

Kchouk v Tunisia (provisional measures) (2022) 6 AfCLR 1059

Application 006/2022, *Salaheddine Kchouk v Republic of Tunisia*

Ruling, 16 December 2022. Done in Arabic, English and French, the Arabic text being authoritative.

Judges: ABOUD, TCHIKAYA, KIOKO, MENGUE, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA, SACKO and ADJEI

Recused under Article 22: BEN ACHOUR

The Applicant, a citizen the Respondent State, brought this Application alleging that two decrees promulgated by the Respondent State were in violation of certain human rights guaranteed in the African Charter and other human rights instruments. The Application was filed along with a request for provisional measures to stop the Respondent State from holding certain elections. In this ruling, the Court dismissed the Applicant's request for provisional measures.

Jurisdiction (*prima facie* jurisdiction, 15-17)

Provisional measures (urgency, 22 extreme gravity 22; irreparable and imminent risk, 22-23; irreparable harm, 24; connection between measures requested and merits, 30-31)

Dissenting Opinion: BENSAOULA

Provisional measures (conditions for grant, 5; urgency, 15)

I. The Parties

1. Salaheddine Kchouk is a national of the Republic of Tunisia (hereinafter referred to as the "Applicant"). He alleges that the Respondent State, in issuing Decrees 54 and 55-2022, violated the rights of equality between men and women, equality of opportunity, freedom of expression, inviolability of the home and confidentiality of correspondence.
2. The Application is filed against the Republic of Tunisia (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 on 5 October 2007. Furthermore, the Respondent State, on 2 June 2017, deposited the Declaration provided for under Article 34(6) of the 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

II. Subject of the Application

3. The Applicant alleges that Presidential Decrees No 54 and 55 of 2022 violate the rights guaranteed by the Charter, the International Covenant on Civil and Political Rights, the International Covenant on Economic and Social Rights, the Universal Declaration of Human Rights, and the Constitution of the Respondent State.

III. Alleged violations

4. The Applicant alleges violation of the rights to non-discrimination, equality, fair trial, participation in the conduct of public affairs, rights guaranteed by Articles 2, 3, 7, 13 and 20 of the Charter, Article 14 of the International Covenant on Political and Civil Rights.
5. The Applicant further alleges that the said decrees violate Articles 22, 23, 26, 30, 37, 38, 39, 51 and 123 of the Respondent State Constitution of 25 July 2022.

IV. Summary of the Procedure before the Court

6. On 25 October 2022, the Registry received the Application together with a request for provisional measures.
7. On 16 November 2022, the Application was served on the Respondent State with a request to it to file its response to the Application on the merits and the provisional measures within ninety (90) days and seven (7) days, respectively. The Respondent State was also requested to submit the names of its Representatives within thirty (30) days.
8. The Respondent State has not responded to the request for provisional measures.

V. Prayers of the Parties

9. The Applicant request the Court to:
 - i. Declare that it has jurisdiction
 - ii. Declare the application admissible;
 - iii. Take the necessary measures to put on hold the implementation of Presidential Decrees No 54 and 55 of 2022;
 - iv. Rule that Decrees Nos 54 and 55 of 2022 are null and void;

- v. Compel the Respondent State to issue a decree establishing the Constitutional Court within three (3) months;
- vi. Order the Respondent State, through the Independent Elections Authority, to refrain from holding the legislative elections scheduled for 17 December 2022, the said legislative elections being based on Decree No 55 which is unconstitutional and contrary to the international instruments ratified by the Respondent State, and to order the Respondent State not to hold the said elections until the Constitutional Court has been established.

VI. *Prima facie* jurisdiction

- 10. Both parties did not submit observations on the *prima facie* jurisdiction of the Court.

- 11. When it is seized of an application, the Court shall make a preliminary examination of its jurisdiction on the basis of Articles 3, 5(3) and 34(6) of the Protocol.
- 12. 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.
- 13. Rule 49(1) of the Rules provides “the Court shall preliminary ascertain its jurisdiction...in accordance with the Charter, the Protocol and these Rules.” However, in ordering provisional measures, the Court need not ascertain that it has jurisdiction on the merits of the Case, but it simply needs to satisfy itself that it has *prima facie* jurisdiction.¹
- 14. In terms of Article 5(3) of the Protocol, “The Court lay entitle relevant non-Governmental organizations (NGOs) with observer Status before the Commission and individuals to institute cases

¹ See *African Commission on Human and Peoples' Rights v Great Socialist People's Libyan Arab Jamahiriya* (provisional measures (15 March 2013) 1 AfCLR 145, 21 10; *Komi Koutché v Republic of Benin* (provisional measures) (2 December 2019) 3 AfCLR 725, § 14; *Ghati Mwita v United Republic of Tanzania*, ACTHPR, Application n° 012/2019 (provisional measures) 9 April 2020, § 14; *Symon Vuwa Kaunda and 5 others v Republic of Malawi*, ACTHPR, Application n° 013/2021 (provisional measures), 11 June 2021, § 11.

directly before it, in accordance with Article 34(6) of this Protocol.”

