

TANZANIA / JUDGMENT

slimane v republic of tunisia

ruling application no 0072024

2024 achpr 5 3 october 2024

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AFRICAN UNION UNION AFRICAINE UNIÃO AFRICANA AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES THE MATTER OF HASNA BEN SLIMANE V. REPUBLIC OF TUNISIA APPLICATION No. 007/2024

RULING

(PROVISIONAL MEASURES) 3 OCTOBER 2024 The Court composed of: Imani D. ABOUD, President; Modibo SACKO, Vice- president; Suzanne MENGUE, Tujilane R. CHIZUMILA, Chafika BENSAOULA, Blaise TCHIKAYA, Stella I. ANUKAM, Dumisa B. NTSEBEZA, Denis D. ADJEL, Duncan GASWAGA, Judges, and Robert ENO, Registrar. Pursuant to Article 22 of 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") and Rule 9(2) of the Rules of Court (hereinafter referred "the Rules") Judge Rafaâ BEN ACHOUR, a national of Tunisia, did not hear the Application. In the matter of: Hasna BEN SLIMANE Self-represented Versus REPUBLIC OF TUNISIA Unrepresented After deliberation, Renders this Ruling: 1 I. THE PARTIES

1. Hasna Ben Slimane (hereinafter referred to as "the Applicant") is a national of the Republic of Tunisia who held the positions of judge, member of the Board of the Independent High Authority for Elections (hereinafter referred to as "ISIE") and minister. She alleges the violation of human rights in relation to her dismissal from the judiciary, the conduct of the presidential election of 2024 and the failure to implement the judgment of the Court in Application No. 017/2021, Brahim Belguith v. Republic of Tunisia.
2. The Application is filed against the Republic of Tunisia (hereinafter referred to as "the Respondent State") which became a Party to the Charter on 21 October 1986 and to the Protocol on 5 October 2007. On 2 June 2017, the Respondent State also deposited the Declaration 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 (hereinafter referred to as "NGOs"). II.

SUBJECT OF THE APPLICATION

3. It emerges from the Application that the Applicant was dismissed from her position as a member of cabinet on 26 July 2021 and from her position as a judge on 17 January 2023. She avers that she was subjected to harassment and defamation on account of her gender. She filed complaints before the criminal courts against several entities which, according to her, did not prosper.
4. She further avers that the Respondent State has not implemented the Court's judgment in Application No. 017/2021 - Brahim Belguith v. Republic of Tunisia (hereinafter referred to as "the Belguith judgment"), in which the Court ordered it to take the necessary measures to restore constitutional democracy by overturning the decrees issued by the President of the Republic in 2021.¹
5. According to the Applicant, there was a low turnout in the parliamentary elections, following which the President of the Republic, on 28 December 2022, accused persons who abstained from taking part in the elections of plotting against State security.
6. The Applicant further declares that by a Decree of 2 July 2024, published in the Official Gazette on 3 July 2024, the President of the Republic set the date of the election and invited voters to the poll for the presidential election of 6 October 2024.
7. The Applicant further states that contrary to an earlier court decision, members of the ISIE declared that candidates were required to submit a printed copy of their judicial record as part of their application file. According to the Applicant the requirement to obtain signatures was not changed through a new law that repealed the Law No.16 of 2024. III.
ALLEGED VIOLATIONS
8. In her main Application, the Applicant alleges violation of the following rights and obligations:
 - i. The right to non-discrimination protected by Article 2 of the Charter and Article 26 of the International Covenant on Civil and Political Rights (ICCPR);² 1 See Ibrahim Ben Mohamed Ben Ibrahim Belguith v. Republic of Tunisia, ACtHPR, Application No. 017/2021, Judgment of 22 September 2022 (merits and reparations), § 147(viii) in which the Court "Orders the Respondent State to repeal Presidential Decree No. 2021-117 of 22 September 2021 and the decrees referred to in decrees Nos. 69, 80 and 109 of 26, 29 July and 24 August 2024 respectively, as well as decrees Nos. 137 and 138 of 11 October 2021, and to restore constitutional democracy within two years of the date of notice of this judgment". 2 The Respondent State became a party to the ICCPR on 18 March 1969. 3 ii. The right to equal protection of the law protected by Article 3(2) of the Charter; iii. The right to protection of her reputation, honour, physical and moral integrity protected under Articles 4 and 17 of the ICCPR and 4 of the Charter; iv. The right to work under conditions of equality which preserve dignity and prevent humiliation, protected by Article 5 read jointly with Article 15 of the Charter;

