

Noudehouenou v Benin (provisional measures) (2020) 4 AfCLR 726

Application 003/2020, *Houngue Eric Noudehouenou v Republic of Benin* Order (provisional measures), 25 September 2020. Done in English and French, the French text being authoritative.

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

The Applicant, in this action, challenged certain national measures which he claimed were a violation of his rights to participate in presidential elections and in the management of the public affairs of his country. The Applicant filed this second request for provisional measures on the grounds that the Respondent State had failed to implement the first order for provisional measures. The Court granted part of the provisional measures sought.

Jurisdiction (*prima facie*, 16; ICCPR, 16; UDHR, 16; withdrawal of article 34(6) declaration, 16)

Provisional measures (probability of materialisation of irreparable damage, 28; imminent irreparable harm 33; imminent reprisals, 41)

Procedure (urgent examination of the merits, 35-36; guarantees of non-repetition before merits, 38)

I. The Parties

1. Mr Houngue Eric Noudehouenou, (hereinafter referred to as “the Applicant”) is a national of Benin, an economist and tax expert by training. He is contesting measures which violate his right to participate in the presidential election and the management of the public affairs of his country.
2. The Application is brought against the Republic of Benin (hereinafter referred to as “the Respondent State”), which became party to the African Charter on Human and Peoples’ Rights (hereinafter referred to as “the Charter”) on the 21 October 1986 and the Protocol to the African Charter on Human and Peoples’ Rights on the establishment of an African Court on Human and Peoples’ Rights (hereinafter referred to as “the Protocol”), on 22 August 2014. In addition, on 8 February 2016, it made the Declaration provided for in Article 34(6) of the Protocol by virtue of which it accepted the jurisdiction of the Court to receive applications from individuals and Non-Governmental organisations. However, on 25 March 2020, the Respondent State deposited with the African Union Commission an instrument withdrawing its Declaration.

II. Subject of the Application

3. This request for provisional measures, filed on 25 August 2020, is a follow-up to the Application instituting proceedings and a first request for provisional measures filed on 21 January 2020 as well as to a Supplementary Brief to the first request filed on 4 June 2020. In the Application instituting proceedings, the Applicant seized the Court with allegations of the violation of his right to participate freely in the management of the country's public affairs, in relation to the 2021 presidential election.
4. He recalls that, as a result of the first request for provisional measures, the Court issued a Ruling on 5 May 2020 by which it ordered the Respondent State to take all appropriate measures to effectively remove all obstacles to the Applicant's participation in the forthcoming communal, municipal, neighbourhood, town or village elections. He states that the Respondent State has failed to execute the ruling relating to these elections.
5. He asserts that the alleged violations of this fundamental rights are ongoing as he is still required to be affiliated to a political party, obtain an endorsement from a Member of Parliament and a Mayor, a tax clearance and a certificate of conformity. He states that the requirements are obstacles to his candidacy in the forthcoming presidential election in 2021.

III. Alleged violations

6. In the Application instituting proceedings and the Supplementary Brief, the Applicant alleged the violation of:
 - i. The right to right to participate freely in the management of the public affairs of his country guaranteed under Articles 13(1) of the Charter, 25 of the ICCPR and 21 of the UDHR;
 - ii. The right to freedom of association guaranteed by Articles 13 of the Charter and 20 of the UDHR;
 - iii. The right to freedom of expression guaranteed by Articles 4 and 6 of ACDEG, 25(b) and 19 of the ICCPR, 19 and 21(3) of the UDHR;
 - iv. The principles of democratic change of government and the right of any citizen to be elected to the supreme office guaranteed by Articles 23(5), 17 of ACDEG and 25 of the ICCPR;

IV. Summary of the Procedure before the Court

7. On 21 January 2020, the Applicant filed the Application instituting proceedings together with a request for provisional measures. The Application and the request were served on the Respondent

State on 20 February 2020 and to other entities provided for in Rule 35 of the Rules.

