

Ajavon v Benin (provisional measures) (2021) 5 AfCLR 150

Application 027/2020, *Sébastien Germain Marie Aïkoué Ajavon v Republic of Benin*

Order, 1 April 2021. 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, a national of the Respondent State, brought an Application contending that criminal proceedings instituted against him in the domestic courts were a violation of his Charter rights. Along with the main Application, and subsequent to the Application, the Applicant filed successive requests for provisional measures which were dismissed by the Court. Applicant then filed this further request for provisional measures to stay execution of a pending judgment of the domestic court. The Court granted the request for provisional measures.

Jurisdiction (*prima facie*, 15, 19; effect of withdrawal of article 34(6) Declaration 18)

Provisional measures (urgency, 28; irreparable and imminent risk, 28; irreparable harm, 29, 33-35; establishment of existence of violation not required, 30)

I. The Parties

1. Mr Sébastien Germain Marie Aïkoué Ajavon (hereinafter referred to as “the Applicant”), is a national of Benin. He challenges the legality of the criminal proceedings brought against him before the Economic Crimes and Terrorism Court (hereinafter referred to as “the CRIET”).
2. The Application is filed against 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 (hereinafter referred to as “the Protocol”) on 22 August 2014. On 8 February 2016, the Respondent State further deposited the Declaration provided for in Article 34(6) of the said Protocol (hereinafter referred to as “the Declaration”), by virtue of which it accepted the jurisdiction of the Court to receive applications from individuals and non-governmental organisations. On 25 March 2020, the Respondent State deposited with the African Union

Commission the instrument of withdrawal of its Declaration. The Court has held that this withdrawal has no bearing on pending cases or new cases filed before the withdrawal comes into effect, that is, on 26 March 2021, one year after the deposit of the Declaration.¹

II. Subject of the Application

3. In the Application on the merits filed on 11 June 2020, the Applicant prays the Court to establish the violation of his fundamental rights by the Respondent State due to its initiating investigation against him for “forgery of a public document, abetment of forgery of a public document and fraud” before the CRIET.
4. The Applicant asserts in the instant request for provisional measures that the Investigative Chamber of CRIET issued Judgment No. 21/CRIET/COM-I/2020 of 29 May 2020 against him which partially dismissed his appeal and referred the case to the Judgments Chamber of the CRIET. This decision was upheld by Judgment No. 003/CRIET/CA/SI of 18 June 2020 of the Appeals Investigation Section of the CRIET. The appeal in cassation that he filed before the Supreme Court was dismissed by a Judgment of 29 January 2021.
5. He submits further that by Judgment No. 41/CRIET/CJ/1S of 1 March 2021, the First Chamber of the CRIET found him guilty of forgery and fraud and sentenced him to twenty (20) years’ imprisonment and a fine of Four Hundred Thousand (400,000) CFA francs, the payment of damages of Eighty Billion Nine Hundred and Fifty-Eight Million Two Hundred and Fifty-Four Thousand, Eight Hundred and Sixty-Three (80,958,254,863) CFA francs for the prejudice suffered by the tax authorities and Sixty Billion (60,000,000,000) CFA francs for the other non-tax prejudices and issued an arrest warrant for him.
6. It is in this context that the Applicant requests the stay of execution of the judgments rendered against him by the CRIET on 1 March 2021, pending a decision on the merits of the case by this Court.

¹ *Houngue Eric Noudehouenou v Republic of Benin*, ACtHPR, Application No. 003/2020, Order of 5 May 2020 (provisional measures), §§ 4- 5 and corrigendum of 29 July 2020.

III. Alleged violations

7. In the Application, the Applicant alleges the violation of:
 - i. The right to a fair trial protected by Articles 7(1), 7(1)(a), 7(1)(c) of the Charter;
 - ii. The right to property protected by Article 14 of the Charter; and
 - iii. The right to adequate housing enshrined in Articles 14, 16 and 18 of the Charter.

