Identity Checks in France in Violation of Article 14 Post-*Wa Baile v. Switzerland*

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Abstract

On February 20, 2024, the European Court of Human Rights ruled in Mohamed Wa Baile's favor on his claim that Switzerland violated his rights under Article 14 of the European Convention on Human Rights, in conjunction with Article 8. Mr. Wa Baile alleged that Swiss law enforcement violated his rights when they subjected him to an identity check without offering an objective reason for doing so. The Court's finding of a substantive violation of Article 14 with respect to racial profiling was unprecedented. The Court relied on factors such as the Administrative Court's ruling that law enforcement had no objective reason for requesting identification from Mr. Wa Baile, statistics showing the extent of racial profiling practices in Switzerland, as well as Switzerland's failure to implement adequate measures to remedy the issue. Similar to Switzerland, statistics show the prevalence of racial profiling in France. France also hesitates to enact laws and implement measures to prevent racial profiling. This is noted in a pending class action lawsuit in the European Court of Human Rights: Seydi and others v. France. *This Comment argues that the theory behind Switzerland's liability in* Wa Baile v. Switzerland *gives rise to allegations of Article 14 violations in France, as law enforcement exhibits a pattern of conducting identity checks absent reasonable suspicion and objective justifications.*

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I. INTRODUCTION

In February 2015, Mohamed Wa Baile's morning commute to work was interrupted when Swiss law enforcement requested that he provide them with identification.[1] The officers stopped Mr. Wa Baile, who is a Swiss citizen,[2] after one of them observed what they believed to be suspicious behavior: Mr. Wa Baile's glancing away from the officer upon seeing him.[3] Mr. Wa Baile alleged that he was one among a crowd of individuals commuting to work at this time, the majority of whom were white, and law enforcement did not ask anyone else for identification.[4] Mr. Wa Baile declined the officers' request for identification.[5] He was reluctant to follow the officers' orders since "he was tired of being stopped because of the color of his skin."[6] Following this, the police officers told him to raise his arms, and they searched for his identification themselves.[7] After they found his identification, Mr. Wa Baile was free to leave.[8]

Almost a decade after Mr. Wa Baile unexpectedly experienced a stop and search, in February 2024, the European Court of Human Rights (ECtHR) issued an unprecedented ruling in the case, *Wa Baile v. Switzerland*.[9] The ECtHR found that Switzerland violated Mr. Wa Baile's rights under Article 14 of the European Convention on Human Rights (ECHR) in conjunction with Article 8, as law enforcement engaged in racial profiling.[10] Article 14 concerns the "[p]rohibition of discrimination,"[11] and Article 8 protects individuals' "[r]ight to respect for

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1 *Wa Baile v. Switzerland*, Apps. Nos. 43868/18 and 25883/21, ¶ 4 (Feb. 20, 2024), https://perma.cc/BHA2-69FK; *see also* Susheela Math, *A Legal Victory in the Drive to End Racist Police Tactics*, OPEN SOCIETY JUSTICE INITIATIVE (Mar. 8, 2024), https://perma.cc/2JPJ-TNDB.

2 *Wa Baile v. Switzerland*, *supra* note 1, ¶ 4.

3 *Id.* ¶ 5, *see also* Daniel Moeckli, *Wa Baile c. Suisse: A victory against racial profiling?* BLOG OF THE EUROPEAN JOURNAL OF INTERNATIONAL LAW (May 15, 2024), https://perma.cc/384F-UEJL.

4 Press Release, Registrar of the Court, Police failed to observe non-discrimination principle during identity check in Zürich railway station, at 2 (Feb. 20, 2024), https://perma.cc/YLL7-22ZD.

5 *See Wa Baile v. Switzerland, supra* note 1, ¶ 6.

6 *See* Moeckli, *supra* note 3.

7 *See Wa Baile v. Switzerland*, *supra* note 1, ¶ 4.

8 *Id.*

9 Legal Summary: *Wa Baile v. Switzerland* – 43868/18 and 25883/21, EUROPEAN COURT OF HUMAN RIGHTS (2024), https://perma.cc/L7LB-ZQMG; *see also* Moeckli, *supra* note 3.

10 *See Wa Baile v. Switzerland*, *supra* note 1, ¶ 36; *see also* Legal Summary, *supra* note 9.

11 European Convention on Human Rights art. 14, Nov. 4, 1950, 213 U.N.T.S. 221, E.T.S. 5 (stating "[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status").

private and family life."[12] Professor Daniel Moeckli, Professor of Public International and Constitutional Law at the University of Zurich,[13] has noted that "[t]his marks the first time that the Court has found a substantive violation of Article 14 in an alleged case of racial profiling."[14] The ruling in *Wa Baile* is particularly notable in that the reasoning behind the ECtHR's decision suggests that other signatories to the ECHR may be held accountable for increased allegations of Article 14 violations, as the prevalence of racial profiling throughout Europe persists.

A. Racial Profiling in Europe

Two decades ago, various entities concerned with human rights identified racial profiling as a pressing issue in Europe—prompting both international and regional human rights bodies to draft recommendations and guidelines in an attempt to address the issue.[15] These entities include, among others, the U.N. Committee on Elimination of Racial Discrimination, the U.N. Special Rapporteur on Racism, and the U.N. Special Rapporteur on the Promotion and Protection of Human Rights while Countering Terrorism.[16]

Given the ongoing instances of racial profiling, organizations such as the European Union Agency for Fundamental Rights (FRA) have taken on the task of providing statistics related to the issue.[17] According to the FRA's first report in 2021, 14% of people in the EU were either subject to a police search at some time during the last twelve months, or the police requested that they provide identification.[18] In contrast, 34% of those from ethnic minority populations were subject to a search or request for identification.[19] News sources also note the alarming rate of profiling in France. It has been found that "[y]oung men who are perceived to be Black or Arab are twenty-nine times more likely to be stopped for

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12 *Id.* art. 8 (stating "everyone has the right to respect for his private and family life, his home and his correspondence…[t]here shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others").

