

TANZANIA / JUDGMENT

roseline emma rasolovoahangy v the republic of madagascar communication 45313 2022 achpr 12 9 march 2022

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Communication 453/13 - Roseline Emma Rasolovoahangy v. The Republic of Madagascar Summary of the Complaint:

1. The Secretariat of the African Commission on Human and Peoples' Rights (the Secretariat) received a Complaint on 28 August 2013 from Nick Kaufman, an attorney (the Complainant), acting on behalf of Roseline Emma Rasolovoahangy (the Victim) against the Republic of Madagascar (the Respondent State), a State Party to the African Charter on Human and Peoples' Rights (the African Charter). 1
2. The Complainant submits that the Complaint concerns the impact of the decision of the Special Electoral Court / Cour Electorale Speciale (CES) in the Respondent State which annulled the Victim's candidacy for the next Presidential elections on the ground that she did not fulfill the residency requirement prescribed under Article 5 of the Loi organique no. 2012-015 of 1 August 2012. Article 5 requires any candidate for the office of the President, to physically reside on the territory of the Respondent State for at least six months before the day of the deadline for the submission of applications and be domiciled in the territory of the Respondent State on the filing date of the application. It is alleged that the candidacy of the Victim had initially been validated and officially published by the CES on 3 May 2013, and also that the first round of the presidential elections had been fixed for 25 October 2013.
3. The Complainant alleges that on 12 August 2013, the Transitional President of the Respondent State signed Ordinance No. 2013-002 permitting modification of Article 9 of the Loi organique No. 2012-015, thereby establishing a mechanism for challenging and reviewing approved candidates. The Complainant contends that two days later, three written challenges to the Victim's candidacy (the Petitions) were filed with the Special Electoral Court/ Cour Electorale Speciale (CES 11) in the Respondent State, alleging that she did not fulfill the residency requirement prescribed under Article 5 of the Loi organique no.2012-015 of 1 August 2012.

4. The Complainant further alleges that on 17 August 2013, before the Victim was even aware of the aforementioned Petitions which were not properly served, and thus, without hearing any defence whatsoever, the CES ruled that her candidacy should be annulled on the grounds that she did not fulfill the necessary residency requirements. The Victim allegedly received notice of the Petitions on 20 August 2013. It is also stated that unlike the Victim, three other candidates who were similarly affected had the opportunity to submit their defence.
5. The Complainant avers that on 20 August 2013, the Victim through her local counsel, submitted a request to the CES to review its decision (having only received, earlier

1 The Republic of Madagascar ratified the African Charter on Human and Peoples' Rights on 9 / f/2~/~~~~ . . !~::~:t":~~ /' •!~!-r;_!~;if '- •' _'51! ,, 1 I; ~ \ t. .:-~~ t'W \ -- :~~ that day, notice of the Petitions) but that this request was summarily dismissed by the CES on 21 August 2013, without any hearing on the submissions, ruling that the issues raised in her request/petition had the status of res judicata by virtue of the CES' decision of 17 August 2013.

6. The Complainant alleges that the Respondent State, through the CES, infringed a fundamental principle of natural justice - namely, audi alteram partem - by making a decision without considering any defence arguments presented by the Victim, and has thereby denied the Victim the right to have her cause heard under Article 7(1)(a) of the African Charter, and as a consequence, her right to pursue public office and directly participate in Government under Article 13(1) of the African Charter.
7. The Complainant contends further that the CES' decision of 17 August 2013 was flawed in that it misinterpreted the residency requirements contained in the Respondent's electoral law. He avers that the Victim's short trips abroad were made in the conduct of her daily business and that the residency requirements contained in the Respondent's electoral law cannot be interpreted in such a way it curtails the enjoyment of another universally accepted human right - namely the right to freedom of movement, which includes the right to leave and to return to one's own country as enshrined in Article 12(2) of the African Charter.
8. The Complainant further avers in his supplementary Observations submitted on 15 October 2013 that it had come to the Victim's attention that several candidates had travelled beyond the borders of the Respondent State in the six month period prior to registering their candidacy and were not disqualified by the CES, which creates serious doubts as to the impartiality of the CES in disqualifying the Victim despite the presentation of certified documentation testifying to her residence in the Respondent State.

