are required to institute proceedings under sections 267 and 275(1) of the Criminal Code in order to exhaust domestic remedies.

 Authors’ comments on the State party’s observations

5.1 On 28 November 2011, the author submitted his comments on the State party’s observations on admissibility and merits. The author challenged the State party’s statement that article 20 (2) does not provide for individual protection. The case invoked by the State party (Communication No. 1570/2007) did not make a determination in that regard. It would weaken the protection of minority groups if victims could not invoke violations of their rights under articles 20 and 27 before the Human Rights Committee.

5.2 The statements contained in the disputed articles aimed at creating fear among Danish population against the religious minority group of “Muslims”. The statements also constituted incitement to adopt a policy of deportation of Muslim criminals to serve their prison sentence in Russian prisons. Whether or not the articles mentioned ethnicity or only religion was irrelevant since the police and prosecution authorities could investigate and press charges under the Criminal Code either way. Members of religious minorities should be protected not only in the law but also in the effective application of the law by providing protection against hate crimes. The author noted that article 20 (2) constitutes a limitation to freedom of speech as established by the Committee’s General Comment No. 34 on article 19.

5.3 The author contended that Mr. E.T.’s propaganda that Muslims who have committed crimes should be deported and separated from the rest of the Muslim community in Denmark amounted to a violation of articles 20 and 27 of the Covenant.

5.4 The State party failed to ensure his right to redress due to political rather than legal reasons. He argued that “the Danish government was only able to stay in power due to the support of the DPP”. The police dealt with the complaints filed against Ms. Frevert and Mr. E.T. in a different manner. In the case against Mr. E.T., a non-DPP member, the Regional Public Prosecutor asked for advice from the Director of Public Prosecution, whereas in the case against Ms. Frevert, the Regional Public Prosecutor made the final decision. He added that Instruction 2/2011 of the Director of Public Prosecutions, which the author claimed to have been likely enacted as a response to the present case, allows the police to take an initial decision on whether to press charges and, in case of a positive decision, the case is then forwarded to the Regional Prosecutors Office and, if the decision to press charges is maintained, it would then have to be examined by the Director of Public Prosecution before the case can go to court. On the contrary, local police/prosecution authorities can adopt a final decision not to press charges under article 266b) without this decision having to be confirmed by the highest prosecution authority.

5.5 Concerning the State party’s claim on non-exhaustion of domestic remedies, the author notes that he could not be expected to file criminal complaints under section 267 of the Criminal Court since these would also have been declared inadmissible arguing a lack of direct interest in the case.

 Additional submissions by the parties

6.1 On 25 January 2012, the State party challenged the author’s statement that Instruction No. 2/2011 of the Director of Public Prosecutions was enacted a result of the present case. Guidelines for submission and reporting of cases under section 266b) of the Criminal Code were issued in 1995 by the Director of Public Prosecutions, under Instruction 4/1995, and later amended in 2006 and 2011.

6.2 With regard to the author’s statement that prosecution procedures in the case of Ms. Frevert and Mr. E.T. differed, the State party notes that such differentiation was due to the fact that no charges were pressed against Frevert and, therefore, the Director of Public Prosecution did not take any decision in that regard, whereas charges were pressed against Thaleruphuus and, hence, the Director of Public Prosecution had to take a decision on that case. Proceedings were therefore carried out in accordance with the applicable guidelines referenced above.

6.3 Finally, the State party reiterates that politicians, including DPP members, have been convicted of violations of section 266b) of the Criminal Code in several cases, the most recent case being the one referenced in the State party’s previous submissions (see footnote 10).

6.4 On 7 September 2012, the author insisted on the lack of a uniform prosecution practice regarding section 266b) of the Criminal Code. According to the author, if the Danish government wanted to ensure a uniform practice, all incidents of possible violations of section 266b) should be submitted to the Director of Public Prosecution in order for this Office to decide on whether to prosecute these cases. Instead, local police and prosecution authorities could decide to discontinue investigations. However, in case they decided to press charges, they had to submit the case first to the regional prosecutor and then to the Director of Public Prosecutor, thereby making it more difficult to initiate criminal proceedings. This was the problem with the present case, where local police/prosecution authorities decided not to prosecute Ms. Frevert and were able to make a final decision in that regard. On the contrary, in order to charge Mr. E.T., local authorities had to “ask for permission” from the regional prosecutions office, who in its turn had to ask the Office of the Director of Public Prosecution to make a decision that would eventually allow the case to go to court.

