

Zayd v Tunisia (provisional measures) (2022) 6 AfCLR 1067

Application 005/2022, *Maher Ben Mohamed Taher Zayd v United 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 is a citizen of the Respondent State and a former member of its parliament. He brought this Application alleging that the dissolution of the parliament by the Respondent State before the expiry of its term was a violation of certain human rights guaranteed in the African Charter and other human rights instruments. The Applicant alleged further that the conduct of the Respondent State, in the course of subsequent political events, including his arrest, trial and sentencing by a military tribunal was also in violation of his rights. The Application was filed along with a request for provisional measures to order the Respondent State to refrain from holding parliamentary elections. In this ruling, the Court dismissed the Applicant's request for provisional measures.

Jurisdiction (*prima facie* jurisdiction, 19-21)

Provisional measures (urgency, 26; extreme gravity 26; irreparable and imminent risk, 26-27; irreparable harm, 28; preventive nature, 29; connection between measures requested and merits, 34; similarity with merits, 39)

Dissenting Opinion: BENSAOULA

Provisional measures (conditions for grant, 5; urgency, 14; real harm, 15)

I. The Parties

1. Maher Ben Mohamed Taher Zayd (hereinafter referred to as "the Applicant"), is a national of the Republic of Tunisia and member of the dissolved Assembly of the People's Representatives. He alleges human rights violations. He alleges violation of his human rights in connection with the dissolution of the Assembly of People's Representatives and the political events that followed.
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. It emerges from the record that the Applicant was elected for a parliamentary term that runs until November 2024. He alleges that the authorities of the respondent State are planning to hold parliamentary elections while the term of office of Parliament has not yet expired.
4. The Applicant alleges the violation of the country’s Constitution by the President of the Republic. He contends that the President took measures that are not within his powers, in particular, by suspending the Assembly of the People’s Representatives and dissolving the government. Subsequently, the President dissolved the Assembly of the Representatives of the People and withheld the entitlements of its members, including salaries, health insurance and travel allowances.
5. The Applicant alleges that the President of the Republic described the Representatives as “rats, criminals and trash”. He further accused them of taking bribes to pass certain laws. The Applicant further alleges that he was arrested on 30 July 2021 and arraigned before a military court on the charge of conspiracy against State security. He avers that the same military court also sentenced him in another case to three (3) years in prison.
6. The Applicant further alleges that armed men in civilian clothes raided his house on two occasions, on 2 November 2021 and 2 August 2022. The authorities also prevented the Applicant and his young son, who holds an American passport, from traveling abroad.
7. The Applicant alleges that the President of the Republic has failed to disclose the state of his physical and psychological health, which exacerbates fear and anxiety over the fate of the country in the light of the chaotic decisions and orders he issues based on his whims and caprices.

A. Alleged violations

8. The Applicant alleges violation of the rights to non-discrimination, equality, life, dignity, security and liberty, fair trial, freedom of movement, the right of the people to self-determination, and the independence of the courts guaranteed by Articles 2, 3, 4, 5, 6, 7,

12, 20 and 26 of the Charter respectively.

III. Summary of the Procedure before the Court

9. On 7 November 2022, the Registry of the Court received the Application together with a request for provisional measures.
10. On 16 November 2022, the Application was served on the Respondent State with a request 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.
11. The Respondent State has not responded to the request for provisional measures.

IV. Prayers of the Parties

12. The Applicant requests the Court to:
 - i. Declare that it has jurisdiction;
 - ii. Declare the Application admissible;
 - iii. Rule, on the merits of the Application, that the Respondent State violated Articles 2, 3, 4, 5, 6, 7 of the Charter by putting the Applicant on trial before military courts and sentencing him for his anti-corruption writings in his capacity as an elected Member of Parliament. Furthermore, the Applicant's family also suffered unlawful kidnapping of its children and deprived the latter of the service of a lawyer to defend them until they were released after a full day of intimidation and deprivation of water and medicine, especially his daughter, who is diabetic.
 - iv. Rule that the Respondent State violated Article 12 of the Charter by placing some members of the Assembly of the People's Representatives under house arrest and unlawfully preventing the rest of the members of the Assembly from leaving the country.
 - v. Find that the Respondent State violated Article 20 of the Charter for flagrant assault on the people's choices by suspending the democratically elected Assembly of the People's Representatives and subsequently dissolving it completely, with military force being used to deter any resistance. The Respondent State also violated the people's right to self-determination by calling parliamentary elections although the term of the legally elected parliament runs until October 2024.
 - vi. Find that the Respondent State violated Article 26 of the Charter for failing to guarantee the independence of the judiciary, by arraigning the elected Representatives of the people before military and anti-terrorism courts for attending a parliamentary session that called

upon the President of the Republic to end his exceptional measures and return the country to constitutional rule.

