COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION

Diop v. France

Communication No. 2/1989

22 August 1990

CERD/C/38/D/2/1989*

ADMISSIBILITY

Submitted by: Demba Talibe Diop (represented by counsel)

Alleged victim: The author

State party: France

Date of communication: 15 March 1989 (initial submission)

Documentation references: Prior decisions - (CERD/C/37/D/2/1989 (Rule 92 decision to State party, dated 23 August 1989)

Date of present decision: 22 August 1990

Decision on admissibility

The Committee on the Elimination of Racial Discrimination, meeting on 23 August 1989, decides:

1. The author of the communication (initial submission dated 15 March 1989 and subsequent correspondence) is Demba Talibe DIOP, a Senegalese citizen born in 1950, currently residing in Monaco. He claims to be the victim of a violation by France of article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination. He is represented by counsel, who has provided a copy of his power of attorney.

2.1 The author, who is married to a French citizen and has one child, has been domiciled in Monaco since December 1985. From July 1982 to December 1985, he had practiced law in Dakar. On 30 January 1986, the author formally applied for membership in the Bar of Nice, submitting all the documentary evidence required. On 5 May 1986, the Bar Council of Nice rejected the application. On 30 May 1986, Mr. Diop appealed the decision to the Court of Appeal of Aix-en-Provence. By judgement of 27 October 1986, the Court of Appeal dismissed the appeal; the subsequent appeal to the Court of Cassation was dismissed on 4 October 1988. It is submitted that all available domestic

remedies have been exhausted.

2.2 The author considers that France has denied him the enjoyment of the right to work (article 5, paragraph (e) (i), of the Convention) on the ground of national origin. The decision of the Bar Council of Nice merely stipulated that Mr. Diop did not hold the Certificate of Aptitude for the Exercise of the Legal Profession (CAPA), as required by article 11 of Act No. 71.1130 of 31 December 1971; the Court of Appeal endorsed this argument. The Court of Cassation, however, held that the Court of Appeal had erroneously interpreted the text on waiver of the CAPA requirement, and that it had "substituted purely juridical considerations for those that were justifiably criticized in the first of the grounds of appeal". The Court of Cassation found that the author met all the statutory requirements for the exercise of the lawyers' profession except one: that of French nationality. The author points out that the Bar Council of Nice had not referred to his Senegalese nationality as an obstacle to his exercising the legal profession in France.

2.3 Article 11, paragraph 1, of Act No. 71.1130 of 31 December 1971 stipulates that "no one may enter the legal profession if he is not French, except as provided for in international Conventions". The author submits that his case falls within the scope of application of the Franco-Senegalese Convention on Establishment (Convention d'établissement franco-sénégalaise) of 29 March 1974, article 1 of which prohibits discrimination between French and Senegalese citizens in the enjoyment of civil liberties to which they are entitled on the same terms (including the right to work, set forth in the preamble of the French Constitution of 4 October 1958). In the light of this provision, the author claims, the Court of Cassation should not have considered Senegalese Citizenship as a statutory impediment to the exercise of the legal profession in France. He further indicates that the legal profession does not fall within the occupational categories to which the restrictions of article 5 of the Convention apply, and no other Convention provision expressly prohibits the free exercise of the legal profession.

2.4 The author further invokes article 9 of the Franco-Senegalese Convention on Movement of Persons (Convention franco-sénégalaise relative à la circulation des personnes) of 29 March 1974, which stipulates that "French nationals wishing to establish themselves in Senegal and Senegalese nationals wishing to establish themselves in France for the purpose of engaging in self-employed activities, or without engaging in any gainful occupation, must .... produce the required evidence of the means of subsistence available to them" (emphasis added). He claims that the legal profession is considered in France to be the epitome of self-employed activity; this is confirmed by article 7, paragraph 1, of Act No. 71.1130.

2.5 Finally, the author invokes article 23 of the Franco-Senegalese Tax Convention (Convention fiscale franco-Sénégalaise) of 29 March 1974, which provides that "[T]he income that a person domiciled in a Contracting State draws from a liberal profession or similar independent activity shall be subject to tax in that State alone, unless that person is regularly possessed of a fixed base for the exercise of his profession in the other Contracting State . . . . . For the purposes of the present article, scientific, artistic, literary, educational and pedagogical activities, inter alia, as well as the activities of doctors, advocates, architects and engineers, are considered legal professions" (emphasis added).