- v. The right to a fair trial, protected by Article 7 of the Charter; vi. The right to free information, access to information, access to the truth and to its dissemination and the right to express one's opinion protected by Article 9 of the Charter and Article 19 of the ICCPR; vii. The right to freely participate in the in the management of public affairs, protected by Article 13(1) of the ICCPR; viii. The obligation to fight all forms of discrimination against women, include the gender perspective and be committed to adopt specific measures to promote the complete and effective participation of women in the political process at all levels as well as the implementation of the principles of equality between men and women, protected by Articles 2(c) and 9 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (The Maputo Protocol);³ ix. The obligation of the State to stop hate speeches which constitute an incitement to discrimination, hostility or violence, protected by Article 20(2) of the ICCPR;
- x. The right to support the peaceful transfer of power, protected by Article 23(1) of the Charter; xi. The right to ensure the implementation of court decisions in favour of Applicants, protected by Article 2(3) of the ICCPR; xii. The right to ensure that one's rights are not restrained in violation of established conditions and procedures, established for exceptional cases of emergency, protected by Article 4 of the ICCPR; ³ The Respondent State became a party to the Maputo Protocol on 27 September 2018. ⁴ xiii. The right to request the State to amend its legislative or other measures to protect the rights guaranteed for its citizens, including the right to freely and equally participate in the management of public affairs, the right to appeal, institutional reforms and the right to fair trial, protected by Articles 2(2) of the ICCPR and 1 of the Charter; xiv. The right to be brought to Court within the shortest possible time and remand in custody should not be the general rule, protected by Article 9(3) of the ICCPR; xv. The obligation to guarantee the independence of the judiciary and to improve on institutions charged with promoting rights and freedom, protected by Article 26 of the Charter; xvi. The right to fair trial, including the right to be tried within a reasonable time and on the basis of fair rules and procedures, protected by Articles 2(3) (a) and (b) of the ICCPR and 7(1) of the Charter; xvii. The right not to use immunity of duty to prevent investigations and charges in case of suspicion of illegal practices, protected by Article 7 (5) of the African Union Convention on Preventing and Combatting Corruption (CPCC),⁴ xviii. The right to benefit from government services on the basis of equality, protected by Article 13(3) of the Charter; xix. The right to freedom and security of persons, the right not to be subject to arbitrary detention and the right to apply legal guarantees relating to remand in custody, protected by Articles 6 of the Charter and 9 of the ICCPR; xx. The right to freedom of association, protected by Articles 10 of the Charter and 21 of the ICCPR; xxi. The right to benefit from government services with respect to the principle of equality, protected by Article 13(3) of the Charter, xxii. The right of all peoples to self-determination, protected by Article 20(1) of the Charter; xxiii. The right to the implementation of court decisions, protected by Article 2(3) of the ICCPR; ⁴ The Respondent State became a party to the CAPLC on 10 February 2020. ⁵ xxiv. The obligation to recognise the rights, duties and freedoms enshrined in the Charter and to adopt legislative and other measures to apply them,

protected by Article 1 of the Charter. IV. SUMMARY OF THE PROCEDURE BEFORE THE COURT

9. On 16 June 2024, the Registry received the main Application together with a request for provisional measures. On 12 July 2024, the Registry received an updated supplementary version of the main Application and the request for provisional measures.
10. On 7 August 2024, the Registry received the main Application together with a request for provisional measures which were served on the Respondent State on the same day. The Respondent State was requested to appoint its representatives within 30 days and to file its response to the request for provisional measures and the main Application within ten and 90 days respectively.
11. On 30 August 2024, the Respondent State requested additional time to respond to the request for provisional measures. The Court did not grant the request for extension of time in view of the urgent nature of the request for provisional measures. V. PRAYERS OF THE PARTIES
12. In the main Application, the Applicant prays the Court to:
 - a) Order the Respondent State to fully execute the Court's judgment in Application No. 017/2021 - Brahim Belguith v. Republic of Tunisia, in particular: 6
 - i. Enforce the judgment setting aside all the unlawful measures referred to in Application No. 017/2021 - Brahim Belguith v. Republic of Tunisia and declare that the measures issued on 25 July 2021 are unlawful and not based on justifiable grounds; ii. Annul all measures subsequent to the same judgment which are contrary to the obligation to execute the judgment, in particular, the legislative provisions which have created an undemocratic electoral system and its consequences; iii. Execute the judgment of the Court by establishing an independent Constitutional Court and set up an independent judiciary and national institutions to promote the rights and freedoms of free participation in the conduct of public affairs and the completion of the democratic transition process, in particular those responsible for freedom of organisation, expression and election and for guaranteeing the impartiality of the administration and the armed forces; repeal all laws and decisions enacted since 25 July 2021 that led to the dissolution of the Supreme Council of the Judiciary, the change in the law and composition of the ISIE and the disruption of the operation of other constitutional and public bodies responsible for promoting rights and freedoms, including the Media Reform Commission; and repeal all laws and decisions enacted since 25 July 2021; iv. Enforce the Court's Ruling on the return to constitutional democracy and respect democratic rules in all elections, including the 2024 presidential election, and ensure peaceful transfer of power; and
 - b) Take all appropriate and necessary measures if it is found that the right of the Tunisian people to self-determination has been violated as a result of unlawful interference by foreign actors.