15. As mentioned in paragraph 2 of this Ruling, the Respondent State is a party to the Charter and the Protocol and has also made and deposited the Declaration accepting the jurisdiction of the Court to receive application from individuals and non-governmental organizations in accordance with Article 34(6) of the Protocol read together with Article 5(3) thereof.
16. In the instant case, the rights claimed by the Applicant to have been violated are protected by the Charter, instrument that the Court is empowered to interpret and apply pursuant to Article 3(1) of the Protocol.
17. In light of the foregoing, the Court, notes that it has *prima facie* jurisdiction to hear the requests for provisional measures.

VII. Provisional measures requested

18. Under provisional measures, the Applicant prays the Court to:
Order the Respondent State, through the Independent Elections Authority, to refrain from holding the legislative elections scheduled for 17 December 2022, the said legislative elections being based on Decree No 55 which is unconstitutional and contrary to the international instruments ratified by the Respondent State, and to order the Respondent State not to hold the said elections until the Constitutional Court has been established.

19. The Court recalls that Article 27(2) of the Protocol provides:
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.
20. The Court notes that Rule 59(1) of the Rules provide:
Pursuant to Article 27(2) of the Protocol, the Court may, at the request of a party, or on its own accord, in case of extreme gravity and urgency and where necessary to avoid irreparable harm to persons, adopt such provisional measures as it deems necessary, pending determination of the main Application.
21. It follows from the foregoing that the Court has the discretion to decide in each case whether to exercise the power vested in it by virtue of the aforementioned provisions in light of the particular circumstances.

22. 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”.²
23. The Court notes that the risk in question must be real, should exclude the purely hypothetical risk, and should explain the need to remedy it in the immediate future.³
24. With respect to irreparable harm, the Court considers that there must be a “reasonable probability of its occurrence” having regard to the context and the Applicant’s personal situation.⁴
25. In view of the above-mentioned provisions, the Court takes into account the nature of the standard practices as regards the procedures for examining and deciding on requests for provisional measures, which rules are of a preventive nature and do not preclude a decision on the merits of the Application.⁵
26. The Court will now consider the Applicant’s request to postpone the parliamentary elections scheduled for December 2022.

A. Injunction on the legislative elections scheduled for December 2022

27. The Applicant requests the Court to order the Respondent State, through the Independent Superior Electoral Authority (ISIE), to suspend the legislative elections scheduled for 17 December 2022, in accordance with Decree No 55 of 2022. The Applicant argues that since the said Decree is unconstitutional and contrary to the international instruments ratified by the Respondent State, the ISIE is enjoined to refuse to supervise any elections prior to the establishment of the Constitutional Court.

2 *Houngue Éric Noudehouenou v Republic of Benin*, ACtHPR, Application No 00004/2020, Order for Provisional Measures of 15 August 2022; *Ajavon Sébastien v Republic of Benin*, ACtHPR, Application No 062/2019, Order for Provisional Measures of 17 April 2020, § 61;

3 *Sébastien Germain Ajavon v Republic of Benin*, *op. cit.* 62.

4 *Houngue Éric Noudehouenou v Republic of Benin*, 28, *Sébastien Germain Ajavon v Republic of Benin*, *op. cit.* 63.

5 *Sébastien Germain Ajavon v Republic of Benin*, *op. cit.*, § 60.

28. The Court notes that this application seeks the Court to order the respondent State to postpone the parliamentary elections scheduled for 17 December 2022, to elect the members of the Assembly of People's Representatives.
29. The Court notes that the Applicant filed his application with the Registry on 21 October 2022. He refers to the two decree-laws No 44 and No 55 of 2022 of 13 and 15 September 2022 relating respectively to the fight against offences relating to information and communication systems and the amendment of the organic law No 2014-16 of 26 May 2014 on elections and referendum.
30. The Court notes that the Applicant has not shown any direct link between the date of the calling of the parliamentary elections and the decree which is the subject of his application. Furthermore, the prayers for provisional measures are the same as those in the main application.
31. The Court observes that, in order to establish the existence of harm which the request for provisional measures seeks to avoid, it is necessary to determine a connection between the measures requested and the merits of the case. The Court notes in this respect that there is no connection between the request for a stay of the election concerned and the rights alleged by the Applicant in the Application instituting proceedings. Indeed, the alleged violations are not alleged in the context of the election whose suspension is sought.
32. Therefore, the Court rejects the Applicant's request for an order to suspend the organisation of the concerned election.
33. For the avoidance of doubt, the Court recalls that this Ruling is provisional and in no way prejudices the Court's findings on its jurisdiction, on the admissibility of the application and on the merits thereof.

