

Zinsou v Benin (provisional measures) (2021) 5 AfCLR 332

Application 006/2021, *Romarc Jesukpego Zinsou v Republic of Benin*

Ruling, 10 September 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 Applicant brought this Application claiming that the Respondent State's COVID-19 quarantine processes were discriminatory and in violation of international human rights law. Along with the Application, the Applicant sought provisional measures for an order to retrocede COVID-19 quarantine fees to all persons who had been victims of discrimination. The Court declined to grant the measures sought on the grounds that doing so would require it to prejudge the merits of the Application.

Jurisdiction (*prima facie*, 11, 12, 14; effect of withdrawal of article 34(6) declaration, 13)

Provisional measures (basic conditions for order, 22; urgency, 23,25; irreparable harm, 24, 25; prejudging merit, 26,27)

I. The Parties

1. Romarc Jésuskégo Zinsou (hereinafter, referred to as “the Applicant”) is a national of the Republic of Benin currently residing in Cotonou. He filed the Application together with a request for provisional measures seeking an order retroceding Covid-19 quarantine fees to all persons who have been victims of discrimination.
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 (Herein after referred to as “the Protocol”) on 22 August 2014. On 8 February 2016, the Respondent State deposited 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 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 of withdrawal of the said Declaration. The Court has ruled that this withdrawal has no bearing on pending cases and on new cases filed prior to the entry into force of the withdrawal, one year after its deposit, that is, on 26 March 2021.¹

II. Subject of the Application

3. It appears from the Application that, following the Council of Ministers meeting of 17 March 2020, the Respondent State took a series of measures to prevent the spread of the Covid-19 pandemic in the country, in particular, the systematic and compulsory quarantine of all persons arriving in Benin by air and requisitioning one thousand hotel rooms to accommodate passengers in quarantine.
4. The Applicant submits that the Government decided that “the cost of quarantining nationals will be borne by the State while non-nationals will bear their own costs “. This measure is challenged by the Applicant before this Court as being discriminatory against non-nationals of Benin.
5. It is against this background the Applicant is requesting provisional measures from the Court ordering the Respondent State to retrocede the costs of quarantine for all victims of discrimination.

III. Alleged violations

6. The Applicant alleges violations of Articles 2 and 3 of the Charter and 26 of the International Covenant on Civil and Political Rights (ICCPR).

IV. Summary of the Procedure before the Court

7. The Application was filed on 3 March 2021, together with a request for provisional measures.
8. On 9 March 2021, the Application together with the request for provisional measures were served on the Respondent State, which was granted ninety (90) days and fifteen (15) days, within which to respond on the merits and on the request for provisional measures, respectively, from the date of receipt of service.

1 *Ingabire Victoire Umuhoza v Republic of Rwanda* (jurisdiction) (Order of 3 June 2016) 1 AfCLR 562, § 67; *Hongue Eric Noudehouenou v Republic of Benin*, ACtHPR, Application No. 003/2020 Ruling of 5 May 2020 (provisional measures), §§ 4 and 5 and *Corrigendum* of 29 July 2020.

9. On 28 April 2021, the Respondent State filed its Response to the request for Provisional Measures, which was transmitted to the Applicant on 4 May 2021 for information.

V. *Prima facie* jurisdiction

10. 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.”
11. Rule 49(1) of the Rules of Court² provides “[t]he Court shall preliminarily ascertain its jurisdiction...”. However, with respect to provisional measures, the Court need not satisfy itself that it has jurisdiction on the merits of the case, only that it has *prima facie* jurisdiction.³
12. In the instant case, the rights allegedly violated by the Applicants are all protected by the Charter to which the Respondent State is a Party. The Court further notes that the Respondent State is a Party to the Protocol and deposited the Declaration under Article 34(6) of the Protocol.
13. The Court further recalls that, it has held that the withdrawal of the Declaration under Article 34(6) of the Protocol has no retroactive effect and has no bearing on new cases filed before the effective date of the withdrawal⁴ as in the instant case. The Court reiterates its position that the withdrawal of the Respondent State’s Declaration which took effect on 26 March 2021,⁵ does not in any way affect its personal jurisdiction in the instant case, since the Application was filed on 3 March 2021.
14. The Court concludes that it has *prima facie* jurisdiction to hear the Request for provisional measures.

VI. On the provisional measures requested

15. The Applicant asks the Court to “order a provisional measure retroceding the quarantine costs to all persons who have been victims” of discrimination.

2 Rules of 25 September 2020.

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

4 *Ingabire Victoire Umuhoya v Rwanda* (jurisdiction), § 67.

