# EUROPEAN COURT OF HUMAN RIGHTS

## Mounir SEYDI and Others v. France
## Application no. 35844/17

# OBSERVATIONS BY THE APPLICANTS IN RESPONSE TO THE GOVERNMENT'S OBSERVATIONS

## INTRODUCTION

1. These observations are not intended to reiterate the arguments set out in the application lodged on 9 May 2017 on behalf of the six applicants. In that application, the applicants established that the identity checks to which they were subjected by the police in 2011 and 2012 constituted racial discrimination in violation of Article 14 of the Convention on Human Rights (hereinafter 'the Convention'), read together with Article 8 of the Convention and Article 2 of Protocol no. 4, and that they had not been given effective remedy within the meaning of Article 13 of the Convention.

2. The discriminatory police stops to which the applicants had been subjected were not isolated acts by members of the law-enforcement agencies who were acting out of line with their professional and ethical obligations. On the contrary, they are part of a systemic and widespread practice throughout France and are the result of a combination of factors that go far beyond the behaviour of individual officers. Numerous independent national and international bodies have already denounced this racial profiling in France and the insufficient or non-existent responses of the French authorities to prevent its occurrence and protect the victims.

3. These observations, which should be read in conjunction with the application lodged on 9 May 2017, are intended to answer the questions put by the Court and respond to the Government's observations; they provide updated information regarding the law and practice of police stops in France since the application was lodged.

## I. FACTS

4. The applicants challenge the Government's version of the facts and therefore submit a precise and well-documented statement correcting the latter's approximations and inaccuracies (Appendix 1). The applicants also provide updates on the studies documenting ethnic profiling in France, including the legal proceedings brought against the State, in addition to the material submitted in support of the application (Doc. 62).

5. The Government contested the very reality of ethnic profiling in France, which had been widely documented at the national and international levels. This attitude runs counter to the recognition by the President of the Republic, on 4 December 2020, of the widespread practice of so-called '*au faciès*' police stops (that is, discriminatory police stops based on a person's appearance) in France, when he stated:
"*Today, when one's skin colour is other than white, one faces many more police stops. And even more so when one is a boy. You are identified as a risk factor, a problem, and that is unbearable.*"[1]

6. The Government's denial, before the Court, of the reality of discriminatory police stops and their devastating consequences on people's daily lives contributes to the persistence of these discriminatory practices and constitutes additional violence for the people concerned.

## II. DOMESTIC LAW AND PRACTICE

7. Identity checks are governed by Article 78-2 of the Code of Criminal Procedure (Doc. 49). The scope of judicial identity checks was extended by Law no. 2016-731 of 3 June 2016, allowing for identity checks of persons subject to judicial supervision, house arrest or a sentence or measure monitored by the sentence enforcement judge (*Juge de l'application des peines*, JAP).[2]

8. In a decision of 24 January 2017,[3] the *Conseil constitutionnel* (hereinafter 'Constitutional Council') specified that, with regard to identity checks carried out on a public prosecutor's orders, freedom of movement prohibits the public prosecutor from targeting places and periods of time unrelated to the investigation of the offences referred to in these orders, and does not authorise identity checks that are overreaching in time or space through a combination of orders relating to

1 Interview with *Brut* media, 4 December 2020. See at 17:06, https://www.brut.media/fr/news/replay-le-president-de-la-republique-emmanuel-macron-repond-a-brut--6aef2ca4-a4d3-47a0-9c71-f92299239ea1
2 This article has also been amended on several occasions to extend the possibilities of identity checks on foreigners.
3 *Conseil constitutionnel* [hereinafter 'Constitutional Council'], Decision no. 2016-606/607, *QPC* of 24 January 2017, para. 23, https://www.conseil-constitutionnel.fr/decision/2017/2016606_607QPC.htm

different places or periods of time. This results in "the prohibition of identity checks based solely on a person's physical appearance, membership of a community or real or supposed foreignness."[4]

9. Article R. 434-16 of the Code of Ethics of the National Police and the National Gendarmerie (Doc. 51) states, *inter alia*, that a police officer or gendarme may not base an identity check on any physical characteristic or distinctive feature in order to determine whom to stop, unless he or she is in possession of a precise suspect description justifying the check. Identity checks may not infringe on the dignity of the person, and a security pat-down must be conducted out of public view whenever circumstances permit.

10. The applicants are not aware of any instructions given to the police setting out the conditions for carrying out identity checks. They are, however, aware of the dispatch sent on 6 March 2017 by the Director General of Criminal Affairs and Pardons to General Prosecutors (*Procureurs généraux*) and Public Prosecutors (*Procureurs de la République*), inviting public prosecutors, following the Court of Cassation's judgments of 9 November 2006 and the Constitutional Council's decision of 24 January 2017, to provide a stricter framework for identity checks based on a public prosecutor's orders, including by requiring the police to send a detailed report on the stops carried out – which should contain information aimed at ensuring compliance with the rules on non-discrimination.[5] However, the Minister of Justice acknowledged to the *Défenseur des Droits* (hereinafter 'Defender of Rights')[6] and the President of the *Conseil National des Barreaux* (National Bar Council , CNB) (Doc. 71) that these instructions had remained largely a dead letter, adding that the Ministry of the Interior was contesting the legality of the requirement for law enforcement officers to write up reports, and announcing a reform of Article 78-2 of the Code of Criminal Procedure, which has not yet been implemented.

## III. LAW

### A. Jurisdiction *rationae materiae*

4 Constitutional Council, Decision no. 2016-606/607 *QPC* of 24 January 2017, Commentary, p. 20, https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/decisions/2016606qpc/2016606_607qpc_ccc.pdf

5 See Appendix 1 to the Third-Party Intervention by the Defender of Rights.

6 Letter addressed on 18 March 2019 to the Defender of Rights, produced in support of Defender's Third Party Intervention.

11. The Government did not hesitate to "express its doubts" as to whether the identity checks carried out on the applicants constituted interference with their rights under Article 8 of the Convention and Article 2 of Protocol no. 4.[7] This challenge lacks substance and cannot be accepted.

1. The identity checks are an interference with private life within the meaning of Article 8 of the Convention

12. In addition to the material submitted in the application, it should be recalled that the Court has repeatedly emphasised that the notion of private life is "a broad term not susceptible to exhaustive definition."[8] Article 8 "protects the right to personal development, whether in terms of personality or of personal autonomy".[9] The right to private life "includes the right to lead a 'private social life', that is, the possibility for the individual to develop his or her social identity."[10] The Court also recalled that an individual's ethnic identity must be regarded as an important element of his or her private life[11] and that, "in particular, any negative stereotyping of a group, when it reaches a certain level, is capable of impacting on the group's sense of identity and the feelings of self-worth and self-confidence of members of the group."[12]

13. The Government tried in vain to present the facts as occasional requests for the mere production of an identity card, which, on the basis of *Reyntjens v. Belgium*, would not constitute an interference with private life. When police stops are overwhelmingly aimed at individuals perceived to be Black or Arab,[13] they affect their ethnic identity and therefore constitute interference with their privacy – which was the case for the applicants. Moreover, the stops exposed the applicants to the public gaze in a humiliating manner and affected their dignity, personal development and social life and, therefore, their private life.[14] They were also very often accompanied by insults, derogatory remarks or threats – a fact that was not disputed by the authorities before the domestic courts. The situation of the applicant Karim Touil is even more evident : he was subjected to three police stops in less than 10 days – a recurrence that the vast majority of 'white' people in France do not experience – the most recent of which was accompanied by insults, physical violence and a

7 *Observations du Gouvernement* [hereinafter 'Observations by the Government'], paras. 66-80.
8 ECHR, GC, *Bărbulescu v. Romania*, 5 September 2017, Application no. 61496/08, para. 70.
9 *Ibid*.
10 *Ibid*.
11 ECHR, GC, *Aksu v. Turkey*, 15 March 2012, Application nos. 4149/04 and 41029/04, para. 58.
12 *Ibid*.
13 Reference is made to the many sources cited in support of the application and these observations.
14 See Open Society Justice Initiative, *Equality Betrayed: The Impact of Ethnic Profiling in France*, 2013, 32 pages, https://www.justiceinitiative.org/publications/equality-betrayed-impact-ethnic-profiling-france

deprivation of liberty. These elements, intrinsically linked to the police stops, are also an interference in private life.

14. Nor is it relevant for the Government to attempt to invoke rules that only permit searches with the consent of the individual, and to infer that police powers are therefore more restrictive than in the case of *Gillan and Quinton v. the United Kingdom*.[15] The facts contradict this purely theoretical view. The Government itself acknowledges, as it did before the domestic courts, that many of the police stops that the authorities carried out were accompanied by searches and pat-downs.[16]

2. Identity checks interfere with the right to freedom of movement

15. As set out by the applicants in their application, the identity checks to which they were subjected affected their right to freedom of movement protected by Article 2 of Protocol no. 4. The intrusion into this freedom was recognised by the Constitutional Council in its decision of 24 January 2017 (supra) and by French legal doctrine , that emphasises that "*the person being checked is obliged to comply with the summons of the law-enforcement authorities, to state his or her identity and is therefore momentarily restricted in his or her movements.*"[17] Moreover, people exposed to racial profiling develop circumvention strategies by making the forced choice to change their route or limit their presence in public space so as to avoid places where they know they run a greater risk of being stopped, which also constitutes a restriction on their freedom of movement (see e.g. Doc. 69a, p. 2, sworn affidavit by Youssoufou Baki). Finally, the applicants were deprived of their freedom of movement for a period of time, having been subjected to searches and pat-downs, and Mr Touil was taken to the police station.

16. The Government disputed that an identity check could constitute an interference with the applicants' right to freedom of movement, arguing that, since the domestic courts had found that no discrimination had been proven, there were no special circumstances justifying that the stops would fall within the scope of Article 2 of Protocol no. 4.[18] This reasoning cannot be followed. It is the implementation of the anti-discrimination rules by the domestic courts that is at issue before the Court, and the State cannot rely on these decisions to override the applicants' individual right of

15 Observations by the Government, paras. 66-73.
16 *Ibid*., paras. 9, 16 et 25.
17 Noémie Veron, "Les contrôles d'identité dans la jurisprudence du Conseil constitutionnel", *Revue française de droit constitutionnel*, 115, 2018, pp. 579 et seq.
18 Observations by the Government, paras. 74-80.

recourse. Moreover, it is the extent of ethnic profiling in France, which is widely documented and recognised, and of which the stops to which the applicants were subjected are an illustration, that constitutes the special circumstances to which the Court referred in *Timishev v. Russia*.

**B. Alleged violation of Article 14 of the Convention, read together with Article 8 and Article 2 of Protocol no. 14**

17. The Court put three questions to the Parties in relation to Article 14 of the Convention. The applicants hereby submit their replies to these questions, together with their observations on the Government's comments.

1. The applicants have been discriminated against in the form of racial profiling and have established a *prima facie* case of discrimination

18. The Court's first question reads as follows:
"Were the applicants victims, in the exercise of their rights guaranteed by the Convention, of discrimination in the form of racial profiling based on their alleged race and/or ethnicity, contrary to Article 14 of the Convention taken together with Article 8 and Article 2 of Protocol no. 4? In particular, has each of the applicants succeeded in establishing, at least by way of a "*prima facie* case", a presumption of discrimination (see, for example, *Hoogendijk v. the Netherlands* (dec.), no. 58641/00, 6 January 2005, and *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 147, ECHR 2005-VII) in the enjoyment of his rights to respect for private life and to freedom of movement? Moreover, in domestic law and practice, what evidence is susceptible to constitute such *prima facie* evidence in the eyes of the domestic courts?" (*our translation*).

19. Each of the applicants was indeed discriminated against on the basis of their actual or presumed race or ethnicity in the course of the police stops to which they were subjected. Given its systemic dimension, this discrimination constitutes both direct and indirect discrimination (a). Therefore, rules for sharing the burden of proof must apply (b). And the applicants have indeed shown a *prima facie* case of discrimination, which the domestic courts have failed to recognise (c).

