JUDGMENT
Conaïde Togla Latondji Akouedenoudje v. Benin
Application NO. 024/2020
13 June 2023
Partial dissenting opinion,
Blaise TCHIKAYA, Vice President;

Introduction

Introduction

1. The Court delivered a judgment on 13 June 2023 in the case between *Mr Conaïde Togla Latondji Akouedenoudje v. the State of Benin*[1]. This majority decision essentially addresses the still controversial issue of the articulation of the powers of the judiciary and those of the police, which derive from the regulatory power of the executive.

2. Regretfully, I dissent with respect to one of the points of the decision, namely, the assertion that the contested inter-ministerial order is legally defensible, both

ACtHPR, *Sieur Conaïde Togla Latondji Akouedenoudje v. Benin,* 22 March 2023.

in terms of its basis and its purpose. It reflects a practice that is enshrined in public law.

3. In the present case, the Applicant*, Mr Conaïde Togla Latondji Akouedenoudje*, challenges an inter-ministerial order issued on 22 July 2019 prohibiting the issuance of official documents to persons standing trial or wanted by the courts of Benin, on the ground that it violates the African Charter on Human and Peoples' Rights of 21 October 1986 and the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights of 22 August 2014.[2]

4. By Order of 25 September 2020, this Court dismissed the request for provisional measures. However, it assumed jurisdiction[3] and no objection was raised to the admissibility of the application. Similarly, the question of granting individuals access to the Court based on the State having deposited the Declaration was settled in accordance with the Court's established and now prolific jurisprudence[4].

5. On the merits, the Court found a violation. This opinion argues, contrary to the Court's decision, that the regulatory authority is entitled by law to take any police measure, provided that it is in support a judicial decision.

6. This is the position of this partial dissenting opinion. In my opinion, the arguments advanced by the Applicant, which are contested by the State, are not legally acceptable. The submissions on the violation of the right to the presumption of innocence and the right to nationality do not hold in the face of police duties.

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[2] The Inter-ministerial order of 22 July 2019 also specified that the ban on the issuance of official documents to persons wanted by the courts of the Republic of Benin is not contrary to the Constitution [...].

[3] In essence, the Court noted that the issues of violation of the right to the presumption of innocence and the right to nationality, which are already protected by the Charter, fall within its material jurisdiction.

[4] On 8 February 2016, the State of Benin deposited the Declaration provided for in Article 34(6) of the Protocol. It accepted the Court's jurisdiction to receive applications from individuals and Non-Governmental Organisations. On 25 March 2020, the Respondent State deposited with the Chairperson of the African Union Commission an instrument withdrawing its Declaration. The Court has held that the withdrawal has no bearing on pending cases and new cases filed before the withdrawal came into effect, in this case, on 26 March 2021.

7. The Court held that there was abusive use of power through violation of the right to the presumption of innocence, owing to the Respondent State's refusal to issue an official document.[5]

8. On this point, I disagree with the decision and write this dissenting opinion. It will be shown that the Court's assessment is at variance with the particulars of the dispute (I) and thus manifestly disregards the objective prerogatives of the Respondent State applicable in the matter (II).

1. *The Conaïde T. L. Akouedenoudje judgment: an inappropriate assessment of facts*

9. As mentioned, the State was found to have infringed the fundamental character of the right to the presumption of innocence provided for under Article 7(1) (b) of the Charter, which states

> *"Every individual shall have the right to have his cause heard". This comprises […] the right to be presumed innocent until proved guilty by a competent court or tribunal."*

10. This finding does not stand up to scrutiny. It is at variance with the circumstances of the case. As we know, presumption of innocence is not absolute, as it is subject to restrictions[6]. Presumption of innocence is subject to restrictions to the extent that it may be limited by the existence of the presumption of guilt. A person who is already standing trial may not invoke the presumption of innocence to evade police action taken against him. This is a time-honoured concept in general international public law.[7] Although

[5] The Court ordered the Respondent State to take all measures to revoke the inter-ministerial order, See ACtHPR, *Conaïde..., op. cit*, § 98.

