Comments from the Danish Government to the report by the Commissioner for Human Rights of the Council of Europe following his visit to Denmark from 19 to 21 November 2013

I. Human rights of asylum-seekers and immigrants

1. The rights of children in the context of asylum and immigration

a. The best interests of the child in family reunification procedures

Re paragraph 11

The best interests of the child are considered in cases concerning children under the age of 18 processed according to section 9c in the Aliens Act. In 2012 the wording "the best interests of the child" (*hensynet til barnets tarv*) were added to section 9c. The referral to the best interests of the child was merely a clarification in wording. For further description reference is made to the comments by the Danish Government regarding recommendation 4 in Memorandum to the Danish Government from the Commissioner for Human Rights to the Council of Europe, 11 July 2007.

Re paragraph 12 and 13

Ensuring a more balanced set of rules on family reunification involving children has been a priority matter for the current Danish Government. New legislation was adopted in 2012 placing further emphasis on best interests of the child.

Under the new legislation the integration potential of a child is considered *only* if the child has reached the age of 8, has a parent in a country other than Denmark and a parent in Denmark, and if the parents have decided that the child should not apply for family reunification in Denmark within the first 2 years after the conditions for family reunification were fulfilled. The rule encourages parents to apply for family reunification for the child as soon as possible, which must be considered to be in the best interest of the child, if the child is going to live in Denmark.

The Government does not accept the premise that the child's integration potential and the best interest of the child are opposite to each other. Often it will be in the best interest of the child to stay with the parent in the country where the child has grown up and is already integrated in society.

Re paragraph 15

New legislation entered into force 1 February 2014. The mother and the child in question have both reentered Denmark on basis of a revival of their residence permit after a decision based on the new legislation.

Re paragraph 16

Based on judgment of the European Court of Human Rights in *Osman v. Denmark, judgment of 14 August 2011, and judgment of the Danish Supreme Court of 7 November 2012, both referred to in the report,* the Danish Immigration Service re-opened cases where the applicants had had their residence permits revoked after a certain time living outside Denmark. Some of The re-opened cases were reversed. According to the present procedures the judgments of the European Court of Human Rights and the Danish Supreme Court are taken into consideration by the immigration authorities when deciding in cases of family reunification.

Re paragraph 7, 17, 18 and 19

The Danish Immigration Authorities will in all cases consider Denmark's international obligations.

The Government notes that Denmark's international obligations do not automatically confer a right to family reunification on children below the age of 18.

In cases where denial of family reunification would be in conflict with the international obligations of Denmark and family reunification cannot be granted according to the Danish Aliens Act section 9 (1) (2), a residence permit will be issued according to section 9c (1) of the Aliens Act.

This could for instance be the case if the child and the parent residing in Denmark otherwise have to live as a family in a country, which the person residing in Denmark does not have the possibility to enter into and reside in together with the applicant – for instance due to health reasons or rights connected to the asylum status.

This is for instance also the case if one of the child's parents who is residing in the home country and with whom the child resides, is granted permission to family reunification of spouses in Denmark with a person that is not the child's parent and if the child has not previously shared family life with the other parent who is still residing in the home country.

This also applies if the establishment of family life with the parent who is still residing in the home country must be assumed impossible or if the best interest of the child goes against referring the child to establishing family life with the parent who is still residing in the home country.

Thus, children between 15 and 18 years of age are not barred in general terms from applying for family reunification. The age limit merely means that children between 15 and 18 do not have a statutory right to family reunification.

Furthermore, reference is made to the remarks regarding paragraph 12 and 13.

b. The rights of children belonging to families of rejected asylum-seekers

Re paragraph 22

Asylum-seekers are, as a general rule, required to stay in an asylum centre while their application is being processed in Denmark. Asylum-seekers with minor children are typically offered a two bedroom apartment in an asylum centre.

Asylum centres are divided into reception centres for recently arrived asylum-seekers, accommodation centres for asylum-seekers whose application is being processed and departure centres for asylum-seekers who have received a final rejection of their application and are required to leave Denmark or are to be deported. Special centres are further provided for unaccompanied minor asylum-seekers and asylum-seekers with special needs for care, e.g. due to severe illness.

The Danish Immigration Service seeks to ensure that families with children are not moved unnecessarily from one centre to another.

All children between the ages of 6 and 16 are offered tuition corresponding to Danish primary and lower secondary school. As far as possible, children are also offered classes in their mother tongue. The number of lessons equals that of Danish primary and lower secondary school.

As far as the length of rejected asylum-seekers' stay in asylum centres is concerned, the Government notes that rejected asylum-seekers are obliged to leave the country in accordance with the decisions of the immigration authorities. The departure will be handled by the police, if the said persons do not leave voluntarily.

The Government is conscious that children of rejected asylum-seekers, who refuse to leave Denmark voluntarily, may be placed in a difficult position. Services offered families with minor children therefore aim at balancing the children's needs with the fact that their parents refuse to respect the decisions of the immigration authorities.

The Government has significantly improved the option for asylum-seekers to live outside of the asylum centres. The option of private housing is now offered to a much larger group of asylum-seekers. This group includes asylum-seekers who are able to provide for themselves (and their family) and those to whom relocation is considered particularly beneficial. The latter group focuses, in particular, on families with children. For families with children the time for offering private housing has been shortened from 18 months to 12 months after the family's application has been refused.

Unaccompanied minor asylum-seekers are also included in the new rules and will be offered the opportunity for housing and seeking ordinary employment outside the centre while their case is processed, if they have stayed in Denmark for six months, starting from the date the asylum application was submitted. Before allowing such employment and housing, it will be assessed whether the minor asylum-seeker has the necessary maturity to undertake a job and provide for himself or herself.

Accommodation outside of the asylum centres gives asylum-seekers the possibility to create a more normal setting for their everyday life, especially for the benefit of the children.

In addition, private housing, education and other activities have the purpose of encouraging a healthy and individual development of the children and in that way prepare them for their future life. Focus is in this context put on physical, metal, spiritual, moral and social aspects.

Reference is made to the Danish Government's remarks regarding paragraph 23 and 24.

Re paragraph 23

As mentioned above, asylum-seeking children of school age are subject to compulsory school attendance during their stay in Denmark.

In asylum centres run by the Red Cross children are typically offered introductory tuition at the Red Cross asylum school. This has the purpose of clarifying the child's vocational level and providing the child with basic knowledge about Danish language and society. Subsequently, the child will either receive normal tuition at the Red Cross asylum school or at a normal public school.

If staying in an asylum centre run by a municipality the child will generally be offered tuition at a public school, normally equivalent to tuition in reception classes. The child will then gradually be introduced into ordinary classes.

Re paragraph 24

As mentioned above, for families with children, whose application for asylum has been rejected, private housing will be offered 12 months after the final rejection. The offer is given regardless of the family's willingness to co-operate with the authorities in organizing their departure from Denmark.

For other asylum-seekers, this housing option is available already when they have stayed in Denmark for six months, starting from the date the asylum application was handed in to the Danish Immigration Authorities

The Immigration Service has informed that since 2 May 2013 on which the amendment of the Aliens Act (Act no 430 01/May 2013) came into force that gave the possibility for some asylum-seekers to move outside the asylum centres, approximately 450 asylum-seekers have been approved to stay outside the asylum centre system (as per 10 March 2014). The Government considers this number significant when compared to the total number of asylum-seekers accommodated in the asylum centres.

Re paragraph 26
The Government is confident that the Danish asylum system is in compliance with United Nations' Convention on the Rights of the Child (UNCRC).

Nevertheless, the Government has a constant focus on ensuring and improving the situation of children in the asylum system.

c. Human rights of unaccompanied and separated minor migrants

Re paragraph 27
The figures were correct at the time they were provided to the Commissioner. The updated figures for the period from January until September 2013 are – due to a correction – 252 persons. The figures for the entire 2013 are 367.

Re paragraph 28
Unaccompanied minor asylum-seekers are accommodated in special asylum centres staffed with specially trained personnel. As mentioned above, unaccompanied minors may too be permitted to live outside the asylum centres, e.g. with family members already residing in Denmark.

Unaccompanied minor asylum-seekers may only be placed in special institutions for young offenders if charged with a criminal offence and by the decision of a judge.

Re paragraph 30
Asylum-seekers are generally not deprived of their liberty during their stay in Denmark. Unaccompanied asylum-seekers are therefore, depending on their age, allowed to leave the asylum centre. If an unaccompanied minor asylum-seeker leaves an asylum centre and does not return, the police will immediately be notified. The police will issue an alert that ensures that the minor is handed over to the immigration authorities, when found by the police.

The immigration authorities take various measures to limit the risks of unaccompanied minor asylum-seekers becoming victims of trafficking. Any information indicating trafficking of minors will be handed over to the police.

Re paragraph 31

Unaccompanied minor asylum-seekers are considered a particularly vulnerable group under the Danish Aliens Act. They are accommodated in special asylum centres staffed with specially trained personnel, have a personal representative appointed, and their applications for asylum are handled in a fast-track procedure.

Unaccompanied minors will only undergo a normal asylum procedure, if they are deemed sufficiently mature. The assessment is made individually in each case.

If unaccompanied minor asylum-seekers are not deemed mature enough to go through a normal asylum procedure, a special residence permit as unaccompanied minor may be granted, if they do not have family or access to public care in their country of origin and consequently would be left to take care of themselves if returned, cf. Section 9 c (3) i of the Aliens Act.

Such residence permit can also be granted to an unaccompanied minor who has been deemed sufficiently mature to go through the asylum process and whose application for asylum is rejected. In such cases, the Immigration Service decides ex officio whether the conditions for this residence permit are met, cf. Section 9 c (3) ii of the Aliens Act.

In these cases the purpose of the minor's stay in Denmark is to strengthen the minor and prepare him or her for the return by helping to build up qualifications to start a new life upon return. When the municipal council arranges the individual offer of support and help, attention will be paid to the fact that the minor is to return to the country of origin. Offers for education, vocational training etc. are therefore given in this context.

Residence permit can be given when the alien turns 18 in exceptional cases, e.g. if the minor took up residence in Denmark at an early age and now has integrated successfully.

When granted residence under Section 9 c (3) of the Aliens Act the minor will be informed that the residence permit will be extended once he or she reaches the age of 18. Likewise, the minor is informed about the option of applying for residence permit on other grounds before reaching 18.

Re paragraph 33

All children go through a psychological screening upon their arrival in the asylum centre system. Psychosocial teams, providing individual support for families and children, are available throughout the asylum system.

The incident mentioned was investigated by the Danish Red Cross, the Danish Immigration Service and the Ombudsman. The latter concluded that the suicide attempts seemed triggered by factors not linked to the conditions in the asylum centre.

Re paragraph 35

The Danish Government holds that the accommodation arrangements for unaccompanied minor asylum-seekers under the Danish immigration system are fully in line with the United Nations' Convention on the Rights of the Child (UNCRC).

Re paragraph 36

When determining the age of an unaccompanied minor asylum-seeker, *all information* available in the case is taken into consideration. Medical examinations are only conducted if necessary. Even if a medical examination has taken place, the age assessment will not depend solely on the result of this examination. Other information, including the statement of the asylum-seeker, will also be considered. The benefit of the doubt is always given to the applicant.

Re paragraph 37

The Council of Europe Group of Experts on Action against Trafficking in Human Beings' (GRETA) report (2011) has in recommendation number 15.1 regarding child victims of trafficking stated that: "GRETA considers that the Danish authorities should take into account the special needs and circumstances to be addressed in the identification of child victims of trafficking, including the setting up of a special referral mechanism for unaccompanied children."

As stated in Denmark's reply to the recommendation, which is published on GRETAs webpage http://www.coe.int/t/dghl/monitoring/trafficking/docs/Reports/GRETA_2011_21_FGR_DNK_en.pdf , the normal referral system involving the Centre Against Human Trafficking (CMM) includes both adult and minor victims of trafficking.

As far as unaccompanied minors are concerned, information regarding potential trafficking may come to Immigration Service's knowledge from a variety of sources besides CMM, e.g. the minor's personal representative, the asylum centre staff, social workers, the police or the minor him/herself.

