

Koutché v Benin (provisional measures) (2019) 3 AfCLR 725

Application 020/2019, *Komi Koutché v Republic of Benin*

Order (provisional measures), 2 December 2019. Done in English and French, the French text being authoritative.

Judges: ORE, KIOKO, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, TCHIKAYA, ANUKAM and ABOUD

The Applicant, a national of the Respondent State, lived in exile in the United States. The authorities in the Respondent State accused the Applicant of criminal activity, cancelled his passport and issued an international arrest warrant. The Applicant claimed, before the Court, that his rights to freedom of movement, liberty, equality before the law, dignity and political participation had been violated and requested provisional measures. The Court noted that the process for cancellation of the Applicant's passport was still pending but granted provisional measures to stay the cancellation to prevent irreparable harm.

Jurisdiction (*prima facie*, 14-19)

Provisional measures (cancellation of passport, 30-32)

I. The Parties

1. Komi Koutché (hereafter referred to the Applicant) is a politician and national of the Republic of Benin, who states that he resides in the United States of America and has the status of an asylum seeker in Spain. Since March 2018, the Applicant has been the subject of judicial proceedings in his country of origin for the alleged misappropriation of public funds.
2. The Republic of Benin (hereinafter referred to as "the Respondent State") became party to the African Charter on Human and Peoples' Rights (hereinafter "the Charter") on 21 October 1986, to the Protocol relating to the African Charter on Human and Peoples' Rights, establishing the African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol") on 25 May 2004. The Respondent State also, on 8 February 2016, deposited the Declaration provided for in Article 34(6) of the Protocol, accepting the jurisdiction of the Court to receive requests from individuals and Non-Governmental Organizations.

II. Subject of the Application

3. The present request for provisional measures arises from an Application submitted on 23 April 2019. It is clear from the Application that, following the advice of the Council of Ministers of 28 June 2017 and 2 August 2017, audit reports relating to the management of the cotton sector as well as the National Microfinance Fund in which the Applicant was implicated for financial misappropriation were made public.
4. The Applicant alleges that on 27 August 2018, the authorities of the Respondent State issued a letter cancelling the Applicant's ordinary passport, with instructions to arrest him if he entered the territory of the Respondent State or in the event of discovering a travel ticket on him.
5. After the cancellation of the Applicant's passport, the authorities of the Respondent State on 17 September 2018, transmitted to the International Criminal Police Organization (hereinafter referred to as "INTERPOL"), the arrest warrant of 4 April 2018 and revoked on 6 April 2018, for the arrest of the Applicant.
6. On 14 December 2018, the Applicant was arrested in Madrid on the basis of information disseminated by INTERPOL. Subsequently, the Respondent State sent a request for the extradition of the Applicant on 17 December 2018 based on the arrest warrant of 4 April 2018. On 28 January 2019, an additional request was made based on the warrant of arrest dated 27 December 2018.
7. From the foregoing, the Applicant alleges the following violations:
 - i. the freedom of movement in accordance with section 25 of the Benin Constitution, Article 12(2) of the Charter, Article 2 of the Protocol on the Free Movement of Persons, the Right of Residence and Establishment adopted by the States of the Economic Community of West African States; and Article 12 of the ICCPR;
 - ii. the right to liberty and equality before the law in accordance with Articles 2, 3 and 6 of the Charter;
 - iii. the right to dignity and reputation of the Applicant in accordance with Article 5 of the Charter;
 - iv. the right to free elections and to participate in the conduct of public affairs of his country as enshrined in Articles 13 of the Charter and 21 of the UDHR.

III. Summary of the procedure before the Court

8. On 23 April 2019, the Applicant filed the Application and also made a request for provisional measures against the Respondent

State. These were served on the Respondent State.

9. On 10 May 2019, the Applicant transmitted to the Court the decision of the *Audiencia Nacional de Madrid*, according to which the request for his extradition was rejected.
10. By two letters received at the Registry on 17 July 2019 and 9 September 2019, respectively, the Applicant informed the Court that the Respondent State had not suspended the execution of the arrest warrant of 27 December 2018.
11. On 9 September 2019, the Applicant filed an additional application for provisional measures and transmitted to the Court a decision of INTERPOL's File Control Commission and two letters from INTERPOL's Secretary General. By these letters, the Applicant informed the Court that he was no longer subject of a red notice and that his passport information had been erased from the INTERPOL database.
12. The additional request for provisional measures and the two decisions of INTERPOL's File Control Commission were served on the Respondent State, which filed its response to the initial and additional requests.

IV. Jurisdiction

13. In considering any Application, the Court must conduct a preliminary examination of its jurisdiction, pursuant to Articles 3 and 5 (3) of the Protocol and Rule 39 of the Rules of Court (hereinafter referred to as "the Rules").
14. However, as regards the provisional measures, the Court does not have to ensure that it has jurisdiction on the merits of the case, but simply that it has *prima facie* jurisdiction.
15. Article 3(1) of the Protocol provides that "[t]he jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned."
16. According to Article 5(3) of the Protocol, "[t]he Court may entitle relevant Non-Governmental Organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with article 34(6) of this Protocol."
17. The Court notes that the Respondent State is a party to the Charter, the Protocol and has also made the Declaration accepting the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organizations in accordance with Article 34(6) of the Protocol read together with Article 5(3) of

the Protocol.

18. In this case, the Court notes that the rights claimed by the Applicant are all protected by the Charter and the relevant human rights instruments to which the Respondent State is a party, namely, the ICCPR,¹ the ECOWAS² Protocol which are all instruments that the Court is empowered to interpret and apply under Article 3(1) of the Protocol.
19. In the light of the foregoing, the Court concludes that it has *prima facie* jurisdiction to hear the Application.