*a. The applicants suffered both direct and indirect discrimination*

20. Article 14 of the Convention does not define direct and indirect discrimination. In the Court's view, direct discrimination results from a difference in the treatment of persons in similar or comparable situations based on an identifiable characteristic, whereas indirect discrimination may result from the disproportionately prejudicial effects of a general policy or measure which appears neutral but has specific discriminatory effects on a particular group.[19]

21. It is particularly surprising for the Government to assert that direct discrimination would require a demonstration of an intent to discriminate.[20] This reveals a profound misunderstanding of national and international non-discrimination law, which has long established that the existence of discrimination is extraneous to any intention, with the specific exception of criminal matters where, by definition, intention is central.[21] The Court makes it clear that "a differential treatment of persons in relevantly similar situations, without an objective and reasonable justification, constitutes discrimination".[22] The Court's decisions cited by the Government are irrelevant as they relate to facts which gave rise to criminal proceedings. The same approach follows from the International Convention on the Elimination of All Forms of Racial Discrimination,[23] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin,[24] and Article 1 of the French Law of 27 May 2008 containing various provisions adapting French legislation to EU law in the field of combating discrimination.[25]

22. The discriminatory police stops to which the applicant had been subjected bear the hallmarks of both direct and indirect discrimination. They reflect a widespread and systemic practice in France, which "can be understood as legal rules, policies, practices or predominant cultural attitudes (...) which create relative disadvantages for some groups."[26]

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19 ECHR, GC, *D.H. and Others v. the Czech Republic*, 13 November 2007, Application no. 57325/00, para. 175.
20 Observations by the Government, para. 154.
21 "The approach is objective, focusing on the analysis of a situation of unfavourable treatment; the approach is no longer subjective, focusing on the wrongful conduct of an individual (except in criminal law)." M. Miné, *Droit des discriminations dans l'emploi et le travail*, Bruxelles, Larcier, 2016, p. 678, para. 1417.
22 ECHR, *Timishev v. Russia*, 13 December 2005, Application nos. 55762/00 and 55974/00, para. 56.
23 Article 1 of the Convention does indeed define racial discrimination as "Any distinction (...) which has the purpose or effect..."
24 Article 2 of the Directive states that "direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin." At no point does the directive refer to any notion of intention.
25 Article 1 of the Act defines direct discrimination as the situation where, on the basis of a protected criterion, "a person is treated less favourably than another is, has been or would be treated in a comparable situation." Once again, it is hard to read here a notion of intention.
26 United Nations, Committee on Economic, Social and Cultural Rights, General Comment no. 20 on "Non-discrimination in economic, social and cultural rights", paragraph 12, 2 July 2009, https://digitallibrary.un.org/record/659980

23. *Direct discrimination*. On the basis of their ethnic origin, the applicants were treated differently by law enforcement officials in comparison to other persons who would have been placed in a similar or comparable situation. The numerous reports, studies and statistics carried out over several decades (see below) have demonstrated beyond any doubt that individuals perceived as Black or Arab are much more likely to be stopped than people of another ethnic origin, real or supposed. According to the extensive data collected by these studies, the applicants were stopped by the police because they were perceived to be of Black or Arab origin. As the Court of Justice of the European Union (CJEU) has noted, "direct discrimination is to be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation."[27]

24. *Indirect discrimination*. The police stops to which the applicants were subjected also constituted indirect discrimination: the rules of Article 78-2 of the Code of Criminal Procedure authorising identity checks, as well as the institutional policies and priorities of the law enforcement agencies, although apparently neutral, were applied disproportionately to the applicants on the basis of their actual or presumed ethnic origin. Such indirect discrimination is also especially highlighted by the reports, studies and statistics that have documented this practice (*infra*).

*b. Sharing the burden of proof*

25. Specific rules for sharing the burden of proof apply to discrimination, whether direct or indirect. The effectiveness of anti-discrimination law requires the rules of evidence to be adapted, as it is difficult for victims to prove discrimination.[28] This was explicitly acknowledged by the French Court of Cassation in the judgments of 9 November 2016 submitted to the Court: "*It is up to the person claiming to be the victim to provide factual evidence of a difference in treatment which gives rise to a presumption of discrimination and, where appropriate, for the administration to demonstrate either the absence of a difference in treatment or that the difference is justified by objective factors unrelated to any discrimination*" (Docs. 8, 14, 20, 31, 42 and 48). The Court adopts the same approach: "*Once the applicant has shown that there has been a difference in*

27 CJEU, 16 July 2015, *CHEZ Razpredelenie Bulgaria AD v. Komisia za zashtita ot diskriminatsia*, C-83/14, para. 53.

28 See in particular: CJEU, 17 October 1989, *Handels- og Kontorfunktionærernes Forbund I Danmark versus DanskArbejdsgiverforening, acting on behalf of Danfoss*, 109/88, para. 14: "The concern for effectiveness which thus underlies the directive means that it must be interpreted as implying adjustments to national rules on the burden of proof in special cases where such adjustments are necessary for the effective implementation of the principle of equality."

*treatment, it is then for the respondent Government to show that the difference in treatment could be justified*."[29] Contrary to what the Government claimed in response to the Third-Party Intervention by the Defender of Rights,[30] the rules on sharing the burden of proof are not designed to compensate for the lack of traceability of identity checks – a situation knowingly engineered by the State. Instead, these rules are integral to anti-discrimination law and are additional to the State's positive obligation to ensure the traceability of identity checks.

26. The applicants therefore had to provide *prima facie* evidence of direct or indirect discrimination, which they did.

*c. The applicants provided* prima facie *evidence of discrimination*

27. Contrary to what the Government argued, the rules for proving *prima facie* evidence do not differ depending on whether the alleged discrimination is direct or indirect: to be effective, anti-discrimination law requires effective evidential rules. However, the characteristics of the discriminatory police stops of which the applicants were victims make it necessary to take into account several additional rules for assessing the *prima facie* case.

*Rules for assessing* prima facie *evidence*

28. The information pertaining to the identity checks to which the applicants were subjected is in the sole hands of the French authorities, since the applicants were not provided with any reason or justification for the stop. However, the Court has repeatedly recognised that "*where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation*."[31] This approach is similar to that of the CJEU, which, as early as 1989, considered that "*where an undertaking applies a system of pay which is totally lacking in transparency, it is for the employer to prove that his practice in the matter of wages is not discriminatory*."[32]

29 ECHR, *Timishev v. Russia*, para. 57.
30 Observations by the Government to the Third-Party Intervention by the Defender of Rights, para. 19
31 ECHR, GC, *D.H. and Others v. Czech Republic*, para. 179. See also ECHR, GC, *Nachova and Others v. Bulgaria*, 6 July 2005, Application nos. 43577/98 and 43579/98, para. 157; ECHR, *Opuz v. Turkey*, 9 June 2009, Application no. 33401/02, para. 183.
32 CJEU, 17 October 1989, *Handels- og Kontorfunktionærernes Forbund I Danmark versus DanskArbejdsgiverforening, acting on behalf of Danfoss*, 109/88, para. 16.

29. Furthermore, in breach of its positive obligations, the French State failed to ensure the traceability of identity checks, and did not respond to the applicants' requests for an explanation. (Docs. 4, 10, 16, 23, 38 and 44). This persistent lack of traceability, which was again highlighted by the Paris Court of Appeal in three judgments handed down on 8 June 2021 (Doc. 70, p. 8), deprives the persons subjected to the stops of any direct evidence and must be taken into account when assessing the *prima facie* case. This is also what the CJEU has ruled: "*(...) a defendant's refusal to grant any access to information may be one of the factors to take into account in the context of establishing facts from which it may be presumed that there has been direct or indirect discrimination*."[33] Otherwise, the effective protection of victims of discrimination is jeopardized. In its comments on the Third-Party Intervention by the Defender of Rights, the Government profoundly misunderstands the requirement for traceability and its benefits.[34] It seems to reject its value on the pretext that issuing a stop form would not make it possible to eradicate the causes of discrimination, and that foreign models are not 100% transferable in France. This ignores the contribution of a traceability mechanism (as required by many bodies), the plurality of measures needed to combat systemic discrimination, and the responsibility of the State to implement a recording mechanism that would be compatible with the French legal system.

30. Moreover, as the Defender of Rights has noted,[35] an identity check takes place at a given moment and often occurs in the absence of witnesses. This is an additional evidentiary difficulty to be taken into account.

31. Finally, the Court must have regard to the numerous reports, studies and statistics that have documented the practice of discriminatory identity checks in France, and which now make it a well established fact. Contrary to what the Government claims, the use of such evidence is not confined to the provision of *prima facie* evidence of indirect discrimination: the Court has also accepted it in cases of direct discrimination,[36] as has the CJEU.[37] And for good reason: the difficulty for a victim to prove discrimination exists irrespective of the type of discrimination, and the rules for the production of evidence must guarantee the effectiveness of anti-discrimination law precisely with

33 CJEU, 19 April 2012, *Galina Meister v. Speech Design Carrier Systems GmbH*, C-415/10, para. 47.
34 Observations by the Government to the Third-Party Intervention by the Defender of Rights, paras. 12 et 12
35 Third-Party Intervention by the Defender of Rights, p. 21.
36 See in particular ECHR, *Opuz v. Turkey*, paras. 192-200; ECHR, *Talpis v. Italy*, 2 March 2017, Application no. 41237/14, para. 145.
37 See for example CJEU, 27 October 1993, *Pamela Mary Enderby v. Frenchay Health Authority and Secretary of State for Health*, C-127/92, para. 17.

regard to these difficulties,[38] which are, as described above, very prevalent in the case of discriminatory police stops.

*The applicants have provided* prima facie *evidence of the discriminatory nature of the identity checks they were subjected to*

32. The applicants, who are perceived to be of African or North African origin, have provided the requisite *prima facie* evidence, since they have stated in sufficient detail that they were stopped by the police and have referred to reliable and significant statistics and reports that attest to the widespread practice of discriminatory identity checks in France. This *prima facie* case must be accepted, especially as the State has failed to provide evidence regarding the stops and their reasons , and is the sole holder of information about the stops that were carried out.

33. Moreover, although they were not legally obliged to do so and had already established a sufficient *prima facie* case, the applicants produced detailed testimonies from persons who had been present during the stops. These testimonies also described the degrading or inappropriate language, insults, searches and pat-downs – even physical violence in the case of Mr Touil – that often accompanied these stops (see Appendix 1).

34. In considering that the applicants had not established a *prima facie* case, the Court of Cassation misapplied the evidentiary rules in two respects, with the effect of undermining the effective protection of the victims of police stops against discrimination. Firstly, it failed to take into account the State's shortcomings regarding the traceability of identity checks and the fact that only the authorities have the elements relating to the disputed stops in their possession. As both the Court and the CJEU have recognised, in the face of such an imbalance, the presumption must be considered established and the burden of proof to demonstrate that no discrimination took place must rest with the respondent State.

35. Secondly, the Court of Cassation limited the acceptance of *prima facie* evidence to situations where the victim provided evidence of a comparison directly observed during the police stops (Appendix 1, paras. 52 and 53). In doing so, it placed an impossible burden of proof on the victims, as identity checks are most often conducted without witnesses: the victims are therefore unable to

38 See in particular ECHR, *DH. and Others v. Czech Republic*, 13 November 2007, Application no. 57325/00, para. 186.

provide a comparison. Moreover, the Court of Cassation overlooked the fact that discrimination occurs when one person is treated less favourably than another is, has been or would be treated in a comparable situation: the comparator may be hypothetical or the result of studies and statistics. Requiring applicants, as part of the production of *prima facie* evidence, to show that other persons have not been checked therefore violates the rules of evidence as they follow, *inter alia*, from Article 14 of the Convention.[39]

*Consideration of statistics, reports and studies documenting discriminatory police stops*

36. The Court agrees to consider statistical data that is reliable, significant and has been critically examined by the Court.[40] In this, it relies on the same criteria as those used by the CJEU.[41] The Court also accepts as *prima facie* evidence studies and reports from the Council of Europe and UN bodies[42] or leading NGOs,[43] as well as statistical data produced by the applicants[44] or by leading NGOs.[45] The Government therefore disregarded the Court's most recent case-law in claiming that the Court limits the use of statistics to those from official sources or those not contested by the respondent State.[46] The Court does not and could not possibly make the absence of a challenge by the State to the statistics produced a criterion of their admissibility, since a mere challenge by the State would then be sufficient to undermine any statistics whatsoever – such a situation, obviously, would not be acceptable.