13 *Daniel Moeckli About/Bio*, EUROPEAN JOURNAL OF INTERNATIONAL LAW, https://perma.cc/ZK8S-JGB9 (last visited March 1, 2024).

14 *See* Moeckli, *supra* note 3.

15 *Id.*

16 *Id.*

17 George Engels, et al., *Police forces across Europe accused of 'ethnic profiling' when stopping and searching people*, CNN (May 25, 2021), https://perma.cc/3XAT-WS2B.

18 *Id.*

19 *Id.*

identity checks than the rest of the population."[20] The FRA's work in providing a more accurate account of the amount of problematic police practices in the EU will assist individuals and organizations that seek to confront the issue further.

B. Relevant Provisions of the European Convention on Human Rights

The ECHR reaches over a dozen areas related to human rights.[21] Most relevant to cases such as *Wa Baile*[22] is the ECHR's guarantee of the right to privacy.[23] The Convention provides that governments can only infringe on the right to privacy when there exist legal and valid reasons for doing so.[24] Such reasons include national security and public safety.[25] When individuals face violations of these rights, they are first expected to exhaust all the options for legal action in the relevant member state where the violation occurred.[26]

Article 14 prohibits interference with the rights detailed in the ECHR arising from a broad range of discriminatory factors.[27] While Article 14 lists several factors that cannot be used to justify intrusion on individuals' rights, such as religion, national origin, political opinion, etc.,[28] these categories are not exhaustive.[29] Mr. Wa Baile sought relief under Article 14 for the violation of the rights provided in Article 8.[30] The invasive search to which law enforcement subjected Mr. Wa Baile in a public setting concerns the right to respect for private life.[31]

C. Roadmap

This Comment argues that the theory behind Switzerland's liability in *Wa Baile v. Switzerland* gives rise to allegations of Article 14 violations in France, given

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20 Lara Bullens, *Police Violence: How can France tackle racial profiling without first addressing race?*, FRANCE24 (July 9, 2023) https://perma.cc/H54V-VTB5.

21 *Impact of the European Convention on Human Rights*, COUNCIL OF EUROPE, https://perma.cc/TYE7-ZVX9 (last accessed Mar. 1, 2025).

22 *See* Moeckli, *supra* note 3.

23 *See Impact of the European Convention on Human Rights, supra* note 21.

24 *Id.*

25 *Id.* (stating that those are two instances in which the government may intervene as a matter of law).

26 *A Convention to protect your rights and liberties*, COUNCIL OF EUROPE, https://perma.cc/35Z7-HV55 (last accessed Mar. 1, 2025).

27 *See* European Convention on Human Rights, *supra* note 11, at 13.

28 *Id.*

29 Janneke Gerards, *The Discrimination Grounds of Article 14 of the European Convention on Human Rights*, 13 HUM. RTS. L. REV. 99, 104 (2013).

30 *See Wa Baile v. Switzerland*, *supra* note 1, ¶ 1.

31 *Id.* ¶ 102.

the prevalence of identity checks that occur without valid, objective reasons. In addition, this Comment will propose litigation strategies to assist potential future claimants. Considering both the ruling in *Wa Baile v. Switzerland*, as well as lower courts' findings in a similar class action lawsuit currently before the ECtHR, *Seydi and others v. France*,[32] claims for relief should include evidence of France's shortcomings in implementing measures to prevent racial profiling per the recommendations of international and domestic entities. Further, claims should note how court precedent applies to the deficiencies in the reasons the state provides for conducting identity checks. Claimants should also present evidence specific to their individual cases showing that law enforcement targeted them as a member of a minority group. The evidence will ideally show that law enforcement could have stopped individuals who do not belong to the same minority group but chose not to. The claimant may also provide relevant statistics on police practices to establish a prima facie case of discrimination.

Part II provides more detail on the ECtHR's ruling in *Wa Baile v. Switzerland*, highlighting the procedural history, the reasoning behind the two rulings regarding Article 14, as well as its implications for other actions brought under Article 8 and Article 14. Part III discusses the misconduct of law enforcement in France that has and continues to give rise to allegations of Article 14 violations. Further, it highlights the arguments and procedural history in *Seydi and others v. France*. Finally, Part IV presents proposed litigation strategies for claimants in France to effectively seek relief after experiencing racial profiling.

II. WA BAILE V. SWITZERLAND RULING

A. Procedural History of Mr. Wa Baile's Racial Discrimination Claim

Following the incident at the train station, Mr. Wa Baile faced criminal action for "refusing to comply with police orders."[33] He appealed twice; the Zürich Cantonal Court denied his second appeal in August 2017, in which Mr. Wa Baile argued "that the identity check was based on racial profiling."[34]

In October 2020, the administrative court found in Mr. Wa Baile's favor, finding that the identity check was unlawful.[35] The administrative court made clear that Mr. Wa Baile's alleged looking away from the police officer could not serve

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32 *Seydi and others v. France*, OPEN SOCIETY JUSTICE INITIATIVE, https://perma.cc/MB4Z-CWBR (last accessed Mar. 1, 2025).

33 *See Wa Baile v. Switzerland*, *supra* note 1, ¶ 9.

34 *Id.* ¶¶ 14–16.

35 *Id.* ¶ 28.

as justification for conducting a stop.[36] However, the administrative court chose not to address the alleged racial profiling that occurred.[37]

Mr. Wa Baile appealed his racial discrimination claim.[38] The Federal Supreme Court of Switzerland found the appeal inadmissible in December 2020, finding that Mr. Wa Baile's claim was "entirely successful before the administrative court."[39] Given this holding, Mr. Wa Baile brought his claim to the ECtHR.