13. The Respondent State did not respond to the main Application. 7 VI. PRIMA FACIE JURISDICTION

14. The Applicant did not submit observations on the jurisdiction of the Court.

15. The Respondent State did not respond to the request for provisional measures.

* * *

16. The Court notes that under Article 3(1) of the Protocol: 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. The Court further notes that under Rule 49(1) of the Rules: “the Court shall conduct preliminary examination of its jurisdiction (...) in accordance with the Charter, the Protocol and these Rules.”

18. However, concerning requests for provisional measures, and in accordance with its jurisprudence, the Court does not have to ascertain that it has jurisdiction over the merits of the case, but simply that it has prima facie jurisdiction.⁵

19. In the present case, the Court recalls that, as indicated in paragraph 2 of the present Ruling, the Respondent State ratified the Charter and the Protocol; and deposited the Declaration. Furthermore, as indicated in paragraph 8 of this Ruling, the rights alleged by the Applicant to have been violated are protected by the Charter, the ICCPR, the Maputo Protocol and the CAPLC, instruments to which the Respondent State is a party. ⁵ See African Commission on Human and Peoples' Rights v. Great Socialist People's Libyan Arab Jamahiriya (provisional measures) (25 March 2011) 1 ACLR 18, § 10; Komi Koutche v. Republic of Benin (provisional measures) (2 December 2019) 3 ACLR 725, § 14; Ghati Mwita v. United Republic of Tanzania (provisional measures) (9 April 2020) 4 ACLR 112, § 14; Symon Vuwa Kaunda & 5 Others v. Republic of Malawi (provisional measures) (11 June 2021) 5 ACLR, 174, § 12. ⁸

20. In light of the foregoing, the Court finds that it has prima facie jurisdiction to hear the present request for provisional measures. VII. PROVISIONAL MEASURES REQUESTED

21. In her request for provisional measures, the Applicant prays the Court to:

- i. Order the Respondent State to publish without delay in the Official Gazette the requirements to stand as a candidate in the presidential election; ii. Order the Respondent State to abolish the requirement of signatures for endorsement; the requirement to provide a copy of a criminal record (Bulletin no 3); and all legal and de facto obstacles to run for office; iii. As a precautionary measure, and in the event that the provisional measures Ruling is not issued before the ISIE considers candidacies, to order the Respondent State to allow the candidacy of any person whose application has been rejected on the basis of a violation of the sponsorship requirement or on the basis of failure to submit Bulletin no 3 (criminal record) even though he or she enjoys his or her civil and political rights and is not prevented by a

final court decision from voting or running for office, as well as any person whose application was rejected for failure to submit a valid power of attorney while he or she was unable to do so for a reason beyond his or her control. iv. Order the Respondent State to suspend the appointment of members of the ISIE Bureau and to appoint new members to continue overseeing the 2024 presidential election. *