IV. Summary of the Procedure before the Court

8. On 22 June 2020, the Applicant filed the Application on the merits together with a previous request for provisional measures. They were notified to the Respondent State. On 27 November 2020, the Court issued an order dismissing the request for provisional measures notified to the Parties.
9. On 4 February 2021, the Applicant filed another request for provisional measures which was served on the Respondent State. This request was declared moot, by virtue of the Ruling of 29 March 2021 duly notified to the Parties.
10. On 5 March 2021, the Applicant filed the instant request for provisional measures which was served on the Respondent State on 9 March 2021 for its observations within fifteen (15) days from the date of receipt.
11. The Respondent State has not made any submissions on this request for provisional measures.

V. *Prima facie* jurisdiction

12. The Applicant asserts that based on Article 27(2) of the Protocol and Rule 51 of the Rules² of Court, 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, that it has *prima facie* jurisdiction.
13. Referring further to Article 3(1) of the Protocol, the Applicant further submits that the Court has jurisdiction insofar as he alleges violations of rights protected by human rights instruments and that the Republic of Benin has ratified the African Charter, the Protocol and deposited the Declaration under Article 34(6).

2 Rules of the Court of 2 June 2010 corresponding to Rule 59 of the Rules of 25 September 2020.

14. Article 3(1) of the Protocol provides that “[t]he 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”.
15. Rule 49(1) of the Rules³ provides that “[t]he Court shall preliminarily ascertain its jurisdiction and the admissibility of an Application in accordance with the Charter, the Protocol and these Rules”. However, with respect to provisional measures, the Court does not have to ensure that it has jurisdiction on the merits of the case, but only that it has *prima facie* jurisdiction.⁴
16. In the instant case, the rights alleged by the Applicant to have been violated are all protected by Articles 7(1), 7(1)(a), 7(1)(c), 14, 16 and 18 of the Charter, an instrument to which the Respondent State is a Party.
17. The Court further notes that the Respondent State has ratified the Protocol. It also deposited the Declaration by virtue of which it accepted the Court’s jurisdiction to receive applications from individuals and Non-Governmental Organisations pursuant to Articles 34(6) and 5(3) of the Protocol read together.
18. The Court notes, as mentioned in paragraph 2 of this Ruling that on 25 March, 2020, the Respondent State deposited the instrument of withdrawal of its Declaration pursuant to Article 34(6) of the Protocol. The Court has held that this withdrawal has no retroactive effect, no bearing on pending cases and on new cases filed before the withdrawal comes into effect,⁵ as in the instant case. The Court reiterates its position in its Order of 5 May 2020 *Houngue Eric v Republic of Benin*⁶ that the withdrawal of the Declaration by the Respondent State takes effect on 26 March 2021. Consequently, the said withdrawal in no way affects the

3 Corresponding to Article 39(1) of the Rules of the Court of 2 June 2010.

4 *Komi Koutche v Republic of Benin*, ACtHPR, Application No 020/2019, Order of 2 December 2019 (provisional measures) §11.

5 *Ingabire Victoire Umuhoza v Republic of Rwanda*, (jurisdiction) (3 June 2016) 1 AfCLR 585 § 67.

6 *Houngue Eric Noudéhouenou v Republic of Benin*, ACtHPR, Application No. 003/2020, Order of 5 May 2020 (provisional measures), §§ 4-5 and corrigendum of 29 July 2020.

personal jurisdiction of the Court in the instant case.

