

Noudehouenou v Benin (provisional measures) (2020) 4 AfCLR 734

Application 028/2020, *Houngue Eric Noudehouenou v Republic of Benin*
 Ruling (provisional measures), 27 November 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, who alleged that domestic laws amending the constitution of the Respondent State amounted to a violation of his Charter protected rights, brought this application for provisional measures to prevent or stay criminal proceedings likely to lead to a violation of his right to liberty and for urgent consideration of the merits of his case. The Court dismissed the application for provisional measures.

Jurisdiction (*prima facie*, 15, 20; effect of withdrawal of Art 34(6) Declaration, 19)

Provisional measures (evidence of risk, 35; hypothetical risk, 35; moot prayer, 39)

Procedure (prioritisation of cases on cause list, no procedure under Protocol or Rules, 41-42)

I. The Parties

1. Mr Houngue Eric Noudehouenou, (hereinafter referred to as “the Applicant”) is a national of Benin. He is seeking orders of provisional measures to stay all criminal proceedings, to prevent the deprivation of his liberty, for an urgent review of the merits of his case and imposition of a penalty for any delay in execution of the decision of the Court.
2. The Application is filed 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 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 (hereinafter referred to as “the Protocol”) on 22 August 2014. Furthermore, on 8 February 2016, the Respondent State deposited the Declaration provided for under Article 34(6) of the Protocol (hereafter referred to as “the Declaration”) through which it accepted the jurisdiction of the Court to receive applications filed by individuals and Non-Governmental Organisations having

observer status with the African Commission on Human and Peoples' Rights. On 25 March 2020, the Respondent State deposited with the African Union Commission an instrument withdrawing the said Declaration. The Court has held that this withdrawal does not have any bearing on pending or the new cases filed before the withdrawal takes effect, that is, a year after the withdrawal of the Declaration, that is, 26 March 2021.¹

II. Subject of the Application

3. In his request for provisional measures, the Applicant states that he had filed with the Court an Application on the merits to challenge on one hand, Law no. 2018-02 of 2 July 2018 amending and supplementing Organic Law No. 94-027 of 18 March 1999 on the Supreme Judicial Council and on other hand, the finding in Decision DCC 18-141 of 18 June of the Constitutional Court of Benin which declared that the said law was in conformity with the Constitution.
4. The Applicant states that, as a result of the referral of his case to this Court, the Respondent State intends to implement against him and his Counsel the provisions of Article 410 of the Benin Criminal Code, whereby anyone who publicly, by acts, words or writings, seeks to discredit a judicial act or decision in conditions likely to undermine the authority of the judiciary or its independence is liable to imprisonment and a fine.
5. Fearing for his own freedom, that of his family and of his Counsel, the Applicant requests the Court to order a number of provisional measures.

III. Alleged violations

6. In the Application on the merits, the Applicant alleges:
 - i. Violation of the Independence of the judiciary protected by Article 26 of the Charter, Articles 2 and 14(1) of the ICCPR, Articles 10 and 30 of the Universal Declaration of Human Rights (UDHR) and Articles 1(h) and 33 of the ECOWAS Protocol on Democracy.
 - ii. Violation of the Magistrates' right to strike protected by Articles 9, 10 and 11 of the Charter

¹ *Houngue Eric Noudehouenou v Republic of Benin*, ACtHPR, Application 003/2020, Ruling of 5 May 2020 (provisional measures) §§ 4-5 and corrigendum of 29 July 2020.

- iii. Violation of the right to remedies provided for under Article 56(5) of the Charter, Article 8 of the UDHR, and Article 1(h) of the ECOWAS Protocol;
- iv. Violation of right to freedom of the means of communication protected by Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR).

IV. Summary of the Procedure before the Court

7. The Application on the merits was filed on 17 September 2020, and the Request for provisional measures was subsequently filed on 28 September 2020.
8. The Application and the Request were served on the Respondent State on 15 October 2020 for its Response on the merits within sixty (60) days and observations on the Request for provisional measures within fifteen (15) days of receipt of the notification. The Application and the Request were also transmitted to the other entities provided for under Rule 42(4) of the Rules on 15 October 2020.
9. The Respondent State submitted its observations on the request for provisional measures on 30 October 2020.