22. The Respondent State did not respond to the request for provisional measures. 9

* * *

23. The Court notes that Article 27(2) of the Protocol stipulates as follows: In cases of extreme gravity and urgency, and where it is necessary to avoid irreparable damage to persons, the Court shall order such provisional measures as it deems appropriate.
24. The Court observes that the provisions of Article 27(2) of the Protocol are reflected in Rule 59(1) of the Rules, which specifies that: Pursuant to Article 27(2) of the Protocol, at the request of a party or on its own motion, in cases of extreme gravity or urgency and where it is necessary to avoid irreparable damage to persons, the Court may order such provisional measures as it considers appropriate, pending a decision on the main Application.
25. Based on the foregoing, the Court takes into account of the applicable law in deciding whether or not to order provisional measures on a case-by-case basis.
26. The Court reiterates that the urgency inherent in extreme gravity means that there is a “real and imminent likelihood that irreparable harm is caused before the Court renders its final decision”.⁶
27. The Court underscores that the requirements of urgency or extreme gravity and irreparable harm are cumulative, so that if one of them is lacking, the provisional measures requested cannot be ordered.
28. Consequently, when deciding on requests for provisional measures, the Court is mindful of the principles set out above and, in particular, of the fact 6 Sébastien Germain Marie Aïkoue Ajavon v. Republic of Benin (provisional measures) (17 April 2020) 4 AfCLR 123, § 61. 10 that provisional measures are preventive in nature and can therefore only be granted if a party fulfils all the required conditions.⁷
29. The Court reiterates its position that it is not required at this stage to examine the merits of the Applicant's allegations that violations have been committed against her father in detention, but only to determine whether the particular circumstances of the case warrant ordering the Respondent State to implement provisional measures.⁸
30. The Court shall consider the following requests for provisional measures:
- (i) publish the requirements to stand as a candidate in the presidential election; (ii) remove obstacles to stand as a candidate in the presidential election, including publishing the conditions for candidacy, removing the sponsorship requirement; removing the obligation

to submit a criminal record (Bulletin no 3); (iii) consider the candidacy of any person whose application has been rejected on the basis of a violation of the sponsorship requirement or on the basis of failure to submit Bulletin no 3; (iv) suspend the appointment of the ISIE Bureau members and appoint new members persons who meet the conditions of integrity, independence and competence.

- i. Request for publication of the conditions for candidacy in the presidential election
- 31. The Applicant prays the Court to order the Respondent State to publish in the Official Gazette, without delay, the requirements to stand as a candidate in the presidential election. * 7 Ibid., § 60. 8 Sébastien Germain Marie Aïkoue Ajavon v. Republic of Benin (provisional measures) (2021) 5 AfCLR 150, §30; Adama Diarra alias Vieux Blen v. Republic of Mali (provisional measures) (2021) 5 AfCLR 124, § 23. 11
- 32. The Respondent State did not respond.

* * *

- 33. The Court notes that the measure requested by the Applicant relates to the requirements to stand as a candidate in the presidential election, in particular the publication of such requirements.
- 34. The Court notes that after the filing of the present request for provisional measures and before the opening of the candidacy period, the Respondent State undertook some processes in respect of the measure being sought by the Applicant. Namely, the decision of the ISIE to which the Applicant makes reference was published in the Respondent State's Official Gazette No. 89 of 17 July 2024. This request has therefore become moot. ii. Request for the removal of obstacles to stand as a candidate in the presidential election
- 35. The Applicant prays the Court to order the Respondent State to publish in the Official Gazette, without delay, the requirements to stand as a candidate in the presidential election; abolish the sponsorship requirement, as it has no legislative basis; abolish the procedure for providing a criminal record extract (Bulletin no 3), since it is incompatible with the objectives of verifying the enjoyment of civil and political rights; undertake not to adopt any criminal sanction to prevent candidacy, unless it results from a final judicial decision approving such an additional sanction; and remove all legal and de facto obstacles to the enjoyment of the right to stand as a candidate.
- 36. In support of these requests, the Applicant considers that her request is urgent given that voters have been called to vote in the presidential election on 6 October 2024 throughout the country and on 4, 5 and 6 October 2024 abroad; the calendar issued has set the period for filing candidacies from 29 July to 6 August 2024; and there are indications that the election process is likely to exclude competitors to the incumbent President. 12

37. The Applicant asserts, on the other hand, that respect for the right to contest in accordance with the law, without unreasonable and unjustified restrictions, is essential to guarantee democratic and fair elections and the peaceful transfer of power, while the ISIE has issued explicit statements to the effect that it will reject any application that does not meet the unjust and illegal conditions it had announced, thereby threatening the integrity of the process, voter turnout and acceptance of the results, and potentially blocking the pathway to restoration of democracy or undermining the principle of peaceful transfer of power.
38. The Respondent State did not make any submission in respect of this request.

