

Noudehouenou v Benin (provisional measures) (2020) 4 AfCLR 701

Application 003/2020, *Houngue Eric Noudehouenou v Republic of Benin*
Order (provisional measures), 5 May 2020. Done in English and French, the French text being authoritative.

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

The Applicant brought an action to challenge domestic law introduced to amend the Constitution of the Respondent State alleging that the effect of the amendment was to restrict the rights of citizens to participate in the political affairs of the State. The Applicant also brought this request for provisional measures. The Court granted one of the measures requested.

Jurisdiction (*prima facie*, 17)

Admissibility (conditions for admissibility not applicable, 26-28)

Provisional measures (preventive nature, 41; purpose of provisional measures, 44; urgency, 48-49; irreparable harm, 48-50; political rights, 51, 54)

I. The Parties

1. Mr Houngue Eric Noudehouenou, (hereinafter referred to as the Applicant) is a Benin national, an economist and tax specialist by profession.
2. The Respondent State is the Republic of Benin (hereinafter referred to as the “Respondent State”), which became a party to the African Charter on Human and Peoples’ Rights (hereinafter referred to as “the Charter”) on 21 October 1986 and to the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights on 22 August 2014. It also deposited the Declaration provided for in Article 34(6) of the said Protocol on 8 February 2016, by virtue of which it accepts the Court’s jurisdiction to receive applications from individuals and non-governmental organizations.¹

¹ The Respondent State has also ratified the International Covenant on Civil and Political Rights (ICCPR), and the Economic Community of West African States (ECOWAS) Protocol A/SP1/12/01 on Democracy and Good Governance, additional to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, on 21 December 2001. It has also ratified

3. On 25 March 2020, the Respondent State deposited with the African Union Commission the instrument of withdrawal of the Declaration it had deposited under Article 34 (6) of the Protocol.

II. Effect of the withdrawal of the Declaration by the Respondent State under Article 34(6) of the Protocol

4. The Court recalls that in its judgment in *Ingabiré Victoire v Republic of Rwanda*,² it held that the withdrawal of the Declaration deposited under Article 34 (6) of the Protocol has no retroactive effect and has no bearing on cases pending at the time of notification of the withdrawal, as is the case in the instant Application. The Court also confirmed that any withdrawal of the Declaration does not take effect until twelve (12) months after the instrument of withdrawal has been deposited.
5. With respect to the Respondent State, as the instrument of withdrawal was deposited on 25 March 2020, the withdrawal of the Declaration made under Article 34(6) will take effect on 25 March 2021.

III. Subject of the Application

6. In Application on the merits, the Applicant submits that Law No. 2019-40 of 7 November 7, 2019 on the revision of the Beninese Constitution excludes any Beninese citizen who is not affiliated with a political party from participating in the public affairs of Benin. The said law also institutes sponsorship as a condition for candidacy in presidential elections. This has the effect of calling into question the principle of impartiality and democratic alternation.
7. In addition to this, there is the requirement of a tax returns provided for in the Beninese electoral code, of which the Director of Taxes is the sole issuing authority, and a certificate of compliance with Law No. 2018-23 of 17 September 2018 issued by the Beninese Constitutional Council, which is not provided for in Law No.

the African Charter on Democracy, Elections and Governance (January 30, 2007), ratified by Law No. 2011-18 of 5 September 2011.

2 Application003/2014. Decision of 3/06/2016 on the withdrawal of the Declaration, *Ingabire Victoire Umuhoza v Republic of Rwanda*, § 67

2018-31 of 9 October 2018 governing candidacy documents.

8. The Applicant alleges violations of the following Articles by the Respondent State:
 - i. Articles 21, 2, 7, 8, 10, 18, 19, 20 and 3 of the Universal Declaration of Human Rights of 10 December 1948 (hereinafter the “UDHR”);
 - ii. Articles 25, 2, 14-1, 26, 18, 19 and 7 of the International Covenant on Civil and Political Rights of 16 December 1966 (hereinafter the “ICCPR”);
 - iii. Articles 13, 2, 3, 8, 9, 10, 7, 23 (1) of the African Charter on Human and Peoples’ Rights (hereinafter the “Charter”);
 - iv. Articles 4, 6, 7, 10, 11, 13, 15, 17, 23, 27 and 39 of the African Charter on Democracy, Elections and Governance of 31 January 2007 (hereinafter referred to as the “African Charter on Democracy”);
 - v. Articles 1, 10, and 33 of the Protocol A/SP1/12/01 on Democracy and Good Governance additional to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security of ECOWAS ratified by Law No. 2003-11 of 9 July 2003 (hereinafter referred to as “the ECOWAS Protocol”).
9. The Applicant seeks the following measures on the merits:
 - i. A decision affirming that the violations of the Applicant’s human rights are well-founded and that the Respondent State has violated each of the human rights at issue or the articles of the international instruments mentioned;
 - ii. a decision ordering the Respondent State to take all necessary constitutional, legislative and other measures within one month and before the next elections, to put an end to the violations found and to report to the Court on the measures taken in this regard;
 - iii. a decision ordering the Respondent State to take all measures to guarantee the Applicant, and all Beninese citizens, the right to participate freely and directly in the 2020 communal, municipal, ward and village elections;
 - iv. a decision ordering the Respondent State to take all measures to put an end to all the effects of the violations of which it has been found guilty by this Court in accordance with Chapter “IX Reparation for damage suffered” of United Nations resolution 60/147 of December 16, 2005;
 - v. A decision allowing the Applicant, in view of the urgency of the substantive issues, to make his submissions on reparations for pecuniary and non-pecuniary damages at a later date, within a time limit to be set by the Court;
 - vi. an order that the Respondent State pay the costs of this procedure;
 - vii. an order that the Respondent State pay all costs”.
10. By a separate attached application, the Applicant seeks the