The Immigration Service has a team of professionals, who have been trained to consider asylum applications from unaccompanied minors, including unaccompanied minors that (might) have been victims of trafficking. The special needs and circumstances to be addressed in the identification of child victims are thus handled by staff specialized in processing asylum applications from unaccompanied minors.

As regards investigation of unaccompanied minors, who have left the Danish asylum system, reference is made to the remarks regarding paragraph 30.

Re paragraph 38
Reference is made to the remarks regarding paragraph 31.

Re paragraph 39
The Netherlands, Norway, the United Kingdom and Sweden participate in a partly EU-funded project called "the European Returns Platform for Unaccompanied Minors" (ERPUM). The project focuses on humane and orderly return of unaccompanied minors who have received final rejections of their asylum application.

In this context, a pilot project on the return of rejected unaccompanied minors to Afghanistan is being developed by the ERPUM countries. In the spring of 2011, the former Ministry of Immigration entered as observer regarding the development of the above-mentioned pilot project.

The Government would like to underline that the decision as to whether Denmark will participate in a pilot project on the return of unaccompanied minors to Afghanistan, will not be taken until all aspects of the project are final.

Any possible participation must comply with Denmark's international obligations, including the Convention on the Right of the Child.

d. The respect of the rights of the child in further areas related to asylum and immigration

Re paragraph 40
It is already an integrated part of the asylum proceedings to examine whether minor children of asylum seeking parents have independent asylum motives.

Regarding the practice of The Refugee Appeals Board the Board has stated that it is fully aware that children may have serious grounds for claiming asylum in their own right and can be confronted with persecution, fear of persecution and risks of a child-specific nature, such as under-age military recruitment, trafficking, sexual exploitation or genital mutilation. For instance, the Board in February 2014 granted an applicant and the applicant's minor daughter asylum because of the risk that the applicant's minor daughter – if returned to the country of origin – would be subject to female genital mutilation.

The Refugee Appeals Board has also stated that the Board at no time has precluded the possibility that a group of children could, in a particular context, be considered a particular social group within the meaning of the Geneva Convention.

The Refugee Appeals Board has further informed that it adapt its examination of the child to the child's age and maturity.

The Board is aware of the special circumstances applicable to asylum-seeking minors, see *inter alia* the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, paras. 213- 219. The Refugee Appeals Board will therefore usually make less strict demands when it comes to the burden of proof in case of children.

As regards the handling of cases regarding unaccompanied minors the Refugee Appeals Board has informed that these cases are given special priority. The Board aims to complete proceedings in these cases within two months.

Re paragraph 43
Reference is made to the remarks regarding paragraph 40.

2. Other human rights issues pertaining to asylum and immigration

a. Strengthening human rights safeguards in asylum procedures

Re paragraph 47
The figures were correct at the time they were provided to the Commissioner. The updated figures for the period from January until September 2013 are – due to a correction – 5.607 persons. The figures for the entire 2013 are 7.540.

Re paragraph 49
When applying for asylum in Denmark the applicant is invited to fill out an application form in which he or she in more specific terms can explain the reason for seeking asylum in Denmark.

Thereafter, the asylum-seeker is called in to an interview with the Immigration Service. The purpose of the interview is, among other things, to give the asylum-seeker a chance to explain his or her asylum motive further. During the interview, the application form is being translated and the part of the interview concerning the asylum-seekers asylum motive will in general take its basis in the asylum-seekers written remarks. If the written asylum application is extensive it will afterwards be sent off to translation, depending on whether the asylum case is to be processed in Denmark or

not. If the asylum-seeker has not filled in a written application, circumstances, which would otherwise appear from the application, will be clarified at the interview.

If the Immigration Service decides that an asylum application can be processed in Denmark and needs further information, the Immigration Service will once again interview the applicant. During the course of the interview, the asylum-seeker has the opportunity to clarify further why he or she is applying for asylum in Denmark.

During all interviews with the Immigration Service, the asylum-seeker is assisted by an interpreter. Asylum adjudicators systematically spend the first minutes of an interview making the applicant feel at ease. The adjudicator explicitly asks the applicant and the interpreter whether or not they understand one another. If this is not the case the interview is discontinued and the applicant is summoned for a new interview on another day.

The applicant is also informed that he or she immediately should say so, if the interpretation becomes unclear at any point of the interview. During the interview breaks are made *inter alia* to allow the applicant, the interpreter and the adjudicator to recuperate.

At the end of the interview the applicant is again asked about the quality of the interpretation and the written report of the interview is read to him or her in its full length. If the applicant notices any misunderstandings they are corrected right away. The applicant is given the opportunity to sign the report. Thus, the applicant has many opportunities to point out any insufficiency.

The Immigration Service has stated that it considers the level of interpretation at all stages of the asylum process to be fully satisfactory including at the initial stage.

The Ministry of Justice finds that the current practice constitutes a safe, fair and effective ground in the handling of asylum applications. The possibility of introducing recording of interviews in the asylum process has been considered. However, the possible advantages by such an arrangement are not found to correspond to the disadvantages, which include longer handling time and placing further focus on inconsistent statements made during the initial phase of the asylum procedure.

Re paragraph 51

Denmark is aware of the situation of asylum-seekers in Bulgaria. Denmark has not suspended transfers to Bulgaria under the Dublin Regulation, however, until a clear picture of the situation in Bulgaria is available, Denmark will not carry out forced returns to Bulgaria under the Dublin Regulation.

Re paragraph 53
Reference is made to the remarks regarding paragraph 49.

Re paragraph 54
Reference is made to the remarks regarding paragraph 49 – 51.

b. Situation of rejected asylum-seekers

Re paragraph 59
Asylum-seekers, including rejected asylum-seekers, are provided with the possibility of seeking accommodation and ordinary employment and work outside of the asylum centres. In order to qualify for this, certain criteria must be met. The asylum-seeker must, *inter alia*, have stayed in Denmark for at least six months and co-operate with the authorities regarding the processing of his or her application for asylum – or, if the application is denied finally – regarding the departure to the country of origin.

Exemptions can be made to the criteria regarding co-operation, *inter alia*, if the lack of co-operation is caused by illness. Furthermore, the provision can be modified, *inter alia*, due to situations concerning minors' schooling or if the authorities do not effect decisions regarding expulsion.

As previously mentioned, accommodation outside the asylum centres for families with children are offered after 12 months from the rejection of their asylum application *regardless* of the co-operation with the authorities.

According to The Danish Immigration approximately 23 asylum-seekers have been approved to work and approximately 450 asylum-seekers have been approved to move outside the asylum centres in the period from 2 May 2013 to 10 March 2014.

Re paragraph 64
The Government agrees that rejected asylum-seekers shall not remain in asylum centres for several years.

With regard to rejected asylum-seekers who cannot be returned it is important to distinguish between the situation when a return cannot be carried out because of lack of cooperation from the rejected asylum-seeker, and the situation when a return is not possible although the rejected asylum-seeker has assisted in the return efforts.

As for the first group the Government finds it important to stress that a rejected asylum-seeker should not be able to exert pressure to obtain a residence permit by denying to abide by the

authorities' rejection of asylum through counteracting the return efforts. As for the latter situation the Danish Aliens Act provides that residence permit may be issued to a rejected asylum-seeker, if it has not been possible to return the alien for at least 18 months, if the alien has assisted in the return efforts for 18 months consecutively, and if return must be considered futile according to the information available at the time.

Furthermore, the Government finds it important to differ between rejected asylum-seekers and persons on "tolerated stay". Persons on "tolerated stay" cannot be forced to return to their country of origin, because they risk persecution within the provisions of the Convention relating to the Status of Refugees or risk the death penalty or being subjected to torture or inhuman or degrading treatment or punishment. At the same time they are also excluded from getting a residence permit in Denmark due to the fact that they are, for instance, considered a danger to national security, falling within the scope of article 1 F of the Convention relating to the Status of Refugees or have been convicted for serious crimes committed in Denmark and subsequently expelled.

Re paragraph 65

The Government would like to stress that returns of aliens are executed with respect of Article 3 of the European Conventions on Human Rights. This is also the case when a returnee has serious health problems. In such cases a humanitarian residence permit can be granted if medical treatment is not available in the country of origin. If the treatment is available, albeit at a considerable cost, a humanitarian residence permit is not granted. This practice is in accordance with the case-law of the European Court of Human Rights.

c. Use of migrant detention

Re paragraph 69

The staff of the Ellebaek Institution for Detained Asylum-Seekers is highly attentive to any personal circumstances of detainees, such as mental and somatic conditions, that will make them particularly vulnerable when detained. Accordingly, it is a standard operating procedure for managing detentions to pay due regard to the situation of the individual detainee and to adapt activities and initiatives to the particular needs of the target group of the Institution.

As regards the detention of children accompanying their parents, the Institution has prepared separate in-house instructions regarding the detention of parents accompanied by children under 7 years of age. These instructions describe the various conditions and requirements to be satisfied to safeguard the best interests of a child when its parent is committed to the Institution. If the best interests of a child cannot be safeguarded while it is committed to the Institution, the local authorities will be requested to assume responsibility for the care of such child. The Institution always endeavours to limit the period of committal imposed on this group of people as much as

possible. Accordingly, the instructions stipulate that parents accompanied by one or more children may not be committed to the Institution for more than 72 hours. The period of detention is usually less than 24 hours.

Detention of foreigners aged 15-17 is governed by separate in-house instructions complementing the general conditions and rights during the period of committal to the Institution. According to those instructions, it must be checked whether there are other detainees in the Institution with the same nationality as the relevant young person and, if so, whether it would be in the best interests of the young person to associate with such person. Moreover, young detainees must be offered a wider choice of leisure time activities, educational offers and similar activities. Weekly entries must also be made jointly by all staff groups in the personal file of all young detainees, and the head of the relevant prison unit must call Danish Red Cross to establish contact to the person appointed as the young person's appropriate adult. Young persons aged 15-17 are not committed to a special unit at the Institution as mentioned in paragraph 41, but to an ordinary unit based on a specific assessment of the needs and best interests of the individual young person. It should be noted in this respect that in reality very few foreigners aged 15-17 are committed to the Institution, for which reason no separate unit has been set up for this specific age group.

As regards the detention of persons with disabilities pursuant to the general rules on health services for inmates of the institutions of the Danish Prison and Probation Service the staff of the Ellebaek Institution will care for any detainees with particular health needs due to physical or mental disability. When a new person is committed to the Institution, or shortly afterwards, an institution nurse will perform a health screening assessment of the detainee to clarify *inter alia* whether he or she has any health problems requiring intervention by health professionals.

Regarding the detention of victims of trafficking the Ellebaek Institution collaborates with Hope Now, a non-governmental social organisation, and the Danish Centre against Human Trafficking regarding the implementation of the initiatives considered necessary by them for specific detainees in the Institution belonging to the said group of persons.

Re paragraph 71

The Danish Aliens Act contains limits to the duration of administrative detention. Section 36 of the Aliens Act provides administrative detention under judicial review in accordance with section 37. According to section 37 (1) and (3) of the Aliens Act an alien deprived of his liberty must, if he has not already been released, be brought before a court of justice within 3 full days of commencement of the deprivation of liberty, and the court shall rule on the lawfulness of the deprivation of liberty and its continuance, which later may be extended by the court, but not by more than 4 weeks at a time.

Furthermore, section 37 (8) of the Aliens Act provides that deprivation of liberty for the purpose of return under section 36 may not occur for a period exceeding 6 months. The court may extend this period for up to additionally 12 months if particular circumstances apply, including cases where, notwithstanding all reasonable efforts, the return process may be expected to take a long time owing to the aliens lack of cooperation in the return or delays in obtaining the requisite travel documents and entry permit.

Section 37(8) provides that the deprivation of liberty must be as brief as possible and may be continued only while the return is being arranged and duly carried out.

