Johnson v Ghana (provisional measures) (2017) 2 AfCLR 155

Application 016/2017, *Dexter Eddie Johnson v Republic of Ghana*

Order, 28 September 2017. Done in English and French, the English text being authoritative.

Judges: ORE, KIOKO, NIYUNGEKO, GUISSE, BEN ACHOUR, BOSSA, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA and BENSAOULA

The Applicant had been convicted of murder and sentenced to death in 2008. He argued that the mandatory death penalty violated the African Charter. At his request, the Court issued provisional measures to the Respondent State to refrain from executing the death penalty until the Application was heard and determined.

Provisional measures (death penalty, 16, 18)

Separate Opinion (1): NIYUNGEKO and BEN ACHOUR

Procedure (time for state to report on implementation, 2, 11, 12)

Separate Opinion (2): MUKAMULISA and BENSAOULA

Procedure (time for state to report on implementation, 7)

I. The Parties

1. The Application is filed by Mr Dexter Eddie Johnson, (hereinafter referred to as "the Applicant), a dual Ghanaian and British national, against the Republic of Ghana (hereinafter referred to as "the Respondent").

2. The Respondent became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 1 March 1989, 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 16 August 2005. It deposited, on 10 March 2011, a declaration under Article 34(6) of the Protocol, accepting the jurisdiction of the Court to receive cases from individuals and Non-Governmental Organisations. Furthermore, the Respondent became a party to the International Covenant on Civil and Political Rights (hereinafter referred to as "the Covenant"), on 7 September 2000.

II. Subject of the Application

3. The Applicant states that he was convicted of murder and

sentenced to death on 18 June 2008.[1] The Court of Appeal and the Supreme Court of Ghana confirmed the conviction and sentence on 16 July 2009 and 16 March 2011, respectively. The Applicant remains on death row awaiting execution.

4. The Applicant alleges, *inter alia*, that the imposition of the mandatory sentence of death, without consideration of the individual circumstances of the offence or the offender, violates:

"a. The right to life under Article 4 of the Charter;

b. The prohibition of cruel, inhuman or degrading treatment or punishment under Article 5 of the Charter;

c. The right to a fair trial under Article 7 of the Charter;

d. Article 1 of the Charter, by failing to give effect to the aforementioned rights;

e. The right to life under Article 6(1), the right to protection from inhuman punishment under Article 7, the right to a fair trial under Article 14(1) and the right to a review of sentence under Article 14(5) of the Covenant; and

f. The right to life under Article 3, and the prohibition of cruel, inhuman or degrading treatment or punishment under Article 5 of the Universal Declaration of Human Rights (hereinafter referred to as "the Universal Declaration")."

III. Procedure

5. The Application was filed at the Registry of the Court on 26 May 2017.

6. Pursuant to Rule 36 of the Rules of Court, (hereinafter referred to as "the Rules"), by a notice dated 22 June 2017, the Registry served the Application to the Respondent drawing attention to the request for provisional measures and indicating that the Respondent could respond to the same within fifteen (15) days should they so wish. The Respondent was also requested to communicate the names and addresses of its representatives within thirty (30) days and respond to the Application within sixty (60) days of receipt of the notice. The Respondent is yet to comply with these instructions.

IV. Jurisdiction

7. In dealing with an Application, the Court has to ascertain that it has jurisdiction on the merits of the case.

1 By the Fast Track High Court in Accra.

8. However, in ordering provisional measures, the Court need not satisfy itself that it has jurisdiction on the merits of the case, but simply needs to satisfy itself, *prima facie*, that it has jurisdiction.[2]

9. 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".

10. The Court notes that the rights alleged to have been violated are guaranteed under Articles 1, 4, 5 and 7 of the Charter, Articles 6(1), 7, 14(1) and 14(5) of the Covenant and Articles 3 and 5 of the Universal Declaration.

11. As indicated in paragraph 2 of this Order, the Respondent became a Party to the Charter on 1 March 1989, to the Protocol on 16 August 2005 and deposited on 10 March 2011, a Declaration accepting the competence of the Court to receive cases from individuals and Non- Governmental Organisations. Furthermore, the Respondent became a party to the Covenant on 7 September 2000.