9. The Complainant also claims to have exhausted local remedies before the judicial system in the Respondent State, since the decisions were rendered by a unique and ad hoc chamber of the highest court in the Respondent State (the CES) with no right of appeal available, and that the Complaint has been submitted within six (6) months of exhaustion of local remedies. Articles alleged to have been violated
10. The Complainant alleges violation of Articles 7(1) and 13(1) of the African Charter. Prayers
1. Find that the Respondent State has violated Articles 7(1) and 13(1) of the African Charter;
11. Call upon the Respondent State to reinstate the Victim on the list of candidates for the Presidential elections of the 4th Government of the Respondent State; and
111. Adopt Provisional Measures whereby the Complainant would be immediately reinstated as a presidential candidate or, in the alternative, the election process would be halted until a final decision of the Commission is rendered on the Complaint. Procedure
12. The Secretariat received the Complaint on 28 August 2013 and acknowledged receipt on 18 September 2013. By the same acknowledgement letter, the Complainant was informed that the Commission had considered and decided not to grant the request for Provisional Measures as it did not meet the required criteria under Rule 98 of its Rules of Procedure.
13. The Secretariat further received Supplementary Observations from the Complainant on 15 October 2013 and acknowledged receipt of the same on 18 October 2013.
14. During its 54th Ordinary Session, the Commission examined the Complaint and decided to be seized thereof, and on 15 November 2013, the parties were notified of the Commission's decision, with a request to the Complainant to file written arguments and evidence on the Admissibility of the Communication within two months of notification in terms of Rule 105(1) of the Rules of Procedure.
15. On 01 April 2014, the parties were informed that the Complainant had failed to make submissions on Admissibility within the deadline and that the Communication would be tabled for Strike-Out.
16. On 09 April 2014, the Complainant availed proof of attempts to transmit submissions on Admissibility within the deadline, which failed due to technological glitches experienced at the Secretariat. These proof as well as the Admissibility submissions were duly transmitted to the Respondent State on 14 April 2014, with a request to present its submissions on Admissibility within two months in terms of Rule 105(2) of the Rules of Procedure. On the same date, both parties were also informed that the matter would proceed in line with the Rules of Procedure of the Commission.
17. At its 55th Ordinary Session, the Commission deferred consideration of the Communication, pending submission by the Respondent State, and on 28 May 2014, both parties were duly informed of this decision. Also, at its 16th Extra-Ordinary Session, the Commission deferred consideration of the Communication due to time constraints and both

18. At its 56th Ordinary Session, the Commission observed that the Admissibility submissions of the Respondent State were long overdue and decided to grant to the latter a period of 30 calendar days from the date of notification thereof within which to file the written observations, failing which the Commission would proceed to adopt a decision on Admissibility. This decision was duly communicated to both parties on 21 May 2015; however, the Respondent State failed to make the required submissions within the deadline or at all.
19. Furthermore, at its 1st Extra-Ordinary Session and 57th Ordinary Session, the Commission deferred consideration of the Communication due to time constraints and both parties were duly informed of this decision.
20. At its 58th Ordinary Session, the Commission considered the Admissibility of the Communication.
21. The Commission adopted a decision on Admissibility at its 19th Extra-Ordinary Session held from 16 to 25 February 2016.
22. On 2 March 2016, the Parties were informed about the decision on admissibility. On the same date, the Complainant was invited to forward her arguments on the merits of the Communication within sixty (60) days of the notification in accordance with Rule 108 (1) of the Commission's Rules of Procedure.
23. On 26 May 2016, the Complainant's submissions on the Merits were received at the Secretariat.
24. On 6 June 2016 the Secretariat transmitted to the Respondent State the Complainant's submission on the Merits and invited it to forward its written submissions on the Merits within sixty (60) days of the notification in accordance with Rule 108 (1) of the Rule of the Procedure of the African Commission on Human and Peoples' Rights.
25. On 28 November 2016, the Secretariat reminded the Respondent State that its written observations on the Complainant's observations was long overdue and informed the parties that the Respondent State had been granted an extension of thirty (30) days within which it was asked to make submissions of its overdue submissions on the Merits, failing to which the Commission would proceed to adopt a decision if the said observations were not received within the indicated period.