Re paragraph 72

The Danish National Police has set out a strategy for the use of detention under the Danish Aliens Act. The strategy was most recently updated in October 2012. It follows from the strategy that detention shall always be used with consideration and only if and as long as it is necessary to reach the objective aim. Furthermore, it must always be based on a specific assessment in each individual case and only be effected if less coercive measures are insufficient. Detention must thus always be proportional and as short as possible. If an alien is being deprived of his liberty, the case must be prioritized and expedited as quickly as possible, and special consideration must be taken in cases concerning vulnerable aliens (e.g. psychologically and physically ill, elderly, minors, pregnant women, etc.).

Reference is also made to the remarks regarding paragraph 69 and 71.

Re paragraph 73

The Government would like to point out that video hearings are not conducted from rooms at Ellebaek Institution for Detained Asylum-Seekers of the Danish Prison and Probation Service. In preparation for a video court hearing aliens at Ellebaek are brought to a building of the Danish National Police by employees of the Danish Prison and Probation Service. The building is located outside the premises of Ellebaek. In this building a video hearing room, a lawyer room and a waiting room have been set up. In the waiting room two employees from Ellebaek and the next alien to be brought before the court in the video hearing room are present. Employees from Ellebaek take care of guard duties, as it is also the case during hearings in person at the Hilleroed District Court. In the video hearing room the alien, his/her lawyer and an interpreter are present. The judge and the Danish National Police's representative are situated in a court room in Hilleroed District Court.

Furthermore, it should be noted that first-time hearings are always held at the Hilleroed District Court, where the alien and his/her lawyer are physically present in the court together with the judge, the representative from the Danish National Police and an interpreter. Only hearings concerning

subsequent prolongations of the detention are held via video conference. Such hearings are carried out in the above-described fashion.

In some few cases, hearings concerning prolongation have been held at the Hilleroed District Court with the physical attendance of the alien and not via video conference.

Also, the Government would like to stress that it is a general condition for holding a court hearing via video conference that the court finds this procedure unobjectionable considering the purpose of the court hearing and the facts of the case, cf. section 748 b, (1), of the Danish Administration of Justice Act.

d. Integration of refugees in Danish society

Re paragraph 76
The aim of this practice is mainly to assess whether the requirements for family reunification are to be met and not to reassess the protection needs for already recognized refugees in Denmark. If the spouse in Denmark is a refugee or has been granted protection status and still risks persecution in his or her country of origin the requirements for family reunification can be suspended.

Re paragraph 77
On 1 January 2012 an accrual principle regarding the rights to cash family benefits was implemented. According to this principle residency or employment in Denmark is required in two out of the last ten years to obtain the rights to full benefits.

From 1 January 2013 fugitives/refugees were excluded from the accrual principle. Another change made in the accrual principle regarded residency in the realm of Denmark cf. the Faroe Islands and Greenland this change means that residency in these parts of the realm is equated with residency in Denmark.

According to the Social pension act residency in a period of 3 years in the realm of Denmark is required to obtain the rights to old age pension. The accrued pension entitlement depends on the time of residency in the realm from the age of 15 years until the retirement age.

In accordance to social invalidity pension and calculation of accrued pension for fugitives/refugees residence in the country of origin is equivalent to residency in the realm of Denmark. The same applies to other countries in which the person concerned has been a resident on a foundation similar as to what is mentioned in § 7 of the Danish Aliens Act.

Similarly applicable until the 1 January 2011 was the opening of rights for- and calculation of accrued state pensions for fugitives/refugees.

From 1 January 2011 the act is changed in such a way that fugitives/refugees can no longer equate the period of residency in the country of origin etc. with residency in the realm of Denmark when seeking the right to old age pension and calculation of accrued pension. In the same period a transnational agreement was implemented under which the existing rules regarding equated residency between country of origin and residency in the realm of Denmark is still applicable for fugitives/refugees who have entered Denmark before the law became effective and who will reach the retirement age before 1 January 2021.

Re paragraph 80
The Government is of the opinion that it is important to encourage refugees to be an active part of the Danish society and the possibility of achieving permanent residence is one way to encourage refugees to do so. The conditions for a permanent residence permit in Denmark are in general tied to integration in the Danish society. A minimum requirement of 5 years of residence in Denmark is for that reason considered to be a reasonable condition for permanent residence. It should be noted that certain conditions for permanent residence will be waived in accordance with Denmark's international obligations. Furthermore a refugee has access to a special waiver regarding certain conditions for permanent residence even if it is not required by Denmark's international obligations. This applies to refugees who have been in Denmark for at least 8 years and have made an effort to become integrated in the Danish society.

Re paragraph 81
Reference is made to the remarks regarding paragraph 76.

Re paragraph 83
On 26 February 2014 the Danish Government presented a bill for the Parliament, which revokes the integration potential criterion in relation to selection of quotas refugees. Instead selection will focus on the capacity of the receiving communities and the needs and expectations of the refugee. The proposal has generally been positively received by UNHCR and other NGOs and is expected to be adopted by the parliament with effect as of 1 June 2014.

Besides the commitment to resettle approximately 140 Syrian refugees in 2014, Denmark contributes considerably to the humanitarian efforts to help Syrian refugees. The Danish Government has recently decided to donate DKK 200,000,000 to helping Syrian refugees and Denmark has undertaken to manage a 3-year protection and development program for Syrian refugees in Jordan.

e. Combating racism and intolerance

i. Hate speech and hate crime

Re paragraph 89

In paragraph 89 the Commissioner notes that in 2012, there were 14 indictments under Section 266 b of the Danish Criminal Code, 4 convictions and 4 acquittals.

Firstly, it should be noted that the data, which the Director of Public Prosecution provided to the Commissioner in November 2013, concerns the number of counts concerning hate speech, for which one or more persons were indicted or sentenced. Thus, in 2012 6 counts resulted in a conviction in court (1 imprisonment, 3 court fines, 1 suspended sentence and 1 conviction in absentia) and 4 counts were settled out of court (ticket fines). According to the data provided there was only 1 acquittal in 2012. Please find enclosed an English version of the statistics previously provided by the Director of Public Prosecutions (Annex I).

Secondly, it should be noted that there is a periodic deviation regarding the data. Thus, indictments in 2012 may relate to crimes reported to the police in 2011, just as convictions in 2012 may relate to indictments from 2011.

As regards the case summarized in paragraph 89 where a politician was acquitted in December 2013, it should be noted that the district court's verdict has been appealed to the high court by the prosecution. Since the case has yet to see its final conclusion it should not at this point serve as an example of Danish case law or the "limited number of successful prosecutions" in the field of hate speech.

Re paragraph 90

In paragraph 90 it is mentioned that NGOs active in the field of combating racism continue to question the effectiveness of existing legal remedies and deplore the lack of opportunities for them to represent alleged victims of hate speech. In this connection it should be noted that under Danish law there are no restrictions as to who may represent victims of a hate speech, just as there are no restrictions as to who may report a crime to the police under section 266 b of the Danish Criminal Code. Thus, NGOs are free to – and do in fact – represent victims of hate speech and report such crimes to the police.

However, it follows from the Danish Public Administration Act that a decision made by a Danish authority as a general rule cannot be appealed by a person or an organization that cannot be considered a party to the decision. In order to be considered a party to a decision one must have a substantial, personal and legal interest in the decision. Thus, a decision to discontinue an

investigation or drop the charges in a case concerning a possible violation of section 266 b can as a general rule only be appealed by a person (or by an organization representing that person) if the person in question can be considered a victim of the statements in question, that is if the statements have had specific consequences for the person in question.

It should be noted that Danish authorities may *proprio motu* assess the correctness of a decision on the merits even when formal entitlements to appeal are not satisfied, and that this in fact happens regularly with regard to possible violations of section 266 b. Thus, in a number of cases concerning possible violations of section 266 b the merits of the case have been considered despite the fact that the person or organization making the appeal cannot be considered party to the particular proceeding. One example being the case mentioned in paragraph 90 (UN CERD, opinion of 6 March 2006 (Communication Number 34/2004: Mohammed Hassan Gelle v. Denmark). Here, the Regional Prosecutor considered an appeal from a Danish NGO representing a person of Somali origin on the merits in a case concerning a decision by the Copenhagen Police not to open an investigation regarding statements about Somalis in general made in a Danish newspaper. Similarly, the Regional Prosecutor considered an appeal from a Danish NGO on the merits in the case summarized in UN CERD Communication Number 22/2002 despite the fact that the reported statements were of a general nature and thus did not have specific consequences for the NGO.

In this context reference is also made to the enclosed Communication No. 1879/2009 from the United Nations Human Rights Committee, which concerned a complaint made by a Danish NGO on behalf of a Danish muslim concerning statements about muslims in general made in two Danish newspapers (Annex II). On the grounds that the author had failed to establish that the specific statements had specific consequences for him or that the specific consequences of the statements were imminent and would personally affect him, the Committee found the communication inadmissible stating that the author had failed to demonstrate that he was a victim for purposes of the Covenant on Civil and Political Rights.

Re paragraph 91

In paragraph 91 the case of Mahali Dawas and Yousef Shava v. Denmark is mentioned in relation to reports that racist motives are often not adequately investigated by the Danish police. In this context, it should be noted that the case concerns an episode that took place 10 years ago and that a number of initiatives have been taken since then to ensure that the police and prosecution deal with possible hate crimes correctly. E.g. the Director of Public Prosecution has issued detailed guidelines in this area, just as relevant police officers and prosecutors have received special education on how to detect and handle such cases. Reference is made to the Government's comments to paragraph 99-102. Thus, the case of Mahali Dawas and Yousef Shava v. Denmark should not be taken into account when evaluating the current state of affairs within this field in Denmark.

Furthermore, the Government believes 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 International Convention on the Elimination of All Forms of Racial Discrimination had been violated. The Government would like to draw attention to the enclosed copy of the letter of 18 June 2012 from the Government to the Committee on the Elimination of Racial Discrimination, in which the Government sought to correct these misunderstandings (Annex III).

As to the claim, that there is a general lack of reporting of hate crime, the report does not state on what basis this claim is made. The Danish victim report that was published in 2012 based on information given by self-reported victims of crime concludes that victims of hate motivated violence are just as likely to report the crime to the police as victims of violence that is not hate motivated. Reference can be made to the report regarding victims 1995-96 and 2005-12 by Professor Flemming Balvig, Britta Kyvsgaard and Anne-Julie Boesen Pedersen, University of Copenhagen and the Danish Ministry of Justice.

Also, the Government would like to point out that the campaign mentioned in paragraph 91 ("Stop hate crime") was continued in 2012 with financial support from The Danish Ministry of Justice.

Re paragraph 92

In paragraph 92 of the report it is stated that in 2012 and 2013, 10 out of respectively 21 and 28 court decisions related to racially-motivated offences resulted in convictions. However, the data provided by the Director of Public Prosecutions concerns hate speech (section 266 b) and includes other decisions than court decisions. It should also be noted that the data is based on the number of counts.

In 2012 there were 10 counts of violation of section 266 b of the Criminal Code which resulted in a guilty decision, including 6 counts that resulted in court decisions and 4 counts that resulted in ticket fines. There was one count that resulted in acquittal. There was a withdrawal of charges concerning 1 count and the charges were waived concerning 10 counts. In 2013 there were 8 counts of violation of section 266 b that resulted in a guilty decision. 7 counts resulted in court decisions and 1 count resulted in a ticket fine. There were 3 counts that resulted in acquittal and the charges were waived concerning 15 counts and withdrawn concerning 2 counts.

In 2012 and 2013 the Director of Public Prosecutions waived the charge in a number of cases on the grounds that the statements in question were not of such a grave nature as to constitute a violation of section 266 b. Furthermore, a number of the statements could not be considered "expressed publicly or with the intention of wider dissemination", as the statements were made during a private conversation or during an argument in a public place and only overheard by a few by-passers. In

this context it should be noted that in a criminal proceeding, the prosecutor has the burden of proof that a criminal offence has been committed, and that pursuant to section 96, Subsection 2, of the Danish Administration of Justice Act, prosecutors have a duty to observe the principle of objectiveness. This principle entails that a suspect should not be prosecuted if the prosecution service based on the evidence before it is of the opinion that a court will not convict the suspect.