6.5 On 19 October 2012, the State party challenged the author’s statements regarding the procedure for cases of violation of section 266b) of the Criminal Code. It noted that, according to the procedure established by Instruction No. 2/2011 of the Director of Public Prosecutions, all cases of alleged violation of section 266b) must be submitted to the Director of Public Prosecutions through the Regional Public Prosecutor. This applies whether or not the Commissioner of Police and/or the Regional Public Prosecutor finds that a prosecution should be instituted. This means that cases in which it is recommended to withdraw charges must also be submitted to the Director of Public Prosecutions. Contrary to the author’s allegation, the Commissioner of Police cannot decide not to launch an investigation. Such decision may only be taken by the Regional Public Prosecutor and appealed to the Director of Public Prosecutions. A copy of decisions by the Regional Public Prosecutor must be sent to the Director of Public Prosecutions in all cases to allow him to monitor the regional practice in this field, pursuant to section 2.4.2 of the referred Instruction.[[10]](#footnote-11)

 Issues and proceedings before the Committee

7.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

7.2 The Committee notes that a communication submitted on behalf of the author to the CERD was declared inadmissible for falling outside the scope of the Convention on the Elimination of All Forms of Racial Discrimination. As required under article 5, paragraph 2 (a) of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under any other international procedure of investigation or settlement.

7.3 The Committee takes note of the State party’s argument that domestic remedies have not been exhausted because the author did not file a complaint under section 267 of the Danish Criminal Court, which prohibits defamatory statements, including racist statements. The Committee also takes note of the author’s claim that criminal complaints under section 267 of the Criminal Court would also have been declared inadmissible. The Committee notes that according to the author his appeal against the withdraw of charges against Mr. E.T. under section 266b had been rejected because the statements made about Muslims had been of a general nature affecting an indefinite number of persons and because the author had failed to justify any particular interest in the outcome of the case. The Committee concludes that in these circumstances it would be unreasonable to expect the author to initiate separate proceedings under section 267 after having unsuccessfully invoked section 266(b) of the Criminal Code. Accordingly, the Committee concludes that domestic remedies have been exhausted pursuant to article 5, paragraph 2 b) of the Optional Protocol.

7.4 The Committee notes the author’s claims under articles 20 (2) and 27 of the Covenant based on the State party’s failure to take effective measures against hate speech statements directed against the Muslim community living in Denmark. The Committee recalls its jurisprudence that no person may, in theoretical terms and by *actio popularis*, object to a law or practice which they hold to be at variance with the Covenant and that any person claiming to be a victim of a violation of a right protected by the Covenant must demonstrate either that the exercise of their rights has already been impaired by a State act or omission or that such impairment is imminent, basing their argument for example on legislation in force or on a judicial or administrative decision or practice.[[11]](#footnote-12) In the present case, the Committee notes the author’s argument that the defamatory statements in the disputed articles affect his daily life in a negative way, preventing him from integrating into the Danish society, accessing social rights and putting him at risk of attacks by persons who may be influenced by such statements. However, the Committee considers that, without prejudice to the State party’s obligations deriving from article 20 (2), the author has failed to demonstrate that his rights under the Covenant were effectively impaired by the State party, or that such impairment would be imminent as a result of the decision to withdraw charges under section 266 (b) of the Criminal Code for the lack of intent to publish the disputed quotations. The author has therefore failed to establish that he was personally affected by the State party’s decision not to prosecute Ms. Frevert or Mr. E.T. for the publication of the articles. In light of the above, the Committee concludes that the author has failed to demonstrate that he was a victim of a violation by the State party of a right protected under the Covenant and declares this part of the communication inadmissible under article 1 of the Optional Protocol.

7.5 The Committee points out that article 2 may be invoked by individuals only in relation to other provisions of the Covenant. A State party cannot reasonably be required, on the basis of article 2, paragraph 3 (b), to make such procedures available in respect of complaints which are insufficiently founded and where the author has not been able to prove that he was a victim of such violations. Since the author has failed to demonstrate that he was a victim of a violation for purposes of admissibility in relation to articles 20, paragraph 2 and 27 of the Covenant, his allegation of a violation of article 2 of the Covenant is inadmissible, for lack of substantiation, under article 2 of the Optional Protocol.

8. The Human Rights Committee therefore decides:

 (a) That the communication is inadmissible pursuant to articles 1and 2 of the Optional Protocol;

 (b) That the decision shall be transmitted to the author and to the State party.