V. *Prima facie* jurisdiction

10. The Applicant asserts pursuant to Articles 27(2) of the Protocol and Rule 51 of the Rules,² that in matters of provisional measures, the Court need not be satisfied that it has jurisdiction on the merits of the case but merely, that it has *prima facie* jurisdiction.
11. Referring further to Article 3(1) of the Protocol, the Applicant asserts that the Court has jurisdiction in so far as, on the one hand, the Republic of Benin has ratified the African Charter, the Protocol and made the Declaration, and on the other, he alleges violations of the rights protected by human rights instruments.
12. The Applicant further argues that although the Respondent State withdrew its Declaration on 25 March 2020, the withdrawal does not take effect until 26 March 2021.
13. The Respondent State has not filed a response to this point.

2 Rules of Court, 2 June 2010 (Rule 59 of the Rules of Court of 25 September 2020).

14. 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, the Protocol and any other relevant human rights instrument ratified by the States concerned.”
15. Rule 49(1) of the Rules³ provides that “[t]he Court shall ascertain its jurisdiction ...” However, with respect to provisional measures, the Court need not ensure that it has jurisdiction on the merits of the case, but merely that it has *prima facie* jurisdiction.⁴
16. In the instant case, the rights alleged to have been violated are all protected by human rights instrument ratified by the Respondent State.
17. The Court further notes that the Respondent State has ratified the Protocol and deposited the Declaration prescribed under Article 34(6) of the Protocol.
18. The Court observes, as stated in paragraph 2 of the present Ruling, that on 25 March 2020, the Respondent State deposited an instrument of withdrawal of its Declaration.
19. The Court also recalls that it has held that the withdrawal of a Declaration filed in accordance with Article 34(6) of the Protocol has no retroactive effect, and has no bearing on pending cases and new cases filed before the withdrawal comes into effect⁵ as is the case in the present matter. The Court reiterated this position in its Order of 5 May 2020, *Houngue Eric Noudehouenou v Republic of Benin*,⁶ and held that the Respondent State’s withdrawal of the Declaration will take effect on 26 March 2021. Accordingly, the Court concludes that said withdrawal does not affect its personal jurisdiction in the present case.
20. From the foregoing, the Court finds that it has *prima facie* jurisdiction to hear the present Application for provisional measures.

3 Formerly Rule 39(1) of the Rules of Court, 2 June 2020.

4 *Komi Koutche v Republic of Benin*, ACTHPR, Application 020/2019, Order of 2 December 2019 (provisional measures) § 11.

5 *Ingabire Victoire Umuhoza v Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR 562 § 67.

6 *Houngue Eric Noudehouenou v Republic of Benin*, ACTHPR, Application 003/2020, Ruling of 5 May 2020 (provisional measures) §§ 4- 5 and corrigendum of 29 July 2020.

VI. Provisional measures requested

- 21.** The Applicant seeks the following orders on provisional measures:
- i. Order the Respondent State to take all necessary measures to ensure his effective protection and that of his counsel, including a stay of all criminal proceedings and suspension of imprisonment for challenging domestic decisions before the Court on the grounds of human rights violations, once the Court's ruling is delivered and to report to the Court within ten days of the delivery of the Court's ruling, on the measures taken.
 - ii. Order the Respondent State to comply with the Court's decision of 6 May 2020, Application 004/2020, and to take all necessary measures to ensure that the Applicant is not unlawfully and/or arbitrarily deprived of his freedom and to report to the Court within ten days of delivery of the ruling;
 - iii. As much as possible, it is the Court's discretion to hear the case on the merits under urgent procedure;
 - iv. Impose on the Respondent State, in the Applicant's favour, a monthly sum of FCFA 500,000,000 for each month of delay in execution and for each month of non-execution of the order to be pronounced by the Court, until the said order is fully executed.
- 22.** To buttress his Application, the Applicant states that Article 410 of the Criminal Procedure of Benin provides for imposition of a prison sentence and a fine on anyone who publicly, by acts, words or writings, seeks to discredit a judicial act or decision in a manner likely to undermine the authority of the judiciary or its independence.
- 23.** The Applicant claims that, as a result of the case it brought before the Court, *inter alia*, to denounce the violation of the independence of the Constitutional Court of Benin by Decision DCC 18-141 of 18 June 2018, the Respondent State intends to implement, at any time, the above-mentioned penal provision against him and his counsel.
- 24.** The Applicant submits that he is constantly being threatened with arrest by the Respondent State in order to compel him to withdraw his complaints and to refrain from exercising remedies at both national and international levels. He argues that the evidence of these threats is, *inter alia*, contained in briefs filed by the Respondent State in cases under consideration before this Court and the ECOWAS Court of Justice.
- 25.** The Applicant also claims that members of his family are also being intimidated.
- 26.** The Applicant asserts that the implementation of the above-mentioned penal provision will have harmful consequences insofar as he and his counsel are concerned. The effect will be

that of condemning them and denying them of their liberty while they have simply exercised their rights of recourse provided for in the Charter. The Applicant submits that this would also affect his ability to argue the cases he has filed before this Court.