37. The studies and statistical data produced by the applicants are reliable and significant. They emanate from researchers at the *Centre national de recherche scientifique* (CNRS) – France's largest public scientific research body –from United Nations and Council of Europe bodies, from the Defender of Rights, and from leading NGOs such as Amnesty International, Human Rights Watch and the Open Society Justice Initiative. The seriousness of these institutions is undisputable.

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39 CJEU, 16 July 2015, *CHEZ Razpredelenie Bulgaria AD v. Komisia za zashtita ot diskriminatsia*, C-83/14, para. 53.
40 CEDH, GC, *D.H. and Others v. Czech Republic*, para. 188.
41 CJEU, 27 October 1993, *Pamela Mary Enderby v. Frenchay Health Authority and Secretary of State for Health*, C-127/92, para. 17.
42 ECHR, *Talpis v. Italy*, para. 145. The Court took into consideration the findings of the UN Special Rapporteur on Violence against Women, the UN Committee on the Elimination of Discrimination against Women (CEDAW) and the National Statistics Office.
43 EHCR, *Opuz v. Turkey*, para. 193. The Court had regard to reports and statistics prepared by the Diyarbakir Bar Association and Amnesty International.
44 CEDH, GC, *DH. and Others v. Czech Republic*, para. 190-191.
45 EHCR, *Opuz v. Turkey*, para. 193. The Court had regard to reports and statistics prepared by the Diyarbakir Bar Association and Amnesty International.
46 Observations by the Government, paras. 160-172.

This rigorous research, conducted over several decades, consistently demonstrates that individuals perceived as 'Black' or 'Arab' are subjected to significantly more frequent police stops than individuals perceived as 'White' (Doc. 62 and Appendix 1). The Council of Europe and the United Nations have also repeatedly highlighted ethnic profiling as a persistent problem in France (Doc. 62 and Appendix 1).

38. The Government disputes the reliability and significance of the statistics and reports produced, without however producing any evidence to counter this extensive documentation.[47] This attitude is inconsistent with the Government's boasting that these statistics and reports were taken into account in judgments finding the State guilty in cases not referred to the Court.[48] The domestic courts, including the Court of Cassation, have accepted the reliability and significance of the reports and statistics produced, which is a factual assessment that cannot be seriously disputed before the Court.

39. *Reliability*. The Government's arguments to challenge the reliability of the statistics and reports lack any rigour. Firstly, the Government presented a fanciful interpretation of the study by CNRS researchers, which it said showed that clothing, and not ethnic origin, was the trigger for the stops.[49] The study's conclusions, however, are very clear: "*The study confirmed that identity checks by police officers are based mainly on appearance: not on what people do, but on what they are, or appear to be. The results show that people perceived as 'Black' (of sub-Saharan or Caribbean origin) and people perceived as 'Arab' (of Maghreb or Mashreq origin) were disproportionately stopped compared to people perceived as 'White'*" (Doc. 52, p. 10).

40. In addition, the Government claimed that the Opinion Way survey produced by the applicants (Doc. 54) was methodologically biased, using obscure reasoning which the applicants found difficult to understand.[50] Reference is made to the analysis of this study submitted by the applicants (Doc. 62, paragraphs 3 and 4).

41. The Government also questioned the 2010 report of the European Commission against Racism and Intolerance, on the basis that it had disputed the report's findings as part of its confidential

47 Observations by the Government, paras. 195 et s.
48 *Ibid*., paras. 138 et s.
49 *Ibid*., para. 201.
50 Observations by the Government, para. 207.

dialogue with ECRI.[51] However, the State's observations do not form part of ECRI's report – the quality of whose work cannot be questioned.[52]

42. Lastly, the Government claimed, contrary to the evidence, that the conclusions of the various reports did not converge, and attempted to support this argument by misrepresenting the study by the Defender of Rights titled "*Relations police/population : le cas des contrôles d'identité*" ("Police/population relations: the case of identity checks"), which according to the Government did not demonstrate the existence of discriminatory police stops.[53] These comments are in flagrant contradiction with the very content of the study, as the Defender of rights pointed out: "*The results of the survey, published in January 2017, confirm that identity checks are mainly aimed at young men from visible minorities, lending credence to the idea of discriminatory '*au faciès*' police stops*."[54]

43. *Significance of statistics and reports.* According to the Government, the statistics produced were not significant because they covered only a limited number of persons and geographical areas. Once again, the Government contradicted the assessment made by the Court of Cassation and the recognition, at the highest level of the State, of the widespread practice of racial profiling. Moreover, the Government's presentation is wholly biased because it ignores a large body of data. It does not say that the CNRS study was based on observations that took place over 75 days, with a reference sample of 37,833 people and the analysis of 525 police stops. It says nothing about the study by the Defender of Rights, which was based on a representative sample of 5,117 people throughout metropolitan France, or about other studies. The same reality is confirmed by the Human Rights Watch report, which documents identity checks targeting minors in several regions of France, and the Amnesty International report in which police officers confirm practices of discriminatory police stops in several regions.

44. These statistical elements, taken individually and together, present unquestionable methodological guarantees, and cover samples and geographical areas that are larger than what the Court accepts as *prima facie* evidence.[55] The Court will therefore find that the reports and statistical

51 *Ibid*., para. 208.
52 ECRI Report on France, Fourth Monitoring Cycle, 15 June 2010, Government comments, https://rm.coe.int/government-comments-on-the-fourth-report-on-france/16808b5733
53 Observations by the Government, para. 213
54 Third-Party Intervention by the Defender of Rights, p. 5
55 In *Opuz v. Turkey*, the Court took into account as reliable and significant a telephone survey of 2848 women in the city of Diyarbakir alone (ECHR, *Opuz v. Turkey*, para. 193).

data produced by the applicants – in the absence of any information provided by the authorities – are reliable and significant and demonstrate that police stops in France have a disproportionate impact on individuals on account of their actual or presumed ethnic origin.

2. The differential treatment had no objective and reasonable justification

45. The Court's second question reads as follows:
"If so, was the difference in treatment allegedly suffered by the applicants objectively and reasonably justified and was there a reasonable relationship of proportionality between the means employed and the aim pursued (see, for example, *Timishev v. Russia*, nos. 55762/00 and 55974/00, ECHR 2005)?"

46. Once the applicants have shown that they have suffered differential treatment, it is for the Government to establish the justification for it, that is to say, to demonstrate the existence of a legitimate aim and a reasonable relationship of proportionality between the aim pursued and the means employed. The margin of appreciation left by the Court to the States is, in the presence of racial discrimination deemed "particularly invidious",[56] very limited: "*no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures*."[57] In the present case, the difference in treatment reserved for the applicants was not justified by a legitimate aim, and the Government did not suggest any.

47. *Legitimate aim.* Identity checks targeting visible minorities do not pursue a legitimate aim. As ECRI[58] and the Parliamentary Assembly of the Council of Europe[59] have pointed out, ethnic profiling cannot be a possible response to the challenges posed by the prevention of crime. It constitutes racial discrimination, violates human rights, contributes to the spread of xenophobic attitudes, and is ineffective.[60]

56 ECHR, *Timishev v. Russia*, para. 56
57 ECHR, GC, *D.H. and Others v. Czech Republic*, para. 176; ECHR, GC, *Sejdić and Finci v. Bosnia and Herzegovina*, 22 December 2009, Application nos. 27996/06 and 34836/06, para. 44 . See also ECHR, *Timishev v. Russia*, para. 56
58 Council of Europe, ECRI, General Policy Recommendation no. 11 on combating racism and racial discrimination in policing, June 2007, para. 25, https://rm.coe.int/ecri-general-policy-recommendation-no-11-on-combating-racism-and-racia/16808b5adf
59 Council of Europe Parliamentary Assembly, Resolution 2364 (2021)1, Ethnic profiling in Europe: a matter of great concern, para. 4, https://pace.coe.int/en/files/29023
60 See also United Nations, Human Rights Committee, *Rosalind Williams Lecraft v. Spain*, 17 August 2009, para. 7.2., https://digitallibrary.un.org/record/662897/

48. *Proportionality.* There is no reasonable relationship of proportionality between the means employed and the aim pursued: a police stop based on ethnic origin can never be justified (Doc. 1, paras. 39-43). Moreover, the Director of the General Inspectorate of the National Police herself has questioned the effectiveness of identity checks.[61]

3. No criteria other than ethnic origin, actual or perceived, were used by the police in deciding to stop the applicants

49. The third question posed by the Court reads as follows:
"In the case of the checks conducted on Mr Seydi, Mr Niane and Mr Touil, which were based on the prosecutor's written summons, were there any other search criteria which led the police officers in charge of the stops to focus more specifically on the profile of the applicants? As regards the stops carried out under Article 78 (2) and (3) of the Code of Criminal Procedure, which were carried out on Mr Abdillahi, Mr Dif and Mr Kaouah, did the police officers concerned have any criteria for narrowing their choice of persons to be stopped (see *Gillan and Quinton v. the United Kingdom,* no. 4158/05, § 83, ECHR 2010 (extracts))? The Government is invited to submit copies of the relevant circulars, directives or other statutory instruments."

50. Contrary to the Government's allegations, the authorities did not demonstrate the existence of objective reasons for the law-enforcement officers' decisions to check the applicants' identities (b). The applicants first recall that the legal framework for identity checks in France does not fulfill the positive obligations incumbent on the State to prevent discrimination (a).

*a. The legal framework for identity checks does not comply with Article 14 in that it does not provide for sufficiently precise criteria limiting the discretionary power of the police*

51. In their application, the applicants recalled the requirements of legality and legal certainty defined by the Court to protect individuals against arbitrary interference in the context of police stops (Doc. 1, paras. 12-14). The Court[62] also stressed that racial discrimination "*requires from the authorities special vigilance and a vigorous reaction*" and that "*they must use all available means*

61 National Assembly, Information report, Information mission on the emergence and evolution of the various forms of racism and the responses to be given to them, 9 March 2021, Hearing of Ms Brigitte Jullien, 10 December 2020.
62 ECHR, *Timishev v. Russia*, para. 56. See also ECHR, *Nachova and Others v. Bulgaria*, para. 145.

*to combat racism*." The State therefore has a positive obligation under Article 14 of the Convention to establish a sufficiently strict legal framework to protect individuals against the risks of arbitrariness and discrimination. The legal framework for identity checks in France does not meet these requirements: it opens the door to discrimination such as that suffered by the applicants.

52. *Identity checks carried out on the orders of the public prosecutor*. Contrary to what the Government is trying to have the Court believe , identity checks carried out on the basis of orders from the public prosecutor are not "strictly regulated."[63] On the contrary, practice shows that the orders, often issued at the request of the police authorities,[64] authorise checks for a very large number of offences and very broadly defined places and periods of time, in effect allowing the police to check any person.[65] The officers do not have to justify the stops or base them on the behaviour of the individuals subjected to them. As the Defender of Rights noted, they "rely largely on subjective criteria, such as feeling or instinct."[66] This is also what police officers told Amnesty International: "*(...) you can stop absolutely anyone you want. There is no reason to suspect a person, they can be subjected to a check at any time. So necessarily, in a logic of higher return, in order to try and stop people who have committed offences, the police operate with their own prejudices. And unfortunately the prejudices of the police are that anyone who is racialised, from working-class neighbourhoods or minorities, is more likely to commit crimes than others*." (Doc. 68, p. 5).