5 *Houngue Éric Noudéhouenou v Benin* (provisional measures), §§ 4 and 5.

16. The Respondent State submits that, in accordance with Article 27(2) of the Protocol and Rule 51 of the Rules, provisional measures may only be ordered in cases of urgency or extreme gravity and where the damage is irreparable.
17. Referring to the Court's jurisprudence, the Respondent State alleges that "extreme urgency" exists when the Applicant is sentenced to death⁶ or "when he is detained in deplorable conditions, subjected to all kinds of torture..."⁷ He asserts that in the instant case, not only is there no urgency or extreme gravity in the prayers requested, but also that the Applicant, who is not one of the alleged victims, does not explain how an urgent measure is sought one (1) year after the contested decisions were taken.
18. With regard to the irreparable nature of the damage, the Respondent State maintains that harm is irreparable only when "the consequences cannot be erased, repaired or compensated for by any means, even by way of compensation". It argues that, in the instant case, the alleged harm does not result from the measures taken by the Government, and that the alleged victims were informed of the measure before they boarded to plane to travel to Benin.
19. Finally, the Respondent State alleges that "the retrocession of costs requested by the Applicant prejudices the merits of the case insofar as it "should be the consequence of the recognition of the alleged violation", which, according to the Respondent, is contrary to the jurisprudence of the Court.
20. It follows, according to the Respondent State, that the measure requested does not meet the requirements of urgency or extreme gravity, nor is the nature of the damage irreparable. The prayer must therefore be dismissed by the Court.

6 *Dexter Eddie Johnson v Republic of Ghana* (provisional measures) (27 September 2017) 2 AfCLR 155.

7 *Léon Mugesera v Rwanda* (provisional measures) (27 September 2017) 2 AfCLR 149.

21. 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”.
22. The Court observes that from this provision, it may only order provisional measures if the conditions of extreme gravity or urgency and the prevention of irreparable harm to persons are met.
23. The Court recalls that “urgency, which is consubstantial with extreme gravity, means that an “irreparable and imminent harm will occur before it renders its final judgment”.⁸ The risk in question must be real and explains the need to remedy it in the immediate future.⁹
24. 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/Applicants’ personal situation.”¹⁰
25. The Court holds that it is for the Applicant seeking provisional measures to prove the existence of urgency or extreme gravity as well as that of irreparable harm.¹¹
26. The Court recalls that “it is only required to ascertain the existence of these basic conditions if it is established that the measures sought do not prejudge the merits of the Application(s)”.¹² In this respect, the Court has held that a request for provisional measures prejudices the merits of an Application “where the subject of the measures sought in the request is similar to the subject of the measure sought in the Application, where its purpose is to achieve the same result or, in any event, where it touches on an issue which the Court will necessarily have to adjudicate upon when examining the merits of the Application”.¹³
27. The Court notes that on the merits of the instant case, the Applicant is requesting it to find discrimination against non-national travellers

8 *Sébastien Ajavon v Republic of Benin*, ACTHPR, Application No. 062/2019, Ruling of 17 April 2020 (Provisional measures), § 61.

9 *Ibid*, § 62.

10 *Ibid*, § 63.

11 *Romarc Jesukpego Zinsou and Others v Republic of Benin*, ACTHPR, Application No. 008/2021, Ruling of 10 April 2021 (provisional measures), § 20.

12 *Elie Sandiwidi and Mouvement Burkinabe des droits de l’homme et des peuples v Republic of Benin*, ACTHPR, Application No. 014 and 017/2020, Ruling of 25 September 2020 (provisional measures), § 65.

13 *Elie Sandiwidi and Mouvement Burkinabe des droits de l’homme et des peuples v Benin* (provisional measures), § 66; See also *Jean de Dieu Ngajigimana v United Republic of Tanzania* ACTHPR, Application No. 024/2019, Order of 26 September 2019 (provisional measures), § 25.

who bear their own quarantine costs, whereas the Government pays the same costs imposed on nationals. The Court considers that retroceding quarantine fees to all foreigners can only be envisaged if it finds that they have been discriminated against. It follows that the Court cannot rule on the request for provisional measures without prejudging the merits of the case.

28. The Court concludes, therefore, that there are no grounds for ordering the provisional measures requested.
29. For the avoidance of doubt, this Ruling is provisional in nature and does not in any way prejudice the findings of the Court on its jurisdiction, the admissibility of the Application and the merits thereof.

VII. Operative part

30. For these reasons,
The Court
Unanimously,

- i. *Dismisses* the request for provisional measures.