Adelakoun & Ors v Benin (provisional measures) (2021) 5 AfCLR 181

Application 009/2021, *Landry Angelo Adelakoun and Others v Republic of Benin*

Ruling, 25 June 2021. Done in English and French, the French text being authoritative.

Judges: ABOUD, TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA, and SACKO

The Applicants brought this Application alleging that their human rights were violated by a decision of the Constitutional Court of the Respondent State which nullified the jurisdiction of the ECOWAS Court over the Respondent State. In this request for provisional measures, the Applicants asked the Court to make an order suspending the effects of the impugned decision of the Constitutional Court of the Respondent State. The Court dismissed the request for provisional measures on the grounds that the Applicants had not demonstrated any evidence of urgency or extreme gravity or irreparable harm.

Jurisdiction (*prima facie*, 14,19; effect of withdrawal of article 34(6) declaration, 18)

Provisional measures (urgency, 24, 26-27; irreparable harm, 25)

Separate opinion: BENSAOULA

Provisional measures (presumption of necessity, 11)

I. The Parties

1. Landry Angelo Adelakoun, Romaric Jesukpego Zinsou and Fifamin Miguèle Houeto (hereinafter referred to as "the Applicants") are nationals of Benin. They allege the violation of the right of access to community justice and of the principle of non-regression, as a result of Decision No. 20-434 of 30 April 2020 rendered by the Constitutional Court of Benin (hereinafter, referred to as "Decision No. 20-343 of 30 April 2020").

2. The Application is filed against the Republic of Benin (hereinafter referred to as "the Respondent State"), which became a party, on 21 October 1986, to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") and on 22 August 2014 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"). The Respondent State further made, on 8 February 2016, the Declaration provided for in Article 34(6) of the Protocol

(hereinafter referred to as "the Declaration") by virtue of which it accepts the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organizations 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 the instrument of withdrawal of its Declaration. The Court has ruled that this withdrawal has no effect on pending cases and also on new cases filed before the entry into force of the withdrawal, on 26 March 2021, that is one year after its deposit.[1]

II. Subject of the Application

3. In the main Application, the Applicants submit that on 30 April 2020, the Constitutional Court of Benin issued decision DCC 20-434, by which it declared Additional Protocol A/SP.1 /01/05 revising the preamble and Articles 1, 2, 9, 22 and 30 of Protocol A/P1/7/91 on the ECOWAS Court of Justice (hereinafter referred to as "the 2005 Protocol on the ECOWAS Court of Justice") null and void, with retroactive effect. The same effect was extended to all decisions rendered by the ECOWAS Court of Justice pursuant to the implementation of the Protocol.

4. They contend that in support of its decision, the Constitutional Court found that the procedure for ratification of the 2005 Protocol on the ECOWAS Court of Justice was flawed under Article 145 of the Constitution of the Respondent State.

5. According to the Applicants, this decision is contrary not only to Article 11 of the 2005 Protocol on the ECOWAS Court of Justice,[2] by virtue of which the ECOWAS Member States accepted its provisional entry into force, but also to Article 46 (1) of the Vienna

1 *Ingabire Victoire Umuhoza v Republic of Rwanda*, Judgment (jurisdiction) (3 June 2016) 1 AfCLR 540 § 67; *Houngue Eric Noudehouenou v Republic of Benin*, ACtHPR, Application No. 003/2020, Ruling (provisional measures) (5 May 2020) §§ 4-5 and Corrigendum of 29 July 2020.

2 This articles provides: "The supplementary Protocol shall enter into force provisionally upon signature by the Heads of State and Government. Accordingly, signatory Member States and ECOWAS hereby undertake to start implement all provisions of this Supplementary Protocol".

Convention on the Law of Treaties.[3]

6. As provisional measures, the Applicants request the suspension of the effects of Decision DCC 20-434 of 30 April 2020.