53. Police stops based on public prosecutors' orders are also characterised by an almost complete absence of oversight by public prosecutors as regards their execution. The Government's silence before the Court on this matter will come as no surprise, since the situation is an embarrassment to the authorities. On 6 March 2017, the Minister of Justice sent guidance to general prosecutors and public prosecutors, instructing them to ensure the production of "systematic reports on the conduct of identity checks carried out on their orders", including "any element enabling the judicial authority to ensure the non-discriminatory nature of these checks, in particular by laying out the criteria employed to select the persons whose identities are to be checked."[67] However, the Minister

63 Observations by the Government, paras. 238.
64 CNCDH, *Avis sur la prévention des pratiques de contrôles d'identité abusives et/ou discriminatoires*, 8 November 2016, p. 22, https://www.cncdh.fr/sites/default/files/161108_avis_pratiques_des_controles_didentite_format_a5.pdf: "It is not uncommon for orders to be issued at the request of the police authorities and for the places and times of identity checks to be determined in consultation with the latter."
65 *Ibid*.
66 Third-Party Intervention by the Defender of Rights, p. 9.
67 See Appendix 1 to the Third-Party Intervention by the Defender of Rights.

of Justice had to acknowledge that these instructions remained a dead letter and that the public prosecutor's office was not in a position to verify that its orders were carried out in a non-discriminatory manner (supra, para. 10). In a letter sent to Human Rights Watch on 12 June 2020, the Director General of the National Police confirmed that the police send a "final telegram" to the prosecutor's office after each operation, with a purely numerical description of the stops that were carried out and no information on the actual conduct of the identity checks (Doc. 72, p. 2).[68]

54. *Administrative police stops*. Article 78-2, paragraph 3, provides that "the identity of any person, regardless of his or her behaviour, may also be checked, in accordance with the procedures set out in the first paragraph, in order to prevent a breach of public order, in particular as concerns the safety of persons or property." These so-called 'preventive' stops are widely criticised as "the crux of police discrimination on an ethnic basis",[69] as they can be decided without any link to the person's behaviour having to be established. This was also noted by the National Assembly's Information Mission on the emergence and evolution of the various forms of racism and the responses to be given to them: "*It is during these stops, which are not justified by any behaviour and are not intended to seek out the perpetrator of an offence, that the risks of so-called* 'au faciès' *stops* [i.e. discriminatory stops based on a person's physical features] *are greatest*." The Defender of Rights also noted the lack of sufficient supervision of administrative stops, leaving room for subjective criteria chosen by the police.[70]

55. *Judicial stops*. Article 78-2, paragraph 1 of the Code of Criminal Procedure allows for stopping persons in respect of whom there are one or more plausible reasons to suspect that they have committed, attempted to commit or are preparing to commit an offence. The work carried out in recent years has shown the need to tighten this legal framework in order to make the selection of individuals to be subjected to such identity checks more objective and to avoid discriminatory stops. According to the independent body CNCDH: "*It transpires from this not very restrictive legislative provision that almost any situation could, if necessary, be written up in an official report in the appropriate terms*."[71]

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68 This letter was produced by the plaintiff organisations in the context of the class action brought on 22 July 2021 before the *Conseil d'État* (Council of State).

69 National Assembly, Information report, Information mission on the emergence and evolution of the various forms of racism and the responses to be given to them, 9 March 2021, Hearing of Mr Sebastian Roché, 9 July 2020, https://www.assemblee-nationale.fr/dyn/15/rapports/racisme/l15b3969-ti_rapport-information#_ftn417

70 Third-Party Intervention by the Defender of Rights, p. 8

71 CNCDH, *Avis sur la prévention des pratiques de contrôles d'identité abusives et/ou discriminatoires*, op. cit., p. 21.

56. *Lack of further guidance to the police*. This broad legal framework is not accompanied by any other guidance or instructions governing the law-enforcement officers' powers to carry out identity checks. The Government submitted a document entitled "*Document sur les exigences respectées par les Gardiens de la paix dans le cadre des contrôles d'identité*" ("Document on the requirements met by police officers in the context of identity checks"), which it presented as containing "*details of how police officers carry out identity checks*".[72] However, this document must inevitably be viewed with caution, as it contains no indication of its author or recipients. Furthermore, it does not contain any indication of the criteria on which law enforcement officers should base their decisions regarding identity checks.

*b. The stops to which the applicants were subjected were not based on any criteria other than actual or presumed race or ethnic origin*

57. No explanation was given to the applicants as to the reasons for the identity checks they were subjected to, either at the time of the stops or following their lawyers' request for justification. In the course of the legal proceedings brought by the applicants, the authorities gave purported explanations *a posteriori*, without ever substantiating them with evidence. In the case of some applicants, these explanations even changed during the proceedings.

*The identity checks based on a public prosecutor's order that targeted Mr Seydi, Mr Niane and Mr Touil*

58. *Mr Seydi.* The Government offered no answer to the question whether the identity check carried out on Mr Seydi had been based on criteria other than ethnic origin. And for a reason : even if it had been carried out in pursuance of a prosecutor's order, such a stop could be carried out irrespective of the person's conduct. The Government therefore failed to show that an objective criterion unrelated to ethnic origin, real or presumed, underpinned the decision to stop Mr Seydi. The written report on the conduct of the operation, which the Government seemed to want to rely on as a guarantee,[73] had never been submitted or referred to before the domestic courts, and probably does not exist.

72 Exhibit 11 of the file submitted by the Government.
73 Observations by the Government, para. 245.

59. This inability on the part of the State to justify Mr Seydi's identity check has led to considerable confusion. For the first time before the Court, the Government claimed that "*the State's judicial agent emphasised before the domestic courts that Mr Seydi had been stopped because the police officers on patrol had been alerted to the commission of an offence in the town centre by two young people of Black African origin*", a factor which, in addition to the instruction given by the public prosecutor's order, justified this specific stop.[74] This assertion is inaccurate and is not supported by any evidence. Mr Seydi was with a Thai friend far from the city centre at the time of the stop. It should also be noted that the same vague 'explanation' ("a theft committed in the city centre") was given by the State to supposedly justify the identity check carried out on Mr Abdellahi on 12 February 2012 in Saint-Germain-en-Laye (see below). Even supposing that this was the actual reason for the stop – *quod non* –, the Court can only note that such criterion related to the applicant's ethnic origin: the police would have been looking for "a Black African type" individual.

60. *Mr Niane*. According to the Government, the criteria for deciding to stop Mr Niane were twofold: an order from the public prosecutor, and the behaviour of Mr Niane, who was said to have been "running out of a building wearing clothing that concealed his face" in an area where there was a high level of delinquency – which constituted a suspicion that an offence had been committed.[75]

61. As recalled in the Statement of Facts, this account of Mr Niane's behaviour is inaccurate (Appendix 1, para. 27): according to the only witness present, he was wearing a hoodie and walking quickly because it was cold, as he was leaving his parents' house to escort his siblings.

62. In the absence of both a reason given by the police at the time of the stop and subsequent record , the explanations given *a posteriori* by the Government concerning an alleged "suspicion that an offence had been committed" cannot be accepted and are not supported by any evidence (see Appendix 1, paragraphs 30 to 32). Moreover, "walking quickly wearing a hood" is not an objective criterion for suspecting the commission of an offence, including in an area where delinquency is alleged to be more frequent.

74 *Ibid.*, para. 251.
75 Observations by the Government, paras. 267-268.

63. As to the prosecutor's orders, it can only be reiterated that they do not constitute an objective criterion that could have justified stopping Mr Niane, since they are formulated in a very broad manner and the law-enforcement agencies acting in execution of such orders do not have to justify the stops in relation to the behaviour of the persons subjected to them.

64. In conclusion, the Government did not demonstrate the existence of objective grounds, unrelated to Mr Niane's ethnic origin, which would have justified stopping him.

65. *Mr Touil*. In this case as well, the Government avoided answering the Court's question as to the existence of grounds for the three identity checks carried out on Mr Touil. The Government merely stated that the stops had taken place "within a specific legal and general framework", namely that of the public prosecutor's order,[76] and that there was no evidence to suggest discriminatory treatment.

66. Once again, the Government's silence is an admission of its own negligence. The prosecutor's orders have a very broad scope and allow for checking the identity of any person regardless of their behaviour. Adding to this the lack of recording and traceability of the stops, the authorities are therefore unable to demonstrate that objective grounds, unrelated to actual or presumed ethnic origin, explained the identity checks carried out on Mr Touil. It should also be noted that the stop carried out on 1 December at around 1.30 p.m. took place outside the framework set by the order.

*The administrative stops that targeted Mr Kaouah and Mr Dif*

67. In the absence of any explanation given at the time of the stop targeting Mr Kaouah and Mr Dif and following the questioning of the Minister of the Interior, the French authorities justified the stop before the domestic courts by referring to the fact that the neighbourhood where the persons concerned were located was particularly affected by delinquency . The Paris Court of Appeal accepted that this constituted a risk to public order,[77] which the Government reiterated before the Court. As to the irrelevance of the elements used by the Government to characterise the area in which the applicants were living as a high-delinquency area, the applicants refer to the Statement of Facts (see Appendix 1, paragraphs 17 and 23).

76 *Ibid*., para. 257.

77 Judgments of the Paris Court of Appeal of 24 June 2015, in the case of Lyes Kaouah and Amine Dif, RG n°13/24286 and RG n°13/24303, p. 6.

68. The fact that a neighbourhood is characterised by higher rates of delinquency cannot be used as an objective criterion for stopping a person in the absence of specific elements relating to his or her behaviour. The Supreme Courts of the United States[78] and Canada,[79] as well as the Birmingham Magistrates' Court (United Kingdom)[80] have held that the mere presence of a person in a neighbourhood alleged to be characterised by high levels of delinquency is not in itself sufficient grounds to justify stopping or arresting him or her. Moreover, it will not escape the Court's notice that the reference to an area of high delinquency does not in any way explain why Mr Kaouah and Mr Dif in particular were stopped. No risk to public order was therefore demonstrated in their case.

*The identity check on suspicion of an offence that targeted Mr Abdillahi*

69. As before the domestic courts, the Government justified the identity check carried out on Mr Abdillahi on the ground that the police had been alerted to the commission of a robbery in the town centre by two young individuals of Black African origin, which corresponded to the profile of Mr Abdillahi and his friend.[81] This allegation of a robbery had never been established by any evidence (see Appendix 1, para. 49), and Mr Abdillahi was not in the vicinity of the city centre. There was therefore no objective criterion for stopping him.

70. Moreover, even according to the Government's statement, it was indeed the actual or presumed ethnic origin of Mr Abdillahi and his friend that justified the identity check, since they had been stopped because they were "young individuals of Black African origin". No other elements of suspect description were provided (height, clothing, hair colour and cut, etc.), whereas the profile of a suspect sought by the police should normally include such elements and the police never issue a suspect profile such as 'two young white men' without any further details.

78 Supreme Court of the United States, *Illinois v. Wardlow*, 12 January 2000, no. 98-1036, https://supreme.justia.com/cases/federal/us/528/119/: "An individual's presence in a 'high crime area,' standing alone, is not enough to support a reasonable, particularized suspicion of criminal activity."

79 Supreme Court of Canada, *R. Mann*, 23 juillet 2004, https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2167/index.do: "The presence of an individual in a so-called high crime area is relevant only so far as it reflects his or her proximity to a particular crime. The high crime nature of a neighbourhood is not by itself a basis for detaining individuals."

80 https://www.theguardian.com/uk-news/2021/aug/02/police-officer-declan-jones-convicted-assaulting-two-black-males: "Being in a high-crime area is not a justification for anyone being stopped and searched."

81 Observations by the Government, para. 9 et 305.

71. Far from demonstrating that there were objective and non-discriminatory grounds for the check, the explanation given by the Government in fact confirms that no criteria other than Mr Abdillahi's actual or presumed ethnic origin justified the check.

**C. Alleged violation of Article 13 of the Convention**

72. The question put by the Court was as follows: "Did the applicants have an 'arguable complaint' of a violation of their rights under Article 14 of the Convention taken together with Article 8 and Article 2 of Protocol no. 4, so that Article 13 is brought into play? If so, did they have access to an effective domestic remedy, as required by that provision, through which they could have raised their claims of breach of the Convention?"

1. Arguable complaint

73. The Court has never given an abstract definition of what constitutes an 'arguable' complaint. It has looked to determine "*in the light of the particular facts and the nature of the legal issue or issues raised, whether each individual claim of violation forming the basis of a complaint under Article 13 (art. 13) was arguable and, if so, whether the requirements of Article 13 (art. 13) were met in relation thereto*."[82] Where the arguability of the complaint is not in dispute, the Court concludes that Article 13 applies.

74. The Government did not contest the existence of an arguable complaint.[83] In view of the widespread practice of discriminatory identity checks in France and the lack of justification given by the authorities, the applicants did indeed have an arguable complaint of a violation of Article 14 of the Convention.