Mr. Wa Baile's experience in the lower courts shows the extent of the challenges an individual may face when seeking relief for discriminatory mistreatment in domestic courts. All the courts to which Mr. Wa Baile brought his claims showed reluctance to opine on whether the interaction constituted racial profiling. As will be further detailed in this Comment, the domestic courts' failure to acknowledge and investigate Mr. Wa Baile's allegations in their entirety amount to a procedural violation of Article 14.[40]

B. The European Court of Human Rights' Judgment

1. Reasoning behind the ECtHR's finding of a procedural violation of Article 14

The ECtHR's decision on the procedural violation of Article 14 stemmed from the Court's consideration of the circumstances surrounding the identity check and the location where it occurred. The interaction as a whole led the Court to find that the "the threshold of severity required for the right to respect for private life to be engaged within the meaning of Article 8 of the Convention has been reached," and Mr. Wa Baile had grounds to bring a racial discrimination claim.[41] The Court explained that the "requisite threshold of severity" means that, to successfully set forth a claim, the claimant must allege facts that show that law enforcement used the claimant's "physical or ethnic characteristics" to target the claimant for an identity check.[42] The government violated its procedural obligations under Article 14 since the administrative and criminal courts failed to effectively examine Mr. Wa Baile's discrimination claims.[43] The administrative

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36 *Id.*

37 Vanessa E. Thompson, *Policing Blackness in Europe: Colonial Entanglements and Contemporary Articulations of Struggle*, 19 EUR. Y.B. MINORITY ISSUES 27, 46 n.54 (2020).

38 *See* Legal Summary, *supra* note 9.

39 *See Wa Baile v. Switzerland*, *supra* note 1, ¶ 30.

40 *Id.* ¶ 103.

41 *Id.* ¶ 102.

42 *Id.* ¶ 71.

43 *See* Press Release, *supra* note 4, at 1.

court had found that law enforcement had no objective reason for the identity check. Thus, this required that court to further examine the potential role Mr. Wa Baile's race had in the officer's decision to request identification.[44] Further, during the criminal proceedings, the domestic criminal courts failed to adequately examine the profiling claims, and the District Court improperly shifted the burden of proof onto Mr. Wa Baile.[45]

2. Reasoning behind the ECtHR's finding of a substantive violation of Article 14

In addressing the substantive component of Mr. Wa Baile's Article 14 claim, the ECtHR's reasoning demonstrates the obligation of signatories to the ECHR to take positive action to safeguard the rights protected by the Convention.[46] The ECtHR explained that it is well-established "that the most fundamental positive obligation imposed on States is to put in place a legal and administrative framework which enables them to fulfill their duties under the Convention."[47] The Court also emphasized the importance of the implementation of national laws as protection against issues such as "arbitrariness and excessive use of force,"[48] and to provide adequate guidance to police officers.[49]

The Court proceeded to incorporate the findings of reports specific to Switzerland that revealed its shortcomings in implementing effective measures to resolve racial profiling.[50] This supported its finding that "the lack of a sufficient legal and administrative framework is likely to give rise to discriminatory identity checks."[51] For example, in a December 27, 2021 report issued by the U.N. Committee on the Elimination of Racial Discrimination (CERD), CERD noted a concern regarding Switzerland's failure to implement laws specific to the prevention of discriminatory police practices.[52] It further stated that Switzerland has not taken sufficient steps to track statistics on racial profiling incidents that occur.[53]

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44 *Id.* at 3, *see also Wa Baile v. Switzerland*, *supra* note 1, ¶ 103.

45 *See Wa Baile v. Switzerland*, *supra* note 1, ¶ 96.

46 *Id.* ¶ 124.

47 *Id.* ¶ 125.

48 *Id.* ¶ 126 (citing *Nachova and Others v. Bulgaria*, Apps. Nos. 43577/98 and 43579.98, (July 6, 2005)).

49 *Id.*

50 *Id.* ¶¶ 127–29.

51 *See Wa Baile v. Switzerland*, *supra* note 1, ¶ 130.

52 Comm. on the Elimination of Racial Discrimination, Concluding observations on the combined tenth to twelfth periodic reports of Switz., U.N. Doc CERD/C/CHE/CO/10-12, at 4 (Dec. 27, 2021), https://perma.cc/BQ7E-5842.

53 *Id.*

In addition, the European Commission against Racism and Intolerance issued a report on March 19, 2020, recommending that Switzerland create an independent entity for the purpose of investigating claims of "racially-motivated misconduct by the police, and ensure it is using the 'reasonable suspicion standard.'"[54] With respect to the meaning of "reasonable suspicion," the term appears in the ECHR,[55] but cases such as *Fox, Campbell and Hartley v. The United Kingdom*[56] show how the ECtHR applied this concept: "[t]he Court agrees with the Commission and the Government that having a 'reasonable suspicion' presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence. What may be regarded as 'reasonable' will however depend upon all the circumstances."[57]

If a claimant successfully shows that they were treated differently by law enforcement officials, the burden of proof shifts to the government, which is required to adequately show that the police were justified in their conduct.[58] To establish a prima facie case, a claimant should present evidence or unrebutted presumptions that demonstrate the requisite level of severity, and the evidence should be "precise and consistent."[59] In addition, in discrimination cases, the court places great importance on statistics the parties provide as evidence.[60] However, the court did not definitively state that it will rely on such reports.[61]

As the standards of establishing a prima facie case apply to this case, the ECtHR explained that the Administrative Court's finding that law enforcement lacked an objective reason for the stop created a "strong presumption" that discrimination occurred.[62] The government's failure to rebut this further supported the ECtHR's finding.[63] The court also referred to materials from international human rights entities regarding the issue of racial profiling in

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54 Eur. Comm'n against Racism and Intolerance, ECRI Report on Switz., at 7 (Mar. 19, 2020), https://perma.cc/VJ7B-9CZL at 7.