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34. The Respondent State has not made any submission on Admissibility despite repeated requests addressed to it in that regard. 4 In the present circumstances, the Commission regrettably, will have no option but to proceed to its analysis and determination of the Admissibility of the Communication on the basis of the information at its disposal, in accordance with its practice.
35. This position was enunciated in *Institute for Human Rights and Development in Africa (on behalf of Esmaila Connateh & 13 others) v Angola*⁵, where the Commission stated that in situations where a State Party fails to address itself to the complaint filed against it, the Commission has no option than to proceed with its consideration of the Communication in accordance with its Rules of Procedure 1•6 In the same decision, the Commission reaffirmed its position by holding that " ... it would proceed to consider Communications on the basis of the submission of the Complainants and information at its disposal, even if the State fails to submit." 7
36. Accordingly, the Commission must give due weight to the Complainant's allegations insofar as these have been adequately substantiated, and hereby undertakes the following analysis on Admissibility on the basis of the information supplied by the Complainant.
37. The Commission would also like to emphasize that the absence of a reaction from the Respondent State does not absolve it from the decision that it may arrive at in the consideration of the Admissibility of this Communication, as the relevant State had, by ratifying the African Charter, indicated its commitment to cooperate with the Commission and to abide by all decisions taken by the latter.⁸
38. Consequent to the above and in the absence of any submissions from the Respondent State, the Commission after carefully examining the information provided by the Complainant is convinced that all the requirements under Article 56 have been complied with: the author has been indicated, being Roseline Emma Rasolovoahangy, represented by attorney - Nick Kaufman; the Communication is compatible with the provisions of the Charter and the Constitutive act of the African Union as it alleges violations of specific, enumerated provisions of the African Charter by a State Party, being the Respondent State, acting through its agent - the CES, and falls within the purview of the personal, material, temporal and territorial jurisdiction of the Commission; it is not written in disparaging or insulting language considering the interpretation given in this regard by the Commission in its jurisprudence⁹; it is not 5 Communication 292/04, para. 34; This was also the position of the Commission in Communication 159/ 1996: *Union Inter Africaine des Droits de l'Homme, Federation Internationale des Ligues des Droits de l'Homme, Rencontre Africaine des Droits de l'Homme, Organisation Nationale des Droits de l'Homme au Senegal and Association Malienne des Droits de l'Homme v Republic of Angola*; Communication 276/03 : *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya*. 6 Communication 292/04 above, para. 34 7 As above. 8 See Communication 227 /99 - *Democratic Republic of Congo vs. Burundi, Rwanda, Uganda* (2003) ACHPR, paras 51-53. ---=--- 9 Communication 284/03 - *Zimbabwe Lawyers for*

Human Rights & Associated Newspapers of Zi! .:,li"we-/•,t>, Zimbabwe (2009) ACHPR, paras 83-97 & Communication 268/03 - Ilesanmi/Nigeria (2005) AC . _ i R~As" ·7_ '-~-\ 40• I• {(; .!t •

39. Regarding the exhaustion of local remedies in particular, the Complainant has explained, with evidence adduced, that the Victim had applied for a review of CES' decision of 17 August 2013 but that this request was summarily dismissed by the CES without any hearing on the submissions, ruling that the issues raised in her application had the status of res judicata by virtue of the CES' decision of 17 August 2013, thus rendering it impossible to have additional recourse to the same court or any other court. It has also been pointed out that the CES is a unique and ad hoc chamber of the Supreme Court which is the highest court in the Respondent State, with no right of appeal against its decisions. 11 In this regard, he cited Decision No. 11-HCC / 03 of 28 August 2013, where in a similar case, the High Constitutional Court of Madagascar stated that it cannot set itself up as court of second instance in relation to the Special Electoral Court.¹²
40. The Commission notes that the above assertions are supported by information available in the public domain regarding the judicial/ court system of the Respondent State.¹³
41. The Commission has held that "the generally accepted meaning of local remedies, which must be exhausted prior to any communication/complaint procedure before the African Commission, are the ordinary remedies of common law that exist in jurisdictions and normally accessible to people seeking justice"¹⁴, and that "the internal remedy [to] which article 56(5) refers entails remedy sought from courts of a judicial nature ... "¹⁵ Furthermore, the Commission's Information Sheet No. 316, also states that "[t]he author [of a Communication] must have taken the matter to all the available domestic legal remedies. That is, he or she must have taken the case to the highest court of the land." The Commission has 10 See Communication 147/95 & 149/96 - Dawda K Jawara vs. The Gambia (2000) ACHPR, paras 23-27. 11 Paras 14 & 15 of the Complaint; paras 10 & 35 above. 12 Decision n° 11-HCC/D3 du 28 août 2013, referenced in footnote 12, page 3 of the Complaint. 13 See information on Madagascar courts at <http://comrava.com/MadagascarCourts.html>, and the text of the Decision No. 11-HCC / D3 of 28 August 2013 at <http://www.hcc.gov.mg/decisions/d3/decision-n-11-hccd3-du-28-aout-2013-concernant-une-demande-pour-annulation-et-sursis-a-execution-de-la-decision-inconstitutionnelle-de-la-cour-electorale-speciale/>. 14 Communication 242/01- Institute of Human Rights and Development in Africa and Interights ~ ~ ~; ~ ~ ~ ~ ~ Mauritania (2004) ACHPR para 27. 4, ~ ~ ~ ~ ~ < s ~ ~ ~ ~ ~ / 4 > ~ ~ ~ ~ ~ - , 15 Communication 221/98 - Alfred B. Cudjoe vs. Ghana (1999) ACHPR para 14. sf ~ ~ ~ ~ ~ , < ~ ~ ~ ~ ~ . ~ ~ ~ ~ ~ 16 Communications Procedure, available at < <http://www.achpr.org/communications/>