13. The Applicant prays the Court to:
 - i. Declare that the lifting of the Applicant's immunity as a member of the Assembly of the People's Representatives is illegal;
 - ii. Vacate the delivered against him by the military courts after the lifting of his immunity, as military courts lack jurisdiction to try civilians.
 - iii. Uphold his right to receive his parliamentary salary and health coverage for himself and his family, according to norms and practices existing since he assumed his parliamentary duties that were truncated by the July 2021 coup.
 - iv. Declare that the Applicant has the right to enter the premises of Parliament to serve the voters who elected him;
 - v. Uphold his right to pecuniary and non-pecuniary reparation for the harm suffered since 25 July 2021 as a result of the presidential measures, including imprisonment, defamation, and fleeing his country to seek safety in exile, away from his family whose members were kidnapped and banned from travel.

V. *Prima facie* jurisdiction

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

15. 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.
16. Article 3(1) of the Protocol provides:

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.
17. 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

18. In terms of Article 5(3) of the Protocol, “The Court may entitle relevant non-Governmental organizations (NGOs) with observer Status before the Commission and individuals to institute cases directly before it, in accordance with Article 34(6) of this Protocol.”
19. 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.
20. 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.
21. In light of the foregoing, the Court, notes that it has *prima facie* jurisdiction to hear to hear the requests for provisional measures.

VI. Provisional measures requested

22. Under provisional measures, the Applicant prays the Court to:
 - i. Issue an urgent decision restraining the Respondent State from holding the parliamentary elections scheduled for 17 December 2022, in the light of the existence of a legitimate parliament democratically elected by the Tunisian people, whose term ends in two years, that is, in November 2024.
 - ii. Rule that the elections called, any decision or action issued by the illegitimate parliament resulting thereof, are null, void and of no legal effect, in the light of a previous decision issued by this honourable Court that nullified the presidential orders and decrees issued after the 25 July 2021 elections, insofar as the elections will prevent him from performing his duties as a member of the current Assembly of the People’s Representatives, and in the absence of a national Constitutional Court with jurisdiction in the matter.
 - iii. Compel the President of the Republic to undergo physical and psychological medical examination to ensure that he is of a sound mind and body to perform his duties, insofar as it is clear that there is a direct threat to the security and stability of the country, in the

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.

absence of a competent constitutional court in Tunisia to compel the President of the Republic to comply with this request.

23. 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.
24. The Court notes that Rule 59(1) of the Rules provides:
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.
25. It follows from the foregoing that the Court has the discretion to decide in each case whether, in the light of the particular circumstances, to exercise the power vested in it by virtue of the aforementioned provisions.
26. 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
27. The Court notes that the risk in question must be real, which excludes the purely hypothetical risk and explains the need to remedy it in the immediate future³
28. 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.⁴
29. 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

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

3 *Sebastien v Republic of Benin*, § 27, *Ibid* 62.

4 *Sebastien v Republic of Benin*, 28, *Ibid* 63.

preclude a decision on the merits of the Application.⁵

30. In this Application for Provisional Measures, the Applicant requests the Court to i) stay the organisation of the parliamentary elections; ii) invalidate the calling of the parliamentary elections and the decisions of the Parliament elected as a result; and, iii) order that the President of the Republic be subjected to a physical and psychological examination.

A. Injunction on the legislative elections scheduled for December 2022

31. The Applicant request the court to issue an urgent decision placing an injunction on the holding of the parliamentary elections scheduled for 17 December 2022, in the light of the existence of a legitimate parliament democratically elected by the Tunisian people, whose term ends in two years, that is, in November 2024.

32. The Court notes that the Applicant seeks an order vacating Article 1 of the Presidential Order No 710 of 15 September 2022 by which the President called parliamentary elections on Saturday, 17 December 2022 to elect members of parliament. Voters residing abroad will vote on Thursday 15, Friday 16 and Saturday 17 December 2022.
33. The Court notes that the Applicant filed his application with the Registry on 7 November 2022.
34. 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.

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

35. The Court further notes that while the claims relating to the legitimacy of the dissolved Parliament and the Parliament that would emerge from the election scheduled for December 2022 are relevant to the merits of the case, it is clear that the Court would risk going into the merits if it were to grant the application for a stay in this case.
36. Therefore, the Court rejects the Applicant's request for an order to suspend the organisation of the concerned election.