55 *See* European Convention on Human Rights, *supra* note 11, 12 art. 5(1)(c).

56 *Fox, Campbell and Hartley v. the United Kingdom*, Apps. Nos. 12244/86; 12383/86 (Aug. 30, 1990), https://perma.cc/539H-Z9ASZDT2-5QU3.

57 *Id.* ¶ 32.

58 *See Wa Baile v. Switzerland*, *supra* note 1, ¶ 132 (citing *D.H. and Others v. the Czech Republic*, App. Np. 57325/00 (Nov. 13, 2007)).

59 *Id.* (citing *D.H. and Others v. the Czech Republic*).

60 *Id.* ¶ 30 (citing *Zarb Adami v. Malta*, App. No. 17209/02 (June 20, 2006), *D.H. and Others v. the Czech Republic*).

61 *Id.* (citing *D.H. and Others v. the Czech Republic*).

62 *Id.* ¶ 134.

63 *Id.*

Switzerland to support the presumption of discrimination.[64] While the ECtHR acknowledges the difficulty law enforcement encounters in making quick judgments, the ECtHR found the government in violation of Article 14 in conjunction with Article 8.[65]

III. *WA BAILE V. SWITZERLAND* RULING AS APPLIED IN FRANCE

A. Racial Profiling in France

Given the ECtHR's recent ruling, as well as the extent of racial profiling claims in France, France will likely face increased allegations of Article 14 violations. For example, young Black and Arab individuals have been stopped and searched by French police in instances where they were not engaged in any criminal activity.[66] The state has not made efforts to collect data to determine whether identity checks aid in crime prevention.[67] International bodies such as the European Commission Against Racism and Intolerance, as well as domestic entities,[68] have taken their concerns to the U.N., requesting that its "expert body on racial discrimination" acknowledge that racial profiling is a systemic issue in the country.[69]

As of the present day, conforming to the ECtHR's finding would likely pose a challenge for France. In addition to failing to gather data on the likelihood that minorities will be subject to a police stop,[70] France historically has not gathered information on race and ethnicity in general.[71] Rather, France's "color-blindness" relates to the government's claim that "[i]t is central to the French ideal of equality and citizenship that the state refrain from making distinctions based on race or ethnicity."[72] However, this does not mean that there is no discussion on the topic of racism—France has implemented laws to protect against ""indirect'

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64 *Wa Baile v. Switzerland*, *supra* note1, ¶ 135.

65 *Id.* ¶ 136.

66 *"They Talk to Us Like We're Dogs,"* HUMAN RIGHTS WATCH (June 18, 2020), https://perma.cc/PWT3-NM67.

67 *Id.*

68 *France: Groups Seek UN Intervention to Address Racial Profiling*, HUMAN RIGHTS WATCH (Apr. 11, 2024), https://perma.cc/S5AA-9EZS.

69 *Id.*

70 Philip Oltermann, *France and Germany urged to rethink reluctance to gather ethnicity data*, THE GUARDIAN, (June 16, 2020), https://perma.cc/N8VC-7ZFS.

71 David B. Oppenheimer, *Why France Needs to Collect Data on Racial Identity… In a French Way*, 31 HASTINGS INT'L & COMP. L. REV., 735, 736–37 (2008).

72 *Id.* at 736.

employment discrimination."[73] To bring allegations of indirect discrimination, claimants typically must rely on data that shows racial or ethnic disparities.[74] For this reason, France's refusal to maintain data that would reveal any differences in treatment poses a barrier for the enforcement of laws that would protect its citizens against discrimination.[75]

B. Current French Case on Racial and Ethnic Profiling: *Seydi and others v. France*

In France, several individuals who allege they were subjected to identity checks based on race filed a class action lawsuit, captioned *Seydi and others v. France* (no. 35844/17).[76] Similar to *Wa Baile*, the claimants allege an Article 14 violation in conjunction with Article 8, but also with "Article 2 of Protocol No. 4."[77]

On April 11, 2012, the claimants brought action in the *Tribunal de Grande Instance*.[78] As part of the case, the men submitted evidence showing that French officers routinely carry out discriminatory identity checks, and they included reports from academics and organizations as well.[79] In its defense to these allegations, the state claimed that police do not have to follow "non-discrimination norms" when conducting identity checks.[80] The state also argued that, in a case of racial profiling, the claimants bear the burden of proof.[81] Ultimately, the claimants' application highlighted that the state failed to produce evidence showing that the identity checks were justified.[82] Further, they claimed that French authorities did not carry out any investigations with respect to the police officers' conduct.[83] The *Tribunal de Grande* dismissed the claims, finding that the claimants bore "the entire burden of proof."[84] The *Cour d'Appel* overturned the lower court's ruling with

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73 *Id.* at 737.

74 *Id.*

75 *Id.*

76 *Seydi and others v. France,* App. No. 35844/17, Subject of the Case (Oct. 25, 2021), https://perma.cc/4EJZ-TD7L.

77 *Id.*

78 *Seydi and others v. France*: *Application*, OPEN SOCIETY JUSTICE INITIATIVE (May 8, 2016), ¶ 27, https://perma.cc/3L78-KQX3.

79 *Seydi and others v. France*, *supra* note 32.

80 *See Seydi and others v. France: Application*, *supra* note 78, ¶ 27.