proceH1Jre/>f - ::);, ,~::~\ 7 \ ~ also maintained that such a remedy must not be subordinated to the discretionary power of public authorities.¹⁷

42. In view of all the above, the Commission notes that the disputed decision was taken by CES which is a chamber of the Supreme Court which is the highest court in the Respondent State, with no right of appeal against its decisions, and therefore considers that there were no other remedies left to be exhausted. Consequently, the Commission holds that local remedies were duly exhausted. Decision of the Commission on Admissibility
43. In view of the above, the African Commission on Human and Peoples' Rights:
 1. Declares this Communication Admissible in accordance with Article 56 of the African Charter; Merits Complainant's Submission on the Merits Alleged violation of article 7 (1) of the Charter
44. The Complainant submits that, by issuing its first decision without hearing any submissions whatsoever from the complainant, the Republic of Madagascar, through the Cour Electorale Speciale (CES), infringed a fundamental principle of natural justice; namely audi alteram partem; therefore, violating its obligations under article 7(1) of the charter.
45. Specifically, the complainant argues that, at least three written challenges to the complainant's candidacy to the presidential election were filed in the Special Court/ 17 Communication 48/90 - Anm esty International v Sudan , 50/91 Comite Loosli Bachelard v Sud~(,;~ ~-~' - 0 Lawyers Committee for Human Rights v Sudan, 89/93 Association of Members of the Episcopal Co}#ei'encif 8P----:~>~ \ East Africa v Sudan (1999) ACHPR, para 31. / _ (,y:,,;'~:- '!' ; \ J; ., (1\1, · ~),f . •~ . ~~ \ ,~.: ; / t:1 8 \::~~~ ::? ~:~// ":-\.,:~ ;.~. :->' / Cour Electoral Speciale (CES) in Madagascar alleging that she did not fulfill the residency requirement as described under article 5 of the Loi organique no. 2012-015 of 1 August 2012. This article requires any presidential candidate to physically reside in the territory of the Republic of Madagascar for at least 6 months before the submission of the application and be domiciliated on the territory of the Republic of Madagascar on the filing date of the application. 18
46. The complainant alleges that CES considered the written challenge which, in her view, "were not properly served" and annulled the Complainant's candidacy "without hearing any defence whatsoever". The Complainant submits that, subsequent to this decision, she submitted a request for review of this decision to the same court through her local council, but her request was rejected in limine.
47. In the view of the complainant, in so doing, the important duty of the tribunal to hear submission from a party that is ingrained in most democratic system was violated.
48. In support of her arguments, the complainant contends that, the breach of this basic principle of natural justice is clearly evidenced by "the fact that the first impugned decision of the CES makes no mention of any defense arguments presented by the complainant". The complainant avers that this was not the case for the other three 11 candidates who submitted

their memoir en defense": The Complainant adds that she was not properly served with the documents issued by the Registry of the CES regarding the three petitions filed about her candidacy. Alleged violation of article 13 (1) of the Charter