1. \* Adopted by the Committee at its 116th session (7-31 March 2016). [↑](#footnote-ref-2)
2. \*\* The following members of the Committee participated in the examination of the communication: Yadh Ben Achour, Lazhari Bouzid, Sarah Cleveland, Olivier de Frouville, Ahmed Amin Fathalla, Yuji Iwasawa, Ivana Jelic, Dunkan Muhumuza Laki, Photini Pazartzis, Sir Nigel Rodley, Victor Manuel Rodríguez-Rescia, Fabián Omar Salvioli, Dheerujlall Seetulsingh, Anja Seibert-Fohr, Yuval Shany, Konstantine Vardzelashvili and Margo Waterval. [↑](#footnote-ref-3)
3. Section 266b) of the Danish Criminal Code provides that “(1) Any person who, publicly or with the intention of wider dissemination, makes a statement or imparts other information by which a group of people are threatened, insulted or degraded on account of their race, colour, national or ethnic origin, religion, or sexual orientation shall be liable to a fine or imprisonment for a term not exceeding two years. (2) In determining the sentence, it is considered an aggravating circumstance if the conduct can be characterized as propaganda activities.” [↑](#footnote-ref-4)
4. The CERD Committee recalled that “the Convention does not cover discrimination based on religion alone, and that Islam is not a religion practised solely by a particular group, which could otherwise be identified by its race, colour, descent, or national or ethnic origin.” Communication No. 36/2006, *P.S.N. v Denmark*, of 8 August 2007, para. 6.3. [↑](#footnote-ref-5)
5. The State party cites, in that regard, the Committee’s Communication No. 1570/2007, *Vassilari et al v Greece*, views adopted on 19 March 2009. [↑](#footnote-ref-6)
6. Instruction 2/2011, of 14 September 2011 of the Director of Public Prosecutions, on “Processing of cases of violation of section 266b) if the Criminal Code and the Act on Prohibition of Differential Treatment based on Race, and cases in which section 81 (1) vi) of the Criminal Code might apply.” [↑](#footnote-ref-7)
7. The State party cites the example of a DPP member who had been convicted on 3 December 2010 by the District court of Randers for a breach of article 266b) for making racially offensive comments in the course of a political debate. [↑](#footnote-ref-8)
8. According to section 267(1) of the Danish Criminal Code, “any person who violates the personal honour of another by offensive words or conduct or by making or spreading allegations of an act likely to disparage him in the esteem of his fellow citizens shall be liable to a fine or to imprisonment for a term not exceeding four months.”

 Section 275 of the Criminal Code establishes that “The offences set out in this Part shall be subject to private prosecution, except for the offences referred to in sections (…) 266b) (…).” [↑](#footnote-ref-9)
9. Communication No. 1487/2006, *Kasem Said Ahmad et al v Denmark,* decision of inadmissibility adopted on 18 April 2008, para. 6.2. [↑](#footnote-ref-10)
10. Section 2.4.1 of Instruction 2/2011 (*op.cit*) establishes that “All cases of violation of section 266b) of the Criminal Code in which a charge has been preferred must be submitted to the Director of Public Prosecutions through the Regional Public Prosecutor together with a recommendation on the question of prosecution. (…)

 Section 2.4.2 establishes that “Cases where the Commissioner of Police finds that a report of an alleged violation of section 266b) should be dismissed (…) or where no basis is found for continuing the investigation, must be submitted to the Regional Public Prosecutor together with a recommendation stating why the report should be dismissed or the investigation discontinued. If the Regional Public Prosecutor endorses the recommendation, the Commissioner of Police must notify the persons presumed to have a reasonable interest therein of the decision as soon as possible (…) and provide guidelines on the right of appeal. It must appear that the decision can be appealed to the Director of Public Prosecutions. The Director of Public Prosecutions must be notified of all cases in which a report lodged with the police is dismissed (…). [↑](#footnote-ref-11)
11. See Communications No. 318/1988, *E.P. et al. v. Colombia*, decision of inadmissibility adopted on 25 July 1990, para. 8.2; No. 1453/2006, *Brun v. France*, decision of inadmissibility adopted on 18 October 2006, para. 6.3; 1868/2009, *Andersen v Denmark,* decision of inadmissibility adopted on 26 July 2010, para. 6.4; and 1879/2009, *A.W.P. v Denmark,* decision of inadmissibility adopted on 1 November 2013, para. 6.4. [↑](#footnote-ref-12)