

UGANDA / JUDGMENT

Fathi and Others v Republic of Tunisia (Application No. 001/2023)

[2023] AfCHPR 3 (17 March 2023)

[2023] AfCHPR 3

COURT

African Court on Human and Peoples Rights

BEFORE

Aboud P, Anukam J, Bensaoula J, Chizumila J, Kioko J, Mengue J, Mukamulisa J, Ntsebeza J, Sacko J, Tchikaya VP

CASE / FILE NUMBER

Application No. 001/2023

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||| | --- | --- | | AFRICAN UNION | ![Description: Description: Description: Description: AU Court logo](data:image/jpeg;base64...) | AFRICAN UNION | | | UNIÃO AFRICANA | | AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS COURS AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES | |

THE MATTER OF

AYADHI FATHI AND OTHERS

V.

REPUBLIC OF TUNISIA

APPLICATION NO. 001/2023

RULING

(PROVISIONAL MEASURES)

17 MARCH 2023

The Court composed of: Imani D. ABOUD, President; Blaise TCHIKAYA, Vice President; Ben KIOKO, Suzanne MENGUE, Tujilane R. CHIZUMILA, Chafika BENSAOULA, Stella I. ANUKAM, Dumisa B. NTSEBEZA, Modibo SACKO and Dennis D. ADJEI– 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^[1] (hereinafter referred to as “the Rules”), Judge Rafâa BEN ACHOUR a national of Tunisia, did not hear the application.

In the Matter of:

Mr Ayadhi Fathi and others

Represented by Ridha Ajmi Ralegal, Attorney-at-Law, Fribourg, Switzerland.

Versus

REPUBLIC OF TUNISIA

Unrepresented

After deliberation,

Issues the following Ruling:

THE PARTIES

Ayadi Fathi, Khelifi Oussama and Makhloufi Sofiane, (hereinafter referred to as “the Applicants”) are Tunisian nationals. They challenge Decree-Law No. 2022-55 amending and supplementing Organic Law No. 2014 of 26 May 2014 on elections and referendums (hereinafter referred to as “the Decree-Law”).

The Application is filed against the Republic of Tunisia (hereinafter referred to as “the Respondent State”) which became a party to the African Charter on Human and Peoples’ Rights (hereinafter referred to as “the Charter”) on 21 October 1986 and to the Protocol 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”) on 5 October 2007. The Respondent State also deposited, on 2 June 2017, the Declaration provided for under 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 Organisations (hereinafter referred to as “the Declaration”).

SUBJECT OF THE APPLICATION

In their Application filed on 6 January 2023, the Applicants challenge Decree-Law No. 2022-55 amending and supplementing Organic Law No. 2014 of 26 May 2014 on elections and referendums.

They allege that the President of the Republic of the Respondent State undertook several illegal and undemocratic acts which truncated constitutional democracy, leading the country into totalitarianism. They cite, in particular, the abrogation of the 2014 Constitution and the dissolution of the provisional body in charge of reviewing the constitutionality of draft laws by Decree-Law No. 2021-117 of 22 September 2021, and the dissolution of parliament by Decree-Law No. 2022-309 of 30 March 2022.

They aver that it was in this context that the President of the Republic issued the decree-law of 15 September 2022, which, they contend, aims to organise elections, particularly legislative elections, in complete disregard of the democratic process, with a view to set up a parliament without real legislative power and subservient to the executive.

Finally, the Applicants contend that since the parliamentary elections are scheduled for 17 December 2022, the Court must adopt appropriate provisional measures pending delivery of the judgment.

ALLEGED VIOLATIONS

The Applicants allege a violation of:

The right to participate freely in the government of their country, protected by Articles 13(1)(2) and 24 of the Charter, Articles 1(1) and 14 of the International Covenant on Civil and Political Rights (ICCPR) and Article 1(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR);

The right to non-discrimination protected by Articles 2 and 18(3) of the Charter, and Article 2 of the ICCPR;

The right to freedom of association, protected by Article 10(1) of the Charter;

SUMMARY OF THE PROCEDURE BEFORE THE COURT

On 6 January 2020, the Applicants filed their Application together with a request for provisional measures. On 2 February 2023, the Application was notified to the Respondent State for its response on the merits and on the provisional measures respectively within ninety (90) and fifteen (15) days of receipt of notification. The Respondent State was also requested to submit the names of its representatives within thirty (30) days.

The Respondent State did not respond.

PRIMA FACIE JURISDICTION

Article 3(1) of the Protocol provides that:

The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instrument ratified by the States concerned.

