

TANZANIA / JUDGMENT

ghannouchi and others v republic of tunisia ruling application no 0042023 2024 achpr 2 3 october 2024

COURT
ACHPRDECIDED
3 October 2024

Source: media.tanzlii.org · Research copy typeset by Esheria. Not court-issued or certified.

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 MOADH KHERIJI GHANNOUCHI AND OTHERS V. REPUBLIC OF TUNISIA APPLICATION No. 004/2023

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 to as "the Rules"), Judge Rafaâ BEN ACHOUR, a national of Tunisia, did not hear the Application. In the matter of: Moadh Kheriji GHANNOUCHI, Saida AKREMI, Elyes CHAOUACHI, Seifeddine FERJANI and Seifeddine BOUZAYENE Represented by Rodney Thomas Dixon KS, Temple Garden Chambers, King's Counsel Versus REPUBLIC OF TUNISIA Represented by the Director General of State Litigation, Ministry of State Domains and Land Affairs After deliberation, Issues the present Ruling: 1 I. THE PARTIES

1. Moadh Kheriji GHANNOUCHI, Saida AKREMI, Elyes CHAOUACHI, Seifeddine FERJANI and Seifeddine BOUZAYENE are all Tunisian nationals (hereinafter referred to as "the First, Second, Third, Fourth and Fifth Applicants" and together as "The Applicants"). They file the present Application on behalf of the following close family members in particular, Rached GHANNOUCHI, Noureddine BHIRI, Ghazi CHAOUACHI (hereinafter, referred to as "the Third Applicant's Father"), Said FERJANI, all imprisoned, and Ridha BOUZAYENE, who died during the demonstrations of 14 January 2022 in the Republic of Tunisia. They filed the application alleging the violation of the rights protected by Articles 1, 2, 4, 5, 6, 7, 9, 10, 11, 13, 16 and 26 of the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") as well as the corresponding provisions of the International Covenant on

Civil and Political Rights (hereinafter referred to as “the ICCPR”)¹ and the International Covenant on Economic, Social and Cultural Rights (hereinafter referred to as “the ICESCR”).²

2. On 23 July 2024, the Third Applicant, Elyes CHAOUACHI, subsequently filed the present request for provisional measures on behalf of his father, Ghazi CHAOUACHI, lawyer and politician imprisoned since 25 February 2023.
3. 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. Furthermore, on 2 June 2017, the Respondent State deposited with the Chairperson of the African Union Commission the Declaration provided for in Article 34(6) of the Protocol (hereinafter referred to as “the Declaration”) by virtue of which it accepts the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organizations (hereinafter referred to as “NGOs”) 1 The Respondent State became a party to the ICCPR on 18 March 1969. 2 The Respondent State became a party to the ICESCR on 18 March 1969. 2 with an observer status before the African Commission on Human and Peoples’ Rights. II. SUBJECT OF THE APPLICATION

4. The Applicants aver that following a series of presidential decrees issued between July and October 2021, the President of the Republic of the Respondent State, on 30 March 2022, dissolved the Assembly of People's Representatives (the Parliament) and amended the law on the Independent Supreme Electoral Body (ISIE). According to the Applicants, the President of the Republic also called a referendum on the Constitution on 25 July 2022, which they alleged was approved despite the low turnout. The Applicants further state that the Constitutional Court of the Respondent State, which was to be established under the Constitution, has not been established.
5. The Applicants also aver that the above-mentioned incidents took place in the “context of the statements made by the President of the Republic of the Respondent State, in which he described the detainees as terrorists and the judges who acquit them as accomplices”.
6. The Third Applicant alleges that his father, Ghazi CHAOUACHI, was arrested on 25 February 2023 and is being prosecuted for “undermining State security and disseminating false news”. He fears that his father could be sentenced to up to ten years' imprisonment or death. III. ALLEGED VIOLATIONS

7. In the Application, the Applicants allege violation of the rights of their detained family members, as follows: 3
 - i. The obligation of the State Parties to recognize the rights, duties and freedoms set forth in the Charter and to undertake to adopt legislative or other measures to give effect to them, as guaranteed by Article 1 of the Charter and Article 2 of the ICCPR, “in view of other violations of the Charter and the fact that the Constitutional Court is not operational, that the independence of lawyers and the judiciary has not been upheld and that the death of Mr