2. Lack of an effective remedy

75. As set out in the application, the applicants did not have an effective domestic remedy to redress the discrimination they had suffered. In order to meet the requirements of Article 13 of the Convention, the alleged remedy must be effective in practice as well as in law and access to this

82 ECHR, *Esposito v. Italy* (dec.), 5 April 2007, Application no. 34971/02.
83 Observations by the Government, para. 324.

remedy must not be unjustifiably impeded by the acts or omissions of the authorities.[84] It must also be capable of directly remedying the situation in dispute.[85] Where their effectiveness is called into question by the applicants, it is for the Government to demonstrate the actual implementation and practical effectiveness of the remedies it has cited in the particular circumstances of the case.[86]

76. In its observations, the Government confined itself to listing in abstract terms the types of civil and criminal remedies available under the law. However, it did not say a word about the effectiveness of these remedies, nor about the causes of the ineffectiveness of the remedies, as raised by the applicants – namely the excessive evidential burden imposed by the domestic courts, the lack of traceability of the stops and the absence of any obligation falling on police officers to inform the person concerned of the grounds for the stop. The Government therefore failed to demonstrate the effectiveness of the remedies, as is incumbent on the State.

77. This silence shows the Government's embarrassment in demonstrating the effectiveness of remedies when, for a very long time, the State has organised a complete absence of traceability of police stops. Moreover, the State inappropriately cites the decisions of the Paris Court of Appeal of 8 June 2021 to supposedly demonstrate the existence of effective remedies, whereas the Court of Appeal specifically criticised the absence of any measures taken by the State to ensure the traceability of police stops (Doc. 70, p. 8). It is therefore the State's omission that hinders the effectiveness of remedies for victims of discrimination, since it deprives them of any proof of the police stop and its reasons. This was also emphasised by a senior judge of the *Conseil d'État* who, speaking of identity checks, noted that "*(...) the practical effectiveness of a remedy in which it is structurally almost impossible to establish the facts and identify their perpetrator is fragile to say the least*."[87]

78. The Government also vainly relies on the few court decisions in which the State was found responsible for discriminatory police stops in an attempt to claim that an effective remedy exists. These decisions, important as they are for the victims, remain largely isolated in view of the scale of the phenomenon of ethnic profiling and the challenges victims face in asserting their rights. As the Defender of Rights points out, "*less than 5% of people who have been subjected to unethical*

84 ECHR, GC, *Ilhan v. Turkey*, 27 June 2000, Application no. 22277/93, para. 97
85 ECHR, *Paul and Audrey Edwards v. United Kingdom*, 14 March 2002, Application no. 46477/99, para. 96.
86 ECHR, GC, *Kudla v. Poland*, 26 October 2010, Application no. 302010/96 para. 159.
87 Aurélie Bretonneau, Conclusions on CE, 13 June 2016, no. 372.721

*identity checks take steps to make the problem known*,"[88] and the lack of evidence and the absence of traceability of the stops are among the reasons for this absence of remedy – as any recourse appears to be lost in advance and therefore ineffective. These decisions in fact testify to the lack of effective remedies, since, despite having been found guilty, the State has not remedied the deficiencies highlighted by the country's highest courts.

## IV. REQUESTS UNDER ARTICLE 46 OF THE CONVENTION

79. The Government has failed to fulfil its obligations under the Convention: Articles 8, 13 and 14 of the Convention and Article 2 of Protocol 4 require the State to take measures to ensure that rules and methods applied by the police are respectful of individual rights and non-discriminatory. Moreover, the case submitted to the Court reveals systemic discrimination in France.

80. Therefore, the prevention of future violations of the Convention requires the Court to give guidance to the Government by indicating general measures to be taken under Article 46 of the Convention. Systemic discrimination calls for a comprehensive set of relevant measures that address its various causes, some of which lie beyond the scope of the present case. The applicants suggest the following general measures.

### A. Reforming French laws and regulations to bring them into line with the Convention

81. As explained, French laws and regulations do not sufficiently limit the police's powers to carry out identity checks, paving the way for discrimination. Article 78-2 of the Code of Criminal Procedure must therefore be amended so as to only permit identity checks when the police can establish the existence of objective and individualised grounds of such a nature as to give rise to a reasonable suspicion that the person being stopped is directly linked to the commission of an offence, or is in possession of useful information pertaining to an offence.

82. Along with such legislative amendment, clear instructions should also be provided, in particular to clarify the concepts of 'objective and individualised grounds' or 'reasonable suspicion' and the rules on non-discrimination.

88 Third-Party Intervention by the Defender of Rights, p. 12.

83. The law should provide for effective monitoring by the public prosecutor of identity checks carried out on his or her order, through the submission by the police of a report detailing the conduct of the operations, including the objective and individualised criteria used to determine whom to stop in connection with the offences committed or sought.

B. Introducing mechanisms for recording and tracing identity checks

84. The Government must put in place sufficient safeguards to ensure effective protection against discrimination, thereby enabling the authorities to identify cases of discrimination, research discriminatory practices and provide victims with an effective remedy in order to obtain redress and prevent the recurrence of similar practices.

85. These safeguards should include the provision of a record of the identity check to each person stopped, including the date, time and place of the stop, the identification number of the officer carrying out the stop, the legal basis and detailed grounds for the stop, information about any follow-up action, the ethnic origin of the person stopped on the basis of self-identification, and the officer's perception of the person's origin. All stop data should be anonymised, collected and analysed by an independent authority, so as to allow for quantitative and qualitative study of the compliance of the police stops with the legal framework, including the principle of non-discrimination.

## V. REQUEST FOR JUST SATISFACTION

86. The identity checks to which the applicants were subjected infringed on their dignity, reputation and private life. The constant and persistent attempts by the applicants to obtain recognition of the discrimination they suffered reflects the lasting negative impact these stops had on them.

87. Numerous national and international bodies have highlighted the devastating effects of discriminatory identity checks: loss of self-esteem, feelings of being a second-class citizen , loss of trust in the authorities, strategies to avoid certain places so as to escape humiliation and the stress of risking further stops.[89] Wider society is also impacted: ethnic profiling "*contributes to promoting a*

89 United Nations, Human Rights Council, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, 29 January 2007, A/HRC/4/26, paras. 56-57; Council of Europe, ECRI, General Policy Recommendation no. 11 on combating racism

*distorted view and to stigmatising parts of the population*" and is "*counterproductive as it reduces the efficiency of investigative work, making the work of the police more predictable and subject to prejudice*."[90]

88. The applicants therefore request the award of just satisfaction, including the award of 5,000 euros per applicant as compensation for the non-pecuniary damage suffered, the expression of a public apology to restore their dignity, and the wide dissemination in the French media of the forthcoming decision and public apology.

James A. Goldston, Executive Director, Open Society Justice Initiative

Slim Ben Achour, Lawyer

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and racial discrimination in policing, June 2007, para. 25; FRA, *Towards More Effective Policing, Understanding and preventing discriminatory ethnic profiling: A guide*, Luxembourg, 2010, pp. 39-43; OSJI, *Equality Betrayed: The Impact of Ethnic Profiling in France*, op. cit.

90 Council of Europe Parliamentary Assembly, Ethnic profiling in Europe: a matter of great concern, op. cit., para. 4. OSJI, *Profiling Minorities: A Study of Stop-and-Search Practices in Paris*, 2009, pp. 20 et 21.

# EUROPEAN COURT OF HUMAN RIGHTS

## Mounir SEYDI and Others v. France
## Application no. 35844/17

## APPENDIX 1: STATEMENT OF FACTS

**Introduction**

1. In accordance with the Court's instructions, the applicants hereby set out the facts relevant to the examination of their application (I). The Government presented the facts relating to the identity checks carried out on the applicants in a manner which completely denied their reality. It sought to conceal the use of ethnic origin as a criterion for selecting the persons stopped and attempted to present the stops as motivated by objective facts that were not demonstrated, whereas the practice of discriminatory checks is widely recognised and documented in France. Moreover, its presentation is riddled with inaccuracies and fails to mention the many incidents that accompanied the stops (inappropriate or impolite remarks by police officers, threats, pat-downs and searches). In so doing, the Government attempts to present the stops as an ordinary police practice with no consequences for the persons subjected to them, which runs contrary to the abundant literature that has documented their impact on the dignity of individuals and their sense of belonging to the Republic.

2. The applicants also provide updated information on studies carried out by independent institutions that have documented the widespread and systemic practice of discriminatory identity checks in France since the Court was seized on 9 May 2017 (II). In contrast, the French state has failed to take the steps required under its positive obligations to end such practices. Several legal actions have been brought against the State, which the applicants briefly summarise (III).

**I. Facts relating to the identity checks carried out on the applicants**

3. By way of introduction, the applicants point out that the Government put forward, generally without proof, supposed objective reasons unrelated to any discrimination on which the decisions to carry out the identity checks on the applicants were allegedly based. These supposed objective

reasons were presented *a posteriori*, in the course of the judicial proceedings brought by the applicants, whereas, in breach of their positive obligations to justify interference with individual rights and freedoms, the authorities never provided the applicants – either at the time of the stops or following their written requests for explanations – with the grounds for the stops to which they had been subjected. Lastly, it should be noted that the officers who carried out the stops in question have never been identified or interviewed, and that the authorities have never produced any internal police reports relating to the stops.

4. In the absence of any recording of the stops by the authorities, the Government's allegations should be interpreted with the utmost circumspection. The Government's approach leads, in contradiction with the rules on the burden of proof in discrimination cases, to a disproportionate burden being placed on the victims of discrimination, while at the same time allowing the State to adopt a purely performative response, whereby it supposedly suffices for the authorities to state a fact for it to be established. A rigorous analysis of the documents in the file will make it possible to distance oneself from the Government's unsubstantiated assertions.

5. After presenting the facts pertaining to the identity checks they had undergone (1.1), the applicants will briefly outline the decisions of the Court of Cassation which, on 9 November 2016, found the French State guilty of gross misconduct on account of discriminatory police stops (1.2), given the inaccuracy of the Government's presentation of these decisions.

1.1. <u>The identity checks carried out on the applicants</u>

<u>a. Applicant no. 1: Mr Mounir Seydi</u>

6. On 15 September 2011, at around 4 p.m., Mr Mounir Seydi, a French student of African origin, **was subjected to an identity check as he was exiting the Croix-Marie metro station in Lille, accompanied by his friend Tawan Siathone. No reason was given** by the police to justify this stop – a fact that was not disputed by the authorities during the domestic proceedings (Doc. 6 and Doc. 7). The evidence presented before the Paris Court of Appeal, and noted by it in its judgment of 24 June 2015, showed that **other passers-by had not been stopped, nor had Tawan Siathone, a Thai national**. Once Mr Seydi presented his student card, the police officers let him go and wished him a good day (Doc. 3 and Doc. 7, p.7).

7. On 2 March 2012, Mr. Seydi's lawyers asked the Minister of the Interior to inform them within fifteen days of the reason for this identity check (Doc. 4). Despite an acknowledgement of receipt on 16 March 2012 undertaking to "refer the matter to the Directorate General of the National Police for appropriate consideration" (Doc. 5), the Minister **failed to respond to Mr Seydi's request**: this failure to respond was not contested before the domestic courts (Doc. 6 and Doc. 7) and is not contested before the Court either.[91]

8. Mr Seydi therefore filed a complaint against the State's judicial agent and the Minister of the Interior before the Paris *Tribunal de Grande Instance*, requesting from it a finding that the State was liable for a discriminatory identity check.

9. It was in the course of these proceedings that, for the first time, the authorities submitted **an order from the public prosecutor dated 7 September 2011**, authorising the Central Police of the Lille agglomeration to carry out identity checks from Tuesday 13 September to Tuesday 20 September, from 11 a.m. to 7 a.m., in the many neighbourhoods listed in the order, with a view to investigating offences of theft and aggravated theft, handling of stolen goods and aggravated handling of stolen goods, breaches of legislation on weapons and explosives and breaches of legislation on narcotics (Document 2). A reading of this order shows that, as is often the case with orders authorizing identity checks (see the applicants' Observations, paragraphs 52 and 53), **its scope is particularly broad, both as regards the places and periods of time covered and the offences sought**. Contrary to the Government's assertions, therefore, the order did not allow checks only in "strictly defined neighbourhoods", nor solely for the purpose of investigating "the offence of unlawful use of narcotics."[92]

10. **No other piece evidence was submitted by the authorities to show that the identity check targeting Mr Seydi was actually carried out under this order**. Although the public prosecutor had expressly requested a "written report on the conduct of these operations" upon their completion (Doc. 2, last paragraph), **no such report was ever produced by the State**. That the stop carried out on Mr Seydi took place in execution of the order submitted is therefore a hypothesis formulated but not demonstrated by the Government.