Under Rule 49(1) of the Rules^{[[2]](#footnote-2)}, “The Court shall conduct preliminary examination of its jurisdiction...”. However, with regard to provisional measures, the Court does not have to satisfy itself that it has jurisdiction on the merits of the case, but merely that it has *prima facie* jurisdiction.^{[[3]](#footnote-3)}

In the instant case, the Court recalls that the Respondent State has ratified the Protocol and deposited the Declaration. Furthermore, as mentioned in paragraph 2 of this Ruling, the rights alleged by the Applicants to have been violated are protected by the Charter, the ICCPR and the ICESCR, instruments to which the Respondent State is a party. [[4]] (#footnote-4)

The Court finds that it has **prima facie** jurisdiction to hear the request for provisional measures.

PROVISIONAL MEASURES REQUESTED

The Applicants seek the following provisional measures:

An order compelling the Respondent State to suspend the enforcement of Decree-Law No. 2022-55 of 15 September 2022 amending and supplementing Organic Law No. 2014-16 of 26 May 2014 on elections and referendums;

An order compelling the Respondent State to postpone the parliamentary elections of 17 December 2022 to a later date.

In support of the measures requested, they argue that the legislative elections scheduled for 17 December 2022 are extremely “serious” insofar as the President of the Republic, who already has extensive and unchecked powers, purports to set up a parliament that is completely under his control. They consider that the said elections run counter to the Court’s judgment of 22 September 2022, which ordered the Respondent State to restore constitutional democracy. [[5]] (#footnote-5)

The Applicants further claim that the Tunisian people stand to suffer imminent and irreparable harm in view of the fact that these elections may plunge the country into institutional disorder and political unrest for an unlimited period of time.

The Respondent State did not respond.

* * *

The Court notes that Article 27(2) of the Protocol provides that

“In cases of extreme gravity and urgency and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary”.

The Court recalls that urgency, which is consubstantial with extreme gravity, means a “real and imminent likelihood that irreparable harm will be caused before it renders its final decision” [[6]] (#footnote-6). The Court emphasises that the risk in question must be real, which excludes the purely hypothetical risk and explains the need to remedy it immediately. [[7]] (#footnote-7)

With regard to irreparable harm, the Court considers that there must be a “reasonable likelihood of its occurrence” having regard to the context and personal circumstances of the applicant. [[8]] (#footnote-8)

The Court emphasises that the two requirements in the above-mentioned article, namely urgency or extreme gravity and irreparable harm, are cumulative, so that if one of them is lacking, the measure requested cannot be ordered.

With regard to the request for suspension of the Decree-Law, the Court notes that the Applicants produced neither any evidence of urgency or extreme gravity, nor evidence of irreparable harm, which would result from the enforcement of the Decree-Law. In effect, they only request the measure without demonstrating the existence of the conditions required by Article 27(2) of the Protocol.

The Court considers that, in the instant case, the request for suspension cannot be entertained and dismisses it.

With regard to the request for the elections of 17 December 2022 to be postponed, the Court notes that the Applicants filed the initial Application as well as their request for provisional measures on 6 January 2023, that is, after the said elections.

The Court therefore considers that the Applicant's request is moot.

For the avoidance of doubt, the Court recalls that this Order is provisional in nature and in no way prejudices the Court's findings on its jurisdiction or on the admissibility and the merits of the Application.

OPERATIVE PART

For these reasons,

THE COURT

Unanimously

Dismisses the requested provisional measures.

Signed:

Imani D. ABOUD, President;

And Robert ENO, Registrar.

Done at Arusha, this Seventeenth Day of March in the Year Two Thousand and Twenty-Three, in English and French, the French text being authoritative.

1. Rule 8(2) of the Rules of Court of 2 June 2010. [[↑](#)](#footnote-ref-1)
2. Rules of Court, 1 September 2020. [[↑](#)](#footnote-ref-2)
3. **Komi Koutche v. Republic of Benin** (provisional measures) (2 December 2019) 3 AfCLR 725 § 14. [[↑](#)](#footnote-ref-3)
4. The Respondent State ratified the ICCPR and ICESCR on 18 March 1969. [[↑](#)](#footnote-ref-4)

5. *Ibrahim Ben Mohamed Ben Ibrahim Belguith v. Republic of Tunisia*, ACtHPR, Application No. 017/2021, judgment of 22 September 2022 (merits and reparations). [↑](#footnote-ref-5)
6. *Sebastien Germain Ajavon v. Republic of Benin*, ACtHPR, Application No. 062/2019, Ruling of 17 April 2020 (provisional measures) § 61. [↑](#footnote-ref-6)
7. Ibid § 62. [↑](#footnote-ref-7)
8. Ibid § 63. [↑](#footnote-ref-8)

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