III. Alleged violations

7. The Applicants allege a violation of:

i. The right of access to justice, guaranteed by Article 7 of the Charter;

ii. The principle of non-regression, enshrined in Article 5 common to the International Covenant on Economic, Social and Cultural Rights (hereinafter referred to as "the ICESCR") and the International Covenant on Civil and Political Rights (hereinafter referred to as "the ICCPR");

IV. Summary of the Procedure before the Court

8. The main Application filed together with a Request for provisional measures was received at the Registry on 11 March 2021.

9. On 16 March 2021, the Registry acknowledged receipt and requested the Applicants to provide information regarding their address and the relief sought.

10. On 2 April 2021, the Applicants responded to the above request.

11. On 9 May 2021, the main Application, together with the request for provisional measures, as well as the additional information on the Applicants' address and their request for reparations, were transmitted to the Respondent State, with deadlines of fifteen (15) days and ninety (90) days being set, respectively, for its response to the request for provisional measures and the main Application.

12. The Respondent State did not file any response to the request for provisional measures until the expiration of the time limit given to it.

V. *Prima facie* jurisdiction

13. 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.

3 This article provides: "The fact that the consent of a State to be bound by a treaty has been expressed in violation of a provision of its internal law concerning competence to conclude treaties may not be invoked by that State as vitiating its consent, unless the violation was manifest and concerned a rule of its internal law of fundamental importance.

14. Furthermore, under Rule 49(1) of the Rules, "the Court shall conduct a preliminary examination of its jurisdiction...". However, in the case of interim measures, the Court need not satisfy itself that it has jurisdiction on the merits, but merely that it has *prima facie* jurisdiction.[4]

15. In this case, the Applicants allege a violation of Article 7 of the Charter and Article 5 of the ICESCR and the ICCPR, which the Court may interpret or apply under Article 3 of the Protocol.[5]

16. The Court notes that the Respondent State has ratified the Charter, the ICESCR and the ICCPR.[6] It has also made the Declaration under Article 34(6) of the Protocol.

17. The Court observes, as mentioned in paragraph 2 of this Ruling, that on 25 March 2020, the Respondent State deposited the instrument of withdrawal of its Declaration made pursuant to Article 34(6) of the Protocol.

18. The Court recalls that it has held that the withdrawal of the Declaration had no retroactive effect on pending cases, nor did it have any effect on cases instituted prior to the withdrawal taking effect,[7] as is the case in the present application. The Court reiterated its position in its Ruling of 5 May 2020 in *Houngue Eric Noudehouenou v Republic of Benin*[8] where it held that the withdrawal of the Respondent State's Declaration would take effect on 26 March 2021. Consequently, the said withdrawal has no bearing on the personal jurisdiction of the Court in this Application.

19. The Court concludes, therefore, that it has *prima facie* jurisdiction to entertain the request for provisional measures.

VI. Provisional measures requested

20. The Applicants request that the Court order the suspension of the Decision DCC 20-434 of 30 April 2020, such suspension to

4 *Ghati Mwita v United Republic of Tanzania*, ACtHPR, Application No. 012/2019, Ruling of 9 April 2020 (provisional measures) § 13.

5 *Sébastien Germain Marie Aïkoué Ajavon v Republic of Benin,* ACtHPR, Application No. 065/2019, Judgment (merits and reparations) of 29 March 2021 § 28.

6 The Respondent State became a party to the ICESCR and the ICCPR on March 12, 1992.

7 *Ingabire Victoire Umuhoza v Republic of Rwanda,* ACtHPR, Judgment (jurisdiction) (3 June 2016) 1 AfCLR 540 § 67.

8 *Houngue Eric Noudehouenou v Republic of Benin*, ACtHPR, Application No. 003/2020, Ruling (provisional measures) of 5 May 2020 § 4-5 and Corrigendum of 29 July 2020.

allow the Respondent State's citizens to continue to benefit from access to ECOWAS Court of Justice.

21. According to them, the Respondent State's citizens will thus be able to continue to sue it before the ECOWAS Court of Justice, since with the effectiveness of the withdrawal of the Declaration, their access to supranational courts will be almost impossible.