49. The Complainant further submits that her right to directly participate in the Government was violated.
50. In support of her argument, the applicant avers that, in its first decision on the merits, the CES's misinterpreted the residency requirement contained in article 5 (1) of the Loi organique No. 2012-015 of August 2012. The complainant submits that the expression "resider physiquement sur le territoire de la Republique" (physically reside on the territory of the Republic) cannot entail actual continuous residence without allowing for sporadic short trips abroad".
51. In her view, if this is the intention of this provision of the electoral law, the latter would violate the right to freedom of movement that is enshrined in different international instruments including the African Charter on Human and Peoples' Rights¹⁹, the 18 Article 5 of the Loi organique no. 2012-015 of 1 August 2012 reads as follows: « Tout candidat aux fonctions du premier President de la Quatrieme Republique, outre Les conditions prevues par l'article 46 de la Constitution, doit: 1. resider physiquement sur le territoire de la Republique de Madagascar depuis au moins six mois avant le jour de la date limite fixee pour le depot des candidatures et 2. resider physiquement sur le territoire de la Republique de Madagascar au jour du depot du dossier de candidature »²⁰. See article 12(2) of the African Charter on Human and People's Rights²¹: "The right of every individual to freedom of movement and residence within his borders and throughout the territories occupied by the national territory of the State of which he is a national, in accordance with the law." (it is the right of every individual to freedom of movement and residence within his borders and throughout the territories occupied by the national territory of the State of which he is a national, in accordance with the law.) Universal Declaration on Human and People's Rights²² and the International Covenant on Civil and Political Rights²³. To this end, the complainant further states that the residency requirements of Madagascar's electoral code should be interpreted in a way that cannot affect the enjoyment of a universally protected right such as the right to directly participate in Government.
52. The complainant alleges that, as senior representative of a large commercial enterprise Petromad Mauritius Ltd, she is obliged to carry out international travels. She avers that, in such circumstances, to deny her to run for the Presidency office because of her successful business career is a discouraging factor to the citizens of Madagascar from engaging with the international community. The Complaint insists that, interpreting the requirement of article 5(1) as residing "continually and from day to day" conflicts with the treaty law that Madagascar is bound to. In her view, the only reasonable interpretation which cannot raise such conflict, is "habitual residence". Additional submissions by the Complainant
53. In her additional submissions, the Complainant avers that, it had come to her attention that some of the presidential candidates who were not disqualified by the CES had travelled in the 6 months prior to their registration to the candidacy for the presidential elections.

54. The complainant adds that amongst the documents which were submitted to the CES in the appeal against the rejection of the Complainant's candidacy, there was a certified document testifying that she was residing in the Republic of Madagascar signed by the Chief of her administrative zone called Fokontany. She insists that, in accordance with the Malagasy law, this document comprises "binding and conclusive" proof that she was physically resident in Madagascar for the six months prior to the presidential election process. Submissions of the Respondent States on the Merits
55. As it appears from the procedure, the Respondent State did not make any observations on the Complainant's allegations despite the timeline which was allocated to them in accordance with the provisions of the Commission's Rules of Procedure. Analysis of the Commission on the Merits On the absence of submissions of the Respondent State
56. In the absence of submissions by the Respondent State, the Commission is called to determine the way forward in such situations. The Commission does not have any choice other than to process the analysis of the communication on merits based on the submissions of the Complainant. This is in accordance with its practice developed in many of its previous communications.
57. In the Communication Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) / Nigeria, the Commission underpinned this position. [It] stated that in circumstances where there is absence of submissions by the Respondent State, "the [African] Commission is compelled to proceed with the examination of the matter on the basis of the uncontested allegations of the Complainants, which are consequently accepted by the [African] Commission" 22 .
58. The same position was adopted in the communication Institute for Human Rights and Development in Africa/ Angola. In this communication, the Commission considered that "in the face of the State's failure to address itself to the complaint filed against it, the African Commission has no option but to proceed with its consideration of the Communication in accordance with its Rules of Procedure" 23 . Therefore, it is in the strict compliance of this well-established tradition that the Commission is obliged to carry on with the examination of the matter based on the allegations of the Complainant.
59. Hence, having closely analysed the submissions of the Complainant on the merits, the Commission proceeds to analyse the arguments and evidence she provides in support of her submissions in order to establish whether there has been a violation of the provisions of the Charter, as claimed by the Complainant. Alleged violation of article 7 (1)