An example of a case where the charges have been waived is a case from 2013, where two persons made racist remarks to the owner of a pizzeria and his brother after having waited for their food a while. Two other guests in the pizzeria overheard the remarks. The charges were waived on the grounds that the statements were not expressed publicly or with the intention of wider dissemination. Instead the two persons were convicted of violating section 266 (serious threats) and section 267 (defamation) of the Criminal Code as they had threatened and violated the personal honour of the owner. The statements for which the charges were waived under section 266 b were instead – with a reference to section 81(6), of the Criminal Code – considered an aggravating circumstance and taken into account by the court when sentencing the violation of section 267.

Re paragraph 93

In paragraph 93 the Commissioner notes that between 2011 and 2012 the percentage of crimes motivated by ethnic origin and religion has increased substantially according to the report by the Danish Security and Intelligence Service (PET) regarding criminal offences in 2012 with a possible extremist motive (RACI 2012). In this context it should be noted that PET gathers intelligence on incidents with a potentially extremist motive for the purpose of giving PET a basis for identifying and assessing potential signs of organized and systematic criminal activities, such as hate crimes that might arise from extremist attitudes. The threshold for registering an incident under the RACI report scheme is substantially lower than the requirements applicable to prosecution and conviction as the police has to register "any incident with a potentially racist or religious motive". Thus, the RACI report also contains information on incidents that are not necessarily criminal offences, just as it contains information on incidents that have not been reported to the police, incidents where it has not been possible to find the offender, and victimless incidents (e.g. a sticker with a swastika found on a wall by the police). Consequently, the fact that the number of incidents with a potentially racist or religious motive registered by the police has increased should not automatically lead to the conclusion that the number of hate motivated violations of the Danish Criminal Code has increased accordingly.

Furthermore, the Government would like to point out that even though there has been an increase between 2011 and 2012 in the number of incidents potentially motivated by ethnic origin and religion the overall number of incidents motivated by various *extremist* attitudes decreased in the same period of time.

ii. Work of the national police

Re paragraph 95

It appears from paragraph 95 that the Commissioner is concerned about reports of ethnic profiling practices. Recent examples of ethnic profiling that were brought to his attention include a search operation carried out in December 2012 at the entrance of a Copenhagen church frequented by Africans. The Commissioner understands that in January 2013 the police authorities apologized for this operation.

Regarding the operation it should be noted that the Copenhagen Police had obtained specific information causing them to believe that illegal aliens attended the location. Against this background a routine control was carried out by the Copenhagen Police Alien Control Group, where the people present on the specific location were asked to identify themselves in order to locate potential illegal aliens. The Copenhagen Police has later apologized for not being aware that the location was used for religious purposes and that a church service was conducted at the time of the control, which the Copenhagen Police had no intention of disturbing.

Re paragraph 96 and 103

According to paragraph 96, the Commissioner notes in particular that Danish law allows police officers to carry out random stop-and-search operations without reasonable suspicion in designated areas. It has been reported that the geographical spread of the designated areas and lack of time limits for these operations, coupled with the possibility for the latter to be carried out without reasonable suspicion, result in increased risks of ethnic profiling.

In paragraph 103, the Commissioner calls on the Danish authorities to look into possible practices of racial profiling by the police and to start a discussion on the best way of addressing any such practices. He strongly encourages them to use the guidance provided by ECRI in its General Policy Recommendation N°11. In particular the Commissioner stresses ECRI's recommendation that member states should define and prohibit racial profiling by law; introduce a reasonable suspicion standard; and carry out research on racial profiling and monitor police activities in order to identify any such practices. While referring to the case of *Gillan and Quinton v. the United Kingdom*, judgment of 28 June 2010 by the European Court of Human Rights the Commissioner recalls that the Court found that granting broad discretion to police officers to carry out stop-and-search operations entailed a clear risk of arbitrariness.

As regards the mentioned the case, the Danish Ministry of Justice immediately examined the ruling carefully to assess whether or not it would affect the Danish rules on visitation zones allowing the police to stop and search citizens under certain circumstances. The British and the Danish regulation have some similarities but there are also differences on crucial points.

According to the Danish rules a visitation zone may only be set up if the police assess that such a measure is necessary given the circumstances. This means that at the time in question there must be an increased risk that someone in the specific geographic area is likely to commit a criminal act endangering other people's life. This assessment by the police must among other factors be based on whether such criminal acts have previously been committed in that specific area and if these acts are connected in time to the establishment of the visitation zone.

On that basis the ruling of the Court of Human Rights does not apply directly to the Danish regulation and therefore the Danish Ministry of Justice did not find cause to change the rules in force. The Danish Ministry of Justice did however inform all police districts about the court ruling and the conclusion of the Ministry's examination. At the same time the Danish Ministry of Justice took the opportunity to highlight the terms and conditions that must be considered and met before establishing a visitation zone.

Visitation zones have so far mainly been set up in Copenhagen in relation to clashes between rival gangs committing criminal and violent acts in the metropolitan area. In these cases the primary purpose of establishing a visitation zone has been to disarm gang members. In cases where the police have decided to establish a visitation zone due to an ongoing dispute between criminal gangs in the immigrant community it is unavoidable that among those who are stopped and searched by the police there will be a relatively high proportion of people from ethnic minority backgrounds.

However, the Copenhagen Police District remains committed to avoid discrimination of any kind. The prevention of ethnic profiling is part of the general strategy for the police force in Copenhagen, and the Danish National Police attaches great importance to teach the police students at the Police Academy to fight and prevent ethnic profiling. Hate crimes and questions concerning racism, intolerance and the relationship with minorities are now part of the mandatory education for police officers in Denmark.

Re paragraph 97

According to paragraph 97, the Commissioner was informed that The Independent Police Complaints Authority has referred an increasing number of cases of police abuse to the Director of Public Prosecutions, including cases in which lower level prosecutor's offices had opted not to refer the case to court.

It would appear that the paragraph is based on a misunderstanding. The Independent Police Complaints Authority has informed the Danish Government that the Commissioner was informed that in its short existence, the Authority has – compared to the former system – received and dealt with an increasing number of complaints both concerning police conduct and police abuse.

Furthermore, the Commissioner was informed that in the far majority of cases, the Public State Prosecutor has referred the cases to court in accordance with the authority's recommendations. In the very few cases where the Public State Prosecutor has opted not to refer the cases to court, the Authority has – for the most part – appealed the decision to the Director of Public Prosecutions.

Re paragraph 99-102

As regards the recommendations in paragraphs 99-102, the Government would like to draw attention to the following initiatives taken in recent years by the police and prosecution service to combat hate crime, including hate speech.

In a joint letter of 22nd September 2011 to all Commissioners of Police and all Regional Public Prosecutors the Director of Public Prosecutions and the National Commissioner of Police emphasized the obligation of the police and prosecution to ensure effective prosecution in hate crime cases. In the letter the police and prosecution services were also encouraged to contribute to projects/campaigns concerning hate crime e.g. information campaigns aimed at influencing public opinion on hate crime. A copy of the letter (in Danish) is enclosed (Annex IV).

Furthermore, in 2011 the Director of Public Prosecutions issued a new Instruction No. 2/2011 which contains detailed guidelines on the investigation and prosecution of hate speech and hate motivated crimes.

In addition to that, one-day seminars on hate crime have been held in all police districts in Denmark during 2011 and 2012. The Danish Security and Intelligence Service and The Danish Institute for Human Rights have developed the seminars and police officers as well as prosecutors have been teaching at the seminars. The participants at the seminars have been police officers and prosecutors.

Furthermore, the Director of Public Prosecution has developed a seminar specifically on hate crime to prosecutors, lawyers and judges. Finally, hate crime was appointed a special area of focus in the 2012-2015 strategy of the prosecution service.

More specifically as regards the guidelines on hate speech in Instruction No. 2/2011, it should be noted that in order to ensure transparency and a uniform practice by the police and prosecution as to the application of section 266 b of the Danish Criminal Code in cases concerning hate speech the Instruction contains detailed guidelines supplemented with relevant case law as to when an act as a general rule should be considered a violation of section 266 b.

Paragraphs discussing the freedom of expression relative to such cases as well as guidelines on the investigation and the sentence claimed in such cases have been inserted in the Instruction.

Furthermore, the guidelines set out a reporting scheme concerning hate speech cases in order to ensure a uniform charging practice nationally and supervise the processing of cases.

As regards the guidelines on hate motivated crime in Instruction No. 2/2011, it should be noted that it follows from the guidelines, that it is a prerequisite for the effective action against hate crime that the police and prosecution are aware of any circumstances in criminal cases that may indicate that the offence was committed in full or in part because of the ethnic origin, religion, sexual orientation etc. of the victim.

Thus, the purpose of the guidelines is to ensure that, when such circumstances exist, the police will make such inquiries during the investigation as are necessary to clarify this aspect of the matter and that the prosecutor will plan the presentation of evidence in such cases so as to provide the requisite proof of aggravating circumstances as mentioned in section 81 section 81(6) of the Criminal Code.

In order to help the police identify the cases where application of section 81(6) of the Criminal Code might be relevant, the Instruction contains examples of circumstances that could indicate that the act was motivated by the ethnic origin, religious belief, sexual orientation etc. of the victim (hate crime indicators).

It follows from the Instruction that the police – when hate crime indicators are present – is under an obligation to investigate this aspect of the case and that prosecutors if no attempt has been made to clarify any hate motive adequately, must return the case to the police for further investigation.

If the prosecutor finds the motive to be adequately clarified and the conditions for applying section 81(6), of the Criminal Code are considered met, section 81(6) of the Criminal Code must usually be cited in the indictment/the motion for a court hearing and during the trial, the prosecutor must make sure to clarify any hate motive by interviewing witnesses and producing evidence with relevant information on that point.

Additionally, the prosecutor must emphasize any hate motive as an aggravating circumstance in relation to sentencing during his or her closing speech. Finally, the prosecutor must invite the court to take an express position on the issue of application of section 81(6) of the Criminal Code in its judgment.

II. Human rights of persons with disabilities

1. Deinstitutionalisation and inclusion in the community of persons with disabilities

Re paragraph 108 – 120

The Government notes that the report states that there is a trend towards building larger housing units for persons with disabilities in Denmark.

Figures show however a varied number of housing units for persons with disabilities. In Denmark housing units for persons with disabilities are built pursuant to the Act on Social Service or pursuant to the Act on Social Housing. Figures show (http://www.tilbudsportalen.dk) a total of 417 housing units by 31 December 2013. 208 of these have between 1 and 20 accommodations. 86 housing units have 40 accommodations or more and 78 of these were built before 2010. These housing units are built pursuant to the Act on Social Services (section 108).

Over the last years more housing units are being built pursuant to the Act on Social Housing. The Ministry of Housing, Urban and Rural Affairs reports that the numbers of accommodations by large are the same in the period from 2006-2009 compared to the period from 2010-2013.

Thus the figures do not support the notion that there is a trend toward building larger housing units for persons with disability.

In Denmark, we see it as a strength to have a varied numbers of housing units for persons with disabilities. In Denmark we strive to offer persons with disabilities individual solutions to accommodate individual needs.

The Act on Social Service states that the local authorities must ensure personal and social development for persons with disabilities. This means for example that local authorities are to provide independent living and inclusion in the surrounding community for persons with disabilities.

With regards to paragraph 110, the Government would like to note that there is no limit on 15 hours on "BPA" (personal assistance) as stated in the report. "BPA" is assigned based on the person's individual needs. "BPA" can be granted up to 24 hours per day.

It is the municipality which makes decisions regarding BPA. Municipal decisions can be appealed to the Appeals Board ("Ankestyrelsen").

With regards to temporary placement offers (paragraph 115) the Government would like to note, that in Denmark, persons with disabilities placed in a temporary placement offer provided for by the Act on Social Service, can only be moved if the local authorities evaluates that the person is no longer in need of a temporary placement. If the person no longer is in need of the temporary

placement, the local authorities are obligated to asses, if the person e.g. is in need of a permanent placement instead.