22. The Respondent State did not file any Response to the Applicants' averments.

***

23. The Court notes that under Article 27(2) of the Protocol: "In cases of extreme gravity and urgency, and where necessary to avoid irreparable harm to persons, the Court shall order such provisional measures as it deems necessary".

24. The Court recalls 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".[9] The risk in question must be real, which excludes the purely hypothetical risk and explains the need to remedy it immediately.[10]

25. With regard to irreparable harm, the Court considers that there must be a "reasonable likelihood of its occurrence" in view of the context and the personal situation of the Applicant".[11]

26. The Court underscores that it is up to the Applicants seeking provisional measures to prove urgency or extreme gravity and irreparable harm.

27. The Court notes that in the present case, in support of their request for provisional measures, the Applicants have not presented any argument or produced any evidence of urgency or extreme gravity and of irreparable harm. In fact, they have merely made the said request without demonstrating the existence of the conditions required by Article 27(2) of the Protocol. In the circumstances, the Court considers that the Applicants have failed to prove their case

9 *Sébastien Ajavon v Republic of Benin*, ACtHPR, Application No. 062/2019, Ruling (provisional measures) of 17 April 2020 § 61.

10 *Ibid* § 62.

11 *Ibid* § 63.

and their request cannot be granted.[12]

28. Accordingly, the Court dismisses the request for provisional measures.

29. For the avoidance of doubt, the Court recalls that this Ruling is provisional in nature and in no way prejudges the Court's decision on its jurisdiction, admissibility and the merits of the case.

VII. Operative part

30. For these reasons

The Court

Unanimously

i. *Dismisses* the request for provisional measures.

Separate Opinion: BENSAOULA

[1] I disagree with the conclusions reached by the Court in its Order and the grounds thereof. I would therefore like to make a brief observation of a general nature and express some more detailed views on the question of the Court's prerogatives in matters of provisional measures

[2] In the request for provisional measures attached to the Application on the merits, the Applicants prayed the Court to suspend the enforcement of Decision dcc 20/43 of 30/04/2020 issued by the Constitutional Court.

[3] The decision would violate the right of access to community justice and the principle of non-regression, because the Constitutional Court of the Respondent State declared null and void all the decisions rendered by the Economic Community of West African States Court of Justice and non-binding to the Respondent State, the Additional Protocol A/P1/7/91 relating to the ECOWAS Court of Justice

[4] These facts would constitute a violation of the right of access to justice protected by Article 7 of the Charter and the principle of non-regression enshrined in Article 5 common to the International Covenant on Economic, Social and Cultural Rights and the

12 *Romaric Jesukpego Zinsou and Others v Republic of Benin*, ACtHPR, Application No. 008/2021 Ruling (provisional measures) of 10 April 2021 § 21.

International Covenant on Civil and Political Rights.

[5] Article 27/2 of the Protocol clearly states that provisional measures are ordered in cases of

- extreme gravity and
- If it is necessary to avoid irreparable harm
- The measures ordered must be deemed appropriate by the Court

[6] The Court, relying on its jurisprudence on the subject, defines urgency consubstantial with extreme gravity as "irreparable and imminent risk of irreparable harm being caused before the Court renders its final decision".

There is a requirement that the risk involved must be real and require immediate remedy (para 24)

[7] In paragraph 26, the Court notes that it is up to the Applicants to provide evidence of urgency or extreme gravity as well as irreparable harm.

[8] Finally, the Court emphasises that the Applicants have not provided any evidence of all these elements. Accordingly, it dismisses the request.

[9] It is my observation that the Court often dismisses provisional measures on the ground that applicants have not provided evidence that the conditions required for ordering such measures exist.

[10] It is clear that, following the example of American and European jurisdictions, the facts that would require ordering provisional measures should be related to fundamental rights, essentially the right to life and the right to personal integrity (physical, psychic and moral), in the sense that they seek to avoid irreparable harm to the human person as a subject of the International Law of Human Rights, since it is essentially a right that protects the human being.