8. On 5 May 2020, the Court issued a first Order for Provisional Measures. The order was duly served on the Parties.
9. On 4 June 2020, the Applicant filed a Supplementary Brief which was served on the Respondent State on 11 June 2020.
10. On 25 August 2020, the Applicant filed a second request for provisional measures, which was served on the Respondent State on 1 September 2020 for its observations within fifteen (15) days from the date of receipt.
11. At the expiry of the afore-mentioned deadline, the Respondent State did not respond to the second request for provisional measures.

V. *Prima facie* jurisdiction

12. On the basis of Article 27(2) of the Protocol and Rule 51(1) of the Rules, the Applicant asserts that with regard to provisional measures, the Court need not be satisfied that it has jurisdiction on the merits of the case, but simply that it has jurisdiction *prima facie*.
13. Referring further to Article 3(1) of the Protocol, the Applicant argues that the Court has jurisdiction insofar as the Respondent State has ratified the Charter and the Protocol and that it has also made the Declaration provided for in Article 34(6) of the Protocol. The Applicant states that, the Respondent State's withdrawal of the Declaration will only take effect from 26 March 2021.
14. Lastly, the Applicant argues that he alleges violations of rights protected by human rights instruments to which the Respondent State is a party.

15. 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".
16. Rule 39(1) of the Rules stipulates that "the court shall conduct preliminary examination of its jurisdiction..." However, with regard to provisional measures, the Court does not have to ensure that it

has jurisdiction over the merits of the case, but simply has *prima facie* jurisdiction.¹

17. In the instant case, the Applicant's rights allegedly violated are all protected by the Charter, the International Covenant for Civil and Political Rights (ICCPR), the Universal Declaration of Human Rights (UDHR), which are instruments that the Court is empowered to interpret and apply under Article 3(1) and 7 of the Protocol.
18. The Court notes, as recalled in paragraph 2 above, that on 25 March 2020, the Respondent State filed an instrument withdrawing its Declaration deposited in conformity with Article 34(6) of the Protocol. The Court recalls, however, in reference to its order for provisional measures of 05 May 2020 and the corrigendum of 29 July 2020, that the withdrawal of the Declaration does not have any retroactive effect and has no bearing on cases pending before it as it only takes effect on 26 March 2021.² Consequently, the Court finds that the said withdrawal will, in no way, affect the personal jurisdiction of the Court in the instant case.
19. The Court therefore concludes that it has jurisdiction *prima facie* to hear the application for provisional measures.

VI. Provisional measures requested

20. The Applicant prays the Court to order the following provisional measures:
 - i. order the Respondent State to take all appropriate measures to effectively remove all legal, administrative, political and other obstacles to the Applicant's effective participation in the 2021 presidential election as a candidate, in his country.
 - ii. impose on the Respondent State, in favour of the Applicant, interest on the present award to be pronounced by this Court, for a monthly sum of 500,000,000 CFA francs for each month of delay in execution and for each month of default execution of the order of this Court, until the full and perfect execution of the said order pronounced by this Court;
 - iii. order all guarantees of non-repetition that the Court deems useful, including but not limited to the following:
 - a. order the Respondent State to bring to justice any person who objects to this Court order

1 *Komi Koutche v Republic of Benin*, ACtHPR, Application 020/2019, Ruling on provisional measures of 2 December 2019.

2 *Houngue Eric Noudehouenou v Republic of Benin*, ACtHPR, Application 003/2020, Ruling on provisional measures of 5 May 2020 and corrigendum of 29 July 2020.

- b. declare and rule that the Assembly of Heads of State of the African Union as well as any competent organ of the African Union and of the United Nations, can examine cases *proprio motu*, in the event of violation of the Court decision, to enforce or have enforced individual and collective sanctions against the Respondent State and all its employees involved in violation of the decisions of this Court;
- iv. rule on the merits in emergency procedure and shorten the time limits granted to them;
- v. order the Respondent State to take all measures to prevent the Applicant, his family and his counsel from reprisals, in any form whatsoever, on the ground of this matter and/or from the persons implicated.