2. The legal capacity of persons with disabilities

Re paragraph 121
The Government would like to point out that the Danish Act on Legal Incapacity and Guardianship from 1995 has been amended in 2007. The correct reference to the act is therefore: The 1995 Act on Legal Incapacity and Guardianship as amended.

Re paragraph 122
It is stated that assisted guardianship represents only a limited share of the guardianship decisions.

The Government has statistics on the number of guardianship cases decided by the courts, but not updated data on the number of assisted guardianship cases, which are decided by the State Administration. The basis for this claim is therefore unclear.

Re paragraph 123 and 129
The Government has taken note of the Draft General Comment on Article 12 of the UN Convention on the Rights of Persons with Disabilities from the Committee on the Rights of Persons with Disabilities. However, the Government does not agree with the Committee's interpretation of Article 12. By letter dated 28 February 2014 the Government has therefore sent its comments to the committee on the Draft General Comment.

In that letter the Government has pointed out that the general comment should take into account that there will be individuals, such as those who are unconscious, who are living in a persistent vegetative state, have very advanced dementia, or have the most profound intellectual disabilities, who will not be in a position to understand that there is a decision to be made, the nature of that decision, or the consequence of any apparently expressed will or preference. If substitute care and treatment decisions are not made for these individuals, they will run the risk of being exploited, neglected, or even left to die. To assume that no one would ever require someone else to make a decision on their behalf would against this background not only be flagrantly wrong but ultimately irresponsible.

Furthermore, the Government has maintained that the general comment should acknowledge the various interpretative declarations made by State parties to Article 12 that *inter alia* express the understanding that the Convention on the Rights of Persons with Disabilities allows for the withdrawal of legal capacity or support in exercising legal capacity, and/or compulsory guardianship, in cases where such measures are necessary, as a last resort and subject to safeguards.

These declarations should be reflected in the general comment so that it is made clear that Article 12 of the Convention permits supported and substitute decision-making arrangements in appropriate circumstances and in accordance with the law.

The Government also pointed out that the right to recognition everywhere as a person before the law is already protected by Article 16 of the International Covenant on Civil and Political Rights. However, a historical interpretation of Article 16 leaves no doubt that this provision is limited exclusively to the capacity to be a person before the law and does not cover the capacity to act. Therefore, limitations on the capacity to act with regard to children, juveniles or mentally ill persons do not represent a violation of article 16 of the Covenant (cf. Nowak, *Un Covenant on Civil and Political Rights: CCPR Commentary (2005), p. 370*). Against this background Denmark sees no reason why such limitations should represent a violation of Article 12 of the Convention on the Rights of Persons with Disabilities. Such an understanding of Article 12 would also be contrary to the statement in paragraph 1 of the Draft General Comment, as it would set out additional rights for people with disabilities.

Furthermore, the Government has asked the Committee to bear in mind that the Human Rights Committee has made it clear that Article 26 of the Covenant – which like Article 12 of the Convention on the Rights of Persons with Disabilities contains the principle of equality before the law – does not entail that every differentiation of treatment is prohibited. Hence, the Human Rights Committee has consistently established that differentiation of treatment does not constitute discrimination, if the criteria for the differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant. The Government sees no reason why Article 12 of the Convention on the Rights of Persons with Disabilities should be interpreted differently in this respect.

Finally, the Government has pointed out that the need for and the permission of substitute decisions has been explicitly recognised in previous human rights instruments in this area (Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, UN, 1991; Declaration on the Rights of Mentally Retarded Persons, UN, 1971). These instruments accepted that – under prescribed conditions and with appropriate safeguards – regimes that allow for substitute decision-making can be indispensable if people with disabilities, whose decision-making skills may be compromised, are to lead lives in which they can both exercise and have protected their human rights. Denmark sees no need for a different understanding of Article 12.

Against this background the Government has strongly urged the Committee to reconsider the Draft General Comment and take into account the issues raised.

The Danish Government submits that the fact that the Committee's interpretation of Article 12 of the Convention as presented in the Draft General Comment is at least debatable should be reflected in the reference to the Draft General Comment in the Commissioner's report.

Re paragraph 125

It is correct that the European Court of Human Rights has found in the cases referred to in paragraph 125, footnotes 85 and 81 that incapacitation amounted to a violation of Article 8 of the European Convention on Human Rights.

However, the main reason the Court found a violation of Article 8 in these cases was that the incapacitation proceedings before the national courts were seriously flawed, which in itself amounted to a violation of Article 6.

Futhermore, in *Shtukaturov v. Russia* the Russian Civil Code did not provide for assisted or partial guardianship, which left the national court with no other choice than to decide on full guardianship.

Hence, the Court has not generally stated that full incapacitation constitutes a violation of Article 8. On the contrary, the Court stated in both judgments that in such a complex matter as determining somebody's mental capacity, the national authorities should enjoy a wide margin of appreciation.

Consequently, the Government considers that the Danish rules concerning incapacitation and guardianship are in line with Article 8 of the European Convention on Human Rights and the case law of the European Court of Human Rights.

Re paragraph 126

In paragraph 126, the Commissioner expresses concern regarding the Danish Act on Legal Incapacity and Guardianship. The Government would like to address some of the issues raised.

The Commissioner is concerned that the Act on Legal Incapacity and Guardianship does not contain any obligation for guardians to promote the person's capacity to act over time.

It is true that the Act does not contain such an obligation. However, the Government would like to point out that it follows from section 26 of the Act that as a main rule, the guardian must consult the person under guardianship before making decisions on important matters.

Furthermore, it follows from article 9 and 10 of the Act that a decision on guardianship should be changed or annulled if the circumstances of the case change over time. According to section 16 (1) (1) and (3), both the person under guardianship and the guardian can request the State

Administration to annul or change a decision on guardianship. The State Administration can also act on its own initiative.

Moreover, the Commissioner is concerned that the Act does not establish safeguards against possible conflicts of interest for guardians and undue influence or exploitation of vulnerability.

The Government would like to point out that it follows from section 12 of the Act that a guardian is dismissed if the guardian abuses his position. A guardian is also dismissed if this is necessary, taking the best interests of the person under guardianship into account.

It follows from section 28 of the Act that the State Administration supervises the guardians. It further follows from section 1 (3) of the Danish order on Legal Incapacity and Guardianship that if the State Administration becomes aware of circumstances which are contradictory to the interests of the person under guardianship, the State Administration must investigate the matter.

Furthermore, it follows from section 47 of the Act that if the guardian is to enter into a legal transaction with the person under guardianship or if their interests in a legal matter are contradictory, a special guardian is appointed to handle the case.

The Commissioner expresses concern that there is no procedural guarantee that persons placed under guardianship will be consulted prior to establishing a guardianship agreement or prior to any decision on important matters.

The Government would like to point out that this is not correct. It follows from section 19 in the Act that the person to be placed under guardianship should be consulted both prior to a court decision on full guardianship according to section 6 of the Act, where the person is deprived of his or her legal capacity, and decisions by the State Administration on other forms of guardianship according to section 5 and 7 of the Act.

Furthermore, as stated above, it follows from section 26 of the Act that as a general rule, the guardian must consult the person under guardianship before making decisions on important matters.

The Commissioner is concerned that the law does not stipulate that the duration of guardianship, should be as short as possible and that there should be a regular review of the guardianship agreement.

The Government would like to point out that the Act on Legal Incapacity and Guardianship is based on the principle that guardianship should be adjusted according to needs and should never exceed the necessary measures.

It follows from section 8 (2) of the Act that a decision on guardianship can be limited to a certain period of time if the conditions due to which the person is placed under guardianship are only temporary or if other conditions speak in favour of such a decision.

The Act on Legal Incapacity and Guardianship does not contain a review clause. However, it follows from section16 of the Act that the State Administration is competent to change or annul a decision on guardianship at any time.

The State Administration can act upon request from:

- the person under guardianship,
- the spouse, children, parents, siblings or other persons who are close to the person under guardianship,
- the guardian,
- the local council
- the regional council
- the police director.

As mentioned above, the State Administration can also act on its own initiative.

Re paragraph 127

The Government has taken note of the Court's judgment in *Alajos Kiss v. Hungary.* However, the Government does not find that this judgment is incompatible with the Danish regulation in this area.

As the Commissioner will be aware the Court recognizes in *Alajos Kiss v. Hungary* that the right to vote is not absolute. There is room for implied limitations and the contracting states must be allowed a wide margin of appreciation in this sphere. Furthermore, the Court accepts in the judgment that it is a legitimate aim to ensure that only citizens capable of assessing the consequences of their decisions and making conscious and judicious decisions should participate in public affairs.

The Government is aware that the Court did not find the Hungarian legislation proportional. However, in that respect it should be noted that it was every form of guardianship, which in Hungary led to an automatic deprival of the right to vote. This is not the case in Denmark where only guardianship as defined in section 6 of the Act on Legal Incapacity and Guardianship – where the person is deprived of his or her legal capacity - leads to a deprival of the right to vote. The conditions for being placed under guardianship were also less strict in Hungary as compared to Denmark.

As regards the reference in footnote no 88 to section 29 of the Danish Constitution, please note that this provision reads as follows: ”Any Danish subject whose permanent residence is in the Realm, and who has the age qualification for suffrage provided for in subsection (2) of this section shall have the right to vote at Folketing [Parliament] elections, provided that he has not been declared incapable of conducting his own affairs.”

Re paragraph 128 and 130

Denmark has taken note of the UN Committee on the Rights of Persons with Disabilities views in communication No 4/2011, *Zsolt Budjosó and five others v. Hungary*, including that it – in the Committee's view – constitutes a violation of Article 12 and 29 of the UN Convention on the Rights of Persons with Disabilities if a state deprives people with disabilities of the right to vote.

However, Denmark does not share the views of the Committee in this respect.

In accordance with the judgment of the European Court of Human Rights in *Alajos Kiss v. Denmark*, Denmark maintains that the right to vote is not absolute as it can be subjected to implied limitations. Furthermore, the contracting states must – as mentioned above under paragraph 127 – be allowed a wide margin of appreciation in this respect.

Denmark would also like to reiterate that it is a legitimate aim to ensure that only citizens capable of assessing the consequences of their decisions and making conscious and judicious decisions should participate in public affairs. The Danish legislation also meets the requirement of proportionality as it is only persons under guardianship as defined in section 6 of the Act on Legal Incapacity and Guardianship who are deprived of the right to vote.

Against this background, the Danish legislation must be considered consistent with Article 12 and 29 of the Convention on the Rights of Persons with Disabilities.

3. Use of coercion in psychiatry

Re paragraph 131 - 149

The Government has read the section of the report on use of coercion in psychiatry with great interest.

The conclusions and the recommendations, which are underlined by the Commissioner, show the importance of a constant focus at the area of coercion in psychiatry. The Government is very much aware of this and is sharing the Commissioners concern. Therefore we are very pleased to confirm

that the Government is continuously working on reducing possibilities of use of coercion in psychiatry.

As mentioned in the report of the Commissioner, the Ministry of Health in October 2013 published a committee report with 90 proposals to develop the efforts and services to people with mental illness.

It is a declared goal of the Government to improve conditions for people with mental illness, including a reduction in the use of coercion. In a few weeks the Government expects to present a comprehensive long-term action plan for the future development and expansion of the services to people with mental illness. This plan will include e.g. targets for reducing coercion in psychiatry, including mechanical restraint, and it will support the new framework and direction for psychiatry that has been recommended by the Commission.

Currently the Government enters partnerships with the regions responsible for progression on the reduction of coercion in psychiatry. The Government has permanently allocated 50 million Danish Kroner per year to these partnerships. 74 million Danish Kroner over four years (2014-2017) has been allocated for testing of force-free units in psychiatry and 100 million Danish Kroner in 2014 to create a better physical environment at hospitals to support a reduction of coercion.

In autumn 2014 the Government will introduce a bill to change the Mental Health Act in order to ensure better rights for psychiatric patients, who are subject to detention or coercion, including measures to reduce mechanical restraint. The Ministry of Health collaborates with the Danish Institute for Human Rights to ensure that the bill will be consistent with the international conventions on human rights.