[6] It should be recalled that technically certain hypotheses make no room for the presumption of innocence. By definition, ECHR control excludes the concept from the scope of application of Article 6 of the Convention. This is the case in particular for disputes concerning the right of foreigners and the right of asylum: *ECHR, 5 October 2000 Maaouia v. France; Comm.* EDH, 25 October 1996, Kareem v. Sweden *eCHR, 28 June 2001, Maillard Bous v. Portugal:* ECHR, Maillard Bous v. Portugal; tax litigation: *ECHR, 20 Apr. 1999, Vidacar S. A. and Opergrup S. L v. Spain*ne; Electoral disputes and political rights: *ECHR, 21 Oct. 1997.*

[7] *Sentence Ben Tillet*, Royaume-Uni c. Belgique, A. Desjardin, 26 décembre 1898, *RGDIP* 1899, p. 46 ; Grivaj (F.), *RGDIP*, 1899, p 46 ; J. J. A. Salmon (J.-J. A.), *AFDI* 1964, p. 225. The doctrine of clean

presumption of innocence places the burden of proof on the prosecution, there may be exceptions to this principle[8].

11. In order to uphold the violation alleged by the Applicant, the Court, in a problematic manner, found that the enforcement of the Interministerial Order of 22 July 2019 tampers with the presumption of innocence (1.1). It also found an alleged violation of nationality rights (1.2). The Court further found that the executive interfered in the powers of the judiciary (1.3). Finally, the Court noted that there was no wanted notice or court order in respect of the Applicant (1.4).

1.1. *A problematic perception of the presumption of innocence.*

12. The Court observes that the refusal to issue official documents pursuant to the Order of 22 July 2019 is in fact a measure of constraint taken against a wanted person, thereby compelling them to comply with court summons.

13. The Court considers that presumption of innocence was disregarded. This finding is problematic, to say the least. The executive, by virtue its regulatory power, intervenes in support of the judiciary. Thus, without seeking to establish the judicial guilt of an individual, the executive can respond to a request to prosecute an accused person. As the Respondent State argued:

> "(...) This principle - the presumption of innocence - does not preclude the accused being deprived of liberty in Order to ensure the effectiveness of investigations, nor does it preclude him being

hands is applied as an admissibility requirement in respect of international claims: the claimant must be reasonably untainted. In the present case, could Mr. Ben Tillet claim pecuniary compensation for having being expelled, given that he violated the law? Although Mr. Ben Tillet was warned, he failed to comply. He not could therefore not claim to have the hands clean to benefit from international protection.

[8] Merle (R.) and Vitu (A.), *Traité de droit criminel*, t. 2: *Procédure pénale,* Cujas, Paris, 5e ed. 2001; (Pradel (J.), *Manuel de procédure pénale*, *ibid.*, 13e ed. 2006; Stefani (G.), Levasseur (G.) and Bouloc (B.), *Procédure pénale,* Dalloz, 21e ed. 2008, 822 p. This is how courts limit the presumption of innocence, particularly in France. The Court held in 2020 that: ". On the presumption of innocence; that the use of a glass box must be justified by a risk to security or by problems of order in the courtroom and not be merely routine. The judges added that the use of the box was not contrary to human dignity, nor to the principle of the presumption of innocence, nor to the confidential and easy communication of counsel with the defendant [...]", Judgment of 18 November 2020.

subjected to measures of restraint, in particular preventive detention or police custody, for the purpose of establishing the truth"[9].

14. In doing so, the executive, as it emerges in the present Conaïde case, neither exercises autonomous regulatory power[10] - a concept in public law - nor regulatory privilege. The exercise of this power derives from a judicial a source insofar as the executive acts in response to a situation brought about by legal action.

15. The European Court provides a perfect characterisation of the presumption of innocence in its famous judgment of 2013 in *Allen v. United Kingdom*[11] wherein the concept of presumption of innocence is fleshed out in two respects (*Allen v. the United Kingdom*, 2013, §§ 93-94). Firstly, it confers a procedural guarantee in the trial process, in particular, by foreclosing any premature statements by the trial judge or any other public authority in terms of an accused person's guilt. Secondly, it operates as safeguard to prevent public officials or authorities from treating acquitted or discharged persons as if they were in fact guilty of the offence for which they were charged. Nothing bars police authorities from intervening effectively to support the judicial authority where appropriate. The mere fact of intervening for policing purposes as required by the situation, does not cause a violation of rights.