12. In light of the foregoing, the Court concludes that it has *prima facie* jurisdiction to hear the Application.

V. On the provisional measures requested

13. The Applicant has requested the Court for:

"i. An order that the Respondent shall not carry out the execution of the Applicant while his application remains pending before the Court; and

ii. An order that the Respondent shall report to the Court within 30 days of the interim order on the measures taken for its implementation."

14. Under Article 27(2) of the Protocol and Rule 51(1) of the Rules, the Court is empowered to order provisional measures *"*in cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons …" and *"*… which it deems necessary to adopt in the interest of the Parties or of justice".

15. It is for the Court to decide whether to issue provisional measures depending on the circumstances of each case.

16. The Applicant is on death row and it appears from this Application

2 See Application 002/2013 *African Commission on Human and Peoples' Rights v Libya* (Order for Provisional Measures)(15 March 2013) and Application 006/2012 *African Commission on Human and Peoples' Rights v Kenya* (Order for Provisional Measures) (15 March 2013); Application 004/2011 *African Commission on Human and Peoples' Rights v Libya* (Order for Provisional Measures) (25 March 2011).

that there exists a situation of extreme gravity and urgency, as well as a risk of irreparable harm to the Applicant.

17. Given the circumstances of this case, where the risk of execution of the death penalty will jeopardise the enjoyment of the rights guaranteed under Articles 4, 5 and 7 of the Charter, Articles 6(1), 7, 14(1) and 14(5) of the Covenant and Articles 3 and 5 of the Universal Declaration, the Court has decided to exercise its powers under Article 27(2) of the Protocol.

18. The Court consequently, finds that the situation raised in the present Application is of extreme gravity and represents a risk of irreparable harm and that the circumstances require that an order for provisional measures be issued, in accordance with Article 27(2) of the Protocol and Rule 51 of the Rules, to preserve the *status quo,* pending the determination of the main Application.

19. The Court recalls that the measures it will order will necessarily be provisional in nature and will not in any way prejudge the findings it might make on its jurisdiction, the admissibility of the application and the merits of the case.

20. For the avoidance of doubt, this order shall not in any way prejudice any findings the Court shall make regarding its jurisdiction, the admissibility and merits of the Application.

21. For these reasons,

The Court,

Orders the Respondent to:

Unanimously,

i. refrain from executing the death penalty against the Applicant until the Application is heard and determined.

By a vote of seven (7) for and four (4) against, Justices Gérard NIYUNGEKO, Rafâa BEN ACHOUR, Marie-Thérèse MUKAMULISA and Chafika BENSAOULA dissenting,

ii. report to the Court within sixty (60) days from the date of receipt of this Order, on the measures taken to implement this Order.

(Partly) Dissenting Opinion: NIYUNGEKO and BEN ACHOUR

1. We voted for the provisional measure to “refrain from executing the death penalty against the Applicant until the Application is heard

and determined".[1] This is because we are convinced about the absolute necessity and urgency of such an order. The Court did well, and on this, we are in perfect agreement that the "situation raised in the present Application is of extreme gravity and represents a risk of irreparable[2] harm" if no action is taken to preserve the *status quo*.

2. That said, we do not share the decision to grant the Respondent State sixty (60) days to report to the Court on the measures taken to implement its decision.[3] In our understanding, this is too long a time limit, and it is not more reasonably defensible than its inconsistency is unwarranted.

3. We note straight away, that the Application was received at the Court Registry on 26 May 2017, and that, unlike other Applications by persons on the death row, it was the Applicant himself who requested an order for provisional measures. In actual fact, unlike other cases, the Court did not take the initiative to pronounce provisional measures on its own accord as authorized by Article 27(2) of the Protocol and Rule 51(1) of its Rules. Upon receipt of the Application, the Court gave the Respondent State sixty (60) days within which to respond to the Application. The latter did not react.

4. Our opinion is presented from two perspectives: firstly, we shall explain why the sixty (60) days' time limit is illogical and unreasonable (I); and secondly, we shall point to the Court's unwarranted inconsistency with regard to time limits when it comes to implementing Rule 51(5) of our Rules (II).

I. Unreasonable time limit

5. To start with, it should be made clear that any such time limit is always counted from the date of receipt of the Court's Order by the Respondent State, rather than from the date of delivery of the said Order by the Court, a provision which protects the Respondent State from any surprises.

6. It should also be emphasized that, by definition, the provisional measures concerned are emergency measures which must be taken quite speedily. Thisplaces the Respondent State in a situation whereby it has to give priority to implementation of the measures in question; measures which must be taken as quickly as possible.