The Government will forward the action plan to the Commissioner, when it has been published.

ANNEX I

Number of 266 b violations reported to the police

Gerningsk	Gerningstekst	2007	2008	2009	2010	2011	2012	2013
74274	Racediskrimination	21	19	24	33	38	38	17

Number of 266 b charges

Gerningsk	Gerningstekst	2007	2008	2009	2010	2011	2012	2013
74274	Racediskrimination	15	9	14	30	27	33	13

Number of 266 b indictments

Gerningsk	Gerningstekst	2007	2008	2009	2010	2011	2012	2013
74274	Racediskrimination	6	8	6	13	20	14	9

Number of 266 b decisions

Gerningsk	Gerningstekst	AFG	Afgørelsestype (type of decision)	Fældt	2007	2008	2009	2010	2011	2012	2013
74274	Racediskriminat	01	Dom (prison sentence)	J	2		1	2	2	1	2
74274	Racediskriminat	02	Idømt bøde (ticket fine in court)	J	4	1	3	1	1	3	2
74274	Racediskriminat	03	Dom/hendelse - straffelovens § 68-70 (special orders in lieu of prison sentences)	J							1
74274	Racediskriminat	04	Betinget dom (suspended sentence)	J	1	1		2	1	1	2
74274	Racediskriminat	06	Delvis betinget dom (partially suspended sentence)	J	1						
74274	Racediskriminat	07	Udeblivelsesdom (conviction in absentia)	J				2	1	1	
74274	Racediskriminat	11	Frifundet (acquitted)	N	4			2	1	1	3
74274	Racediskriminat	21	Afgjort med bødeforelæg (ticket fine)	J	1	4		1	1	4	1
74274	Racediskriminat	66	Tiltalefrafald uden vilkår (Rpl. § 722, stk. 1, nr. 4) (withdrawal of charges without conditions*)	J			1				1
74274	Racediskriminat	67	Tiltalefrafald uden vilkår (Rpl. § 722, stk. 1, nr. 7) (withdrawal of charges without conditions*)	J	1						
74274	Racediskriminat	68	Tiltalefrafald uden vilkår (Rpl. § 722, stk. 2, jf. stk. 3) (withdrawal of charges without conditions*)	J			1				
74274	Racediskriminat	69	Påtale opgivet (Rpl. § 721, stk. 1, nr. 2) (charges waived)	N	7	1	3	11	16	9	14
74274	Racediskriminat	71	Tiltalefrafald uden vilkår (Rpl. § 722, stk. 1, nr. 5) (withdrawal of charges without conditions*)	J							1
74274	Racediskriminat	74	Sigtelsen grundløs - straffeloven (Rpl. § 721, stk. 1, nr. 1) (waiving of unfounded charges)	N	2			1		1	1
Total					23	7	9	22	23	21	28

*Considered guilty, but no sanctions deemed necessary

Bemærkninger:

Der er et efterslæb i opdatering af afgørelser på alle sagsområder i POLSAS, hvorfor data for tidligere år først anses for værende pålidelige 2 måneder efter årets udgang.

Generelt:

Data for 2011 er til dels indeholdt Bornholms Politi, såfremt anmeldelsen har fundet sted efter 1. januar 2011.

Data er analyseret på baggrund af POLSAS, bearbejdet i QlikView efter anklagemyndighedens ledelsesinformationssystem.
Der tages forbehold for indtastningsfejl. Data er dynamiske, idet der tages højde for rettelser af indtastningsfejl, forsinkede opdateringer, nye afgørelser mv.
Anmeldelser er opgjort efter, hvilken gerningskode anmeldelsen er sket efter.
For anmeldelser sluttet efter rpl's §749 stk. 1 og 2 gælder, at statistikken vises for anmeldelsesåret og ikke det år, sagen sluttes.
Sigtelser og tiltaler er opgjort efter, hvilken gerningskode sigtelsen er sket efter.
Afgørelser er opgjort efter, hvilket gerningskode afgørelsen er sket efter.
Anmeldelser er opgjort efter, hvor journalnumre, der er blevet anmeldt med den konkrete gerningskode.
Sigtelser, tiltaler og afgørelser er opgjort efter, hvor mange personer pr. journalnummer, der er blevet sigtet, tiltalt og afgjort.
Der vil være en periodevis forskydning af data, da f.eks. antallet af afgørelser i 2011 kan vedrøre sigtelser rejst i 2010.
Data er opdateret den 8. november 2013.

ANNEX II

United Nations CCPR/C/109/D/1879/2009

International Covenant on Civil and Political Rights

Distr.: General
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Unedited Version

Human Rights Committee

Communication No. 1879/2009

Decision adopted by the Committee at its 109th session (14 October – 1 November 2013)

Submitted by:	A.W.P. (represented by Niels-Erik Hansen of the Documentation and Advisory Centre on Racial Discrimination (DACoRD))
Alleged victim:	The author
State party:	Denmark
Date of communication:	26 March 2009 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 15 May 2009 (not issued in document form)
Date of adoption of decision:	1 November 2013
Subject matter:	Hate speech against the Muslim community in Denmark.
Substantive issues:	Hate speech; discrimination based on religious belief and minority rights; right to an effective remedy.
Procedural issue:	Non-substantiation; non-exhaustion of domestic remedies; victim status
Articles of the Covenant:	2, paragraph 3; 20, paragraph 2; and 27
Article of the Optional Protocol:	1; 2; and 5, paragraph 2 (b)
	[Annex]

Annex

Decision of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights (109th session)

concerning

Communication No. 1879/2009*

Submitted by:	A.W.P. (represented by Niels-Erik Hansen of the Documentation and Advisory Centre on Racial Discrimination (DACoRD))
Alleged victim:	The author
State party:	Denmark
Date of communication:	26 March 2009 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 1 November 2013,

Adopts the following:

Decision on Admissibility

1. The author of the communication is Mr. A.W.P., a Danish citizen. He claims to be a victim of violations by Denmark of his rights under article 2; article 20, paragraph 2; and article 27 of the International Covenant on Civil and Political Rights. The author is represented by counsel[1].

Facts as presented by the author

2.1 On 18 April 2007, MP Søren Krarup, member of the Danish Popular Party (DPP) expressed his views in an article from the newspaper "Morgenavisen Jyllands-Posten", about allowing a female parliamentary candidate to speak in Parliament wearing her Muslim scarf. Mr. Krarup stated that "just like the Nazis believed that everyone from another race should be eliminated it is the belief in Islam that everyone of another faith must be converted and if not eliminated." On 20 April 2007, Member of Parliament (MP) Morten Messerschmidt from the DPP stated in an article from Nyhedsavisen that "Muslim

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kaelin, Ms. Zonke Zanele Majodina, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabian Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval. The text of an individual opinion by Committee members Mr. Yuval Shany, Mr. Fabian Omar Salvioli and Mr. Victor Manuel Rodríguez-Resia is appended to the present Views.

[1] The Optional Protocol entered into force for the State party on 6 April 1972.

societies are per definition losers. Muslims cannot think critically [...] and this produces losers [...]" On the same date, Member of the European Parliament (MEP), Mogens Camre from the same political party stated in the same newspaper article that "the idea that a fundamentalist with headscarf should become member of the Danish Parliament is sick. She (the candidate for parliament) needs mental treatment [...]".

2.2 The author is a Muslim. In his opinion, the statement comparing Islam with Nazism is a personal insult to him. Furthermore, it creates a hostile environment and concrete discrimination against him.

2.3 The author filed a complaint before Copenhagen Metropolitan police. On 20 September 2007, the police informed the author by letter that the Regional Prosecutor had decided not to prosecute the three above-mentioned members of the DPP. The letter also advised the author about the possibility to appeal this decision to the Public Prosecutor General.

2.4 On 16 October 2007, the author appealed the decision to the Public Prosecutor General who, on 28 August 2008 upheld the decision of the Regional Prosecutor stating that neither the author, nor his counsel could be considered legitimate complainants in the case. Statements covered by section 266 (b) of the Criminal Code[2] are usually of such a general nature that there generally would be no individuals who are legitimate complainants. He added that there was no information proving that the author could be regarded as an injured person according to the Act on the Administration of Justice section 749 (3). He could not be said to have such a substantial, direct, personal and legal interest in the outcome of the case to be considered as a legitimate complainant.

2.5 Under section 99, paragraph 3, subsection 2, of the Administration of Justice Act, this decision is final and cannot be appealed to. There are no other administrative remedies available and the public prosecuting authority has a monopoly to bring cases to courts in relation to section 266 (b) of the Criminal Code.

The complaint

3.1 The author claims that by not fulfilling its positive obligation to take effective action against the reported incident of hate speech against Muslims in Denmark, the State party has violated the author's rights under article 2; article 20, paragraph 2; and article 27, of the Covenant.

3.2 According to the author, the comparison made in the incriminated statements between Islam and Nazism is just one example of the on-going campaign by members of the DPP stirring up hatred against Danish Muslims. Some people who are influenced by such statements take action in the form of hate crimes against Muslims living in Denmark. 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 suffer from racist attacks in the street. The Board was dismantled by the Danish Government in 2002 and no further studies were carried out since then. The State party fails to

[2] The provision of the Criminal Code on racially discriminating statements is worded as follows:
"Section 266b.
(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 inclination shall be liable to a fine or to imprisonment for any term not exceeding two years.
(2) When the sentence is meted out, the fact that the offence is in the nature of propaganda activities shall be considered an aggravating circumstance."

acknowledge the need to protect Muslims against hate speech in order to prevent future hate crimes against members of religious groups. The author notes that a statement made as part of a systematic racist propaganda such as the one led by the DPP, is an aggravating factor under section 266 subsection 2 of the Danish Criminal Code.

3.3 With regard to his status as a victim, the author refers to the Opinion of the Committee on the Elimination of All Forms of Racial Discrimination (CERD) regarding communication No. 30/2003[3], where CERD adopted an approach to the concept of 'victim' status similar to that of the Human Rights Committee in the case of *Toonen v Australia* and the European Court of Human Rights in *Case of Open Door and Dublin Well Women v Ireland*[4],. In particular, the Court found certain authors to be 'victims' because they belonged to a class/group of persons which might in the future be adversely affected by the acts complained of. The author argues, therefore, that as a member of such a group, he is also a victim.

The State party's observations on admissibility and merits

4.1 By note verbale of 14 July 2009, the State party submitted its observations on the admissibility and merits of the communication. It notes that the Copenhagen Police processed counsel's complaint and interviewed Mr. Messerschmidt on 22 August 2007. The latter confirmed his statements and explained that, at the time they were made, there was a debate in Denmark because a Muslim parliamentary candidate had stated that she would be wearing her scarf in the hall of the Parliament if she were elected. The purpose of his statement was to support Mr. Krarup. He had not intended to insult Muslims but simply express his view that Islamism was problematic because its adherents prized God's will above ordinary common sense and turned religion into a political ideology.

4.2 On 4 September 2007, the Copenhagen Police submitted the case to the Regional Prosecutor for Copenhagen and Bornholm, who decided on 7 September 2007 that the investigation should be discontinued pursuant to section 749(2) of the Danish Administration of Justice Act. On 20 September 2007, the Commissioner of the Copenhagen Police notified the Regional Public Prosecutor's decision to the author's counsel stating that a particular extensive freedom of expression is enjoyed by politicians in respect of controversial social issues and the Regional Public Prosecutor found that the said persons had not transgressed the borderline into criminality. It is particularly during a political debate that statements that may appear as offending to some occur, but in such situations importance should be attached to the fact that they occur during a debate in which, by tradition, there are quite wide limits to the use of simplified allegations.

4.3 On 28 August 2008, the Director of Public Prosecutions decided that neither the author nor his counsel were entitled to appeal in this case because they did not show a reasonable interest pursuant to section 749(3) of the Administration of Justice Act (persons considered to be parties in the case).