19. The Court therefore finds that it has *prima facie* jurisdiction to hear the Application for provisional measures.

VI. Provisional measures requested

20. The Applicant seeks a stay of execution of Judgment No.41/ CRIET/CJ/1S. Cor of 1 March 2021 issued at first instance by the trial chamber of the CRIET pending the examination of the Application on the merits.
21. He submits that until the date of his judgment by the CRIET, neither he nor his advocate were invited by the judicial authorities of the Respondent State to acquaint themselves with the case file in order to better prepare their defence. According to him, this requirement meets the principle of equality of arms between the defendant and the prosecution as recalled by the Principles and Guidelines on the right to a fair trial and legal assistance in Africa adopted in July 2003 by the African Commission on Human and Peoples' Rights.
22. The Applicant further asserts that at the 1 March 2021 hearing, the judge refused to allow his advocate to defend his cause because he had not appeared physically even though a letter informing the judge of this absence had been sent to him. The Advocate was allowed to intervene only on the civil aspect as though the conviction had already been confirmed.
23. He notes that in criminal matters, even when a letter of absence is not adduced, criminal courts are obliged to hear the advocate who appears to defend the accused. He alleges that his right to defence recognised and protected at all stages of the proceedings by Article 14(3) of the ICCPR, Article 7(1)(c) of the Charter and Article 428 of the Beninese Code of Criminal Procedure has not been respected. He therefore considers that the trial was unfair.
24. Moreover, the Applicant adds that the remedies, namely, the appeal and the appeal in cassation, which are open to him, will not be of any effectiveness to him since he will not be able to go to the hearings and his advocate will not be able to defend him for the same reason cited by the first judge. He notes further, that no recourse will be able to suspend the effects of the warrant issued against him.
25. The Applicant points out that, in addition, the Supreme Court will deny him a possible appeal in cassation on the grounds that he did not surrender himself to be imprisoned, as it had already done in a previous case, in compliance with Article 594 of the Code of Criminal Procedure.

26. The Applicant states that he fears being arrested due to a warrant issued against him in an unfair trial and the final seizure of all his assets due to the heavy sentences pronounced against him, more than one hundred and forty billion (140,000,000,000) CFA francs, thereby reducing him to a state of total indigence.
27. He concludes that the requirements of urgency and irreparable harm set out in Article 27(2) of the Protocol and Article 59 of the Rules of Court have been met, so that the Court may order the provisional measures requested.

28. The Court recalls that urgency, which is consubstantial with extreme gravity, means that an “irreparable and imminent risk will be caused before it renders its final judgment”.⁷ The risk in question must be real, which excludes the purely hypothetical risk and explains the need to remedy it in the immediate future.⁸
29. With respect 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 situation.⁹
30. The Court holds that it does not, at this stage, have to establish the existence of the violations alleged by the Applicant, but must determine whether the circumstances of the case require that the provisional measures requested be ordered.¹⁰
31. The Court notes that in the instant case, the Applicant was sentenced by the Trial Chamber of the CRIET to twenty (20) years imprisonment, accompanied by an arrest warrant.
32. The Court also notes that “the arrest warrant is the order given to the police to search for the accused and to take him to the prison indicated on the warrant where he will be received and detained”.¹¹

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

8 *Ibid*, § 62.

9 *Ibid*, note 8, § 63.

10 See in this sense, ICJ, Application of the Convention on the Prevention and Punishment of Genocide (*Gambia v Myanmar*) Order for Provisional Measures, 23 January 2020, § 66.

11 Article 132 in fine of the Code of Criminal Procedure of the Respondent State.

33. The Court emphasises that, being a search and arrest warrant, the arrest warrant places the Applicant at risk, which will result in irreparable harm if it is executed.
34. The Court concludes that the circumstances of the instant case show a situation of urgency requiring the need to stay the execution of the decision appealed, before irreparable harm is caused to the Applicant.
35. With regard to irreparable harm in relation to the civil convictions, the Court notes that the Applicant's movable and immovable property is already in the custody of the Respondent State. The Respondent State has not implemented the measure to lift the seizures on the Applicant's movable and immovable property ordered by the Court.¹²
36. The Court therefore holds that there is a real risk that the Applicant's property will be sold thereby permanently dispossessing him of his assets.
37. Consequently, the Court, orders the stay of execution of Judgment no. 41/CRIET/CJ/1S. Cor of 1 March 2021, issued at first instance of the CRIET's Trial Chamber, in order to prevent irreparable harm to the Applicant, pending consideration of the Application on the merits.
38. For the avoidance of doubt, this ruling is provisional and in no way prejudices the Court's conclusions on its jurisdiction, the admissibility of the Application and the merits of the Application.

VII. Operative part

39. For these reasons,
The Court

Unanimously,

- i. *Orders* the stay of execution of Judgment No. 41/CRIET/CJ/1S. Cor of 1 March 2021 issued in first instance by the Trial Chamber of the CRIET, pending examination of the Application on the merits.
- ii. *Report* to the Court within thirty (30) days, from the date of notification of this Ruling, on the measures taken to implement the order.

12 *Sébastien Germain Ajavon v Republic of Benin*, ACTHPR, Application No. 013/2017, Judgment of 28 November 2019, § 144.