7. Having said that, the question as to how much time a Respondent State should be allowed to report on the measures taken to comply

1 Para (a) of the operative provisions.

2 Para 8.

3 Para (b) of the operative provisions.

with an Order of Court is always a topical one.

8. In deciding to issue an Order for Provisional Measures either in the interest of the Parties or in the interest of justice, the Court must do so with firmness to avoid criticism regarding the immediate and urgent applicability of such measures. Firmness is all the more necessary when it comes to measures aimed at protecting the fundamental right to life,[4] as in this case, to prevent the Applicant subject to capital punishment, from being executed even when the proceedings are pending before the Court.

9. In general, however, it may be said that in granting such a time limit to the Respondent State, the Court's main objective is to give the latter time to put the appropriate measures in place.

10. With regard to this objective, the extent of the time limit will certainly depend on the nature of the measures expected. If, for example, the time is intended for the Respondent State to initiate a legislative process or other similar process, it is obvious that the Respondent State will need a relatively long time to complete the process. If, on the other hand, it is simply a matter of refraining from doing something or of doing something easy, such as allowing the Applicant access to medical care or a lawyer or to receive visits from members of his family, then the Respondent State does not need much time to comply with the Court Order.

11. In the instant case, the Court did not order the Respondent State to urgently enact a law for retroactive abolition of the death penalty or to retry the Applicant, which would have required much time. All that the Court orders is for the Respondent State to temporarily suspend execution of the death sentence imposed on the Applicant by the domestic court, pending the Court's decision on its jurisdiction, admissibility of the Application and on the merits of the case.

12. To ensure that the sixty (60) days' time limit granted meets the logic inherent in the urgency of the provisional measures, it was necessary to take into account the means which the Respondent State must deploy to stay execution of a person under death sentence who, besides, is "on the death row awaiting execution".

4 A right protected by Article 4 of the Charter: "Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right", and by Article 6 of the International Covenant on Civil and Political Rights: 1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life. 2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court."

13. In this respect, it seems judicious to recall that, in this matter, the principle is that of immediate stay of execution and to the minute, and that no derogation is effective. By way of illustration, the European Court of Human Rights, in a Judgment issuing provisional measures, strongly reaffirmed that when life and health are at stake, even "*diplomatic assurances*" are ineffective and application of the provisional measure is immediate, urgent and to the minute.[5]

14. Admittedly, under the procedure before this Court and by virtue of Rule 37 of its Rules, the Respondent State has sixty (60) days to respond to an Application filed against it; but to give the same *quantum* when it is comes to informing the Court of the execution of measures to prevent occurrence of unforeseeable, extremely serious violations with irreparable consequences, does not seem logical to us.

15. If in the first case (production of defense brief) the Respondent State must have sixty (60) days to investigate the case, search for, collect and establish the evidence for its claims, this is not the case with regard to this Order.

16. For these reasons, it is our view that the decision to grant the party performing the provisional measure sixty (60) days is neither logical nor reasonable.

II. Time limits of unwarranted inconsistency

17. A global overview of the provisional measures so far issued by the Court reveals that, while the legitimacy of the said measures does not call for comment on our part, justification of the *quantum* of the time limits allowed for the State to submit its report suffers from an unwarranted variation.

18. It is noteworthy that the said time limits oscillate between fifteen (15),[6] thirty (30)[7] and sixty (60) days as in the instant case. Admittedly, the Judge has in this domain a broad power of evaluation in as much as Rule 51 of the Rules in paragraphs 1 and 5 does not spell out cases of necessity, nor does it prescribe a particular time limit. The Rule in question confines itself to stating that: "the Court may … prescribe to

5 *Othman v United Kingdom* ECHR, Fourth Section, 17 January 2012, No. 8139/09, paras 148, 151, 170 and 180). See also *Marcellus S Williams, Petitioner v Cindy Griffith*, *Warden* Supreme Court of the United States, decision suspending execution of the death penalty was followed with immediate effect even though execution of the convict was already scheduled for the very evening of the day of the delivery of stay of execution decision and a report thereon followed.

6 See Order of 25 March 2011, *African Commission on Human and Peoples' Rights v Great Libyan Arab Jamahiriya*; Order of 15 March 2013, *African Commission on Human and Peoples' Rights v Republic of Kenya*.