91 Observations by the Government, para. 3.
92 *Ibid.,* paras. 5 and 6.

11. However, despite these deficiencies , the Court of Appeal found that the identity check carried out on Mr Seydi was justified under Article 78-2 (prosecutor's order) and that the applicant had not proven that it was discriminatory, as the Court of Appeal erroneously required proof of discrimination and not *prima facie* evidence (Doc. 7).

12. In its 9 November 2016 decision, the Court of Cassation dismissed Mr Seydi's cassation complaint against the Paris Court of Appeal's judgment, wrongly holding that Mr Seydi had not demonstrated the existence of *prima facie* evidence. Contrary to the Government's assertion,[93] the Court of Cassation did not, however, "confirm the reasoning of the Court of Appeal": where the Court of Appeal had, through an erroneous application of the rules on the burden of proof in discrimination cases, declared that the applicant had to demonstrate a "body of serious, precise and concordant evidence making it possible to characterise the inequality of treatment based on subjective criteria complained of by the appellant", the Court of Cassation ruled that "it is up to the person claiming to be the victim to provide factual evidence of a difference in treatment that gives rise to a presumption of discrimination, and, where appropriate, for the administration to demonstrate either the absence of a difference in treatment or that it is justified by objective factors unrelated to any discrimination" (Doc. 8, p. 5).

b. Applicant no. 2: Mr Lyes Kaouah

13. On 27 September 2011, at around 8.30 p.m., Mr Lyes Kaouah, a French citizen of North African origin, was subjected to an identity check and a search while he was chatting with his friend Amine Dif (applicant no. 3) on the stairs outside his home in Vaulx-en-Velin. **The two men were surrounded by fifteen police officers. Mr Kaouah was blinded by their flashlights** and when he asked them to stop, a police officer replied "Why, are you fragile?" (Doc. 15). Moreover, when the young man asked why there were so many officers, one of the police officers replied "**you, you don't have any balls, when just three of us come you act pretty, so we come together to show you who's stronger**" (Doc. 15)[94] – which raises questions, to say the least, about the police's use of the collective pronoun "you" toward two young men of African and North African origin, and the stigmatisation that this word implies. Intimidated by the police, Mr. Kaouah and Mr. Dif stated their identity. Mr Kaouah, who did not have his identity card with him, provided this information orally.

93 Observations by the Government, para. 8.

94 Mr Dif also reported these words of the police in his own words: "When there are fifteen of you, you act strong, but when there's only two of you, there is no one left." (Doc. 9)

He also witnessed **Mr Dif's pat-down** – acknowledged by the Ministry of the Interior before the domestic courts (Doc. 63, p. 2). The two young men were then asked to leave, **without any explanation being given for the stop. These facts were not contested in the domestic proceedings** and were taken into account in the judgment of 2 October 2013 by the Paris *Tribunal de Grande Instance* (Doc. 18, p. 3). Yet the Government remains silent before the Court about the precise circumstances of this stop.

14. On 2 March 2012, Mr Kaouah's lawyers asked the Minister of the Interior to inform them within fifteen days of the reason for the stop (Doc. 10). Despite an acknowledgement of receipt on 16 March 2012 undertaking to "refer the matter to the Directorate General of the National Police for appropriate consideration" (Doc. 11), **the Minister failed to respond to Mr Kaouah's request**; this failure to respond was not contested before the domestic courts (Doc. 12 and Doc. 13) and is not contested before the Court either.[95]

15. Mr Kaouah therefore filed a complaint against the State's judicial agent and the Minister of the Interior before the Paris *Tribunal de Grande Instance*, requesting from it a finding that the State was liable for a discriminatory identity check.

16. It was in the course of these proceedings that, for the first time, the authorities alleged that Mr Kaouah and Mr Dif had been "**stopped in a sensitive neighbourhood of Vaulx-en-Velin, an area particularly affected by delinquency**, including violence against individuals and drug trafficking", and that "a few days before Mr Kaouah's identity check, cars had been set on fire in the neighbourhood" (Doc. 63, p. 2).

17.However, the authorities failed to demonstrate that the checks had been justified by a threat to public order allegedly posed by Mr Kaouah and Mr Dif: **no element relating to their behaviour was ever mentioned**. Mere reference to a particular area cannot constitute an objective reason for stopping a person. Moreover here **the events to which the authorities referred in order to justify their claim that the applicants had been in a high-crime area took place in a completely different neighbourhood from that in which Mr Kaouah and Mr Dif were located, and several weeks before the impugned stop** (and not just a few days, as the Government erroneously asserted in paragraph 21 of its observations): **those events therefore had no**

95 Observations by the Government, para. 18.

**connection with the place where the applicants had been stopped**. Lastly, it is surprising that the only documents to which the Government referred in connection with these 'events' – **without submitting any official documents** – were a 'blog' (Skyrock) and an article in the regional press.

18. Notwithstanding these obvious deficiencies, the Paris Court of Appeal considered, in its judgment of 24 June 2015, that the 'dangerous' nature of the area justified the stop (Doc. 13, p. 6).

19. The Court of Cassation, in its decision of 9 November 2016, rejected the cassation complaint lodged by Mr Kaouah. The same remarks should be reiterated as those made in para. 12 above with regard to the criticism of that judgment and its misrepresentation by the Government in its observations (para. 24).

c. Applicant no. 3: Mr Amine Dif

20. On 27 September 2011 Mr Amine Dif, a French citizen of North African origin, was subjected to an identity check while conversing with his friend, Lyes Kaouah, in the circumstances already described above (see paragraph 13). Mr Dif showed his identity card, and was **subjected to a pat-down from his upper body to his ankles; the police searched his trouser pockets and emptied the entire contents of his satchel** (Doc. 9 and Doc. 15). Mr Dif also confirmed the various **degrading and derogatory remark**s made to them by the police (Doc. 9). **These facts were not contested during the domestic proceedings** and were taken into account in the judgment handed down on 2 October 2013 by the Paris *Tribunal de Grande Instance* (Doc. 18, p. 3). However, before the Court, the Government remains completely silent on the precise and complete circumstances of this stop.

21. On 2 March 2012 Mr Dif's lawyers asked the Minister of the Interior to inform them within fifteen days of the reason for the stop and search (Doc. 16). Despite an acknowledgement of receipt on 16 March 2012 undertaking to "refer the matter to the Directorate General of the National Police for appropriate consideration" (Doc. 17), **the Minister failed to respond to Mr Dif's request**; this failure to respond was not contested before the domestic courts (Doc. 18 and Doc. 19) and is not contested before the Court.[96]

96 Observations by the Government, para. 18.

22. It was in the course of these proceedings that, for the first time, the authorities alleged that Mr Kaouah and Mr Dif had been "**checked in a sensitive district of Vaulx-en-Velin, an area particularly affected by delinquency**, and in particular by violence against persons and drug trafficking", and that "a few days before Mr Dif was stopped and searched, cars had been set on fire in the district" (Doc. 64, p. 2).

23. As in the case of Mr Kaouah, at no time during the internal proceedings was it suggested that Mr Dif posed a threat to public order. Reference is made to what has already been said above about the lack of evidence produced by the Government and the inadequacy of the mere reference to an area affected by crime (see paragraph 17).

24. As in the case of Mr Kaouah, however, the Paris Court of Appeal considered that the 'dangerous' nature of the area justified the identity check (Doc. 19, p. 6).

25. The Court of Cassation, in its decision of 9 November 2016, rejected the cassation complaint lodged by Mr Dif. The same remarks should be reiterated as those made in para. 12 above with regard to the criticism of that judgment and its misrepresentation by the Government in para. 24 of its observations.

d. Applicant no. 4: Mr Bocar Niane

26. On 11 November 2011, shortly after 8 p.m., Mr Bocar Niane, a French citizen of African origin, was stopped and searched by four police officers as he left his parents' home on rue Emile Cordon in Saint-Ouen to escort his siblings and cousin, who were waiting for him outside the building. The testimony given during the domestic proceedings, which was not contested, stated that **although Mr Niane offered no resistance, the officers pushed him against a wall, kicked open his legs, patted him down , threatened to 'taze' him and then threatened to fine him for 'damaging public property' as he had put one foot against the wall** while the officers were checking his identity document (Doc. 22). During the stop, Mr. Niane told the officers that he had not been doing anything wrong and that he was "just walking his little sisters home" (Doc. 30). Once again, before the Court, the Government remains completely silent about the incidents that accompanied this police stop.

27. According to the written testimony of his sister Mariame, which Mr Niane submitted to the domestic courts, just before the stop **Mr Niane was walking briskly and wearing a hood because it was cold** (Doc. 22). Before the domestic courts, the authorities had added, **without however relying on any evidence**, that Mr Niane's hood would have prevented his identification (Doc. 65, pp. 2 and 8 and Doc. 27, pp. 2 and 19), while acknowledging that he was walking at a fast pace and wearing a hood. **The authorities had clearly interpreted Mariame Niane's testimony very liberally, and had read into it things that it did not contain**. Moreover, for reasons the applicant is unable to understand, the Paris Court of Appeal, in its decision of 24 June 2015, reinterpreted the facts by stating that Mr Niane was "running" out of a building and wearing clothes that "masked his face" (Doc. 29) – contradicting the way in which the facts had been presented by the parties, the prosecutor's office of the Paris *Tribunal de Grande Instance* (Doc. 25, p. 2) and the *Tribunal de Grande Instance* (Doc. 26, p. 5). **It is surprising that the Government should adopt this erroneous and unsubstantiated interpretation of the facts before the Court, taking a position contrary to that which it had defended before the domestic courts**.

28. On 2 March 2012 Mr Niane's lawyers asked the Minister of the Interior to inform them within fifteen days of the reason for the stop (Doc. 23). Despite an acknowledgement of receipt on 16 March 2012 undertaking to "refer the matter to the Directorate General of the National Police for appropriate consideration" (Doc. 24), **the Minister failed to respond to Mr Niane's request**; this failure to respond was not contested before the domestic courts (Doc. 26 and Doc. 29) and is not contested before the Court.[97]

29. Mr Niane therefore filed a complaint against the State's judicial agent and the Minister of the Interior before the Paris *Tribunal de Grande Instance*, requesting from it a finding that the State was liable for a discriminatory identity check.

30. It was in the course of these proceedings that, for the first time, the authorities provided what they presented as a **twofold justification for the check** carried out on Mr Niane. On the one hand, Mr Niane was allegedly stopped **on suspicion of (attempted) commission of an offence, on the pretext that he was walking at high speed with a hood over his head in a neighbourhood characterised by delinquency**. On the other hand, the authorities produced **an order from the public prosecutor** dated 3 November 2011, authorising an identity check operation on Friday 11

97 Observations by the Government, para. 27.

November 2011, from 3 p.m. to 7 p.m., in several districts of Saint-Ouen, with a view to investigating offences against the legislation on the residence of foreigners, offences of carrying or transporting weapons without legitimate reason and offences against the legislation on narcotics (Doc. 21). The order was allegedly extended on the same day for the period from 9 p.m. to 1 a.m., which the State failed to prove. **A reading of the order submitted reveals a particularly broad scope, both in terms of the places targeted and the offences sought**. Contrary to the Government's assertions, **the order was not limited to a specific district or solely for the purpose of investigating the offence of unlawful use of drugs**.[98]

31. Moreover, **no evidence was adduced by the authorities to show that Mr Niane's identity check had actually been carried out in execution of the order**. This assertion therefore remains an unproven hypothesis on the part of the Government. In any event, the order as submitted could not serve as justification for the identity check carried on Mr Niane, which had taken place shortly after 8 p.m., as his sister Mariame had reported (Doc. 22), i.e. outside the period of time covered by the public prosecutor's authorisation.