81 *Id.*

82 *Id.*

83 *Id.*

84 *Id.* ¶ 28.

respect to five of the thirteen men, as they succeeded in showing that the police did not stop any white people.[85]

In 2016, the *Cour de Cassation* found that "non-discrimination law applies to these cases and that this implies a shifting of the burden of proof."[86] However, the court observed that only presenting evidence showing a pattern and practice of subjecting members of minority groups to identity checks more frequently does not meet the requisite threshold for a presumption of discrimination.[87] Six of the claimants proceeded to bring their claims to the ECtHR.[88]

In their Application to the ECtHR, the claimants argue that the domestic courts failed to apply non-discrimination law and the burden-shifting framework.[89] The application also claims that the domestic courts erred in accepting vague justifications from the state.[90] In addition, the claimants allege that France failed to take positive action to implement measures against discriminatory police practices.[91]

ECtHR precedent indicates the fact-dependent nature of the reasonable suspicion standard.[92] For this reason, the way in which the facts are presented, as well as the evidence to support those facts, are important in demonstrating that there existed no objective reason for the identity check. Similar to *Wa Baile*, domestic courts in *Seydi* emphasized the way in which claimants alleged racial discrimination in deciding the claims.

IV. PROPOSED LITIGATION STRATEGIES IN ACTIONS AGAINST DISCRIMINATORY IDENTITY CHECKS IN FRENCH COURTS AND THE ECTHR POST *WA BAILE V. SWITZERLAND*

Public scrutiny of the widespread racial discrimination among law enforcement in France[93] has not yet influenced France to ameliorate its potential noncompliance with Article 14. France will likely soon find itself defending against claims of procedural and substantive violations of Article 14. This Comment

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85 *Id.* ¶ 30.

86 *Seydi and others v. France: Application*, *supra* note 78, ¶ 30.

87 *Id.*

88 *Id.*

89 *Id.* ¶ 2.

90 *Id.* ¶ 18.

91 *See Seydi and others v. France: Document 1: Additional Submissions*, (May 8, 2016), ¶¶ 44-58. 44. https://perma.cc/4MPC-C658.

92 *See Fox, Campbell and Hartley v. the United Kingdom, supra* note 56, ¶ 32.

93 *See, e.g.*, Almaz Teffera & Olivia Ensign, *France Needs International Scrutiny of Its Police Racism*, HUMAN RIGHTS WATCH (Sept. 29, 2023), https://perma.cc/59EF-LQSY (originally published in LE TEMPS, Sept. 28, 2023).

differs from the observations and solutions offered by other organizations[94] in that it specifically discusses how French claimants should structure their arguments with a focus on the ECtHR's emphasis on "precise and consistent" evidence that shows severity,[95] in addition to the factors identified by Professor Moeckli.

A. Arguments to Adequately Allege a Procedural Violation of Article 14

1. The alleged mistreatment meets the required level of severity

As explained in the *Wa Baile* ruling, the ECtHR established a threshold claimants must meet for their claims to be heard.[96] This requires that claimants show that law enforcement based the decision to request identification on discriminatory factors.[97] The reasoning behind the finding that Mr. Wa Baile successfully demonstrated that Article 8 was at issue suggests that the ECtHR will look for a detailed account of the events leading up to and during the check to determine whether the claim(s) may proceed. It is crucial that the filing incorporates details such as where the identity check occurred, how many individuals were in the area at the time, whether law enforcement subjected other individuals to mistreatment, whether law enforcement provided the claimant with a reason for the identity check, and if the police did provide a reason, whether it indicates bias.[98] Further, the ECtHR also noted that, in instances in which the identity check occurs in a public space, claimants can raise arguments related to the incident's impact on the claimants' reputation and self-respect.[99]

To guide the drafting of the factual background, claimants should also note the reasoning in cases such as *Basu v. Germany*, to which the ECtHR referred in

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94 *See, e.g.*, Magdalena Maier, *From Perception to Proof: Redefining Racial Profiling in Light of the Wa Baile Decision*, EQUINET: EUROPEAN NETWORK OF EQUALITY BODIES (Aug. 7, 2024), https://perma.cc/7PGL-G4LS ; *see also Wa Baile v. Switzerland*, OPEN SOCIETY JUSTICE INITIATIVE, https://perma.cc/MET2-HZNE (last accessed Apr. 12, 2025); Communication from Tarek Naguib, Coordinator of the NGO platform (Humanrights.ch, The Alliance Against Racial Profiling, and FIZ Advocacy and Support for Migrant Women and Victims of Trafficking) to DGI Directorate General of Human Rights and Rule of Law, ECtHR, Re: Execution of the ECtHR Judgment in *Wa Baile c. Suisse*, (Apr. 2025) (critiquing Switzerland's failure to comply with the judgment in *Wa Baile v. Switzerland* and offering potential solutions to the Committee of Ministers) https://perma.cc/7BJK-H2U9.

95 *Wa Baile v. Switzerland*, *supra* note 1, ¶ 132.

96 *See id.* ¶ 102.

97 *Id.* ¶ 71 (citing *Basu v. Germany*, App. No. 215/19, (Oct. 18, 2022)).

98 *Id.*

99 *Id.*

discussing when a claim concerns Article 8 in *Wa Baile*.[100] *Basu v. Germany* offers further insight into the threshold requirement. Relevant arguments in that case concerned whether an identity check can give rise to an Article 8 violation, and whether the alleged discriminatory conduct by law enforcement amounted to a violation of the claimant's rights.[101] In evaluating these arguments, the ECtHR elaborated on its interpretation of Article 8. The Court found that it "protects a right to identity and personal development, and the right to establish relationships with other human beings and the outside world."[102] Citing *Gillan and Quinton* and *Vig v. Hungary*, ECtHR proceeded to explain that when law enforcement uses its "coercive powers" to require an identity check and search, it "an interfer[es] with the right to respect for private life."[103] Key to the ECtHR's reasoning with respect to this part of the claimant's allegations is the fact that, in some past cases, "[a]pplicants had to identify and explain the concrete repercussions on their private life and the nature and extent of their suffering, and to substantiate such allegations in a proper way."[104] In addition to highlighting factors like the location of the identity check and the fact that officers did not stop any other individual, the ECtHR noted that the claimant in *Basu* discussed the impact of the identity check.[105] The complainant alleged that, to avoid such embarrassment again, he chose to "[stop] travelling by train for several months."[106] Thus, French claimants should not only include details that show discrimination on part of the police, but also elaborate on the effect of the alleged misconduct to bolster their claims.