2.6 The author further alleges that the French judicial authorities, by denying him to practical law

in France, violated the principle of equality, enshrined in article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination. Allegedly, his right to equal treatment before the tribunals was violated in two respects: First, six lawyers of Senegalese nationality are members of the Paris Bar. According to the author, his application would have been granted had he submitted it in Paris, and considers it unacceptable that the State party should accept such differences within the national territory. Secondly, it is submitted that the principle of equality at the international level has also been affected by virtue of the fact that on the basis of the above-mentioned bilateral instruments, all French lawyers have the right to exercise their profession in Senegal and vice versa. Given that the bilateral instruments provide for the principle of reciprocity, the position of French lawyers practicing in Senegal or wishing to practice there is said to have been compromised by the rejection of the author's application by the Bar Council of Nice.

2.7 Finally, it is submitted that the State party violated the author's right to a family life because, in the life of the impossibility to practice law in Nice, the author was forced to temporarily leave his home and take up residence and practice law in Daker, so as to be able to provide for his family.

3. By decision of 23 August 1989, the Committee on the Elimination of Racial Discrimination transmitted the communication to the State party, requesting it, under rule 92 of the Committee's rules of procedure, to provide information and observations relevant to the question of the admissibility of the communication.

4.1 In its submission under rule 92, dated 1 December 1989, the State party observes that the author failed to raise the issue of discriminatory treatment of which he claims to have been the victim before the domestic courts; accordingly, his communication is said to be inadmissible because of non-exhaustion of domestic remedies, under article 14, paragraph 7(a), of the Convention.

4.2 The State party further observes that the communication is inadmissible as incompatible with the provisions of the Convention in accordance with article 1, paragraph 2, which stipulates that the "Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State party to this Convention between citizens and non-citizens". In the case under consideration, the rejection of Mr. Diop's application by the Bar Council of Nice was exclusively based on the applicant's nationality, not because he was Senegalese but because he was not French within the meaning of article 1, paragraph 2. The State party adds that the ratio legis of article 11, paragraph 1, of Act No. 71.1130 of 31 December 1971 is to protect French lawyers from foreign competition. In so doing, France is said to exercise her sovereign prerogatives expressly recognized by article 1, paragraph 2, of the Convention.

4.3 With respect to the contention that the author meets all the requirements for the exercise of the legal profession in France, the State party notes that the author erroneously assumes that the Court of Cassation dismissed his appeal only because he was not of French nationality. It points out that for the Court, this finding was in itself sufficient to dismiss the appeal, thus making it superfluous to consider whether other conditions for the exercise of the legal profession in France had or had not been met. The State party endorses the interpretation of article 1 of the Franco-Senegalese Convention on Establishment by the Court of Cassation, according to which this provision merely concerns the enjoyment of civil liberties and cannot be construed as encompassing a right to exercise the legal profession. For the State party, the author's argument that the right to work is a civil

liberty and that, since the legal profession is gainful occupation, it is a civil liberty, is a mere "sophism" and must be rejected: the exercise of the legal profession is not a civil liberty and is not a right if all the conditions for its exercise are not met.

4.4 Concerning the author's allegation of discriminatory treatment in comparison to other Senegalese lawyers able to exercise their profession on French territory, the State party concedes that several Senegalese lawyers have been admitted to the Bar of Paris in spite of their nationality. These lawyers were, however, admitted prior to the judgement of the Court of Cassation in the author's case; if this jurisprudence were to be invoked before the Bar Council or the ordinary tribunals, it is likely, according to the State party, that these lawyers would have to be stripped of the membership.

4.5 With respect to the treatment of French Lawyers by the Senegalese authorities, the State party explains that the article 16 of a Senegalese Law on the Exercise of the Legal Profession of 1984 stipulates that no one may be admitted to the Bar in Senegal if his is not Senegalese or the citizen of a State that grants reciprocity. In application of this provision, the Bar Council of Dakar rejected, on 14 March 1988, the application of a French lawyer who had been admitted on a probationary basis in 1984. The decision of the Bar Council of Dakar was based on the fact that the applicant in question was not Senegalese and that no international Convention or other application provision provided for reciprocity in the matter. The Court of Appeal of Dakar confirmed this decision by judgement of 15 April 1989. During the appeal proceedings, it was submitted on behalf of the Bar Council that the Franco-Senegalese Convention on Establishment of 1974 did <u>not</u> provide for reciprocity with respect to liberal professions. In his pleadings, the Public Prosecutor, who had himself participated in the elaboration of the 1974 Convention, contended that the omission of liberal professions had been deliberate; the State party notes that one of the Convention's aims purportedly was to forestall the admission of French lawyers to the Bar of Senegal. The State party concludes that Mr. Diop's situation in France is similar to that of French lawyers wishing to practice in Senegal and that, accordingly, the principle of equality of treatment and of reciprocity invoked by him may be applied to his disadvantage.