[11] I think that the Court, instead of basing its orders on the "lack of evidence", could often, and for some of the emergency measures requested, apply the presumption that the protective measures requested are necessary and that a substantial and reasonable proof of the existence of the facts is not required, because the very purpose of requests for measures is of an urgent nature with a risk of real harm.

[12] This is all the more so as there does not seem to me, from a legal and epistemological point of view, to be any obstacle to extending urgent measures to other human rights, as these are all inseparable and indivisible.

[13] Internationally, provisional protection can, at best, only prevent an aggravation of human rights violations already committed by the States with regard to those other rights that are excluded

by international judicial institutions from being the subject of provisional measures.

[14] Common sense tells me that it is not for nothing that the law requires that a request for provisional measures be linked to a request on the merits, given that their effects will disappear with the pronouncement of the decisions on the merits. In my opinion, it would often be practical to refer to these requests on the merits in order to determine the gravity, urgency and harm related to the request for provisional measures, without judging the merits of the case.

[15] In fact, in the Order that is the subject of this declaration, it is clear that the Applicants impugn the decision taken by the Respondent State through its Constitutional Council, for having violated their right of access to justice and the principle of the non-retroactivity of laws, both of which are enshrined in Article 7 of the Charter and Article 5 common to the ICESCR and the PDCIP respectively.

[16] Although in paragraph 20 of the Order the Applicants clearly state that suspending the execution of the Respondent State's decision would allow Beninese citizens to continue to benefit from access to Community justice, the Court notes in paragraph 27 that the Applicants have not developed any arguments or produced any evidence of urgency or extreme gravity as well as irreparable harm. Hence the Court's dismissal of the request in paragraph 28 of the Order.

[17] Article 27/2, to which the Court refers in paragraph 23, gives the Court the prerogative to order the provisional measures it deems appropriate, if it considers that there is extreme gravity and the need to avoid irreparable harm to persons. It is my understanding that the power to determine the appropriateness of provisional measures is given to the Court in paragraph 23, with exclusive jurisdiction to determine extreme gravity, urgency and irreparable harm.

[18] It is obvious, then that as the provisional measures judge being judge of the obvious and incontestable, the Court cannot divest itself of its power to define the relevance of the provisional measures to the benefit of the Applicants and in any case, to the latter.

[19] As I underlined above, it happens that the very nature of the request for provisional measures is urgent, if not grave, and would avoid irreparable damage.

[20] If a judge cannot take up a request himself, once seized, his competent extends to the point where he must say the law and render justice. A decision that ignores the right to access to justice and the principle of non-retroactivity of laws due to the allegations

of the Applicants, and that does not elicit any response from the Respondent State can only be urgent, grave and cause irreparable harm.

[21] In their reply in paragraph 20, the Applicants made an unequivocal summary of the urgency, gravity and irreparable harm, and there was no need elaborate on their reasons, since the Court, by virtue of its prerogatives, could deduce the elements of urgency from the very nature of the facts alleged without ignoring the principle of neutrality.

[22] The disturbance caused by the decision that was the subject of the application was manifestly unlawful because it nullified acquired rights and rights protected by the Charter, given that the power of the provisional measures judge is limited to what is manifest. This is all the more so because as regards the case on the merits, the Court is bound by the procedure and the interest of good justice which require a meticulous examination of the case, a process that is often long.

[23] Emergency measures will remain for me as a means of treating urgency resulting from the delays of a justice system that is slow by necessity. The Court's only concern would be the style of drafting the order because if the order must not prejudge the merits, the order issued must be based on simple presumptions of damage and prejudice which would make urgency ease to assess. One could for examine say that "it would appear that, if the Applicant's allegation is found by the Court to be true on the merits, the harm and damages alleged would be certain …" or that it would appear from the decision that is the subject of the requests for provisional that if it were to be implemented the resulting harm and damage would be certain …"