following provisional measures:

- i. Interpret to the Parties Article 13 (1) of the Charter, subject to the assessment of the merits of the provisions of Beninese domestic law in relation to this interpretation
- ii. Order the Respondent State to take all appropriate measures to grant, effectively and without hindrance, the right to run for office to the Applicant and to any Beninese citizen who wishes to run for office as an independent candidate in the communal, municipal, ward and village elections of the year 2020, without being affiliated to any political party;
- iii. Order the Respondent State to take all appropriate measures to allocate elected seats to the Applicant and any Beninese citizen who is an independent candidate, under conditions of equality and non-discrimination;
- iv. Order the Respondent State to take all appropriate measures to issue to the Applicant and to any Beninese citizen the administrative documents required for their candidacies in accordance with the principle of presumption of innocence;
- v. Order the Respondent State to take all appropriate measures to ensure the transparency of the 2020 elections;
- vi. Order the Respondent State to take all appropriate measures to avoid a second post-election crisis in the 2020 elections and to “establish and maintain political and social dialogue, as well as transparency and trust between political leaders and the people, with a view to consolidating democracy and peace” in accordance with Article 13 of the ACDEG.

IV. Summary of the Procedure before the Court

11. On 21 January 2020, the Applicant filed with the Court Registry application on the merits and for provisional measures.
12. On 18 February 2020, pursuant to Article 34(1), the Registry acknowledged receipt of the said application and, in accordance with Article 36 of the Rules of Court, notified them to the Respondent State, with a request to submit its response on provisional measures within fifteen (15) days and on the merits within sixty (60) days.
13. On 28 February 2020, the Registry received from the Applicant additional evidence and pleas concerning the requests on the merits and for provisional measures. The Registry notified the Respondent State on 5 March 2020, with a request to submit its response within eight (8) days from the date of receipt.
14. On 4 March 2020, the Registry also received a letter from the Respondent State requesting an additional fifteen (15) days counting from 3 March 2020, to respond to the requests for

provisional measures. The Respondent State's request was notified to the Applicant on 5 March 2020, for its comments within three (3) days from the date of receipt.

15. On 10 March 2020, the Registry acknowledged receipt of the Respondent State's request for an extension and requested that the Respondent State provide its response on provisional measures within eight (8) days from the date of receipt.
16. On 18 March 2020 the Registry received the Respondent State's response and notified it to the Applicant for his comments.

V. Jurisdiction

17. The Applicant submits, based on Article 27(2) of the Protocol and Article 51 of the Rules, that in matters of provisional measures the Court need not be satisfied that it has jurisdiction over the merits of the case, but merely that it has *prima facie* jurisdiction.
18. Referring further to Article 3(1) of the Protocol, the Applicant submits that the Court has jurisdiction insofar as the Respondent State has ratified the African Charter and the Protocol. It has also deposited the Declaration under Article 34 (6). The Applicant alleges violations of rights protected by other human rights instruments.

19. When an application is submitted to the Court, the Court shall ascertain its jurisdiction, pursuant to Articles 3 and 5(3) of the Protocol and 39 of the Rules of Court (hereinafter "the Rules").
20. Article 3(1) of the Protocol provides that "the 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".
21. Under Article 5(3) of the Protocol, "*The 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*".
22. The Court notes that the Respondent State has ratified the Charter and the Protocol. It has also deposited the Declaration by virtue of which it accepts the jurisdiction of the Court to

receive applications from individuals and Non-governmental organizations in accordance with Articles 34(6) and 5(3) of the Protocol read together.