7 See Order of 18 March 2016, *Armand Guehi v United Republic of Tanzania*.

the Parties any interim measures which it deems necessary to adopt in the interest of the Parties or of justice" and that it may, in addition, "invite the Parties to provide it with information on any issue relating to implementation of the interim measures adopted by it."

19. In light of the foregoing provisions, we believe that in determining the time limit contemplated in paragraph 5 of Rule 51, the Court should take into account certain parameters, including *inter alia,* the very nature of the measure, the degree of implementation or the imminence of the irreparable harm, the attitude of the party performing the provisional measure and the degree of the latter's cooperation in moving forward the procedure.[8]

20. Also to be taken into account is whether or not implementation of the provisional measure requires involvement of other third Parties or whether the implementation involves outside elements, etc.

21. All in all, do the fluctuations of time limits really take into account all the endogenous and exogenous elements inherent in the implementation of the measure dictated by the Court? If not, how does one understand the sixty (60) days' time limit decided in the instant Order?

22. In this case, it must also be said that the Order does not take into account the interest of justice and the need for the performing party to maintain the *status quo* until the conclusion of the proceedings pending before the Court. This is so because the Court's interest in monitoring execution of its decision is emptied of all its substance. The time limit lacks proportionality because it diminishes the State's obligation to report back to the Court. Moreover, it deprives the Court of the opportunity to keep a watchful eye on the rights of which it has the mandate to protect.

23. It is the foregoing reasons that led us to vote against paragraph (b) of the operative part of the Order. We hope the Court will adopt a consistent course of action in this area and be extremely demanding, upon the right to life coming under threat.

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8 When it is established that the performing party is not inclined to full cooperation, the Court should give extremely short time limit, followed by repeated reminders if need be.

Joint Separate Opinion of CHAFIKA and MUKAMULISA

1. We by and large subscribe to the Order rendered by the majority but would like to express our disagreement on point (b) of the operative provisions. In the paragraph (b) of the operative provisions of the Order for Provisional Measures, the Court directs the Respondent to "report to the Court within sixty (60) days from the date of receipt of this Order, on the measures taken to implement this Order."

2. In terms of Article 27 paragraph 2 of the Protocol and Rule 51 of the Rules, the Court shall, in cases of extreme gravity and urgency … adopt such provisional measures as it deems necessary. The Court held in paragraphs 14 *et seq.* of the Order that "the situation raised in the present Application is of extreme urgency and gravity and represents a risk of irreparable harm, and that the circumstances require that an Order for provisional measures be issued". In the case of death sentence, the stay of execution of this sentence was self-evident.

3. However, by granting the Respondent a period of two (2) months to *"report on the measures taken*", the Court ran counter to the very nature of the Order, which is executable forthwith, and to its characterization of the facts which it considers as being of extreme gravity.

4. Besides, it is apparent from the Court's jurisprudence that much shorter time-limits have been granted and in far less serious circumstances. That the death penalty is the most serious sanction imposable on any convicted person, should have provided the explanation for reducing the time limit accorded to the Respondent State to make the report.

5. In his Application, the Applicant prayed the Court to issue an Order for Provisional Measures and to allow the Respondent State one month to make its report. As this deadline is tied to the execution of the provisional measures sought, the Court, by granting a longer time limit without the Respondent requesting the same in its reply to the Applicant's request on this point, has ruled *ultra petita* because, even if the provisional measure lies within the Court's discretionary power, the time limit non-the-less remains a right of the Parties, especially where any of them has raised the same in its Application or Reply.

6. Although the Court did not grant the time-limit requested by the Applicant in favour of the Respondent, it all the same did not give reasons to back the time-limit prescribed in the operative provision of its Order; which runs counter to the terms of Rule 61 of the Rules.

7. Moreover, it is apparent from the Court's jurisprudence that

for similar cases (death penalty),[1] the time limit accorded to the Respondent was less than two months (60 days): as a matter of fact, in its previous Orders, the Court allowed a time limit of thirty (30) days. This instability in jurisprudence is not such as would enhance the reliability of the Court's decisions.

1 See the Orders in: *Evodius Rutechura v United Republic of Tanzania* (Application 004/2016); *Ally Rajabu and Others v United Republic of Tanzania* (Application 007/2017); *Armand Guehi v United Republic of Tanzania* (Application 001/2017).