16. However, the Court opportunely recalled that the Order of 22 July 2019 targets two categories of persons:

> "*namely, persons whose appearance, hearing or interrogation is required at the preparatory or trial stage of criminal proceedings initiated against them, and persons who have been the subject of an enforceable conviction*".

[9] ACtHPR, *Conaïde Togla Latondji Akouedenoudje, op. cit*, § 59.
[10] Douence (Jean-Cl.), *Recherches sur le pouvoir réglementaire de l'administration, L*GDJ, 1968, 535 p.
[11] ECHR, *Allen v. United Kingdom,* 12 July 2013

17. The idea thus conveyed is that only the people concerned were targeted. In other words, the executive intervenes only when it considers that it is in the public interest to do so.

1.2. *Alleged violation of nationality rights*

18. The Applicant affirmed that the Inter-ministerial order violates the right to [...] nationality, which compelled him to bring a case with the Constitutional Court of the Respondent State on 16 August 2019 challenging the constitutionality of the said decree. The case was dismissed by Decision DCC 20-512 of 18 June 2020.[12] The conditions for granting nationality are determined by the State. The right to nationality is protected by Article 15 of the Universal Declaration of Human Rights (UDHR).

19. It should be recalled, as the Applicant contends in his Reply, that nationality is the legal belonging of a person to the State and that the law of the Respondent State defines the modalities of its attribution, loss and forfeiture. This has long been established in international law[13]. It follows that the State must in fact, on the one hand, guarantee persons' rights to membership and, on the other hand, exercise its full sovereign personal jurisdiction over persons. Therefore, it should be understood that the State has a duty to assist all public authorities in the exercise of their duties. It is the case that the decree under discussion did not contain any provisions relating to nationality and that no evidence was adduced to the contrary.

20. Furthermore, as the Court states:

> "The granting of nationality is a matter of State sovereignty and therefore each State determines the requirements for the granting, enjoyment and

[12] ACtHPR, *Conaïde Togla Latondji Akouedenoudje v. Benin, op. cit*., § 4.
[13]ICJ, *Case* Nottebohm Case, Liechtenstein. Guatemala, 6 April 1955: The International Court of Justice recognizes that it is up to Liechtenstein, like any sovereign State, to regulate by its legislation the conditions for acquiring its own nationality. It formulated a principle that was already present in the jurisprudence of its predecessor: "In the current state of international law" said the ICJ, "these questions are in principle included in the reserved domain of States " (AC, Décrets de nationality en Taisie et at Maroc, 7 février 1923).

> withdrawal of nationality in line with relevant international law […]. Every individual has the right to the recognition of their legal status everywhere, so that nationality not only defines the identity of each individual but also grants them the protection of the state and confers on them many civil and political rights".[14]

21. It was for the Executive in the exercise of its regulatory powers, if necessary, within the framework of its police powers, without rendering persons stateless, to leverage these documents to better monitor persons facing trial or wanted by national authorities.

1.3. *Executive interference*

22. The Court notes that by virtue of this decree, the Ministers of Justice and of the Interior, who are part of the executive, are interfering with the powers of the judiciary. As will be shown below, even with due regard for human rights, the powers of the State by virtue of its judicial sovereignty are intertwined with its public order powers. There is no interference by the State from the outset; it must be established that there has been a clear infringement of public or private rights by the public authority in order to consider that there has been abuse of power.

23. There is the hypothesis that the executive has a duty to act in the general interest. To quote from state liability law, "when the house is burning, you can't ask the judge for permission to send in the fire brigade".[15] *This idea is relevant in the Conaïde* case because the purpose of the police arrest is to anticipate a possible "disappearance" of persons standing trial or wanted by the courts.

24. In a way, the issue at stake is the relationship between the judiciary and the police. Indeed, according to paragraph iii (3) of the Preliminary Book of the Code of Criminal Procedure:

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[14] ACtHPR, *Anudo Ocheng Anudo v. Tanzania* 28 March 2018, §76; *Robert John Penessis v. Tanzania* 28 November 2019, §85.
[15]Numerous rulings in administrative jurisprudence enshrine this approach. *Infra*. note *32.*

> "The measures of compulsion to which a suspect or an accused person may be subjected are taken by decision, or under the effective control, of the judicial authority. They must be strictly limited to the needs of the proceedings, proportionate to the seriousness of the offence charged and not inimical to the dignity of persons".