BOUZAYANE has not been effectively investigated and no one has been punished for the same”; ii. The right to the enjoyment of the rights and freedoms recognized and guaranteed without distinction of any kind, protected by Article 2 of the Charter and Article 2 of the ICCPR in that “the series of violations that culminated in the detention and prosecution of political leaders, as well as in the death of Mr BOUZAYANE and failure to investigate his death, is evidence that the Respondent State practices discrimination based on political opinion, which jeopardises the enjoyment of the rights guaranteed by the Charter”; iii. The right to life, protected by Articles 4 of the Charter and 6 of the ICCPR insofar as “Mr BOUZAYANE's life was not respected since it appears that he was arbitrarily deprived of life”; iv. The right to human dignity and the prohibition of torture, protected by Articles 5 of the Charter and Articles 7 and 10 of the ICCPR, given that “the dignity of the relatives of the Applicants and the right to be protected against torture and cruel, inhuman or degrading treatment or punishment has not been respected”;

- v. The right to liberty and security of person, protected by Articles 6 of the Charter and 9 of the ICCPR, insofar the Applicants’ relatives were not detained “pursuant to a warrant, on the basis of reasonable suspicion or probable cause, and sufficient reasons were not given”; vi. The right to a fair trial, protected by Articles 7 of the Charter and Articles 14 and 15 of the ICCPR, due to the lack of an operational Constitutional Court, breach of judicial independence and impeding access to lawyers for accused persons; vii. The right to information and to freedom of opinion and expression, protected by Articles 9 of the Charter and 19 of the ICCPR “insofar 4 as the arrests, detentions, prosecutions and convictions of which the Applicants complain are the result of politically motivated”; viii. The right to freedom of association, protected by Article 10 of the Charter and Article 22 of the ICCPR “insofar as the Applicants’ close relatives were targeted by the Respondent State on account of their membership of the National Salvation Front or parties associated with it”; ix. The right of assembly and peaceful assembly, protected by Article 11 of the Charter and Article 21 of the ICCPR in relation to the murder of the fifth Applicant’s father;
 - x. The right to participate freely in the government of one’s country, protected by Article 13 of the Charter and Article 25 of the ICCPR, insofar as legislation contrary to the 2014 Constitution was adopted, including legislation adopting the 2022 Constitution, and insofar as the right of the Applicants' associates to participate freely in the governance of the Respondent State was truncated; xi. The right to the enjoyment of the highest attainable standard of physical and mental health protected by Article 16 of the Charter and Article 12 of the ICESCR, insofar as the detainees are not afforded access to doctors of their choice, which prevents them from enjoying the highest attainable standard of physical and mental health; xii. The obligation of States to guarantee the independence of the courts, guaranteed by Article 26 of the Charter, insofar as the measures taken by the President of the Respondent State undermine the independence of the courts.
8. In his request for provisional measures, the Third Applicant further alleges that the Respondent State violated the following rights:

- i. The right to equality before the law and equal protection of the law, guaranteed by Article 3 of the Charter; and ii. The right to privacy, guaranteed by Article 17 of the ICCPR. 5 IV.

SUMMARY OF THE PROCEDURE BEFORE THE COURT

- 9. On 1 June 2023 the Registry received the main Application. On 23 July 2024, the Registry received this request for provisional measures.
- 10. On 8 June 2023, the said Application was served on the Respondent State, requesting it to file the list of its representatives and to respond within 30 and 90 days respectively. On 2 August 2024, the present request for provisional measures was served on the Respondent State for its Response within ten days.
- 11. The Respondent State did not file any response to the present request for provisional measures within the stipulated time-limit.
- 12. On 2 and 9 September 2024, the Third Applicant requested the Court to consider the instant Application as a matter of urgency and attached a copy of the judgment of the Respondent State's Administrative Court dismissing an application to issue the Third Applicant with the endorsement form authorising him to initiate the procedure in respect of his father's candidacy. He also attached a copy of the ISIE decision of 2 September 2024 containing the final list of candidates for the presidential elections scheduled for 6 October 2024. V.