39. The Court notes that the Applicant seeks an order to remove the sponsorship obligation, obligation to provide a copy of bulletin no 3 of the criminal record and obligation not to adopt any criminal sanction to prevent candidacy, unless it results from a final judicial decision confirming such a sanction.
40. The Court observes in this respect that it cannot examine this request without examining and analysing the matter of the requirements of sponsorship, submission of an extract from the criminal record, legality of the powers of attorney required, nature of these three conditions and their compatibility with the requirements of international human rights instruments. It follows that the request under consideration also relates to the subject matter of the main Application. The Court cannot therefore examine it without ruling on the merits of the case.
41. Accordingly, the Court dismisses this request as it touches on the merits of the main Application. 13 iii. Request for the validation of all applications rejected on the grounds of the aforementioned obstacles
42. The Applicant requests that in the event that the provisional measures order is not issued before the ISIE rules on the candidacies, the Respondent State should be ordered to accept the candidacy of any person who has filed an application which was rejected on the basis of violating the sponsorship requirement by failing to submit bulletin no 3, even though he or she enjoys his or her civil and political rights and a final judicial decision has not prevented him or her from voting and standing as a candidate, as well as any person whose candidacy has been rejected for failure to present a recognised power of attorney when he or she was unable to do so for a reason beyond his or her control. *
43. The Respondent State did not make any submission in respect of this request.

44. The Court notes that, through this request, the Applicant seeks for the removal of all legal and factual obstacles to the right to stand for election.

45. The Court observes that this request is inherently connected to the merits of the main Application. Like the previous request, it cannot be dissociated from the merits of the claim, and follows logically from the determination of the previous request.
46. As such, this third request requires the Court to examine the requirements to stand as a candidate and their compliance with the provisions of international human rights instruments. The same applies to the Applicant's request that this Court should validate the participation of all candidates whose applications were rejected on the basis of the aforementioned requirements. 14
47. Accordingly, the Court dismisses this third request as it touches on the merits of the main Application. iv. Request to order the Respondent State to suspend the appointment of ISIE Bureau members and appoint new members
48. The Applicant prays the Court to order the Respondent State to suspend the appointment of the ISIE Bureau members and to appoint new members to proceed with the supervision of the 2024 presidential election, provided that their replacements meet the conditions of integrity, independence and competence and that their names are made public in advance to receive objections, if any, so as to guarantee the integrity of the electoral process and the acceptance of the results.
49. The Applicant alleges that the Respondent State refused to consider the appeal she filed on 6 June 2022 against the appointment of members of the body supervising the elections. According to her, numerous irregularities have been reported in the electoral processes conducted by the ISIE members supervising the elections since their appointment.
50. She asserts that the said members have taken unprecedented steps in relation to the 2024 presidential elections by waiving the ISIE's competence to issue the electoral calendar and by setting conditions that clearly lack objectivity and impartiality; and have an exclusionary effect on the competitors of the incumbent President. It is her submission that their continued supervision of the electoral process would threaten the integrity of the process and reinforce exclusion, in light of previous practices during electoral periods since 2022.
51. The Applicant also submits that in light of the delay in considering judicial petitions and taking into account the public information on the lack of judicial independence as well as the lack of access to effective measures to deal with the many repeated and serious complaints related to important elections to the highest office of the State by the ISIE Council members, 15 their continued supervision of the 2024 elections will cause irreparable harm as it shall cast a shadow on the integrity and fairness of the electoral process and could lead to the rejection of the results with risks for the instability of the country. *
52. The Respondent State did not make any submission in respect of this request.

* * *

53. The Court notes that, through this request, the Applicant seeks an order for the suspension of sitting ISIE members on the ground that the said members do not meet the legal requirements of independence and competence. It also appears that the Applicant is seeking an order that new members be appointed in compliance with the conditions of integrity, independence and competence in accordance with certain procedures to ensure the integrity of the presidential election scheduled to take place in October 2024.
54. The Court notes that the Applicant connects this request with several issues such as the criteria for appointing ISIE members, the complaint she filed against the former and current ISIE members and all such other issues that pertain to the search of 29 August 2022, as she alleges that the domestic proceedings in which she is involved have been delayed by certain authorities of the Respondent State.
55. The Court notes that at this stage of the examination of the request for provisional measures, it is not required to examine the merits of the case, nor the admissibility of the main Application.
56. Accordingly, the Court declines to grant the measure sought as it requires an analysis of the facts and alleged violations which falls under the merits of the main Application. 16
57. For the avoidance of doubt, the Court stresses that this Ruling is provisional in nature and does not in any manner prejudices its findings on its jurisdiction or on the admissibility and merits of the main Application. VIII. OPERATIVE PART
58. For these reasons, THE COURT, By a majority of 9 Judges for and 1 Judge against, Justice Chafika Bensaoula dissenting,
- i. Holds that the request to order the Respondent State to publish the requirements to stand as a candidate in the presidential election has become moot; ii. Dismisses the other requests. Signed: Imani D. Aboud, President; And Robert Eno, Registrar. Done at Arusha this Third Day of October in the Year Two Thousand and Twenty-Four in Arabic, English and French, the Arabic text being authentic. 17

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