2. The state failed to take adequate action following allegations of discrimination

In the *Wa Baile* opinion, the ECtHR makes clear the obligations on which signatories to the ECHR must act after a claimant sets forth an "arguable claim" within the scope of Article 8 that a public official stopped them due to their race.[107] The Court explained that the claimant's successful demonstration that the facts involve Article 8 triggers the state's Article 14 obligation to further investigate the connection between the alleged discrimination and the events that took place.[108] The opinion also explains that states must provide the claimant with the

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100 *Id.*

101 *Basu v. Germany*, App. No. 215/19, (Oct. 18, 2022), ¶¶ 19–20.

102 *Id.* ¶ 21.

103 *Id.* ¶ 22.

104 *Id.* ¶ 23.

105 *Id.* ¶ 26.

106 *Id.*

107 *See Wa Baile v. Switzerland*, *supra* note 1, ¶ 91.

108 *Id.*

opportunity to show that law enforcement acted "in excess or abuse of power," and the state must not impose "insurmountable procedural obstacles."[109] In addition, regardless of whether domestic courts find in the claimant's favor, the ECtHR requires that courts explain in detail the reasoning that led to the ruling.[110] Failure to do so constitutes a violation of Article 8.[111]

These findings indicate the potential shortcomings by the government to which claimants should pay particular attention when seeking remedies in French courts. In Mr. Wa Baile's case, the ECtHR specifically identified the failures of the lower courts in the criminal proceedings to provide adequate reasoning as to why the courts found racial discrimination did not occur.[112] In outlining the procedural history of their claims, therefore, future claimants should highlight any general statements from the domestic courts, such as "there [is] no evidence that the applicant's skin colour had been a determining factor in the police officer's decision to carry out an identity check."[113]

While French courts have issued favorable rulings in recent years for individuals who claimed to experience racial discrimination in other contexts,[114] which may support an argument that efforts are being made to address the issue in France, the claimants' application in *Seydi and others* demonstrates recent deficiencies in domestic courts' reasoning related to racial profiling claims. The applicants included key details about the courts' conclusions, which subsequent claimants should note. For example, the applicants explained that the *Tribunal de Grande Instance* erroneously placed a significant burden on the applicant to show racial discrimination.[115] In the event potential claimants find that officials exhibited a pattern of placing too high a burden to prove their claims, they can argue that such a practice is inconsistent with the ECtHR's finding in *Wa Baile* on the importance of domestic courts' complete investigation of claims that meet the required level of severity.[116]

B. Arguments to Adequately Allege a Substantive Violation of Article 14

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109 *Id.*

110 *Id.* ¶ 92.

111 *Id.*

112 *Id.* ¶ 96.

113 *Wa Baile v. Switzerland*, *supra* note 1, ¶¶ 14, 96.

114 Layli Foroudi, *French court finds Adecco guilty of racial profiling and discrimination*, REUTERS (Mar. 13, 2024), https://perma.cc/C2UT-W2D2.

115 *See Seydi and others v. France: Application*, *supra* note 78, ¶¶ 27–28.

116 *See Wa Baile v. Switzerland*, *supra* note 1, ¶¶ 102–03.

1. States must implement adequate legal and administrative frameworks to allow citizens to enjoy the rights provided in the ECHR

The ECtHR started its analysis on the substantive component of Mr. Wa Baile's claim by reiterating the importance for states to recognize their positive obligations to guarantee their nationals' rights under the ECHR.[117] The Court characterizes the establishment of sufficient legal and administrative measures to protect citizens rights as "*the most fundamental* positive obligation" of states.[118] With respect to Switzerland, the ECtHR found that the existing administrative framework was insufficient.[119] This part of the *Wa Baile* opinion works to the advantage of potential claimants in France, as France's failure to establish frameworks to ensure its compliance with the ECHR is similar to that of Switzerland.

Regarding measures to protect against police misconduct, the ECtHR specified in *Wa Baile* that "the Court has held that national law regulating police operations must provide a system of adequate and effective safeguards against arbitrariness and excessive use of force."[120] In recent years, organizations such as Human Rights Watch have highlighted ways in which France has hindered the development of measures to protect citizens against discriminatory policing, as well as how France can improve the monitoring of police misconduct.[121] In their arguments, claimants should include the fact that "[p]arliamentarians tabled numerous bills proposing reforms to more narrowly circumscribe police powers."[122] Further, claimants can also argue that the significant number of identity checks in France annually suggests that there exists insufficient guidance as to when police should conduct such a stop. In 2021, there were forty-seven million identity checks.[123] The president of the *Cour des Comptes*, "France's supreme administrative audit institution," stated that "'there is no doctrine on ID checks, [to define] why we do it.'"[124] Further, Human Rights Watch noted that police unions and hierarchies refuse to have officers use "stop forms," which is "a

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117 *Id.* ¶ 124.

118 *Id.* ¶ 125 (emphasis added).

119 *See* Moeckli, *supra* note 3; *see also Wa Baile v. Switzerland*, *supra* note 1, ¶¶ 89–103.

120 *Wa Baile v. Switzerland*, supra note 1, ¶ 126.

121 *See "They Talk to Us Like We're Dogs," supra* note 66.

122 *Id.*

123 Layli Foroudi, *French police checked IDs on 'massive' scale in 2021, no strategy defined -report says*, REUTERS (Dec. 6, 2023), https://perma.cc/2LN9-7ZPN.