23. The rights alleged by the Applicant to have been violated are all protected by the Charter, the ICCPR, the ECOWAS Protocol and the UDHR, all of which are instruments that the Court is empowered to interpret and apply under Article 3(1) of the Protocol.³
24. In view of the foregoing, the Court recalls its established jurisprudence that it does not have to satisfy itself that it has jurisdiction on the merits of the case, but that it has *prima facie* jurisdiction⁴.

VI. Admissibility

25. The Respondent State contends that the Application is inadmissible for lack of urgency or extreme gravity and irreparable harm.

26. The Court emphasizes that neither the Charter nor the Protocol stipulates admissibility requirements in respect of provisional measures, the examination of such measures being subject only to *prima facie* jurisdiction, which in the instant case has been established.⁵
27. Article 27(2) of the Protocol and Article 51(1) of the Rules, on which the Respondent State relies to establish the inadmissibility of the Application, are in fact the requirements that allow the Court

3 *Action pour la Protection des Droits de l'Homme v Republic of Côte d'Ivoire*, AfCHPR (Merits)18 November 2016.

4 See Application 058/2019 XYZ *v Republic of Benin* (Provisional measures), 2 December 2019; Application 020/2019 Komi Koutche *v Republic of Benin* (Provisional measures), 2 December 2019; Application 002/2013 *African Commission on Human and Peoples' Rights v Libya* (Provisional measures) 15 March 2013; Application 006/2012 *African Commission on Human and Peoples' Rights v Kenya* (Provisional measures) 15 March 2013 and Application 004/2011 *African Commission on Human and Peoples' Rights v Libya* (Provisional measures) 25 March 2011).

5 See *Sébastien Germain Ajavon v Republic of Benin*, (Provisional measures) 17 April 2020, paragraph 30;

to grant or dismiss a request for provisional measures.⁶

28. The Court notes that it does not examine the admissibility of requested provisional measures. It simply limits itself to examining its *prima facie* jurisdiction. It can therefore not entertain the Respondent State's objection based on lack of jurisdiction.
29. Accordingly, the Court dismisses the objection based on admissibility.

VII. Provisional measures requested

30. The Applicant states in his Application for provisional measures that Article 153-1 of Law No. 2019-40 of 7 November 2019, amending the Beninese Constitution excludes from participation in public affairs any Beninese citizen not affiliated to a political party or who is not a candidate of a political party. He further alleges that this same law creates a new requirement for candidacy, namely, candidates in presidential elections must be sponsored by elected officials. This has the effect of eliminating impartiality and democratic handing-over of power.
31. In addition, there is the requirement of a tax receipt provided for in Benin's electoral code, the issuance of which is the sole responsibility of the Director of Taxes, which is not a guarantee against abuse and arbitrariness. Also required is a certificate of compliance with Law No. 2018-23 of September 17, 2018 issued by the Constitutional Council pursuant to Decision EL 001 of 1 February 2019, which did not exist previously. Accordingly, the Applicant requests the Court to grant the above provisional measures (see paragraph 7).
32. The Applicant alleges, on the one hand, the imminence of the upcoming elections on 17 May 2020 and, on the other hand, the occurrence of irreparable harm. Regarding the imminence of the communal and legislative elections, the Applicant produces minutes of the Respondent State's Cabinet meeting of 22 January 2020, which adopted the decree convening the electoral body for 17 May 2020. He states that the deadline for submitting candidacies for the 17 May 2020 elections is 11 March 2020.
33. The Applicant contends that if no provisional measures are taken in these circumstances, human rights will be violated in the upcoming 2020 elections through the disqualification of independent candidates, the violation of the rights to freedom of association, freedom of expression and the right to equality.

6 See Note 4, paragraph 31.

He further submits, with regard to irreparable harm, that if the elections were to be held despite the alleged violations, and even if the Court were to rule against the State of Benin, the latter would never annul the elections.

34. Finally, he asserts that this situation could lead to serious disturbances leading to loss of life.
35. The Respondent State argues that urgency means “ the nature of a state of affairs which, if not remedied within a short time, is likely to cause irreparable harm “, while extreme gravity is a situation of heightened violence of an exceptional nature justifying the Court’s intervention to put an end to it.
36. The Respondent State therefore concludes that the provisional measures requested are not based on any finding of urgency or extreme gravity.
37. With regard to irreparable damage, the Respondent State notes that it is distinct from damage that is difficult to repair and refers to actions whose consequences cannot be erased, repaired or compensated for.
38. The Respondent State further contends that provisional measures are only possible in exceptional cases, when an applicant is exposed to a real risk of irreparable harm, such as a threat to life or ill-treatment prohibited by international legal instruments or a serious and manifest violation of his or her rights.
39. The Respondent State finally asserts that, in addition to the lack of urgency and irreparable harm, requests for provisional measures, in any case, are considered at the stage of the merits.