VIII. Operative part

34. For these reasons,
The Court

By a vote of nine (9) for, and one (1) against, Judge Chafika BENSOUALA dissenting,

Dismisses the request to order the respondent State to postpone the holding of the parliamentary elections scheduled for 17 December 2022 until the Court can examine the merits of the case.

Dissenting Opinion: BENSAOULA

1. I do not share the Court's findings in its above-mentioned Ruling and the reasons proffered with regard to the dismissal of the Application seeking an Order for the Respondent State to postpone the legislative elections slated for 17 December 2022 until examination of the case on the merits.
2. It is therefore my wish to write this dissenting opinion because I am convinced that the Court should have declared the request well-founded for the simple reason that it meets the requirements of urgency warranting provisional measures.
3. In this regard, Article 27(2) of the Protocol clearly 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".
4. Rule 59(1) of the Rules of Court also clearly provides that "Pursuant to Article 27(2) of the Protocol, the Court may, at the request of a party, or on its own accord, in case of extreme gravity and urgency and where necessary to avoid irreparable harm to persons, adopt such provisional measures as it deems necessary, pending determination of the main Application".
5. Hence, it emerges from a reading of the above two Rules that the conditions governing provisional measures remain the urgency or the gravity of cases and the need to avoid irreparable harm.
6. In paragraph 22 of its Ruling, the Court declares 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. It further provides in its paragraph 23 that the risk in question must be real, which excludes a purely hypothetical risk...
8. With respect to irreparable harm, in paragraph 24 of the Ruling, the Court considers that there must be a "reasonable probability of occurrence" having regard to the context and the Applicant's personal situation.
9. It is noteworthy that the Application seeking the suspension of the legislative elections of 17 December 2022 was filed before the Court on 25 October 2022 with the prayer on the merits, that is, over one (1) month before the elections.
10. It emerges from the Applicant's prayers on the merits (paragraph 4 of the Ruling) that he, *inter alia*, alleges the violation of Articles 13 and 20 of the Charter and Article 14 of the International Covenant on Civil and Political Rights.
11. It is clear from the request for provisional measures that the Applicant seeks the suspension of the elections because they are

- based on Decree 55/22 which he considers to be unconstitutional.
12. The case file on the merits shows that the decree in question is a decree-law numbered 2022/55 and dated 15 September 2022 amending Organic Law No 2014/16 of 26 May 2014 on elections and referenda.
 13. As indicated in paragraph 9 (iv) of the Ruling, the Applicant did indeed, among his claims on the merits, request the suspension and annulment of this decree!
 14. It emerges, however, that in paragraph 30 of the Ruling the Court found that the Applicant did not establish any direct link between holding the legislative elections and the decree-law, so that the prayer for provisional measures is indistinguishable from the claims on the merits, especially as in paragraph 31 the alleged violations are not in the context of the election, the suspension of which is sought. Consequently, it is my opinion that the Court has not only misrepresented the Applicant's claims but has also prejudged the merits.
 15. It is clear that there is a situation of urgency... because holding elections while substantive claims are pending before the Court would completely destroy the meaning of the said claims and prejudice the decision of the Court on the merits!
 16. As for real harm, it is apparent that the Applicant is a Tunisian citizen who aspires to the stability of his country's institutions, and therefore, that organizing premature elections according to his allegations whereas the mandate of the dissolved parliament would expire only in November 2024 cannot but constitute real harm that cannot be restored to the original state if the Court were to declare the measures taken by the Respondent State as being in breach of the principles enshrined in the Charter.
 17. In my opinion, prayers for provisional measures must be considered against the backdrop of the nature of the request itself!
 18. A request for the suspension of an act can only be a request with provisional and momentary effects which abates once the Court renders its decision on the merits.
 19. Therefore, in my opinion, the Court should have declared the request for suspension well-founded, insofar as it was not only provisional but also temporary and urgent, given that the event was imminent and unequivocally prejudicial to the Applicant.