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NEWS REPORT

Country:	France
Title:	Court of cassation, First Civil Chamber, 9 November 2016, nos 15-24.207 to 15-25.877 regarding the liability of the State for racial profiling in police controls
Date:	18 November 2016
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Context	
Issue at stake:	Liability of the State for practices of racial profiling
Ground of discrimination:	Racial or ethnic origin, other (Race)
Source:	National Court decision
Field:	Other
Applicable law:	Articles 5, 8, 13 and 15 of the ECHR, Preamble of the Constitution of 1946, Article 1 st and 66 of the Constitution of 1958, Article L141-1 of the Code of Judicial Organisation, Article 78 par 3 and 3 of the Code of penal procedure

Content

Case:

Article 78 paragraph 2 of the Code of penal procedure allows police forces to proceed to police controls without cause when there is a Magistrate order allowing controls on a specific day in a designated area, or in application of paragraph 3 in order to prevent the perpetration of a crime. These provisions are widely used to control illegal immigrants or persons living in unsecure areas, and give rise to racial profiling.

In the absence of arrest, there is no procedure to trace individual police controls and the penal procedure does not explicitly provide for a remedy.

The 13 claimants have been subjected to identity controls and searches without being arrested. Their lawyers requested from the police justification of the controls and received no answer. On this basis they sued the State in civil damages for liability for racial profiling in application of Article L141-1 of the Code of Judicial Organisation. Civil liability of the state requires that intentional characteristic fault be established.

The 13 cases were dismissed by the first instance court on the basis that the actions of the police officers, who acted within the parameters of the law, could not give rise to liability of the State.¹

The Defender of rights presented observations before the Court of Appeal arguing that the State had a positive obligation to take action to prevent police controls based on racial grounds and ensure an effective recourse in application of the Constitution and of Articles 5, 8, 13 And 15 of the ECHR. The Defender of rights' observations were followed

¹ High Court of Paris, 2 October 2013, nos RG 12/05876, RG 12/05884, and seq.

by the Court of Appeal who admitted the Appeals in 5 of the 13 cases even if all controls were legal and made under the authority of a magistrate order.²

It held that police controls must be implemented in the respect of fundamental rights and of the principle of equal treatment, which cannot allow police controls operated on the basis of racial criteria, physical appearance or origin. The State must not only refrain from discrimination but must take all necessary measures to prevent its occurrence.

It held that the shift in the burden of proof provided by Law No. 2008-476 of 27 May 2008 applied and that once the claimants had provided evidence of differential treatment, the police had the burden to establish that its control was justified. The Court of appeal accepted justifications of the police where the controls were based on the search for a person of North African Origin who had just committed a robbery, where the person controlled was in an insecure neighbourhood running and hiding his face with the hood of his sweatshirt, and controls in a place known for massive violence and drug dealing.

The 8 claimants who did not succeed before the Court of appeal brought their claim before the Court of cassation, and argued that the Court of appeal had imposed too heavy a burden upon claimants which did not comply with the right to an effective recourse.

The State also attacked the decision of the Court of Appeal before the Court of cassation and argued : first that the shift in the burden of proof provided by civil law in matters of discrimination did not apply to police controls and that the State did not have to justify controls which were entirely discretionary; and, second, that when proceeding to police controls in application of a Magistrate order invoking repression of illegal immigration, the police was justified in controlling black and north African persons upon their appearance of being foreign.

In response to the State's arguments, the claimants and the Defender of Rights reiterated the enforceability of the shift of the burden of proof provided by the Law n°2008-496 as regards access to goods and services on the ground of ethnic origin and race, and its necessary application to ensure compliance with the obligation of the state to provide effective remedy.

As regards the discretionary right of the police to proceed with racial profiling, the Defender of Rights argued that racial profiling was illegal and that the law had to be interpreted in such a way as to respect guarantees provided by the ECHR. Thus, the choice of the State to invoke the necessity to take appearances in consideration in order to identify foreign persons was in itself discriminatory in that physical appearance cannot be an indication of nationality considering many French citizens were of African or North African descent.

Decision of the Court:

In two cases, the Court of cassation reversed the finding of the Court of Appeal.

In one case for a procedural issue not related to arguments on the merits. In the second case, it found an error of appreciation, concluding that the Court had not enquired whether the police had proper justification to proceed to the controls. These cases will be adjudicated again by the Court of appeal.

In 8 cases, the Court of cassation dismissed the claims of the claimants alleging that the Court of Appeal had not properly implemented the burden of proof.

² Paris Court of Appeal, 24 June 2015, docket numbers: N° 348 – 13/24286, N) 347, 13/24284, N° 346, 13/24277, N°345, 13/24274, N°344, 13/24269, N°343, 13/24267, N°342, 13/24265, N° 341, 13/24262, N° 340, 13/24261, N° 351, 13/24303, N° 350, 13/24300, N° 349, 13/24299, N° 339, 13/24255.

In three cases it dismissed the claim of the State.

The Court of cassation followed the observations of the Defender of Rights and concluded that persons who deem to have been victim of racial profiling, can pursue the liability of the State by filing a recourse on the basis of article 141-1 of the Code of judiciary organization.

As regards evidence of racial profiling, the Court, implicitly recognizing the absence of traces of the controls and the necessity to give access to effective remedy in the sense of Article 13 of the ECHR, confirmed applicability of the shift in the burden of proof provided in civil claims for discrimination.

According to the Court, even when controlling persons in relation to their potential illegal presence on the territory, a police control is discriminatory if, in the absence of preexisting objective reasons related to the context of the control or the behavior of the person, it is enforced in relation to physical characteristics of persons subjectively associated with the real or deemed origin of the person.

Key points of analysis:

This case is the result of the elaboration of a very complex strategy supported by the NGO Open society.

It is deemed to be a very important precedent for the protection against racial discrimination, in a judicial context where police controls have never been challenged before the courts, and have always been considered to be discretionary.

In addition it took to a higher judicial level the recognition of the principle which was argued by the Defender of Rights that, in the continuity of the European Court of Human Rights jurisprudence, there is a positive obligation of the State to take positive steps to prevent the police from committing racial discrimination, therefor justifying that the burden of proof imposed on the claimant be facilitated and that liability be triggered without requiring proof of intentional characteristic fault.

As regards the finding of the Court in relation to physical characteristics associated with the real or deemed origin of a person, the finding of the Court affirms that in a country where French citizens can originate from overseas departments and where millions of French citizens have an African, North African or Asian origin, there can be no physical characteristic of being foreign, and such a reasoning necessarily is the result of a stereotype.

Internet link source:

- <http://www.defenseurdesdroits.fr/fr/actions/protection-des-droits-libertes/decision/decision-msp-mds-mld-2015-021-du-3-fevrier-2015>;
- <http://www.defenseurdesdroits.fr/actions/protection-des-droits-libertes/decision/decision-mds-2016-132-du-29-avril-2016-relative-des>;
- https://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/relatifs_contr_35473.html.