PRAYERS OF THE PARTIES

- 13. The Applicants pray the Court to:
 - i. Declare that it has jurisdiction to hear the Application. ii. Hold that the present application is admissible. iii. Hold that the Charter, the ICCPR and the ICESCR were violated as indicated above. iv. Order that the detention and prosecution alleged by the Applicants should be suspended. 6
 - v. Order the Respondent State to annul all convictions resulting from the arrests, detentions and prosecutions alleged by the Applicants. vi. Order the Respondent State to open an investigation into Mr BOUZAYENE's death. vii. Order the Respondent State to compensate the Fifth Applicant and the close relatives of the First to Fourth Applicants for moral damage, in such sums as it deems to be appropriate. viii. Order the Respondent State to provide guarantees of non-repetition with regard to the violations found by the Court. ix. Order the Respondent State to bear the costs incurred by the Applicants.
- 14. The Respondent State prays that the main Application be declared inadmissible. It did not respond to the request for provisional measures. VI. PRIMA FACIE JURISDICTION
- 15. Neither of the Parties submitted on jurisdiction.

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 of Court: “The Court shall ascertain its jurisdiction and the admissibility of an Application in accordance with the Charter, the Protocol and these Rules”. 7
18. However, as regards requests for provisional measures, and in line with its jurisprudence, the Court does not have to satisfy itself that it has jurisdiction to examine the merits of the case, but only that it has prima facie jurisdiction.³
19. In the present case, the Court recalls that the Respondent State ratified the Charter and the Protocol and deposited the Declaration. In addition, as noted in paragraph 2 of this Ruling, the rights whose violation are alleged by the Applicants are protected by the Charter, the ICCPR and the ICESCR, instruments to which the Respondent State is a Party.
20. In light of the foregoing, the Court finds that it has prima facie jurisdiction to examine the present request for provisional measures. VII. PROVISIONAL MEASURES REQUESTED
21. In the present request for provisional measures, the Third Applicant prays that:
 - i. His father, Mr. Ghazi CHAOUACHI, be released. ii. The Respondent State does not prevent his father from standing for the election.

3 See African Commission on Human and Peoples' Rights v. Great Socialist People's Libyan Arab Jamahiriya (provisional measures) (25 March 2011) 1 AfCLR 17, § 10; Komi Koutche v. Republic of Benin (provisional measures) (2 December 2019) 3 AfCLR 725, § 14; Ghati Mwita v. United Republic of Tanzania (provisional measures) (9 April 2020) 4 AfCLR 112, § 14; Symon Vuwa Kaunda & 5 Others v. Republic of Malawi (provisional measures) (11 June 2021) 5 AfCLR 174, § 12.

8

22. The Court notes that Article 27 (2) provides that: In cases of extreme gravity or urgency, and where it is necessary to avoid irreparable damage to persons, the Court shall order such provisional measures as it deems appropriate.
23. The Court emphasises that Rule 59(1) of the Rules of Court provides that: In accordance with 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 adopt such provisional measures as it considers appropriate, pending a decision on the main Application.

24. In view of the above, the Court considers the applicable law in deciding whether or not to order provisional measures on a case-by-case basis.
25. The Court observes that urgency, which is consubstantial with extreme gravity, means that there is an “irreparable and imminent risk of irreparable harm being caused before the Court renders its final decision”.⁴
26. The Court emphasises 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.
27. Consequently, when deciding on requests for provisional measures, the Court is mindful of the principles set out above and, in particular, of the fact that provisional measures are preventive in nature and can therefore only be granted if a Party shows proof of the existence of required conditions.⁵
28. The Court reiterates its jurisprudence that it is not required at this stage to examine the merits of the Applicant’s allegations that violations were committed against his father in detention, but only to determine whether the 4 Sébastien Germain Marie Aïkoué Ajavon v. Republic of Benin (provisional measures) (17 April 2020) 4 AfCLR 123, § 61. 5 Ibid., § 60. 9 particular circumstances of the case require it to order the Respondent State to take provisional measures.⁶
29. The Court will consider the following requests for provisional measures: A) order the release of the Third Applicant’s father; B) order the Respondent State to desist from preventing the Applicant’s father from contesting the presidential election of 6 October 2024. A. On the request for the release of the Third Applicant’s father, Mr Ghazi CHAOUACHI
30. The Third Applicant first prays the Court to order the Respondent State to release his father, Mr Ghazi CHAOUACHI. To this end, he argues that his father, who is being prosecuted for serious offences, is being held beyond the legal time limit and has no access to a lawyer or a doctor, despite the Court of Appeal's order of 28 August 2023.⁷
31. The Applicant maintains that by holding his father in detention, the Respondent State is restricting his right to participate freely in the government of this country, pointing out that on 10 July 2024, one of his sons, vested with the power of attorney, petitioned the ISIE, but the authorities rejected his request. The Applicant also argues that by detaining his father, the Respondent State is restricting his right to participate freely in the government of his country.
32. The Third Applicant underscores that in the present case, extreme gravity has been established, insofar as his father’s lack of regular access to a lawyer was prejudicial both in regard to domestic proceedings against him as well as the abuse inflicted on the detainees. The Applicant further 6 Sébastien Germain Marie Aïkoué Ajavon v. Republic of Benin (provisional measures) (1 April 2021) 5 AfCLR 150, § 30; Adama Diarra alias Vieux Blen v. The Republic of Mali (provisional measures) 5 AfCLR 124, § 23. 7 Moadh Kheriji Ghannouchi and

