

COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION

Diop v. France

Communication No. 2/1989

18 March 1991

CERD/C/39/D/2/1989/Rev. 2*/

VIEWS

Submitted by: G. A. C. Enkelaar (counsel)

On behalf of: Demba Talibe Diop (petitioner)

State party concerned: France

Date of communication: 15 March 1989 (date of initial letter)

Date of decision on admissibility: 22 August 1990

The Committee on the Elimination of Racial Discrimination, established under article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination,

Meeting on 18 March 1991,

Having concluded its consideration of communication No. 2/1989, submitted to the Committee by G. A. C. Enkelaar on behalf of D. T. Diop under article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination,

Having taken into consideration all written information made available to it on behalf of Mr. Diop and by the State party,

Bearing in mind rule 95 of its rules of procedure requiring it to formulate its opinion on the communication before it,

Adopts the following:

OPINION

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.

The facts as submitted:

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 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 his application; on 8 May 1986, the competent authorities in Nice delivered his resident's permit (visa d'établissement). On 30 May 1986, Mr. Diop appealed the decision of the Bar Council to the Court of Appeal of Aix-en-Provence. By judgement of 27 October 1986, the Court of Appeal dismissed the appeal; a subsequent appeal to the Court of Cassation was dismissed on 4 October 1988.

2.2 The decision of the Bar Council of Nice was based on the fact 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 upheld the decision on the same grounds. The Court of Cassation, however, found 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: the 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 argues 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, according to the author, the Court of Cassation should not have considered Senegalese citizenship as an 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 Article 9 of the Franco-Senegalese Convention on Movement of Persons (Convention franco-sénégalaise relative à la circulation des personnes) of 29 March 1974 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). The author states 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 Article 23 of the Franco-Senegales Tax Convention (Convention fiscale franco-sénégalaise) of 29 March 1974 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 liberal professions” (emphasis added).

2.6 The author further notes that, on 12 February 1990, he requested that his name be added to the list of legal counsel (conseils juridiques), as French nationality is no prerequisite for the practice as legal counsel. By letter dated 24 April 1990, he was informed that his inscription was imminent. On 26 June 1990, however, he was told that his request could not be complied with, as he had not demonstrated that he had fulfilled the requirement of a three-year apprenticeship (stage); the author affirms that his application had been complete and included, in particular, proof of such an apprenticeship.

The complaint:

3.1 The author considers that he was denied the right to work on the ground of national origin, and alleges that the French judicial authorities 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, whereas he was denied to practice law in Nice, 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; he considers it unacceptable that the State party should allow such differences within the national territory. Secondly, it is submitted that the principle of equality and reciprocity at the international level is also 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.

3.2 Distinctions, exclusions, restrictions or preferences established in the application of the International Convention on the Elimination of All Forms of Racial Discrimination must be spelled out in legislative provisions which, the author claims, do not exist in his case. Such distinctions would contravene article 34 of the French Constitution. Furthermore, even if there were pertinent domestic legislation, the bilateral Franco-Senegales Conventions of 29 March 1974 prevail over domestic legislation and authorize French and Senegalese citizens to exercise a liberal profession, including the legal one, on the territory of the State of which they do not have the citizenship.

3.3 The author claims that existing Senegales legislation (Law on the Exercise of the Legal Profession of 1984) does not prohibit legal practice by French citizens in Senegal. In this context, he notes that on 8 January 1985, Ms. Geneviève Lenoble, a French citizen and member of the Paris Bar, was admitted to the Bar of Senegal; so was, on 7 January 1987, another French citizen, Ms.

Dominique Picard. On the other had, the Governing Body of the Bar Council of Nice required, for Mr. Diop's inscription on the roll, the Certificate of Aptitude for the Exercise of the Legal Profession (CAPA), although article 44 of the decree of 9 June 1972, concerning the application of article 11, paragraph 3, of the Law of 31 December 1971 stipulates that this Certificate is not necessary for individuals who already are qualified to practice law in a country with which France concluded an agreement of judicial co-operation.

3.4 It is submitted that the State party violated the author's right to a family life because, in the light 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 Dakar, so as to be able to provide for his family.

3.5 The author claims that the decision of the Bar Council of Nice of 5 May 1986, confirmed by the Court of Appeal on 27 October 1986, is irreconcilable with the judgement of the Court of Cassation of 4 October 1988. The Court of Cassation did not annul the decision of the Bar Council as contrary to the law in criticizing its motivation; it simply substituted its own motives in dismissing the appeal. In the author's opinion, the irreconcilability of the judicial decisions in the case is equivalent, in law, to a refusal to adjudicate his request for admission to the bar altogether, thus denying him an effective remedy before domestic courts. In this way, it is submitted, he was denied the exercise of a fundamental public freedom, that is, his right to work in France.

The State party's observations:

4.1 The State party contends that the author has failed to raise, before the domestic courts, the issue of discriminatory treatment of which he claims to have been the victim; accordingly, his communication should be declared 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 Mr. Diop's case, the rejection of his application by the Bar Council of Nice was exclusively based on his 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 exercises for 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 claims that, for the Court of Cassation, the fact that the author was not of French nationality 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.