4.4 The State party contests the admissibility of the communication on the ground that article 2 can be invoked only in conjunction with other articles of the Covenant. Furthermore, article 2, paragraph 3 (b), obliges States parties to ensure determination of the right to such remedy "by a competent judicial, administrative or legislative authority", but a State Party cannot reasonably be required, on the basis of that article, to make such

[3] CERD communication No. 30/2003, *The Jewish community of Oslo et al v. Norway*, Opinion adopted on 15 August 2005, para. 7.4.

[4] Communication No. 488/1992, *Toonen v. Australia*, Views adopted on 31 March 1994, para. 5.1; and the Judgement of the ECtHR, Case of Open Door and Dublin Well Women v. Ireland, Application No. 14234/88; 14235/88, Judgment of 29 October 1992.

procedures available no matter how unmeritorious the claims may be. Article 2, paragraph 3, only provides protection to alleged victims if their claims are sufficiently well-founded to be arguable under the Covenant.

4.5 The State party further submits that the incriminated statements cannot be considered as falling within the scope of application of article 20, paragraph 2, of the Covenant. For statements to be comprised by article 20, paragraph 2, the wording of the provision requires them to imply advocacy of national, racial or religious hatred. In addition, such advocacy must constitute incitement to discrimination, hostility or violence. Advocacy of national, racial or religious hatred is not sufficient. The State party rejects that the relevant statements by some members of the DPP in any way advocated religious hatred. All the statements had their background in a public debate on how members of Parliament should appear when speaking from the rostrum of Parliament. All three statements were made as part of this intense public debate, which took place both in the press and in the Parliament. The State party insists that during the debate, a large majority of Parliament sharply rejected those statements.

4.6 Although the statements may be seen as offensive, there is no basis for asserting that those statements were made with the purpose of inciting to religious hatred. One of those statements was not directed at all Muslims but at this particular candidate for Parliament. The statements in question therefore fall outside the scope of article 20, paragraph 2 of the Covenant and the claims before the Committee should be considered as insufficiently substantiated pursuant to article 2 of the Optional Protocol.

4.7 The State party further claims that the author has not exhausted all domestic remedies. The State party opposes section 266 (b) of the Criminal Code on racially discriminating statements, which is subject to public prosecution and for which only persons with a personal interest can appeal the Prosecutor's decision to discontinue the investigation, to sections 267 and 268 on defamatory statements which are applicable to racist statements[5]. Contrary to section 266b, section 267 allows for private prosecution. Hence, the author could have instituted criminal proceedings against Mr. Krarup, Mr. Messerschmidt and Mr. Camre. By choosing not to do so, he has failed to exhaust all available domestic remedies. The State party refers to the Committee's jurisprudence concerning the publication of "The Face of Muhammad" where it declared a communication inadmissible as the authors who had filed a criminal complaint for defamation under section 267 had submitted the communication to the Committee before the High Court had issued its final decision on the matter[6]. In the State party's opinion, such jurisprudence implies that criminal proceedings under section 267 are required to exhaust domestic remedies in issues related to allegations of incitement to religious hatred. It cannot be considered to be contrary to the Covenant to require the author to exhaust the remedy according to section 267, even after the public prosecutors have refused to institute

[5] The provision of the Criminal Code on defamatory statement is worded as follows:
"Section 267.
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 any term not exceeding four months." This provision is furthermore supplemented by section 268, which provides:
"Section 268.
If an allegation has been made or disseminated in bad faith, or if the author has had no reasonable ground to regard it as true, he shall be guilty of defamation and the punishment mentioned in section 267 may then be increased to imprisonment for two years."

[6] Communication No. 1487/2008, *Kasem Said Ahmad and Asmaa Abdol-Hamid v. Denmark*, 18 April 2008.

proceedings under section 266 (b), as the requirements for prosecution under the former provision are not identical to those for prosecution under the latter one.

4.8 On the merits, the State party contends that the requirement of access to an effective remedy has been fully complied with in the present case, as the Danish authorities, i.e. the Prosecution Service, handled the author's complaint of alleged racial discrimination in a prompt, thorough and effective manner, fully consistent with the requirements of the Covenant. Article 2, paragraph 3 (a) and (b), of the Covenant, does not require access to the courts if a victim has had access to a competent administrative authority. Otherwise, the courts would be overburdened with cases where persons allege that something is a violation of the Covenant and must be determined by the courts regardless of how thoroughly the competent administrative authority investigated their allegations.

4.9 The fact that the author's criminal complaint did not lead to the result desired by the author, namely prosecution of Mr. Krarup, Mr. Messerschmidt and Mr. Camre, is irrelevant, as State parties are under no obligation to bring charges against a person when no violations of Covenant rights have been revealed. In this connection, it should be emphasized that the issue in the present case was solely whether there was a basis for presuming that the statements of Mr. Krarup, Mr. Messerschmidt and Mr. Camre would fall within the scope of application of section 266 (b) of the Criminal Code. The assessment to be made by the Prosecution Service was therefore a strictly legal test. In that connection, on 22 August 2007, the Copenhagen Police did interview one of the said persons, Mr. Messerschmidt, about the background for his statements. It was undisputed that those persons had made such statements in the newspapers and there was no doubt as to the context in which they were made. There was also no need to interview the author as his views were detailed in his complaint to the police and no other investigative measures were relevant in this case.

4.10 According to the travaux préparatoires of section 266 (b) of the Criminal Code, it was never intended to lay down narrow limits on the topics that can become the subject of political debate, nor details on the way in which the topics are discussed. The right to freedom of expression is especially important for an elected representative of the people. Interferences with the freedom of expression of an opposition member of Parliament call for the closest scrutiny. In the present case, the State party considers that the national authorities' handling of the author's complaint fully satisfied the requirements that can be inferred from article 2, paragraph 3 (a) and (b), of the Covenant.

4.11 Concerning the possibility of appealing the decision, the Covenant does not imply a right for the author or his counsel to appeal the decisions of administrative authorities to a higher administrative body. Nor does the Covenant govern the question of when a citizen or lobby organisation should be able to appeal a decision to a superior administrative body. Any person who considers himself the victim of a criminal offence can appeal. Others can appeal only if they have a special interest in the outcome of the case other than having a sentence imposed on the offender. Therefore, there was no indication of circumstances showing that the author or his legal representative was entitled to appeal. The State party finds that the decision of the Director of Public Prosecutions, which was well reasoned and in accordance with the Danish rules, cannot be considered contrary to the Covenant.

4.12 The State party adds that the Commissioners of Police must notify the Director of Public Prosecutions of all cases in which a report concerning a violation of section 266 (b) is dismissed. This reporting scheme builds on the ability of the Director of Public Prosecutions, as part of his general power of supervision, to take a matter up for re-consideration to ensure proper and uniform enforcement of section 266 (b). In that connection, reference is made to the case concerning publication of the article "The Face of Muhammad" and the accompanying 12 drawings of Muhammad, in which the Director of Public Prosecutions decided, due to the public interest about the matter, to consider the

appeal without determining whether the organizations and persons who had appealed the decision of the Regional Public Prosecutor could be considered entitled to appeal[7]. In the present case, however, the Director of Public Prosecutions found no basis for exceptionally disregarding the fact that neither the author nor his counsel were entitled to appeal the decision.

4.13 The author's evidence proving the risk of attacks consists solely in a reference to a study from 1999 from which it appears that people from Turkey, Lebanon and Somalia living in Denmark suffer from racist attacks in the streets. In the State party's view, such study cannot be considered sufficient evidence to prove that the author, who is a native Dane, has a real reason to fear attacks or assaults, and in fact he has not stated anything about any actual attacks – whether verbal or physical – to which he has been subjected to due to the statements made by Mr. Krarup, Mr. Messerschmidt and Mr. Camre.

4.14 The State party therefore requests the Committee to declare the communication inadmissible for failing to establish a *prima facie* case under article 20, paragraph 2, of the Covenant and for failing to exhaust domestic remedies. Should the Committee declare the communication admissible, it is requested to conclude that no violation of the Covenant has occurred.

Author's comments on the State party's observations

5.1 On 24 August 2009, the author provided his comments. He notes that in the response of the State party, no reference has been made to article 27 of the Covenant. He therefore presumes that it must be taken for granted that the author has not been protected in his right to the peaceful enjoyment of his culture and religion and its symbols. According to article 27, members of minority groups have a right to their identity, and should not be forced to "disappear" or to submit to forced assimilation. This right should be absolute. As to the State party's observations that the incriminated statements fall outside article 20, paragraph 2, of the Covenant, the State party has not addressed the question whether limits on statements fall within the positive duty of State parties under article 27 of the Covenant to protect the right of minorities in their enjoyment of their culture and its symbols and the right to profess and practice their religion.

5.2 The author contests that a thorough investigation was made in this case. It is very difficult to understand how the Danish police were able to finalize the investigation without interviewing the three persons concerned (only Mr. Messerschmidt was interviewed by police). Given the repeated pattern of degrading and offensive statements from the political party of Mr. Krarup, Mr. Messerschmidt and Mr. Camre, it would have been appropriate to examine whether the statements met the definition of propaganda which has been deemed an aggravating circumstance under section 266b §2. In the author's view, the incriminated statements fall outside the functional area of Parliamentary immunity and are not in accordance with an equal application of the ordinary strict legal test.

5.3 The author refers to the travaux préparatoires of section 266 (b) of the Criminal Code as well as to the *Glistrup* case[8] to affirm that there has been an intention to include acts of politicians or political statements in the scope of section 266 (b). A legislative amendment of 1996 inserted paragraph 2 of section 266 (b) to counteract propaganda activities. The background of the bill was to be seen in the ever more prominent tendencies towards intolerance, xenophobia and racism both in Denmark and abroad. Propaganda acts, understood as a systematic dissemination of discriminatory statements with a view to

[7] Communication No. 1487/2008, *op.cit.*

[8] Glistrup case. Judgement of Danish Supreme Court, 23 August 2000. Danish Weekly Reports UfR 000. 2234.

influencing public opinion, were seen as an aggravating circumstance, allowing only for a penalty of imprisonment and not a simple fine. The explanatory report further contained a directive for the prosecution authorities that it should not show the same restraints as in the past in bringing charges if the acts were in the nature of propaganda. In the *Glistrup* case, the Supreme Court found that section 266 (b) was applicable as the defendant, who was a politician, had subjected a population group to hate on account of its creed or origin. The Court further noted that freedom of expression must be exercised with necessary respect for other human rights, including the right to protection against insulting and degrading discrimination on the basis of religious belief.

5.4 On the legal test the Prosecutor should have carried out, the author contends that the balance between all elements at stake was not performed. The incriminated statements did not take place during a debate involving an exchange between contending parties but emanated from a unilateral attack against a vulnerable group with no possibility to defend itself. By not carrying out an investigation, despite the existence of the Supreme Court's jurisprudence which has recognized limitations to the freedom of expression of politicians, the prosecuting authorities have given no opportunity for the author, and the minority group he belongs to, to have his case adjudicated by a court of law. The author recalls that the Danish Prosecution authorities made a series of similar decisions not to investigate and prosecute complaints regarding statements made by politicians, such as in *Gelle v. Denmark*, where CERD found a violation of article 6 of the Convention on the Elimination of All Forms of Racial Discrimination[9].

5.5 With regard to the exhaustion of domestic remedies, the author strongly rejects the argument of the State party whereby he should have instituted proceedings under sections 267 and 275 (1) of the Criminal Code for defamation. Section 266 refers to a public or general societal interest and is protective of a group (collective aspect) whereas section 267 derives from a traditional concept of injury to personal honour or reputation and refers to an individual person's moral act or qualities (individual aspect). Contrary to the requirement of section 267, an insulting or degrading statement under section 266 needs not be false to fall within the scope of that provision.

5.6 In *Gelle v. Denmark*[10], CERD considered it unreasonable to expect the petitioner to initiate separate proceedings under the general provisions of section 267, after having unsuccessfully invoked section 266 (b) of the Criminal Code in respect of circumstances directly implicating the language and object of that provision. As for the inadmissibility decision of the Committee in *Ahmad and Abdol-Hamid v. Denmark*[11], the author notes that the facts in that case were different from the present one, since it involved two different sets of proceedings, one with the second applicant under section 266 (b) and the other with the first applicant under section 267. Since the communication was submitted jointly and one of the two procedures was still pending at the time of examination by the Committee, the Committee declared the whole communication inadmissible. The State party can therefore not use this example as a reason to reject the admissibility of the present communication on that ground.