Others v. The Republic of Tunisia, ACtHPR, Application No. 004/2023, Ruling of 28 August 2023 (provisional measures), § 61(i) where the Court decided as follows: “For these reasons, the Court, unanimously; Orders the Respondent State to take all necessary measures to remove the obstacles preventing the four detainees and their families from having access to and communicating with the lawyers and doctors of their choice”. 10 submits that his father's poor health could lead to physical incapacitation. In addition, the Applicant notes that extreme gravity ensues from the violation of national laws through the imprisonment a political opponent in order to prevent him from participating in the presidential elections. According to the Applicant, his request for provisional measures is the inevitable consequence of the non-implementation of the Order of the Respondent State's Court of Appeal of 28 August 2023.

33. With regard to urgency, the Third Applicant maintains that it is essential for lawyers to have regular access to persons suspected of having committed offences, and any refusal or interruption of access is prejudicial to the latter. In the Applicant's view, it is necessary to immediately halt the deterioration of his father's health condition and to release him, since there is no legal basis for his continued detention. According to the Third Applicant, the Decree No. 403 of 2024 of 2 July 2024, slating elections for the month of October is illegal since it is based on the Constitution of 2022, which was promulgated pursuant to a decree that is contrary to the Constitution and to the Charter. The Applicant avers that the said decree sets the period for submitting candidatures for the presidential election as between 29 July 2024, and 6 August 2024.
34. With regard to irreparable harm, the Third Applicant considers that, insofar as the proceedings against his father are still pending, lack of access to a lawyer is a source of irreparable harm to him, especially if, at the end of the criminal proceedings, this Court orders the annulment of the proceedings and the release of the prisoners. It is the Applicant's contention that his father's worsening health condition cannot be remedied by the judgment in the main Application, since the Court of Appeal cannot restore to an individual the freedom he should have enjoyed in the past under national law.
35. He points out that the Court cannot, prior to the judgment in the present case, change the date of the elections and cannot, of its own motion, restore the Applicant's father in a position where he could have been elected had he been able to run for office unimpeded. According to the Third Applicant, 11 the provisional measures requested in the present case share similarities with those granted in this Court's Ruling in Guillaume Kigbafori Soro and Others v. Republic of Côte d'Ivoire.^{8 *}
36. The Respondent State did not make any submission on this request.