V. Provisional measures requested

20. Citing Article 27 of the Protocol and Rule 51 of the Rules, the Applicant prays the Court to order the Respondent State to take the following provisional measures:
 - i. suspend its request for extradition with the Spanish authorities;
 - ii. suspend the pending proceedings before the *Cour de Répression des Infractions Économique et du Terrorisme* (the CRIET);
 - iii. cancel the arrest warrant of 27 December 2018 issued in an attempt to regularize his arrest;
 - iv. revoke the decision of 27 August 2018 to cancel his passport and provide him with identification and travel documents enabling him to travel across borders;
 - v. authorize him as well as his political party without delay to take part in the legislative elections of 28 April 2019.
21. In the additional request, the Applicant prays the Court to order the Respondent State “to rescind the Inter-Ministerial Order of 22 July 2019 which deprives the Applicant of numerous administrative documents issued by the Benin authorities, including those relating to his civil status and the exercise of his political rights.”

22. The Court notes that under Article 27(2) of the Protocol and Rule

1 Benin became a Party to the ICCPR on 12 March 1992.

2 Benin signed the ECOWAS Protocol on 29 May 1979. According to Article 13(1), “The Protocol shall enter into force provisionally, upon signature by the Heads of State and Government, and definitively upon ratification by at least seven (7) signatory States in accordance with the constitutional rules of each signatory State.”

51(1) of the Rules it is empowered to make provisional measures not only “in cases of extreme gravity or urgency, and when necessary to avoid irreparable harm to persons” but also “in the interest of the parties or of justice.”

23. In the present case, the Court notes that the request for suspension of extradition by the Spanish authorities has become moot, as the *Audiencia Nacional de Madrid* rejected the request to extradite the Applicant.
24. The Court also notes that the request to allow the Applicant and his political party, without delay, to participate in the legislative elections of 28 April 2019 has been overtaken by events, as these elections have already taken place. Moreover, the Court considers that the Application having been filed a week before the elections, it was materially unable to decide on such a request at such a short period of time. The Court will thus not pronounce itself on this matter.
25. With regard to the request for suspension of the proceedings pending before the CRIET, the Court is of the opinion that this request relates to the merits of the case and is therefore dismissed.
26. With regard to the requests to order the Respondent State to rescind the arrest warrant of 27 December 2018 and the Inter-ministerial order of 22 July 2019 which deprives the Applicant of numerous administrative documents issued by the Respondent State’s authorities, the Court is of the opinion that, in addition to the fact that these claims are connected with the merits of the case, the extreme gravity or urgency has not been demonstrated, as required by Article 27(1) of the Protocol. Both requests are, therefore, dismissed.
27. With regard to the request to order the Respondent State to rescind its decision to cancel the Applicant’s passport of 27 August 2018 and to provide him with identification and travel documents enabling him to cross the border, the Court notes that the Applicant submits as evidence of the cancellation of his passport the following :
 - i. the letter from the Minister of Justice and Legislation dated 27 August 2018 requesting the Minister of the Interior to cancel the Applicant’s passport;
 - ii. Radio-Telephone Message dated 27 August 2018 concerning the cancellation of three passports, including the Applicant’s passport No. B0606668;
 - iii. The detention of a police officer for disclosing two confidential correspondences concerning the cancellation of the Applicant’s passports and those of two other citizens of Benin.

28. The Court notes that the Respondent State does not acknowledge that it cancelled the Applicant's passport and alleges that the evidence provided by the Applicant does not demonstrate that his passport was cancelled. The Respondent State argues that the Applicant's passport is still valid and the Applicant has been using it in his travels outside the country.
29. The Court is of the opinion that the procedure for cancellation of the Applicant's passport was initiated by the letter of the Minister of Justice and Legislation of Benin addressed to the Minister of the Interior requesting the cancellation of the Applicant's passport. The Court considers that the evidence provided by the Applicant and the response of the Respondent State indicate that the said procedure is still pending.
30. The Court considers that given that the Applicant lives abroad, the passport is his main identification or travel document which gives him access to work and public services in general, necessary to his living conditions in his country of residence.
31. The Court therefore considers that the circumstances of this case reveal a situation of urgency and a risk of irreparable harm if the Court were to render a decision favourable to the Applicant on the merits. This is because the procedure for cancelling the passport can be concluded at any time and result in the cancellation of the Applicant's Passport.
32. In the present case, the Court considers it appropriate to grant a provisional measure of stay of the procedure of cancellation of the Applicant's passport.
33. For the avoidance of doubt, this order does not in any way prejudice the conclusions that the Court might draw regarding its jurisdiction, the admissibility and merits of the Application.

VI. Operative Part.

34. For these reasons,
The Court,

Unanimously,

- i. *Finds* that the request for suspension of extradition by the Spanish authorities has been overtaken by events and is moot;
- ii. *Does not* make a finding on the request to allow the Applicant and his political party, without delay, to participate in the legislative elections of 28 April 2019;
- iii. *Dismisses* the request for suspension of the proceedings pending before the CRIET;
- iv. *Dismisses* the request to order the Respondent State to rescind

- the arrest warrant of 27 December 2018;
- v. *Dismisses* the request to order the Respondent State to rescind the Inter-ministerial order of 22 July 2019.

Orders the Respondent State to:

- vi. Stay the procedure of cancellation of the Applicant's passport until the final judgment of this Court;
- vii. Report to the Court within fifteen (15) days of receipt of this Order, on the measures taken to implement it.