4.4 The State party further explains the organization and the functions of the system of Bar Councils attached to each regional court (Tribunal de Grande Instance). These Bar Councils are administered by a Governing Board (Conseil de l’ordre), enjoy legal personality and operate independently of one another. It is the duty of the Governing Board of each Bar Council to decide on applications for admission to the bar; decisions on such matters by the Board may only be appealed by the applicant and the Public Prosecutor (Procureur Général) of the competent Court of Appeal, within two months of the notification of the decision. The State party adds that each Governing Body decides independently on applications for admission to the Bar and may, in the process, err in its interpretation of applicable legal provisions.

4.5 In as much as the admission of six Senegalese lawyers to the Bar of Paris is concerned, the State party submits that the governing Body of the Bar of Paris erroneously interpreted applicable regulations by admitting these Senegalese citizens. The State party affirms that this situation does not create any rights for the author, nor a legal basis on which the inscription of every Senegalese lawyer on the Bar Roll could be justified, as any such act would violate the applicable rules and regulations. Furthermore, these lawyers were admitted prior to the Court of Cassation’s judgement in the author’s case; if this jurisprudence were to be invoked before the ordinary tribunals, it is likely, according to the State party, that these lawyers would have to be stripped of membership.

4.6 With respect to the treatment of French lawyers by the Senegalese judicial authorities, the State party explains that 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 admitted to the Bar of Senegal on a probationary basis in 1984. The decision of the Bar Council of Dakar was based on the fact that the applicant was not Senegalese and that no international Convention or other applicable 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 not 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.

Issues and proceedings before the Committee:

5.1 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 procedures, determine whether or not it is admissible under the International Convention on the Elimination of All Forms of Racial Discrimination.

5.2 The Committee took note of the State party's observation that the communication was inadmissible on the ground of non-exhaustion of domestic remedies, since the author had not invoked discriminatory treatment based on national origin before the domestic courts. The Committee noted, however, that on the basis of the information before it, 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 had not indicated the availability of any other remedies to the author. In the circumstances, the Committee concluded that the requirements of article 14, paragraph 7(a), of the Convention and of rule 91(e) of the Committee's rules of procedure, had been met.

5.3 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 observed that the question of the application of this article was one of substance which should be examined at a later stage, in conformity with rule 95 of the rules of procedure. The Committee further observed that rule 91(c) of the rules of procedure enjoined it to ascertain whether any communication is compatible with the provisions of the Convention, and that "compatibility" within the meaning of rule 91(c) must be understood in procedural, not substantive, terms. In the Committee's opinion, the communication did not suffer from procedural incompatibility.

5.4 On 22 August 1990, therefore, the Committee on the Elimination of Racial Discrimination declared the communication admissible.

6.1 The Committee on the Elimination of Racial Discrimination has examined the present communication in the light of all the information made available by the parties, as provided for in rule 95, paragraph 1, of its rules of procedure.

6.2 The Committee has noted the author's claims (a) that he was discriminated against on one of the grounds defined in article 1, paragraph 1, of the Convention on the Elimination of All Forms of Racial Discrimination, (b) that the rejection of his application for admission to the Bar of Nice constituted a violation of his right to work (article 5 (e) of the Convention) and his right to a family life, and (c) that the rejection of his application violated the Franco-Senegalese Convention on Movement of Persons. After careful examination of the material placed before it, the Committee bases its decision on the following considerations.

6.3 In respect of the alleged violations of the Franco-Senegalese Convention on Freedom of Movement of 29 March 1974, the committee observes that it is not within its mandate to interpret or monitor the application of bilateral conventions concluded between States parties to the Convention, unless it can be ascertained that the application of these conventions result in manifestly discriminatory or arbitrary treatment of individuals under the jurisdiction of States parties to the International Convention on the Elimination of All Forms of Racial Discrimination, which have made the declaration under article 14. The Committee has no evidence that the application or non-application of the Franco-Senegalese Conventions of March 1974 has resulted in manifest discrimination.

6.4 As to the alleged violation of article 5(e) of the Convention and of the right to a family life, the Committee notes that the rights protected by article 5(e) are of programmatic character, subject to

progressive implementation. It is not within the Committee's mandate to see to it that these rights are established; rather, it is the Committee's task to monitor the implementation of these rights, once they have been granted on equal terms. In so far as the author's complaint is based on article 5(e) of the Convention, the Committee considers it to be ill-founded.

6.5 Finally, in as much as the allegation of racial discrimination within the meaning of article 1, paragraph 1, of the Convention is concerned, the Committee notes that article 11, paragraph 1, of the French Act No. 71.1130 of 31 December 1971 stipulates that no one may accede to the legal profession if he is not French, except as provided for in international conventions.

6.6 This provision operates as a preference or distinction between citizens and non-citizens within the meaning of article 1, paragraph 2, of the Convention: the refusal to admit Mr. Diop to the Bar was based on the fact that he was not of French nationality, not on any of the grounds enumerated in article 1, paragraph 1. The author's allegation relates to a situation in which the right to practice law exists only for French nationals, not to a situation in which this right has been granted in principle and may be generally invoked; accordingly, the Committee concludes that article 1, paragraph 1, has not been violated.

7. The Committee on the Elimination of Racial Discrimination, acting under article 14, paragraph 7 (a), of the International Convention on the Elimination of All Forms of Racial Discrimination, is of the opinion that the facts as submitted do not disclose a violation of any of the provisions of the Convention.

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

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