124 *Id.* (alteration in original).

written record of the procedure."[125] Hence, the way in which France's law enforcement agencies approach the subject of race shows that, in failing to acknowledge the issue of race, France is far from implementing measures that will provide appropriate guidance to law enforcement. This goes against CERD's recommendation that states ensure police learn "how to avoid engaging in racial profiling practices."[126] France maintains that systemic racism is not a concern among its police forces.[127] Even the State's Action Plan on Anti-Racism avoided discussion of "the practice of racial and ethnic profiling by police."[128] These findings will serve as support in demonstrating that France's practices run afoul of their obligations under the ECHR to ensure there are sufficient frameworks in place at the national level to prevent discriminatory policing.

Despite contemporary police accountability efforts of French organizations, showing that France remains in noncompliance with its obligations under the ECHR is straightforward. Numerous human rights entities recommend that France implement reforms to effectively respond to the issue.[129] Currently, the INDEX Police Accountability Lab in France is primarily concerned with instances of state violence, and its reports have been used in court.[130] However, its efforts do not meet the ECtHR's expectations that signatories to the ECHR implement legal and administrative mechanisms specific to racial profiling.

In addition, the Defender of Rights in France operates as an "independent constitutional authority," and it handles matters related to anti-discrimination.[131] This entity can intervene in matters brought in French courts and issue decisions on complaints.[132] But the decisions are not legally binding—they are considered recommendations.[133] In *Wa Baile*, the ECtHR dedicated multiple paragraphs in its judgment to the positions of intervening parties, including The French Defender

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125 *See "They Talk to Us Like We're Dogs," supra* note 66.

126 *See Wa Baile v. Switzerland*, *supra* note 1, ¶ 127 (citing General recommendation No. 36 (2020) on preventing and combating racial profiling by law enforcement officials, U.N. OFFICE OF THE HIGH COMMISSIONER, U.N. Doc. CERD/C/GC/36 (Dec. 17, 2020)).

127 Teffera & Ensign, *supra* note 93 (citing Déclaration de la porte-parole du Haut-commissariat des Nations unies aux droits de l'Homme, FRANCE DIPLOMATIE (June 30, 2023), https://perma.cc/W2VV-DY3X.)

128 *Id.*

129 *Id.*

130 *Index Police Accountability Lab*, GUERILLA FOUNDATION, https://perma.cc/9ZJT-2Z7M (last accessed Oct. 13, 2024).

131 *Defender of Rights*, EQUINET: EUROPEAN NETWORK OF EQUALITY BODIES, https://perma.cc/Z2ZC-56Q8 (last accessed Oct. 13, 2024).

132 *Id.*

133 *Id.*

of Rights, Open Society Justice Initiative, and Amnesty International.[134] Therefore, seeking a recommendation from the French Defender of Rights in addition to exhausting domestic remedies would benefit claimants, as such entities can assist in framing the issues for the Court.

2. Claimants must establish a prima facie case of racial discrimination

In bringing a racial profiling claim, as previously mentioned, the ECtHR requires that claimants present evidence "based on a sufficiently serious, precise and concordant body of evidence, or on unrebutted presumptions."[135] Claimants may also rely on statistics and reports from domestic and international organizations to set forth their claims.[136] In elaborating on the reasons for which claimants rely on findings from international organizations[137] on the extent of racial profiling in France, as opposed to more specific data,[138] claimants should discuss the fact that France has historically refrained from engaging in topics related to racial identity and disparities, which has impacted its unwillingness to collect relevant data pertaining to racial profiling.[139] Further, claimants can emphasize the widespread criticism France receives from Human Rights Watch,[140] Amnesty International,[141] and Open Society Justice Initiative[142] to demonstrate France's continued failure to adequately resolve its high prevalence of profiling.

The Community House for Solidarity Development, Pazapas, Equality, Anti-Discrimination, Interdisciplinary Justice Network, Amnesty International France, and Human Rights Watch brought their concerns about France to the U.N. Committee on the Elimination of Racial Discrimination in 2024.[143] The groups asked the U.N. to "recognize the systemic nature of the problem of racial profiling in France, and set out specific steps the French government should take

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134 *See Wa Baile. v. Switzerland*, *supra* note 1, ¶¶ 114–23.

135 *Id.* ¶ 132.

136 *Id.* ¶¶ 133–35.

137 *See, e.g.*, Ethnic Profiling in France: A Well-Documented Practice, OPEN SOCIETY JUSTICE INITIATIVE (May 2011), https://perma.cc/7EUB-3VN6.

138 *See, e.g.*, JUDITH SUNDERLAND & BENJAMIN WARD, HUMAN RIGHTS WATCH (ORGANIZATION), THE ROOT OF HUMILIATION: ABUSIVE IDENTITY CHECKS IN FRANCE (2012).

139 *See* Oppenheimer, *supra* note 71, at 736–37.

140 *Ethnic Profiling by the French Police: Urgent Action Needed*, HUMAN RIGHTS WATCH (Oct. 17, 2024), https://perma.cc/US6J-K7R5.

141 *France 2023*, AMNESTY INTERNATIONAL (2023), https://perma.cc/GSY6-379H.

142 *Profiling Minorities: A Study of Stop-and-Search Practices in Paris*, OPEN SOCIETY JUSTICE INITIATIVE (June 2009), https://perma.cc/2QXZ-A29F.

143 *See France: Groups Seek UN Intervention to Address Racial Profiling*, *supra* note 68 (citing CERD Submission April 2024, https://perma.cc/9N65-ST6F).

to eliminate racial profiling."[144] If the U.N. heeds that call, its further commentary on the issue in France would support those seeking remedies.

