

Italian Supreme Court (Corte Suprema di Cassazione)
Ordinanza no 15981/2012 – 20 September 2012

CONSIDERED THAT

1. On April 15th 2010, T.T., a Senegalese citizen, requested to the Court of first instance [*Tribunale* of Trieste] the recognition of the refugee status or, subordinately, the granting of the subsidiary protection or a permit to stay. He alleged to be homosexual and that he couldn't live freely such condition in his country of origin – which criminalizes homosexuality - also because of hostility in the familiar and social environment.
2. The Court of first instance [*Tribunale* of Trieste] on February the 9th 2011, rejected the claim and the Court of Appeal of Trieste turned down the appeal against the judgement of the Court of first instance.
3. In the reasoning of the judgement, the Court of Appeal affirmed that the fact that homosexuality is a crime under the law of Senegal is irrelevant to grant the protection because it is not possible 'to infer from the general situation of a country that the individual is victim of persecution' (Cass. Civ. 26822/2007). The Court affirmed as well that even if the homosexuality of the claimant will be proven, on the basis of the circumstances alleged with the appeal it couldn't be held that he had been victim of specific and tangibles acts of violence and threats by the Senegalese authorities so to force him to leave the country. Neither it could be held – according to the appealed judgement – that acts of persecution similar to the above ones had been committed by groups of power backed by the state or able to influence the state policy with respect to the public order and the public safety. According to the Court, what can be held on the basis of the appellant's allegations is 'that he was ill-treated by his relatives that didn't accept his homosexuality', but for the Court this is certainly not sufficient to grant the protection requested.
4. T.T. appeals to the Supreme Court with two legal objections, with which he affirms that the Court of Appeal violated and/or misinterpreted art. 3 of D.Lgs. 251/2007 [TN: the law that transposed the Qualification Directive] and art. 8 of D.Lgs. 25/2008 [TN: the law that transposed the Procedure Directive]. And that the reasoning of the Court was omitted, insufficient and contradictory on facts disputed and decisive for the judgement. With the first legal objection the claimant criticizes the appealed judgement because it did not take into the right consideration the evidence that the claimant asked to admit. And because the Court of Appeal has not searched for an adequate knowledge of the legal and social situation of the country of origin of the claimant, thus violating the legal principle of Italian and UE law on the examination of international protection applications. With the second legal objection the claimant affirmed that the Court of Appeal made a mistake when it held – with an evidently illogical reasoning – that it was not possible to infer from the general situation of a country that the individual is victim of persecution. For

the claimant the criminalization of homosexuality necessarily prevents to all homosexual citizens to live freely their sexual and emotional life and therefore constitutes a deprivation of a fundamental right.

HELD THAT

5. Both legal objections raised by the claimant are right. As regard to the first one, that is logically preliminary to the second one, it must be recognized, contrary to what the Court of Appeal held, that criminal penalties for homosexual acts under section 319 of the Senegalese criminal code constitute per se a general situation of deprivation of the fundamental right to live freely one's sexual and emotional life. On this point this Court already took a position in judgement n. 16417/2007 pronounced on a similar application for international protection by a Senegalese citizen [NT: actually that judgement was not pronounced on an international protection case but on a case of a repatriation injunction], where it clarified that persecution is to be considered a form of radical fight against a minority which can also be realized through legal means and notably through the provision that the behaviour that is intended to be fought is a crime punishable by imprisonment. The Senegalese criminal provision provides that: "*Sans prejudice des peines plus graves prevues par les alineas qui precedent ou par les articles 320 et 321 du present Code, sera puni d'un emprisonnement d'un à cinq ans et d'une amende de 100.000 à 1.500.000 francs, quiconque aura commis un acte impudique ou contre nature avec un individu de son sexe. Si l'acte a etè commis avec un mineur de 21 ans, le maximum de la peine sera toujours prononce*" [NT: quoted in French].
As a consequence, persons with a homosexual orientation are forced to violate the criminal law of Senegal and expose themselves to severe penalties in order to live freely their own sexuality. This represents a severe interference in the private life of Senegalese homosexual citizens which greatly compromises their personal freedom. This violation of a fundamental right, set out in our Constitution, in the European Convention on Human Rights and in the Charter of Fundamental Rights of the EU, binding in this matter, affects automatically the individual situation of homosexual persons, as it places them in such situation of objective persecution as to justify the grant of the requested protection.
6. As regards to the second legal objection, the Supreme Court considers that the Court of Appeal expressed a convincement on the homosexuality of the claimant on the basis of a not thorough investigation, given that the claimant had asked to admit the witness of his partner as evidence of being homosexual, to the purpose of excluding the instrumentality of his application for international protection. But the Court of Appeal has held irrelevant the witness [NT: and it has not admitted it], on the basis of a wrong consideration of the consequences of the criminal sanction provided by the Senegalese criminal code. Furthermore the Court of Appeal has ignored completely the social situation of the country, as far as are concerned

homophobia and severe acts of discrimination and persecution against homosexuals, reported by the media and by governmental and ngo web sites.

7. Therefore the Supreme Court admits the appeal and remits the case back to the Court of Appeal of Trieste in order to admit the evidence required to verify the homosexuality of the claimant and in order to verify what is the current legal situation and the situation of homosexuals in the Senegalese society. The Court of Appeal has to carry out what above observing the legal principle of Italian and UE law on the examination of international protection applications.

[translated by Simone Rossi and Alexander Schuster – lawyers in Italy]