B. Vacation of the elections called, the results thereof and the decisions of the parliament to be elected

37. The Applicant prays the Court to vacate the call for election of a new parliament on 17 December and the result thereof in light of the existence of a legitimate parliament whose term runs until November 2024, *insofar as the elections will prevent him from performing his duties as a member of the current Assembly of the People's Representatives, and in the absence of a national Constitutional Court with jurisdiction in the matter.*

38. The Court notes that the Applicant seeks a measure vacating the aforementioned call for elections and all actions undertaken by the parliament resulting thereof, in line with a previous ruling of this Court on the Presidential Orders and Decrees issued and the non-establishment of the Constitutional Court in the Respondent State.
39. The Court considers that this request relates to the merits of the Application and therefore cannot be considered at the stage of provisional measures. The convening of the electoral college is a measure which is similar in nature to the application already examined. The Court considers that the same answer applies to the application under consideration. The annulment of future decisions of the parliament to be elected is obviously a potential claim and the damage associated with it is not at all realized.
40. Furthermore, it would not be possible to grant the present Claim without affecting the merits of the Application.
41. Consequently, the Court rejects the request for interim measures to annul the convocation of the electorate and the decisions of the Parliament that will result from the December 2022 election.

C. Measure compelling the President of the Republic to undergo physical and psychological examination

42. Finally, the Applicant requests the Court to order that the President of the Republic of the Respondent State to undergo physical and psychological medical examination to ensure that he is of a sound mind and body to perform his duties, *insofar as it is clear that there is a direct threat to the security and stability of the country, in the absence of a competent constitutional court in Tunisia to compel the President of the Republic to comply with this request.*

43. The Court notes that there is nothing on record to warrant granting this request. Consequently, the Court dismisses it.
44. 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.

VII. Operative part

45. For these reasons,
The Court

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

- i. *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.
- ii. *Dismisses* the request for an order invalidating the convening of the electoral college, the results of the elections and any action taken by the parliament to be elected until it can consider the merits of the case.
- iii. *Dismisses* the request for an order requiring the President of the Republic to undergo a medical, psychological and physical examination to ascertain his state of health.

Dissenting Opinion: BENSAOULA

1. I do not share the Court's finding 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 organization of 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 of the Protocol in its paragraph 2 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 paragraph 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 requirements governing provisional measures remain the urgency or the gravity of cases and the need to avoid irreparable harm.
6. In paragraph 26 of its Ruling, the Court declares that urgency, which is consubstantial with extreme gravity, means that an irreparable and imminent risk will be caused if it does not grant the request, before it renders its final judgment.
7. It further provides in paragraph 27 of the Ruling that the risk in question must be real, which excludes a purely hypothetical risk.
8. With respect to irreparable harm, the Court considers, in paragraph 28 of the Ruling, 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 7 November 2022 with the prayer on the merits, over one (1) month before the elections.

10. The Applicant is an elected Member of Parliament, a fact not denied by the Respondent State, and the term of the current parliament will expire in 2024.
11. It is apparent from the same alleged facts which the Respondent State does not contest, because although notified, it did not respond to the Applicant's claims, that the suspension of Parliament resulted in the suspension of the allowances of its members and all that arises from the loss of the status of Member of Parliament.
12. It emerges from the Applicant's claims on the merits that he alleges the violation of Article 20 of the Charter for flagrant attack on the will of the people by suspending the assembly of its democratically elected representatives and dissolving it completely, and the right of the people to self-determination by calling legislative elections whereas the term of the legally elected parliament runs until October 2024.
13. It is clear from the request for provisional measures that the Applicant at no time requested, as provisional measure, the annulment of Presidential Decree No 2022/710 of 15 September 2022 by which the President called legislative elections, contrary to what is stated in paragraph 32 of the Ruling. In fact, the Applicant only sought the suspension of the elections. This request in itself remains a provisional and, therefore, temporary measure which should not have brought the Court to consider the merits of the case pending the emergence of a new fact which could be the judgment on the merits rendered by the Court or another measure taken by the Respondent State to vacate the measure.
14. It is clear that there is a situation of urgency... insofar as 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!
15. As for real harm, it is noteworthy that the Applicant being a sitting member of the current parliament, the suspension thereof and the loss of benefits attached thereto (salary, allowances, etc.) certainly constitute real harm that cannot be restored to the initial state if the Court were to declare the actions taken by the Respondent State in breach of the principles enshrined in the Charter,
16. Indeed, holding elections which will put in place a new parliament, could in no way restore the Applicant's rights and would make it impossible to execute any decision of the Court rendered in favour of the Applicant.
17. Furthermore, in paragraph 35 of its Ruling, the Court considers that it would risk delving into the merits, if it were to grant the Applicant's request to stay elections in the instant case.

- 18.** In my opinion, prayers for provisional measures must be considered against the backdrop of the nature of the request itself!
- 19.** A request for suspension of an act can in no way be considered as a request relating to the merits insofar as it is temporary and only a request for annulment of the act can be determined by a Judge on the merits, because it meets the requirements in terms of form and the merits.
- 20.** In my opinion, therefore, the Court should have declared the request for suspension well-founded as it was not only provisional but temporary and urgent, given that the event of holding elections was imminent and unequivocally prejudicial to the Applicant.