5.7 The author maintains that he should be considered a victim of the incriminated statements since he has been directly affected by being singled out as a member of a minority group, distinguished by a cultural and religious symbol. He was exposed to the effects of the dissemination of ideas encouraging cultural and religious hatred, without being afforded adequate protection.

[9] CERD communication No. 34/2004, *Gelle v. Denmark*, Opinion adopted on 6 March 2006, para. 6.5.
[10] CERD communication No. 34/2004, *op.cit*, para. 6.2.
[11] Communication No. 1487/2008, *op.cit.*

5.8 The author insists on the balance between the freedom of expression that public persons, including politicians and civil servants, enjoy and the duty of the State to limit this freedom when it contravenes other fundamental rights. With regard to the State party's contention that the statistical data on violence against Muslims is dated 1999, the author replies that it is specifically because the Board for Ethnic Equality was dismantled in 2002 that no updated data can be provided herein. Partial corroboration of the continued validity of these data can however be found in the recent publication by the EU Fundamental Rights Agency issued in May 2009[12]. In this report, the State party is noted for groups that have a high victimization rate but a low police report rate.

Issues and proceedings before the Committee

Consideration of admissibility

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

6.2 The Committee has ascertained, as required under article 5, paragraph 2(a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee notes the State party's argument that the author did not exhaust domestic remedies, by failing to institute proceedings for defamatory statements, which are applicable to racist statements (sections 267 and 275(1) of the Criminal Code). The Committee notes that according to the author, section 266 (b) on the one hand (see footnote 2 above) and sections 267 and 268 on the other hand (see footnote 6 above), do not protect the same interests (collective interest vs. private interest); that section 266 (b) regards racist statements which the State party has the obligation to prosecute (collective interest) while section 267 regards personal defamation (civil suit) and is therefore directed at specific individuals; and that an insulting or degrading statement under section 266 needs not to be false to fall within the scope of that provision. It takes note of the author's argument that private litigation is not by definition a remedy to secure the implementation by the State party of its international obligations. The Committee considers that 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 in respect of circumstances directly implicating the language and object of that provision. Accordingly, the Committee concludes that domestic remedies have been exhausted pursuant to article 5, paragraph 2 b) of the Optional Protocol[13].

6.4 With regard to the author's allegations under articles 20, paragraph 2, and 27 of the Covenant, the Committee observes that no person may, in theoretical terms and by *actio popularis*, object to a law or practice which he holds to be at variance with the Covenant. Any person claiming to be a victim of a violation of a right protected by the Covenant must demonstrate either that a State party has by an act or omission already impaired the exercise of his right or that such impairment is imminent, basing his argument for example on legislation in force or on a judicial or administrative decision or practice. In the Committee's decision regarding *Toonen v. Australia*, the Committee had considered that the author had made reasonable efforts to demonstrate that the threat of enforcement and the pervasive impact of the continued existence of the incriminated facts on administrative

[12] EU-MIDIS 02, Data in Focus Report/Muslims.

[13] Communication No. 1868/2009, *Andersen v. Denmark*, Inadmissibility decision of 26 July 2010, para. 6.3.

practices and public opinion had affected him and continued to affect him personally. In the present case, without prejudice to the State party's obligations under article 20, paragraph 2 with regard to the statements made by Mr. Krarup. Mr. Messerschmidt and Mr. Camre, the Committee considers that the author has failed to establish that those specific statements had specific consequences for him or that the specific consequences of the statements were imminent and would personally affect him[14]. The Committee therefore considers that the author has failed to demonstrate that he was a victim for purposes of the Covenant. This part of the communication is therefore inadmissible under article 1 of the Optional Protocol.

6.5 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 direct victim of such violations[15]. Since the author has failed to demonstrate that he was a victim 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.

7. The Committee therefore decides that:

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

(b) This decision will be transmitted to the author and, for information, to the State party.

[Adopted in English, French and Spanish. the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

[14] Communication No. 1868/2009, *op. cit.* para. 6.4.
[15] Communication No. 1868/2009, *op.cit.*, para. 6.5.

Appendix

Individual opinion by Committee members Mr. Yuval Shany, Mr. Fabian Omar Salvioli and Mr. Victor Manuel Rodríguez-Rescia (concurring)

1. Although we agree that the author's petition is inadmissible, we are concerned that the language used by the Committee in its Views may be read to limit more than is necessary the right of victims to submit communications. The Optional Protocol only allows for submission of communications by persons claiming to be a victim of a violation of a right protected by the Covenant and does not recognize actio popularis, Still, in situations where an act or omission by a State party adversely affects a group of individuals, all members of the group who can demonstrate either that the act or omission already impaired the exercise of their right under the Covenant or that such impairment is imminent, may be considered as victims for the purposes of their right of standing. Indeed, in Toonen v. Australia, the Committee took the view that although the law criminalizing private homosexual conduct was of a general nature and had a pervasive impact on administrative practices and public opinion in Tasmania, the author had demonstrated that the threat of enforcement of the law and the discriminatory social attitudes it sustained had actually affected him and continued to affect him personally.[1]

2. In the present case, the author failed to establish that the decision of the State party not to bring criminal charges in connection with the specific statements delivered by Mr. Krarup, Mr. Messerschmidt and Mr. Camre had actually affected him, or that the specific consequences of the said decision were imminent and would affect him personally. The fact that the author is a member of the Muslim minority in Denmark and that the said statements targeted this minority group is not enough to conclude that the State party prima facie failed to adequately protect the author and that such a failure had actually affected the exercise of his rights under the Covenant.

3. As a result, we are of the view that the correct ground for inadmissibility should be the author's failure to substantiate a violation of his rights under article 20, paragraph 2, and 27 of the Covenant, and not lack of victim status due to the collective nature of the harm allegedly afflicted by the acts or omissions of the State party.

[Done in English, the English text being the original version. Subsequently to be issued also in Arabic, Chinese, French, Russian and Spanish as part of the Committee's annual report to the General Assembly.]

[1] Communication No. 488/1992, *Toonen v. Australia*, Views adopted on 31 March 1994. para. 8.2.

ANNEX III

MINISTRY OF FOREIGN AFFAIRS OF DENMARK

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File: 28.B.49.d.1.JTP.10

Department: International Law

Date: 18 JUNI 2012

Regarding the Committee on the Elimination of Racial Discrimination's Follow-up Procdure 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 criminalises 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-

cording 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

ANNEX IV

RIGSADVOKATEN

POLITI

22. september 2011

J.nr. RA-2010-609-0060

Til samtlige politidirektører og
regionale statsadvokater

Nye tiltag i indsatsen mod hadforbrydelser

1. Politi og anklagemyndighed er og skal være meget opmærksomme på sager om hadforbrydelser og de særlige spørgsmål, der kan opstå i forbindelse med disse sager. Det er afgørende, at politi og anklagemyndighed til stadighed har fokus på denne type forbrydelser og arbejder aktivt for at modvirke disse.

Dette kan f.eks. ske ved, at politi og anklagemyndighed, når det måtte være relevant, bakker op om og bidrager til (lokale) projekter, f.eks. informationskampagner, der har til formål at oplyse om og påvirke holdninger til hadforbrydelser. Der kan i den forbindelse henvises til informationskampagnen "Stop hadforbrydelser", som Københavns Politi, Institut for Menneskerettigheder og Københavns og Frederiksbergs kommuner gennemførte i 2010.

Den helt centrale måde, hvorpå politi og anklagemyndighed kan bidrage til at modvirke hadforbrydelser, er ved at sikre en effektiv strafforfølgning i disse sager.

Politiets og anklagemyndighedens indsats på dette område har flere gange i de senere år været genstand for offentlig debat, og der har også været eksempler på, at internationale organer har udtrykt kritik af efterforskningen og behandlingen af visse konkrete sager om overtrædelse af straffelovens § 266 b.

Herudover har Institut for Menneskerettigheder i udredningen "Hadforbrydelser i Danmark – vejen til en effektiv beskyttelse" fra 2011 foreslået en styrkelse af politiets og anklagemyndighedens indsats mod hadforbrydelser. Som mulige indsatser peger Institut for Menneskerettigheder bl.a. på øget fokus på de eksisterende retningslinjer om anvendelse af straffelovens § 81, nr. 6, og udvikling af redskaber til at identificere og efterforske et muligt diskriminerende motiv.

2. Med henblik på yderligere at styrke politiets og anklagemyndighedens indsats mod hadforbrydelser har Rigsadvokaten netop udsendt Rigsadvokatmeddelelse nr. 2/2011 om behandlingen af sager om bl.a. straffelovens § 266 b, der afløser den hidtil gældende Rigsadvokatmeddelelse nr. 9/2006. Meddelelsen er udbygget på en række punkter i forhold til den hidtidige meddelelse, idet navnlig afsnittene vedrørende sager om overtrædelse af straffelovens § 266 b og anvendelse af straffelovens § 81, nr. 6, er udbygget.

Således indeholder afsnittet om overtrædelser af straffelovens § 266 b nu retningslinjer for behandlingen og efterforskningen af disse sager samt en nærmere gennemgang af de enkelte elementer i bestemmelsen med henvisninger til relevant retspraksis.

Afsnittet om anvendelse af straffelovens § 81, nr. 6, om tilfælde, hvor en forbrydelse har baggrund i andres etniske oprindelse, tro, seksuelle orientering eller lignende, er også udbygget i den nye rigsadvokatmeddelelse. Således indeholder afsnittet nu en række eksempler på omstændigheder, der kan indikere, at der er tale om en hadforbrydelse, og som – når de foreligger – skal føre til, at dette aspekt af sagen søges belyst nærmere under efterforskningen.

For så vidt angår anklagemyndigheden fremgår det bl.a. af retningslinjerne, at anklagemyndigheden skal tilrettelægge bevisførelsen således, at der kan føres det fornødne bevis for, at der foreligger skærpende omstændigheder som nævnt i straffelovens § 81, nr. 6.

3. Herudover har Politiets Efterretningstjeneste i samarbejde med bl.a. Institut for Menneskerettigheder taget initiativ til en temadag om hadforbrydelser, der tager sigte på at styrke den samlede indsats med at forebygge, registrere og efterforske hadforbrydelser. Der vil på kurset bl.a. blive behandlet emner som hadforbrydelser og menneskerettigheder, forhold der indikerer, at der er tale om en hadforbrydelse, lovgivning, Rigsadvokatens retningslinjer samt efterforskning og tiltalerejsning i denne type sager.

Temadagene er udbudt til samtlige politikredse ved brev af 10. juni 2011 fra Politiets Efterretningstjeneste til politidirektørerne, og det er hensigten, at såvel politiuddannede som anklagere, der sidder med relevante fagområder (f.eks. personfarlig kriminalitet), skal deltage i kurset i de enkelte politikredse.

Herudover undersøger rigsadvokaturen i øjeblikket mulighederne for ved elektronisk udtræk at indsamle statistiske oplysninger om anvendelsen af straffelovens § 81, nr. 6, i straffesager.

4. Med henblik på at sikre, at politi og anklagemyndighed i forbindelse med behandlingen af straffesager er opmærksomme på omstændigheder, der kan indikere, at der er tale om en hadforbrydelse, og behandler sådanne sager i overensstemmelse med retningslinjerne i RM 2/2011, anmodes politikredsene om at være særligt opmærksomme på at tage de fornødne

skridt til at udbrede kendskabet til den nye rigsadvokatmeddelelse til alle relevante personalegrupper og sikre, at relevante personer deltager i de ovennævnte temadage.

Herudover anmodes politikredsene om at overveje mulighederne for lokalt at iværksætte yderligere initiativer på området, som f.eks. udarbejdelse af actionscards eller lignende, der kan bidrage til at sikre, at et muligt hadmotiv identificeres, registreres og strafforfølges.

Med venlig hilsen

Jørgen Steen Sørensen Jens Henrik Højbjerg