- 21. The Applicant argues that there is fear of irreparable damage and an urgency insofar as the alleged violations are ongoing and the deadline for submitting candidacy files is set for 19 January 2021.
- 22. He further explains that the provisional measures are also justified in the interests of justice because the Respondent State has not complied with the Order for Provisional Measures in Application 062/2020 *Ajavon Sébastien v Benin* .of 17 April 2020 to suspend the holding of the 2020 municipal and legislative elections and the Order for Provisional Measures in Application 003/2020 of 5 May 2020 ordering the Respondent State to remove the obstacles to his candidacy for said election.
- 23. In terms of the measures concerning the application of interests and the guarantee of non-repetition, he explains that they are justified as they will spare him the irreparable damage linked to the certainty that the Respondent State will not comply with the measures taken, as was the case with the other orders.

- 24. 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”.

25. The Court observes that it is up to it to decide in each individual case whether, in the light of the particular circumstances of the case, it should exercise the jurisdiction conferred on it by the above provisions.
26. The Court recalls that urgency, consubstantial with extreme gravity, refers to a real and imminent risk being caused before it renders its final decision.³
27. The court underscores that the risk in question must be real, which excludes any risks that are purely hypothetical, and explains the need to remedy it forthwith.⁴
28. With regard to irreparable damage, the Court considers that the probability of its materialization should be reasonable, having regard to the context and the personal situation of the Applicant.⁵
29. The measures requested will be examined in the light of the foregoing.

A. Measure aimed at effectively removing all judicial, administrative, political and other obstacles to the presidential election

30. The Court notes that the fact that it is undisputed that the Applicant could not, in the current state of the instruments in force, present his candidacy for the next presidential election.
31. The Court recalls the provision of Article 13(1) of the Charter which provides that “[e]very citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives”.
32. The Court notes that to enjoy such a right in the current legal framework on presidential elections in force as in the Respondent State, the candidate must have all the documents that constitute the candidacy file and must submit them before the deadline of 21 January 2021.
33. The Court therefore considers that there is urgency in the instant case given that the 2021 presidential electoral process is imminent and the risk for the Applicant not participating as a candidate for the election is real, so that there is indisputably imminent irreparable damage.

3 *Ajvon Sébastien v Republic of Benin*, ACTHPR, Application 062/2019, Ruling on provisional measures of 17 April 2020, § 61.

4 *Ibid* §62.

5 *Ibid* §63.

34. Accordingly, it orders the Respondent State to take all the necessary measures to effectively remove any administrative, judicial, political and other obstacles to the Applicant's candidacy for the forthcoming presidential election in 2021.

B. Measure concerning the urgent examination of the merits of the case

35. The Court observes that the procedure for urgent examination of the merits of the application is neither provided for by the Protocol nor by the Rules of Court.

36. The Court notes that although in practice it has generally adopted a case-by-case approach in applying time limits and the priority in examination of applications, it does so in application of its discretionary judgment in the interest of justice.

37. Accordingly, the Court declares this request moot and dismisses it.

C. Imposition of interest and guarantees of non-repetition

38. The Court observes that the measures requested presupposes that the Respondent State is liable for the alleged violations. This should be addressed during the proceedings on the merits.

39. The Court notes that the said measures prejudice the merits since they would necessarily lead the Court to examine the aspects which it will have to examine under the proceedings on the merits.

40. Accordingly, the Court dismisses the request.

D. Measures to prevent the Applicant, his family and his counsel from reprisals

41. The Court observes that the Applicant did not provide evidence of real and imminent reprisals against his person, his family and his counsel. Neither does he establish the urgency of such measures.

42. The Court therefore does not see the need to order the measure requested and therefore dismisses it.

43. For the avoidance of doubt, this Order is provisional and does not prejudice in any way the decisions that the Court may take on its jurisdiction, on admissibility and on the merits of the Application.

VII. Operative part

44. For these reasons,

The Court,

Unanimously,

- i. *Orders* the Respondent State to take all necessary measures to effectively remove any administrative, judicial and political obstacles to the Applicant's candidacy in the forthcoming presidential election in 2021.
- ii. *Dismisses* all the other measures requested.
- iii. *Orders* the Respondent State to report to the Court within thirty days of notification of this Ruling, on the measures taken to implement the order.