4.6 Finally, the State party points out that if the author, who is married to a French citizen, wishes to live with his family in France while practicing his profession, it would be open to him to apply for French citizenship under article 371 of the Nationality Code. If, however, he wishes to retain his Senegalese citizenship, it would be open to him to ask for his name to be added to the list of legal counsel (conseils juridiques), as no condition of nationality is required in France for the exercise of this profession.

5.1 In his comments, dated 5 February 1990, the author reaffirms that he has exhausted domestic remedies and points out that the State party has failed to clarify which effective remedies would still be available to him. With respect to the State party's objection that he never complained of discriminatory treatment before the courts, he notes that he only was subjected to discrimination based on national origin, within the meaning of the Convention, upon delivery of the judgement of last instance, namely the judgement of the Court of Cassation of 4 October 1988.

5.2 The author further contends that the State party's argument that the communication should be declared inadmissible as falling outside the scope of the Convention is unrelated to the conditions

for admissibility set out in the Convention. It is the task of the Committee on the Elimination of Racial Discrimination to determine, once a communication is declared admissible, whether or not it is compatible with the provisions of the Convention.

5.3 The author reiterates that the French legislator has determined that the condition for the exercise of the legal profession in France is French nationality, "except as provided for in international convention"; he maintains that the texts of the above-mentioned conventions concluded between France and Senegal speak for themselves, since they make clear that the State party makes no differentiation between its own and Senegalese citizens in matters such as the one under consideration. Finally, he notes that the competent authorities in Nice, well aware of his situation and of his desire to practice the legal profession in France, delivered his resident's permit (visa d'établissement) on 8 May 1986.

6.1 Before considering any claims contained in a communication, the Committee on the Elimination of Racial Discrimination must, in accordance with rule 91 of its rules of procedure, determine whether or not it is admissible under the International Convention on the Elimination of All Forms of Racial Discrimination.

6.2 The Committee has taken note of the State party's observation that the communication should be declared inadmissible because of non-exhaustion of domestic remedies, since the author did not invoke discriminatory treatment based on national origin before the domestic courts. On the basis of the information before the Committee it appears, however, that the issue of the author's national origin was first addressed by the court of last instance, the Court of Cassation, in its decision of 4 October 1988. Furthermore, the State party has not indicated any remedies that might still be available to the author. In the circumstances, the Committee concludes that the requirements of article 14, paragraph 7(a), of the Convention and of rule 91(e) of the Committee's rules of procedure, have been met.

6.3 In respect of the State party's observation "that the communication should be declared inadmissible as not falling within the scope of the Convention in the light of article 1, paragraph 2", the Committee observes that the question of the application of this article is one of substance which should be examined at a later stage, in conformity with rule 95 of the rules of procedure. The Committee further observes that rule 91(c) of its rules of procedure enjoins it to ascertain whether any communication is compatible with the provisions of the Convention. "Compatibility" within the meaning of rule 91(c) is to be understood in procedural, not substantive, terms. The Committee does not consider that the author's communication suffers from a procedural incompatibility.

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

(a) That the communication is admissible;

(b) That, in accordance with article 14, paragraph 6(b), of the Convention, the State party shall be requested to submit to the Committee, within three months of the date of the transmittal to it of the present decision, written observations or statements clarifying the matter and the measures, if any, that may have been taken by it;

(c) That any explanations or statements received from the State party shall be communicated by the Secretary-General under rule 94, paragraph 4, of the Committee's rules of procedure to the author and his counsel, with the request that any comments which they may wish to submit thereon should reach the Committee in care of the Centre for Human Rights, United Nations Office at Geneva, within six weeks of the date of the transmittal;

(d) That this decision shall be communicated to the State party, to the author and to his counsel.

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