32. **The authorities did not provide the domestic courts with any probative documentary evidence to support their claim that the area was 'heavily affected by delinquency '**. They merely produced press articles, none of which were contemporaneous with the stop at issue: the articles were dated December 2009, May 2011, late November 2011 and September 2012 (Doc. 27, p. 23), whereas the stop took place on 11 November 2011. Here again, one can only be surprised that **no official documents were submitted**.

33. Finally, it is surprising that two justifications were given for a single identity check: if Mr Niane's behaviour was really such as to suggest that he had committed or was about to commit an offence, the production of an order purporting to justify the check was totally unnecessary. It can therefore be seen that **the authorities, who have no record of the identity check carried out on Mr Niane, are trying to justify it by all means and *a posteriori***. This attitude, which does not meet the minimum evidential requirements, cannot be validated.

98 Observations by the Government, para. 30.

34. In spite of all these deficiencies, the Court of Appeal nevertheless considered that in a neighbourhood affected by delinquency, Mr Niane's behaviour – wrongly interpreted – was objectively suspicious and justified the stop (Doc. 29, p.7).

35. The Court of Cassation, in its decision of 9 November 2016, dismissed the cassation complaint lodged by Mr Niane. The same remarks should be reiterated as those made in paragraph 12 above with regard to the criticism of that decision and its misrepresentation by the Government in paragraph 24 of its observations.

e. Applicant no. 5: Mr. Karim Touil

36. Karim Touil, a French citizen of North African origin, was subjected to **three identity checks over a ten-day period in the town center of Besançon**. Such **re-occurrence of police stops in a very short period of time** should suffice to demonstrate the reality of a widespread practice of discriminatory identity checks in France, and the impact it has on individuals and the exercise of their rights. Mr Touil's case is unfortunately also an illustration of the abuses often committed by police officers in the context of such stops.

37. On 22 November 2011, at around 1.30 p.m., Mr Touil was subjected to a **first identity check** by three BAC officers in the vicinity of the Quick restaurant in the Grande Rue in Besançon, where he was with his friend Antony Amouri and a female friend. Mr Amouri was also checked, but **not the young girl**. Mr Touil and Mr Amouri were **searched from shoulder to foot** (Doc. 33, p. 3). After presenting their identity cards, they were allowed to leave.

38. On 1 December 2011 at 1.30 p.m., while Mr Touil was with two friends, Kevin Chatelain and Paul Guardado, in front of the "Brioche dorée" establishment in Besançon, he was subject to a second identity check (Doc. 36 and Doc. 37). A police officer told his colleague: "let's check that one", before declaring: "**we know your codes from the housing estates**." Mr Chatelain replied that he did not live in a housing estate, to which the officer replied, "**you, shut up, stay there**". **Mr Touil was then grabbed by the shoulder and forcibly led into the entrance of a building, where the police took his identity card and emptied the contents of his bag onto the ground, before telling him to take off his shoes and frisking him from head to foot. The officers then left without indicating the reason for the stop and the search**. These facts were **not contested in the domestic proceedings** (Doc. 40 and 41). Once again, however, the Government failed to mention to

the Court the precise circumstances of the identity check and the incidents that had occurred in the course of the stop.

39. On the same day (1 December 2011), Mr Touil was subjected to a third police stop in front of the Besançon Town Hall at 3.30 p.m. Mr Touil was there with several friends when three officers lined them up against the wall and said: "**identity check... keep your mouths shut**", **before proceeding to search them and to pat them down** (Doc. 33, Doc. 34 and Doc. 37). One of the officers addressed Mr Touil **in a familiar tone**: "**You're too fat, you need to lose weight, do some sports**". Mr Touil asked the officer to speak properly to him, to which the officer retorted by **threatening him with a "slap"**. Mr. Touil replied that the officer had no right to do so. **The officer then slapped him hard on the left cheek, before twisting his arm behind his back in order to pin him against the wall** (Doc. 40, p. 3). The officer then told him to "**empty your shit**". Once all of Mr. Touil's belongings had been spilled on the floor, the officer said, "It's okay, pick up your stuff" (Doc. 40, p. 3; Doc. 33; Doc. 35). Mr Touil's friends, who witnessed the turn of events, told him that he should file a complaint. Following this, t**he police put Mr Touil in a police van and took him to the police station, where he was held for some time and then released**. These facts were further confirmed by a witness who was not involved in the events, Mr François Serrault, then aged 64, who witnessed the police stop while from the terrace of the "Brioche dorée" (Doc. 37). **Mr Serrault testified to the humiliation inflicted on Mr Touil and his friends, the aggressiveness of the officers and the slap given to Mr Touil by a police officer**. When Mr Serrault asked a police officer whether he thought that "it was normal that your colleague just gave this boy a slap", he was told "Sir, let us do our job" – which also outraged the witness.

40. On 2 March 2012, Mr Touil's lawyers asked the Minister of the Interior to inform them within fifteen days of the reasons for these three identity checks (Doc. 38). Despite an acknowledgement of receipt on 16 March 2012 undertaking to "refer the matter to the Directorate General of the National Police for appropriate consideration" (Doc. 39), **the Minister failed to respond to Mr Touil's request**; this failure to respond was not contested before the domestic courts (Doc. 40 and Doc. 41) and is not contested before the Court either.[99] This silence is particularly disturbing in view of the serious violence committed by the police against Mr Touil, which is not disputed by the Government.[100]

99 Observations by the Government, para. 35.
100 *Ibid*., para. 37.

41. Mr Touil therefore filed a complaint against the State's judicial agent and the Minister of the Interior before the Paris *Tribunal de Grande Instance*, requesting from it a finding that the State was liable for a discriminatory identity check.

42. It was during these proceedings that, for the first time, the authorities provided 'explanations' regarding the motives of the identity checks carried out on Mr Touil. **The stop on 22 November was allegedly motivated by considerations of public order, because of the purported regular presence in the center of Besançon of aggressive and violent young people, and even people who were heavily intoxicated and under the influence of drugs** (Doc. 66, p. 10). It should be noted that this allegation is not supported by any evidence and cannot therefore be regarded as factually established. Even though the Paris Court of Appeal, in its judgment of 24 June 2015, did not find any justification for this police stop, it nonetheless validated it. (Doc. 41, p. 7). Moreover, if the concern of the law-enforcement agencies was indeed the presence of persons with the profile described *a posteriori* by the authorities, it does not explain why Mr Touil was stopped on 22 November 2011, **since nothing establishes, and the Government does not allege, that Mr Touil had been violent or aggressive, or under the influence of alcohol or drugs**. It is therefore obvious that **the *a posteriori* justification given by the authorities is entirely fictional**.

43. With respect to the identity checks that took place on 1 December 2011, the authorities, for the first time before the Paris *Tribunal de Grande Instance*, submitted an order from the public prosecutor dated 25 November 2011, authorising the Besançon Police to carry out identity checks from Tuesday 29 November to Sunday 4 December 2011, from 2 p.m. to 8 p.m., in the city centre area, with a view to investigating drug offences, aggravated robberies and breaches of the legislation on weapons and explosives (Doc. 32). **A reading of this order reveals a particularly broad scope, both in terms of the places and periods of time covered and the offences sought**.

44. **No evidence was produced by the authorities to show that the identity checks to which Mr Touil was subjected on 1 December were carried out in pursuance of this order**. It should also be noted that, according to one witness (Doc. 36), **the first check on 1 December took place at about 1.30 p.m.** – a fact admitted by the Paris Court of Appeal (Doc. 41, p. 7) and also admitted by the Government before the Court (see paragraphs 34 and 254 of the observations by the Government) – **whereas the order only authorised identity checks from 2 p.m. onwards**: this shows that there was **no justification** for the stop. To remedy this embarrassing difficulty, the authorities reproached the witness (erroneously cited as Mr Omouri when it was in fact Mr

Chatelain) before the domestic courts for being imprecise, as he spoke of a police stop between 1.30 and 2 p.m. (Doc. 66, p. 10). This reproach was totally inappropriate on the part of an authority which not only failed to fulfil its obligation to ensure the traceability of checks, but also failed to provide the slightest evidence of what it was alleging. Finally, **although the public prosecutor had expressly requested a "written report on the conduct of these operations" upon their completion (Doc. 32, last paragraph), no such report was ever produced by the authorities** before the domestic courts. The alleged justification for the identity checks targeting Mr Touil in the order produced is, in conclusion, only a hypothesis which the Government has formulated but not demonstrated.

45. Despite these shortcomings, however, the Paris Court of Appeal found that the stops on 1 December 2011 were justified under Article 78-2 (order from the public prosecutor). Moreover, while acknowledging the verbal and physical assault inflicted by a police officer on Mr Touil and the derogatory comment about his weight, the Court nevertheless considered that the evidence presented did not suggest that Mr Touil's racial origin had been the sole reason for the stops – without providing any other reasons (Doc. 41, p.7).

46. In its decision of 9 November 2016, the Court of Cassation rejected the cassation complaint lodged by Mr Touil. The same remarks should be reiterated as those made in para. 12 above with regard to the criticism of that decision and its misrepresentation by the Government in para. 24 of its observations.

f. Applicant no. 6: Mr Dia Abdillahi

47. On 12 February 2012 in Saint-Germain-en-Laye (78), Dia Abdillahi, a French national of African origin, was subjected to an identity check as he was walking home from the post office with his cousin Benyachourpi Manssouri (Doc. 47, p. 2 and Doc. 48, p. 2). Four police officers in civilian clothes got out of an unmarked police vehicle travelling in the opposite direction, that turned around to park alongside Mr Abdillahi and Mr Manssouri. who found themselves surrounded by the officers. One of the police officers said, "Police stop", and then **the officers began to pat them down. The police addressed them in a rude manner, using informal language** (Doc. 43 and Doc. 46, p. 3). They demanded that Mr Abdillahi **empty his pockets and remove one of the two pairs of trousers he was wearing because of the cold, in full view of passers-by, before patting him down again**. Noting that Mr Abdillahi was in Saint-Germain-en-Laye although he

lived in Marseille, one of the officers commented: "**So, you're on holiday, you don't work? Make sure you find a job quickly because if Sarko wins you won't be able to stay like this**." The two men were then asked to leave without being informed of the reason for the identity check. These facts, as the judgment handed down by the Paris *Tribunal de Grande Instance* Paris points out, were not contested during the proceedings. Once again, before the Court, the State watered down the reality of the police stop as it was conducted and glossed over the incidents, coyly mentioning "an identity check and a search" (para. 9 of its observations).

48. On 2 March 2012, Mr Abdillahi's lawyers asked the Minister of the Interior to inform them within fifteen days of the reason for this stop (Doc. 44). Despite an acknowledgement of receipt on 16 March 2012 undertaking to "refer the matter to the Directorate General of the National Police for appropriate consideration" (Doc. 45), **the Minister failed to respond to Mr Abdillahi's request**; this failure to respond was not contested before the domestic courts (Doc. 46 and Doc. 47) and is not contested before the Court.[101]

49. Mr Abdillahi therefore filed a complaint against the State's judicial agent and the Minister of the Interior before the Paris *Tribunal de Grande Instance*, requesting from it a finding that the State was liable for a discriminatory identity check.

50. It was in the context of these proceedings that, for the first time, the authorities put forward an alleged 'justification' for the identity check carried out on the applicant: **the police officers on patrol had apparently been "alerted to the commission of an offence in the city center by two young individuals of Black African origin," which was said to correspond to the profile of Mr Abdillahi and his friend** (Doc. 67, p. 8). **This assertion was never established by any evidence** (Doc. 46, p. 3, Doc. 47, p. 2 and Doc. 48, p. 2). To justify this lack of evidence, the authorities invoked the two-month retention period for radio messages (Doc. 67, p. 8). However, apart from the fact that the authorities failed to ensure the traceability of the checks – which is their responsibility – and therefore cannot rely on their own failure to do so, **they have not provided the slightest evidence of the alleged theft**, which should still be recorded in the police databases well beyond the two-month period. Moreover, contrary to the authorities' allegations, **Mr Abdillahi was not in the vicinity of the theft: he was more than two kilometres away** from the city centre. Lastly, the authorities also alleged before the Paris *Tribunal de Grande Instance* that Mr Abdillahi and his

101 Observations by the Government, para. 11.

friend had "stalled and changed direction" at the sight of the police car, which allegedly also motivated their check(Doc. 67, p. 9). As the State did not produce any evidence documenting the said check and therefore the alleged behaviour of Mr Abdillahi and his friend, one can only be surprised by this allegation, which is purely gratuitous and was made several months, if not years, after the stop. No doubt aware of these excesses, the Government is not repeating them today before the Court.