27. The Applicant therefore submits that the conditions of urgency and irreparable harm provided for in Article 27 (2) of the Protocol have been fulfilled, justifying the provisional measures sought.
28. The Respondent State contends that Article 410 of the Criminal Procedure referred to by the Applicant does not punish the exercise of the right to bring cases, but rather statements designed to discredit the Beninese judiciary.
29. The Respondent State asserts that, in any event, neither the Applicant nor his counsel is subject to criminal proceedings, let alone detention, for filing the Application before this Court. The Respondent State therefore submits that the request for provisional measures should be dismissed.

30. 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.”
31. The Court notes that it decides on a case by case basis whether, in light of the particular circumstances of a case, it should exercise the jurisdiction conferred on it under the above provisions.
32. The Court recalls that urgency, which is consubstantial with extreme gravity, means a “real and imminent risk will be caused before it renders its final judgment.”⁷ The risk in question must be real, which excludes purely hypothetical risk and explains the need to remedy it in the immediate future.⁸
33. As regards irreparable harm, the Court considers that there must be a “reasonable probability of occurrence” having regard to the context and the Applicant’s personal situation.⁹

7 *Sebastien Ajavon v Republic of Benin*, ACTHPR, Application 062/2019, Order (provisional measures) of 17 April 2020, § 61.

8 *Ibid*, § 62.

9 *Ibid*, § 63.

34. The prayers of the Applicant will be examined in light of the above.

A. Prayer for protective measures and stay of all criminal proceedings stemming from the filing Application 028/2020

35. The Court observes that the Applicant has not adduced evidence as to the reality or even the imminence of criminal proceedings against him and his counsel for bringing his case before the Court. Furthermore, he has not adduced any evidence of intimidation towards his family members. The Court notes thus, that the Applicant's allegations are hypothetical.

36. The Court therefore considers that there is no need to grant the request sought and dismisses it.

B. Application for measures against any deprivation of liberty, in compliance with the Order for Provisional Measures of 6 May 2020, Application 004/2020

37. The Court notes that on 6 May 2020, in Application 004/2020, *Houngue Eric Noudehouenou v Republic of Benin*, it issued an order for provisional measure as follows:¹⁰

Orders the Respondent State to stay execution of the judgment of 25 July 2019 of the Court for Repression of Economic Crimes and Terrorism against the Applicant, Houngue Eric Noudehouenou, until the final Judgment of this Court.

38. The Court observes that the respondent State does not dispute that the judgment of 25 July 2019 was not executed.

39. Thus, given that the stay of execution of the ten-year imprisonment sentence is still in effect, the prayer sought herein is moot.

40. Accordingly, the Court dismisses this particular request.

C. Prayer to order urgent review of the merits of the case

41. The Court points out that the procedure for urgent examination of the merits of an application is not provided for in the Protocol or in the Rules of Court.

42. The Court notes that while in its practice it has generally adopted a case by case approach according to the priorities for examining

¹⁰ *Houngue Eric Noudehouenou v Republic of Benin*, ACtHPR, Application 004/2020, Ruling of 6 May 2020 (provisional measures) §§ 73 and corrigendum of 29 July 2020.

applications, it does so by exercising its discretion in the interests of justice. The Court notes that an examination of the merits of the case is not urgent in the instant case.

43. Accordingly, the Court declares that the request herein is baseless and dismisses it.

D. Prayer for imposition of penalty for delay in execution of the decision of Court

44. The Court observes that the measure sought presupposes that the Court would grant the order for provisional measures requested.
45. The Court notes that since the other measures requested have been dismissed, this request is dismissed as well.
46. For the avoidance of doubt, this Order is provisional in nature and does not in any way prejudge the findings of the Court on its jurisdiction, on the admissibility of the Application and the merits thereof.

VII. Operative part

47. For these reasons,
The Court,
Unanimously,

- i. *Dismisses*, the Applicant's request for provisional measures