60. The Complainant alleges the violation of article 7 (1) of the African Charter in its first part which provides that: "Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force" . This provision protects the right of everyone to have his cause heard through the right to appeal to competent national organs.
61. This right includes both the initial right to seize a court with a matter, as well as the right to appeal from a first instance decision to higher tribunals. The concept of the right to appeal needs to be understood in a broad sense. As the Commission already indicated, the guarantees in Article 7 (1) extend beyond hearings in the normal context of judicial determination or proceedings²⁴ . In fact, it embraces the administration of ²² Communication 155/96 -The Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) / Nigeria (SERAC case) (2001) ACHPR para 49 ²³ Communication 292/04 - Institute for Human Rights and Development/J-nlifJ)~a/ Angola (2008) ACHPR para
34. /' .,- ~,:::--., . ²⁴ Communication 241 /0 I- Purobit and Moore v. Gambia (2003) ACHPR~)~ra~ , ;,-,:::~ , .- h: ;,i. 1,... ~- -:.; ·1 11 \. --~-\bullet " ;:~ , , , \ \. :;~v- ::\bullet . . --- ____~.\-:::~ , · ~ the justice. The latter must be in a way that achieves fairness for all, regardless of the identity of the parties to the proceedings or the nature of the proceeding themselves²⁵.
62. The administration of the justice should be in a fashion that offers an opportunity for all to challenge any violation of human rights before competent jurisdictions. In many instances, the Commission have ruled on the incompetent jurisdictions. For example, in the communication Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria, the Commission underlined that to have a duly instituted court case in the process of litigation nullified by executive decree forecloses all possibility of jurisdiction being exercised by competent national organs²⁶.
63. The guarantees protected under article 7 (1) implies also that Courts must consider and respect the submissions of the parties in their decisions. In the Communication Malawi Africa Association, AmnestIJ International, Ms Sarr Diop, Union interafricaine des droits de l'Homme and RADDHO, Collectif des veuves et ayantsDroit, Association mauritanienne des droits de l'Homme c. Mauritania, the commission concluded that there was a violation of article 7(1)(a) because the Court did not consider all the elements of the fact and law. [It] concluded as follows: "From all indications, the Court of Appeal simply confirmed the sentences without considering all the elements of fact and law. Such a practice cannot be considered a genuine appeal procedure. For an appeal to be effective, the appellate jurisdiction must, objectively and impartially, consider both the elements of fact and law that are brought before it. Since this approach was not followed in the cases under consideration, the Commission considers, consequently, that there was a violation of Article 7(1)(a) of the Charter" ²⁷ .

64. Another important aspect of the guarantees under article 7 (1) is the right to the execution of a judgement. The Commission indicated in the communication *Antoine Bissangou v Congo* that "it would be inconceivable for this article to grant the right for an individual to bring an appeal before all the national courts in relation to any act violating the fundamental rights without guaranteeing the execution of judicial rulings" 28 . Hence, the right to have someone's cause heard include the right to the execution of the judgement. The former would remain unguaranteed if the decisions taken by Courts and Tribunals do not produce any effects.
65. In all, States party to the African Charter have an obligation to adopt necessary legislation or other measures to give effect to these aspects of the right of an individual 25 United Nations Counter- Terrorism Implementation Task Force, Basic Human Rights Reference Guide: Rights to a fair Trial and Due Process in the Context of Countering Terrorism, New York, 2015, page 9 26 Communication 140/94-141/94-145/95 - Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria (1999) ACHPR para 43 27 Communication 54/91-61/91-96/93-98/93-164/97-196/97-210/98 - Malm-vi Africa Association, Amnesty International, Ms Sarr Diop, Union interafricaine des droits de l'Homme and RADDHO, *91-9Jif?fef v?ilves et ayantsDroit, Association mauritanienne des droits de l'Homme c. Mauritania* (2000) para 94 ;:- _,: "" c:e:, ~:., . , ' . 28 Communication 253/02 - *Antoine Bissangou v Congo* (2006) ACHP { ~~~an :: ~~~;) -- ; , . , \ 12 .: r~.-;_ tit>.i., ~-...;: .: . \,1. ' -y =: J, ;t, ~:/, 1 . \) =:~ /; ""=~ ..:.....,- ~-. ~:~-. h., to have his/ her cause heard. States must ensure that the administration of justice is fashioned in a way that it cannot discriminate whoever wants to use it; they should also ensure that an opportunity to use competent jurisdiction is given to all and that their judgements are effectively implemented. Failure of this means they infringe article 7 (1)
66. In the present communication, the factual issue brought before the Commission is the alleged misinterpretation made by Court Electorrzl Special (CES) of the residency requirement under article 5(1) of the Loi organique No. 2012- 015 of 1 August 2012. In other words, the issue raised by the Complainant is to know whether the CES did not misinterpret the residency requirement in accordance with article 5(1) of the abovementioned Loi orgnnique. The Complainant submits that the formula « resider physiquement sur le territoire de la Republique » does not entail a continuous residency in the country without sporadic short h-ips abroad .
67. It is not for the commission to deal with alleged errors of interpretation committed by national courts. The Commission is, indeed , not a court for appeal and, therefore, cannot question an assessment made by a national court unless its findings are manifestly or arbitrary unreasonable. The European Court of Human Rights adopted the same position in the case of *Platakou v Greece* indicating that it is not its task to take the place of the domestic courts and that it is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation29 .