51. Despite these many deficiencies and approximations, the Paris Court of Appeal accepted the explanation given by the State for the identity check carried out on Mr Abdillahi, and accepted that the description of the suspects – **although referring exclusively to ethnic origin** – constituted an objective basis for the police stop in question (Doc. 47, p. 6 and Doc. 48, p. 5).

52. The Court of Cassation, in its decision of 9 November 2016, dismissed the cassation complaint lodged by Mr Abdillahi. The same remarks should be reiterated as those made in para. 12 above with regard to the criticism of this decision and its misrepresentation by the Government in its observations (para. 24).

1.2. <u>The decisions of the Court of Cassation of 9 November 2016 finding the French State guilty of gross misconduct on account of discriminatory police stops</u>

53. It is true that, while the applicants' complaints were dismissed by the Paris Court of Appeal and the Court of Cassation, other victims won their case, with these courts, on the same day, finding the State guilty of gross misconduct on account of discriminatory identity checks. The evidence produced by the victims – who were represented by the same lawyers – was identical to that produced by the applicants, with one exception: these victims had produced an affidavit (from another victim present on the spot or a witness) certifying that other people, of white appearance, had not been stopped by the police.

54. Contrary to what the Government would have us believe, these decisions are not exempt from criticism. **The Court of Appeal had, as in the case of the applicants, erroneously applied the rules of burden of proof** by requiring that "proof of the infringement of human rights and the principle of equality must be established, in accordance with the case-law of the European Court, by a body of serious, precise and concordant circumstances." It is therefore incorrect to assert, as the

Government does in its observations,[102] that the Court of Appeal held that the victims had demonstrated a *prima facie* case. As for the Court of Cassation, while it correctly set out the rules of evidence sharing, it misapplied them by considering that *prima facie* evidence presupposed the production of a concrete element of comparison, whereas that element of comparison could be hypothetical and derived from reports and statistics.

## II. Updated information about studies and reports documenting the practice of discriminatory police stops in France

55. Since the applicants seized the Court on 9 May 2017, the persistent practice of racial profiling in France has continued to be documented and denounced, both at the national and international levels. In contrast, the French State has failed to take the measures required under its positive obligations to put an end to it.

56. The Defender of Rights issued an opinion no. 18-08 on 12 March 2018, following his hearing before the Senate's Commission of enquiry into the state of the internal security forces. He recalled that "*For several years, identity checks have been the subject of debate, particularly because of the risks of abuse and discrimination in their implementation. Several studies and reports have demonstrated the existence of discriminatory identity check practices in France. (...) The Defender of Rights has continued the action of the National Commission on Security Ethics (CNDS) to combat abusive and discriminatory identity checks, by exercising all of his powers – conferred on him by law – to protect and promote rights.* ***His position is based on the individual complaints and testimonies he has received, the hearings he has held and the research he has carried out, particularly comparative law studies****. Three essential points were identified:* ***the need to make the determination of whom to stop more objective, the need to inform the person being stopped of the reasons motivating the stop, and the introduction of a traceability mechanism*** *making it possible to evaluate the way in which identity checks are carried out, as well as their usefulness – which the Defender of Rights has regularly recalled since 2012*."[103]

57. The **2019 report of the Observatory of the Defender of Rights**, published in June 2020, also states that "*it is well established that* ***people corresponding to the profile of 'young man perceived***

102 Observations by the Government, para. 146.
103 Defender of Rights, Opinion 18-08 of 12 March 2018 on the state of the internal security forces, https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=24355

***as Black or Arab' are more likely to be subject to identity checks*** *and also have a more degraded relationship with the police."*[104] The report further details that men corresponding to the profile of *"young men, perceived as Black or Arab (...) are 20 times more likely than others to be stopped. These results suggest that identity checks are targeted at these specific population groups.*"

58. On 2 April 2019, in Decision no. 2019-090 of 2 April 2019 on discriminatory instructions and service notes issued by a Paris police station regarding the systematic eviction of Roma and homeless people, the Defender of Rights noted that "*discriminatory orders and instructions to carry out identity checks of 'Black and North African gangs' in a defined sector and systematic evictions of 'homeless people and Roma' were disseminated throughout the district*", and considered that "***such a practice by law enforcement is based on profiling people on criteria exclusively linked to what they are: their physical appearance, their origin, their actual or presumed membership of an ethnic group or race****, or their particular economic vulnerability – this constitutes racial and social profiling that is contrary to the norms prohibiting discrimination and to the ethical obligation of impartiality and non-discrimination that binds police officers*."[105]

59. In December 2019, the Defender of Rights published a collective work entitled "*Inégalités d'accès aux droits et discriminations en France"* ("Inequalities in access to rights and discrimination in France"),[106] in which ten researchers (from major research institutions: CNRS, Inserm, Ined, Ehess, Cesdip, Odenore, PACTE social science laboratory, Cermes 3) analysed the results of the general population survey on access to rights conducted by the Defender of Rights in 2016. This study reveals the profiles of the people most exposed to the risks of discrimination and shows that identity checks affect on average 16% of people over eighteen, and that **young men perceived as Black or Arab have a twenty-fold higher probability of being stopped compared to others**. The study also reports that less than 5% of those **confronted with such misconduct seek redress**.

60. In his report of 22 June 2020, entitled "*Discriminations et origine: l'urgence d'agir*" ("Discrimination and origin: the urgent need for action"), **the Defender of Rights reiterated his**

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104 *L'Observatoire du Défenseur des droits.* 2019 Report, June 2020, pp. 45-47, https://www.defenseurdesdroits.fr/fr/rapports/2020/06/rapport-2019-de-lobservatoire-du-defenseur-des-droits

105 Defender of rights, Decision 2020-102 of 12 May 2020 on observations before the judicial court of X in the context of proceedings for State liability concerning discriminatory identity checks, p. 2, https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=28449

106 Defender of Rights, *Inégalités d'accès aux droits et discriminations en Franc*e, December 2019, https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=30743

**concerns about the persistence of discriminatory identity checks**, and shared his observation that "*the referrals made to the Defender of Rights, his investigations, the testimonies collected by his teams and his delegates throughout the country show that discrimination based on origin or a related criterion is becoming commonplac*e."[107]

61. In June 2020, the NGO Human Rights Watch published a report entitled "'They Talk to Us Like We're Dogs': Abusive Police Checks in France", in which **young French, Black and Arab minors testify about the discriminatory identity checks they are subjected to**.[108] This report is based on research conducted in 2019 and 2020 **in several French cities**: Paris and the Paris suburbs, Lille, Strasbourg and Grenoble. Forty-eight minors and forty-eight adults were interviewed. These were men, since empirical studies show that they are much more likely to be subject to identity checks by the police. The report found that minors are subject to identity checks even at a very young age (some as young as 12). It further noted that "*Many of the people interviewed for this research felt they were targeted by the police because of the way they look or because of where they live and spend time*."[109] In the absence of any state-organised recording mechanism, "*the fact that police stops are widely perceived, including by young children, to be based on prejudice is in and of itself a matter of deep concern".*[110]

62. In June 2021, in the context of a report analysing human rights violations committed by the police against Africans and people of African descent, **the UN High Commissioner for Human Rights highlighted the problem of discriminatory identity checks in France**.[111] States, including France, were called upon to take concrete and transformative measures to "***reverse cultures of denial, dismantle systemic racism and accelerate the pace of action***."[112]

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107 Defender of Rights, *Discriminations et origines: l'urgence d'agir*, 15 June 2020, p. 3, https://insti.ddd.prod.ext.ssl-gouv.fr/sites/default/files/atoms/files/rap-origine-num-15.06.20.pdf

108 Human Rights Watch, *"They Talk to Us Like We're Dogs": Abusive Police Stops in France*, June 2020, 44 pages, https://www.hrw.org/sites/default/files/media_2020/06/France0620_web_0.pdf

109 *Ibid*., p. 22.

110 *Ibid*., p. 22.

111 Human Rights Council, Report of the United Nations High Commissioner for Human Rights, Promotion and protection of the human rights and fundamental freedoms of Africans and of people of African descent against excessive use of force and other human rights violations by law enforcement officers, A/HRC/47/53, 1 June 2020, para. 26, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/122/03/PDF/G2112203.pdf?OpenElement

112 *Ibid*., p. 1

63. On 28 January 2021, **the Parliamentary Assembly of the Council of Europe** adopted a resolution entitled "Ethnic profiling in Europe: a matter of serious concern",[113] wherein **the reality of ethnic profiling in France is explicitly described**.

## III. Legal actions brought against the French State for discriminatory police stops

64. In recent years, the French State has been targeted by a number of legal challenges brought by organisations or individuals complaining of discriminatory identity check practices.

### a. A class action filed on 22 July 2021

65. On 22 July 2021, six organisations[114] brought a class action before the *Conseil d'État* (Council of State) against the Prime Minister, the Minister of the Interior and the Minister of Justice, in order to bring an end to discriminatory identity checks and requesting the Council to order the authorities to take the necessary structural measures to this end.[115] This action followed the formal notice sent by the organisations to the same authorities on 27 January 2021, but to which they did not respond. This class action is still pending.

66. Among the documents produced by the applicant organisations in support of this class action is **a report by Amnesty International France, which gives an account of interviews conducted with six members of the French national police force, according to whom "*the principle that identity checks can be carried out in a discriminatory manner was perfectly established and recognised*"** (Doc. 68, p. 4).

67. The complaint before the Council of State also includes **numerous testimonies from victims and witnesses of discriminatory identity checks by the police in France**. The anonymity of some victims has been preserved, particularly in view of their young age and the fear of reprisals from the police – most of these victims already suffer almost daily discriminatory harassment. Other victims

113 Council of Europe Parliamentary Assembly, Resolution 2364 (2021)1, Ethnic profiling in Europe: a matter of great concern, https://pace.coe.int/en/files/29023

114 Amnesty International France, Human Rights Watch, the *Maison communautaire pour un développement solidaire* (MCDS), Open Society Justice Initiative, Pazapas and *Réseau-Égalité, Antidiscrimination, Justice-Interdisciplinaire* (REAJI).

115 Open Society Justice Initiative, Class Action Lawsuit against French Government for Ethnic Profiling by Police, https://www.justiceinitiative.org/litigation/class-action-lawsuit-against-french-government-for-ethnic-profiling-by-police

or witnesses felt sufficiently well-prepared and/or protected to make their identity public. Their testimonies are included in the appendix (Doc. 69). Among them, **Mr Younès Omarjee, Member of the European Parliament (MEP)**, testified that he and the traveler in the adjacent seat, of Congolese origin, were subjected to a check on a Thalys train on 28 June 2019, while no other passenger in the car was, despite European rules protecting MEPs during their travels. **Other victims and witnesses confirm the recurrent practice of identity checks targeting people perceived as Black or Arab, and their devastating impact on their sense of belonging to the Republic**.

b. Conviction of the French State on three counts of gross misconduct on 8 June 2021

68. The French State was also found guilty on three counts of gross misconduct by the Paris Court of Appeal on 8 June 2021, as a result of the discriminatory identity checks to which three young men, aged 17 and 18, were subjected on 17 March 2017 at the Gare du Nord while returning from a school trip with their class and teacher (Doc. 70). As the State did not lodge an appeal in cassation, these judgments have irrevocably become *res judicata*. **The Court of Appeal particularly castigated the utter failure of the authorities to ensure traceability of the identity checks**, in the absence of any explanation given by the police at the time of the stops and despite an express request for justification addressed to the Minister of the Interior within five days of the stops by the young victims' lawyer (Doc. 70, p. 5). These judgments – which the State merely mentions in paragraph 340 of its observations in an attempt to prove that the applicants had access to an effective remedy – further demonstrate the reality of ethnic profiling in France and the serious shortcomings of the State in remedying it.