With respect to the showing that there existed no objective reason for the stop, the Court of Appeals in *Seydi and others v. France* accepted the state's explanation of the reasons for the identity checks.[145] Given the ECtHR's reasoning in *Wa Baile v. Switzerland,* there are counterarguments available to individuals in France who wish to move forward with profiling claims. Reasons such as the officers' "gut instincts" and reliance on the characteristics of the area in which the stop occurred (in other words, high-crime areas) have been found to be unacceptable.[146] For example, in *Gillan and Quinton v. The United Kingdom*, the ECtHR disapproved of a search that was "based exclusively on the 'hunch' or 'professional intuition' of the officer concerned."[147]

Those subjected to identity checks in public areas in France should gather evidence on whether officers requested identification from other individuals of different backgrounds in the surrounding area, a fact to which both Mr. Wa Baile and the successful claimants in *Seydi and others v. France* testified.[148] In the event the claimants cannot present this type of evidence, like in the case of the claimant in *Seydi* who was in front of his home at the time the check occurred,[149] then they should rely on the state's inability to present "overall statistical figures on identity checks" as noted by the ECtHR in *Wa Baile*, in conjunction with reports from international and domestic organizations.[150]

While the *Cour de Cassation* in *Seydi and others v. France* opined that presenting statistics on the broader issue of racial profiling does not suffice to show that the individual claimant was subjected to mistreatment,[151] the application to the ECtHR discusses the ECtHR's precedent in *D.H. v. The Czech Republic*, which provides that "applicants may have difficulty in proving discriminatory treatment . . . In order to guarantee those concerned the effective protection of their rights, less strict evidential rules should apply in cases of alleged indirect

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144 *Id.*

145 *See Seydi and others v. France: Application*, *supra* note 78, ¶ 30.

146 *See* Math, *supra* note 1; *see also Gillian and Quinton v. the U.K.*, App. No. 4158/05 (Jan. 12, 2010), https://perma.cc/2SJ5-7FFZ.

147 *Gillian and Quinton v. the United Kingdom*, *supra* note 146.

148 *See Wa Baile v. Switzerland, supra* note 1, ¶ 8; *see generally Seydi and others v. France: Application*, *supra* note 78, ¶¶ 10–17.

149 *See Seydi and others v. France: Application, supra* note 78, ¶ 12.

150 *See* Moeckli, *supra* note 3; *see also Wa Baile v. Switzerland, supra* note 1, ¶¶ 133–36.

151 *Seydi and others v. France: Application*, *supra* note 78, ¶ 32.

discrimination."[152] The ECtHR further stated that reliable statistics have the potential to support a presumption of discrimination in instances in which the court is "'assessing the impact of a measure or practice on an individual group.'"[153] Thus, it is unlikely that an inability to allege facts similar to Mr. Wa Baile's will preclude other claimants from showing a prima facie case of discrimination.

Claimants should focus the evidence they provide on the lack of an objective reason for the stop as a matter of law, given the uncertainty over the dispositive nature of an administrative court's finding in the applicant's favor on this factor.[154] While some scholars find that the Administrative Court's ruling that there was no objective justification was crucial in shifting the burden to the government,[155] the ECtHR's judgment states the "[establishment of] the existence of a difference in treatment" suffices at this stage.[156] Still, claimants in France should prepare to address whether there was an objective justification in the absence of a favorable lower court ruling on this issue. One *Cour de Cassation* finding, for example, provides guidance for a case where no such justification exists—"the Court of Cassation has found that seeking to get off a bus to avoid the police did not justify an identity check in the absence of any other motivation."[157] This is comparable with the facts in *Wa Baile*, given that the officers' suspicion arose from him looking away from them, suggesting avoidance.[158]

V. CONCLUSION

Various international organizations have expressed concerns regarding the ongoing racial profiling across Europe, and statistics show that misconduct on part of law enforcement remains a pressing issue. The favorable outcome of *Wa Baile v. Switzerland* suggests that there may be progress in the effort to prevent racial profiling among signatories to the ECHR.[159] The ECtHR's reasoning clarifies the legal arguments claimants should present, as well as the evidence to be included in support of claims. Given the dynamics of racial profiling in France, those subjected to unlawful identity checks can argue that France lacks effective mechanisms to prevent racial profiling. Further, claimants can highlight precedent

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152 *See Seydi and others v. France: Document 1*, *supra* note 91, ¶ 18 (quoting *D.H. v. The Czech Republic*, App. No. 57325/00, ¶ 186 (Nov. 13, 2007) (alteration in original)).

153 *Id.* ¶ 20 (quoting *D.H. v. The Czech Republic*, ¶¶ 188–95).

154 *See* Moeckli, *supra* note 3.

155 *See* Maier, *supra* note 94.

156 *See Wa Baile v. Switzerland*, *supra* note 1, ¶ 132.

157 *"The Root of Humiliation": Abusive Identity Checks in France*, HUMAN RIGHTS WATCH (Jan. 26, 2012), https://perma.cc/5JT7-NHCG (citing Cour de Cassation, 2e civ., Mar. 4, 1999).

158 *See Wa Baile v. Switzerland*, *supra* note 1, ¶ 5.

159 *See* Moeckli, *supra* note 3.

from the *Cour de Cassation*, the ECtHR, and other authorities on the kinds of actions that give rise to reasonable suspicion and an objective basis to request identification from an individual. Finally, as the claimants in *Seydi* argued in their application, statistics specific to France show that racial profiling is a widespread, structural issue.[160] The ECtHR's observations in *Wa Baile v. Swizerland* show that there is a path forward for others outside of Switzerland who experience racial profiling. The ECtHR's ruling will ideally prompt all signatories to the ECHR to ensure they take active steps to prevent further instances of profiling or otherwise risk an ECtHR finding against them.

160 *See Seydi and others v. France: Application*, *supra* note 78, ¶ 23.