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opportunity of being heard and the right to present their case and evidence. The starting point of this principle is the right to notice or information about the content and the formulations of the allegations involved in the matter. It is indeed through the notice or information that the parties are able to organize their defense.

74. The Commission also believes that the information or notice cannot produce necessary effects if it is not adequately provided. In particular, the notice should be embedded with all the essential information and materials to enable the recipient to prepare a relevant defense. The timeline of the notice is also an important element to enable a good defense as the parties need to be given enough time to read the notice, to prepare the defense accordingly and submit it to the involved judicial body. The Commission is of the view that time for the notice should not prevent the litigants from using available remedy.
75. This is in line with the principle of equality of arms as the main feature of the concept of a fair trial. Indeed, in this judgment *Ruiz-Mateos v. Spain*, the European Court of Human Rights indicated that this principle of equity of arms includes the fundamental right that proceeding should be adversarial³⁵. The right to an adversarial trial means "the opportunity for the parties to have knowledge of and comment on the 32 See the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003 A (2) e). 34 ;,, , ." ~C'=. . --- --- 33 Communication 3 13/05- *Kenneth Good v Republic of Botswana* (2010) A~.PR paraJJ,5__!"i, . ; \, Idem, para 104 .~ ---, ', \ 35 *Ruiz-Mateos v. Spain* (1993) ECHR (Application no. 12952/87) r{i~.,fi..(I ,!1• ,/':,~,,, \, •• \ J;f 1 \ ~. ~~ ·t / ~_!: 14 \ ':; \ ~ ~ ~ //1; ' '~:~:~j) observations field or evidence adduced by the other parties" 36 . Therefore, in the view of the commission, the essence of this principle is to ensure that the other party is aware of the allegations submitted against him/ her and is given an opportunity to make necessary observations on them.
76. The principle of equality of arms applies to any kind of litigation including those where private interests are opposed. This was assessed by the European Court of Human Rights in the case of *Ankerl v Switzerland*. In this case, the ECHR indicated that in such instances, "equality of arms" implies "that each party must be afforded a reasonable opportunity to present his case - including his evidence -under conditions that do not place him at a substantial disadvantage vis-a-vis his opponent" 37
77. In the present communication, the Complainant alleges that whilst she was not even aware of the petitions which were filed against her, the CES ruled that her candidacy should be disqualified. As claimed by the Complainant, the Commission notes that the official notice of these petitions against her before the CES were given to her the same day she was informed about her rejection from the list of the candidates. This is contrary to the spirit of the right of everyone to have his/her cause heard. In accordance with this right, in addition to the right to be informed about the allegations, the Complainant had the right to be given enough time to prepare and submit her defense. This was not the case in this instance.