37. The Court notes from the record that the Third Applicant's father has been in pretrial detention since 25 February 2023 and that there has been no court decision depriving him of his civil and political rights despite his prosecution and pre-trial detention.
38. The Court recalls that, on 28 August 2023, in the matter of Moadh Kheriji Ghannouchi and Others v. Republic of Tunisia it ordered the Respondent State "to take all measures to eliminate all barriers that prevent the four detainees, and their close relatives, to have access to and communicate with lawyers and doctors of their choice". The Court notes that the Third Applicant alleges that his father has not been allowed to enjoy any of the measures stated above, and that the Respondent State has thus failed to comply with the said Ruling on provisional measures.
39. The Court further that, while making reference to its Ruling of 22 April 2020 in the earlier cited case of Soro and Others v. Côte d'Ivoire,⁹ the Third Applicant contends that the Court is bound in the present case to make the same analysis and reach the same conclusions as those contained in the said Ruling. 8 Guillaume Kigbafori Soro and Others v. Republic of Côte d'Ivoire, ACtHPR, Application No. 012/2020, Ruling of 22 April 2020 (provisional measures). 9 Ibid. 12
40. The Court is of the view that it cannot determine the prayers of different Applicants in respect of the merits and provisional measures when they are not factually and legally identical and do not involve the same legal outcome. In this respect, the Court adopts a case-by-case approach in dealing with each case taking into account its context, facts, and subject matter.
41. In the present case, the Court notes that in the main Application, the Applicants, including the Third Applicant, pray the Court to "order that the detention and prosecution alleged by their relatives be suspended."
42. In the circumstances, the Court considers that this first measure requested is the same as that made on the merits of the main Application, such that the Court cannot rule thereon before examining the merits of the case.
43. Consequently, the Court dismisses the request in respect of this measure. B. On the request to allow the Third Applicant's father, Mr Ghazi CHAOUACHI, to contest in the presidential election
44. The Third Applicant contends that it is urgent for the Court to order any measure to remove all obstacles that would prevent his father from running in the presidential election thereby participating freely in the government of his country, especially as the deadline for filing applications is 6 August

2024. The Applicant explains that the Respondent State has already impeded Mr. CHAOUACHI's participation in the aforementioned elections. The Applicant further submits that it would be extremely serious to prevent a prominent political opponent, who has not yet been deprived of his civil and political rights under the national law of the Respondent State, from standing in the presidential election.
45. The Third Applicant lastly contends that the harm resulting from such a situation would be irreparable. It would not be possible to appoint Mr. CHAOUACHI, the Third Applicant's father, to the position to which he would have been elected if he had been allowed to run unimpeded. According to him, comparison could be made between this request and the one granted in the second Ruling issued by this Court in *Soro and Others v. Côte d'Ivoire*.¹⁰ *
46. The Respondent State did not make any submission on this request.
- * * *
47. The Court notes that, in this request for provisional measures, the Third Applicant prays the Court to order the Respondent State to remove all impediments to his father's candidacy.
48. The Court notes that the Third Applicant make reference to the Court's Ruling of 22 April 2020 in the case of *Soro v. Côte d'Ivoire*,¹¹ arguing that this Court is bound in the present case to make the same analysis and reach the same conclusions.
49. The Court recalls that, as it had consistently held, it deals with each application before it on a case-by-case basis taking into account the circumstances of each case.
50. In the present matter, the Court considers that the request of the Third Applicant under consideration is subject to an assessment of domestic proceedings and facts in the Respondent State namely regarding the alleged refusal by the ISIE to accept the application by one of Mr CHAOUACHI's sons to obtain the necessary endorsement forms, and to proceed with the steps enabling him to file his nomination papers as a candidate. The Court finds that such determination goes beyond a request for provisional measures and falls under the merits of the case. ¹⁰ *Guillaume Kigbafori Soro and Others v. Republic of Côte d'Ivoire (provisional measures)* (15 September 2020) 4 AfCLR 516. ¹¹ *Ibid.* 14
51. Accordingly, the Court dismisses the request for the immediate removal of all obstacles preventing the father of the Third Applicant from standing in the elections, in particular, the October 2024 presidential elections.
52. For the avoidance of doubt, the Court confirms that this Ruling is provisional in nature and does not in any manner prejudge its findings on its jurisdiction, or on the admissibility and merits of the main Application. VIII. OPERATIVE PART
53. For these reasons, THE COURT

- i. Dismisses the Third Applicant's request that his father should be released; ii. Dismisses the Third Applicant's request that all obstacles preventing his father from standing in elections, in particular in the 6 October 2024 presidential elections, are removed. Signed: Imani D. Aboud, President; And Robert Eno, Registrar. Done in Arusha, this Third Day of October in the Year Two Thousand and Twenty-Four in Arabic, English and French, the Arabic version being authoritative. 15

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE	https://media.tanzlii.org/media/judgment/329426/source_file/415542469c982d0f/ghannouchi-and-others-v-republic-of-tunisia-ruling-application-no-0042023-2024-achpr-2-3-october-2024.pdf
CASE PAGE	https://chat.esheria.ai/case-law/tanzania/moadh-kheriji-ghannouchi-v-republic-of-tunisia-provisionalmeasures-achpr-2024

Prepared on 12 October 2026 · Esheria