40. The Court notes that Article 27(2) of the Protocol provides that “In cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary”.
41. In view of the foregoing, the Court shall take into account the law applicable to provisional measures, which are preventive in nature and do not prejudice the merits of the Application. The Court may only order provisional measures *pendente lite* if the basic requirements are met, namely, extreme gravity or urgency

and the prevention of irreparable harm to persons.

42. The Court recalls that the Applicant has requested six (6) provisional measures, namely:

- i. Interpret to the Parties Article 13 (1) of the Charter, subject to the assessment of the merits of the provisions of Beninese domestic law in relation to this interpretation
- ii. Order the Respondent State to take all appropriate measures to grant, effectively and without hindrance, the right to run for office to the Applicant and to any Beninese citizen who wishes to run for office as an independent candidate in the communal, municipal, ward and village elections of the year 2020, without being affiliated to any political party;
- iii. Order the Respondent State to take all appropriate measures to allocate elected seats to the Applicant and any Beninese citizen who is an independent candidate, under conditions of equality and non-discrimination;
- iv. Order the Respondent State to take all appropriate measures to issue to the Applicant and to any Beninese citizen the administrative documents required for their candidacies in accordance with the principle of presumption of innocence;
- v. Order the Respondent State to take all appropriate measures to ensure the transparency of the 2020 elections;
- vi. Order the Respondent State to take all appropriate measures to avoid a second post-election crisis in the 2020 elections and to “establish and maintain political and social dialogue, as well as transparency and trust between political leaders and the people, with a view to consolidating democracy and peace” in accordance with Article 13 of the ACDEG.

43. It is clear to the Court that the provisional measures requested can be classified into three categories, which it will now examine.

A. Provisional measure relating to the interpretation of Article 13(1) of the Charter

44. The Court observes that in international law provisional measures are measures which, under the seal of urgency, serve to preserve a legal situation or to safeguard rights or interests threatened by the risk of harm.

45. The Court notes that the measure sought by the Applicant is for the Court to interpret a provision of the Charter or to determine the manner in which it is to be applied. The Court is persuaded that this would go beyond its strict litigation function, which is the only one at play in the instant case.

46. Moreover, the request to interpret an article relating to the free participation of citizens in the conduct of public affairs, the violation

of which is alleged by the Applicant, necessarily prejudices the merits of the case. This would lead the Court to examine aspects that it will have to examine at the merits stage of the proceedings.

47. Accordingly, the Court dismisses this request.

B. Provisional measures 2 to 4 on the requirement for independent candidates to be issued administrative documents and other requirements

48. The Court observes that urgency, which is consubstantial with extreme gravity, means that there is an “irreparable and imminent risk of irreparable harm being caused before the Court renders its final decision”. There is therefore urgency whenever “acts likely to cause irreparable harm may occur at any time before the Court makes a final decision in the case”.

49. The Court emphasizes that the risk in question must be real, which excludes the purely hypothetical risk and explains the need to remedy it immediately.

50. With regard to irreparable harm, the Court considers that there must be a “reasonable probability of occurrence” having regard to the context and the Applicant’s personal situation⁷.

51. The Court notes that provisional measures 2 to 4, which relate to political rights, have a special meaning;

52. These rights are protected by Article 2 of the African Charter. It is clearly stated that “Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status “. Furthermore, Article 13(1) of the Charter establishes the general principle in human rights that “Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law”.

53. The Court notes that it is not disputed that as things stand, the Applicant cannot be a candidate in the upcoming communal, municipal, ward and village elections;

54. The Court considers that the risk for him not running in these elections is real, so that the irreparable nature of the resulting

7 See Note 4, paragraphs 61-63.

harm is indisputable.

55. The Court notes, in view of the foregoing, that the requirements stipulated under Article 27(2) of the Protocol have been met.
56. Consequently, the Court orders the Respondent State to take all necessary measures to effectively remove all administrative, judicial and political obstacles to the Applicant's candidacy in the forthcoming communal, municipal, ward, town and village elections.

C. Provisional measures 5 and 6 to ensure the transparency of the 2020 elections and to avoid a post-election crisis in relation to these elections

57. The Court observes that the Applicant does not provide evidence that the 2020 elections will not be transparent, let alone that unrest will occur.
58. The Court declares that it will not grant these requests.
59. This Ruling does not in any way prejudice the findings of the Court on its jurisdiction, the admissibility of the Application and the merits thereof.

VIII. Operative part

60. For these reasons

The Court,

Unanimously,

- i. *Orders* the Respondent State to take all necessary measures to effectively remove all administrative, judicial and political impediments to the candidacy of the Applicant in the upcoming communal, municipal, ward, city or village elections.
- ii. *Requests* the Respondent State to report on the implementation of this Ruling within fifteen (15) days from the date of receipt.
- iii. *Dismisses* all other measures requested.