78. The Commission finds that there is nothing in the information at its disposal to indicate that the Complainant was informed about the petitions and their content in accordance with the requirement of the principle of equality of arms. It also results from the submissions of the complainant, that the latter requested for a review of this decision but that the CES rejected this request. Considering all these circumstances, the Commission observes that the Complainant was not given an opportunity to present her case and necessary evidence.
79. This leads us to conclude that the Respondent has violated article 7(1)(a) of the Charter. Alleged violation of article 13 (1)
80. The Complainant submits that the Respondent State violated article 13(1) of the Charter which reads as follows: "Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provision of the law". This article protects the right to participate in the government of one's country. As the Commission indicated in the Communication Gabriel Shumba and Others (Represented by Lawyers for Human Rights) v. The Republic of Zimbabwe, this right is important in that it forms an integral part of democracy, such a State cannot be considered a democracy if it does not guarantee the right of its citizens to participate in the government through free and fair elections. 38
81. Reading through the lines of the provision of article 13 (1), it can be noted that this right comprises of two subsequent rights namely: 1) the right to be elected, and 2) the right to elect. Specifically, as the commission already indicated, the right to directly participate in government refers to the right of citizens to stand as a candidate for elections, whereas the right to participate through freely chosen representatives refers to the right of citizens to vote in elections³⁹. In this particular instance, the Complainant alleges that as a result of the CES decision, she was denied the right to pursue public office, and therefore, the right to participate in the government of her country through election.
82. Under these circumstances, the Commission is called to elucidate whether the amendment of the Loi organique No 2012-015 of August 2012, establishing thereby a mechanism for challenging and reviewing-approved candidates is not in contradiction with or violates article 13 (1) of the Charter. The Commission is of the view that, like other rights and freedoms enshrined in the Charter, the right to participate in elections can be limited by national law in accordance with article 27 (2) of the Charter which indicates that the rights and freedoms of each individual shall be exercised with due regards to the rights of others, collective security, morality and common interest. However, as the Commission already indicated in Communication Amnesti; International v Zambia, the "claw-back" clauses must not be interpreted against the principles of the Charter; recourse to them should not be used as a means of giving credence to violation of express provisions of the Charter.⁴⁰
83. The African Court on Human and Peoples' Rights expressed the same view in Rev. Chistopher Mtikila v. United Republic of Tanzania. The Court indicated that the limitations set out in Article 27 (2) of the Charter must take the form of law and that such limitations

have to be proportionate to the legitimate aim pursued. 41 The General Comment no 25 of the Human Rights Committee to which the Commission is entitled to draw inspiration from when interpreting the Charter in accordance with article 60 and 61 of the Charter is also very clear on this point. While interpreting article 25 of the International Covenant on Civil and Political Rights on the right to participate in public affairs, voting rights and the right to equal access to public service, the Committee indicated that any restrictions on the right to stand for elections, such as minimum age, must be justifiable on objective and reasonable criteria⁴². The Committee insisted that persons "who are otherwise eligible to stand for election" 38 Communication 430/ 12 -Gabriel Shurnba and Others (Represented by Lawyers for Human Rights) v. The Republic of Zimbabwe (2020) ACHPR, para 69 39 Idem, para 70 ° 4 41 Communication 212/98 Amnesty International v Zambia (1999) ACHPR para 46 :-~ ~:-... Application 0 11/2011 - Rev. Christopher Mtikila v. United Republic of Tanzania (2013) AfCHPR, para 107 13/... '1,,_ , , ;l'i:-Jih';,t; 42 See paragraph 15 of the General Comment No. 25: The right to participate in public affairs, voting rights and the right to equal access to public service (Art. 25): 12/07/96. CCPR/C/2 1/ Rev. I/ Add. 7, General Comment, 1~-- 5fi 16 , :,_ . . ;li "' ~,•. , , ·w should not be excluded by unreasonable or discriminatory requirements such as education, residence or descent, or by reason of political affiliation" 43 .

84. In this particular instance, the Respondent State did not submit its considerations to explain the reasonableness of the restriction resulted from this amendment or any other lawful purpose it seeks to serve. The Commission is of the view that national laws must be in a way that does not jeopardise or nullify the enjoyment of the rights and liberties enshrined in the Charter. It therefore concludes that the amended law violates article 13 (1) of the Charter. Decision of the Commission on the Merits
85. In view of the foregoing, the African Commission on Human and Peoples' Rights:
 1. Finds that the Respondent State violated articles 7(1) and 13 (1) of the Charter,
 11. Requests the Respondent State to take all necessary measures to repair the damages caused by the violations found; III. Requests the Respondent State to take all necessary measures to make sure that the Loi Organique no. 2012-015 of 1 August 2012 and all other relevant laws and practices are brought into conformity with the African Charter; 1v. Requests the Respondent State to report back in writing, within one hundred and eighty (180) days of the notification of this decision, on the measures taken to implement these recommendations. 43 Ibidem. 17

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