25. Thus, the refusal to issue an official document, which can be considered as a measure of constraint taken against the Applicant, is based on an inter-ministerial order that was ruled constitutional by the Constitutional Court of the Respondent State in its decision of 18 June 2020.

26. The Applicant was in the situation of the first hypothesis, namely, a person standing trial or wanted by the law is in a peculiar situation and remains innocent until any decision on the merits of the case has been rendered. However, they are required to comply with police directives. These measures can come from both the judicial and regulatory authorities.

1.4. *Absence of a wanted notice or court order*

27. The Court considered that the Respondent State should have obtained a wanted notice or warrant issued by the judicial authorities before prohibiting the issuance of the relevant documents to wanted persons. The judgment reads:

> "The Court notes, however, that the Respondent State has not provided evidence of any search notice or warrant issued by the judicial authorities, let alone a court decision prohibiting the issuance of the documents in question to wanted persons"[16].

28. The Court considers that the refusal to issue these documents, which is not grounded on any judicial decision, suggests that persons "wanted by the courts" are guilty. This perception is exacerbated by the fact that, according to Article 3 of the said decree, the list of persons "wanted by the courts" can be consulted

[16] ACtHPR, *Conaïde Togla Latondji Akouedenoudje, op. cit*, § 68.

by anyone on the website of the Ministry of Justice and Legislation, the address of which was indicated therein.

29. The Court notes that under the name of each person “wanted by the courts” is stated an offence and, next to it, a court. This alone is enough to make the public believe that these people are guilty.

30. However, the impression that can be created by the application of the provisions of Article 3 of the inter-ministerial order of 22 July 2019 cannot be an impediment to the sovereign regulatory power of the Respondent State.

31. By granting the Applicant’s request based on the violation of the right to respect for the presumption of innocence, the Court curtailed the prerogatives of the Respondent State.

2. *The Conaïde T. L. Akouedenoudje judgment: the disregarded prerogatives of the Respondent State*

32. The Respondent State’s position (2.1) in the present case is justified by its prerogatives, which provides a regulatory ground for the inter-ministerial order (2.2) as well as a basis by virtue of its power to enact police laws (2.3). These prerogatives of the Respondent State seem to have been ignored.

2.1 The State’s defensible position

33. The Respondent State denied that there was a violation of the presumption of innocence, which presupposes that a person charged with an offence is deemed innocent until proven guilty.

34. It further contends that this principle does not preclude a person standing trial from being deprived of liberty for the sake of conducting effective investigations, neither does it preclude such persons from being subject to restrictive measures such as police custody or preventive detention, for the purpose of establishing the truth.

35. Finally, the Respondent State maintains that the prohibition on issuing official documents is in no way a declaration of guilt but is intended to prevent persons planning to evade justice from absconding.

36. It may be added that the decree in question contributes to respect for the presumption of innocence to the extent that it allows defendants to appear in court to “demonstrate” either their innocence or their guilt.

2.2 The basis of the Order of 22 July 2019

37. There are no difficulties associated with the legal grounds for this order. The grounds are traditional to this category of orders.

38. In the domestic order, a regulatory text must have a legislative or constitutional basis. The Inter-ministerial Order of 22 July 2019, Article 3 of which prohibits the issuance of official documents, including passports, to persons wanted by the courts of Benin, is based on Decree No. 416 of 20 July 2016, which lays out the powers, organisation and functioning of the Ministry of the Interior and Public Security[17].

39. The scope of the order covers ensuring public order, especially internal and external state security. The Ministry is required to take all measures to ensure the prevention, investigation and punishment of any acts likely to disturb public order.

40. The application of the provisions of the Order of 22 July 2019 was intended to ensure effective investigations in the judicial procedure.

[17] In addition to the Constitution of Benin (of 11 December 1990), this text covers various national laws.

2.3 The Respondent State's regulatory prerogatives

41. The Respondent State is sovereign over its territory. The links between the executive and the police are well known. Professor Charles Debbasch explains their various contours in detail in his now classic book[18]. There is a kind of ambiguity in arguing for strict separation between the powers of the judge and those of the police who execute the decisions of the judge. Both express, with due respect for the rights of the individual, the powers of public authorities.[19]

42. The State has prerogatives by virtue of which it enacts police laws whose mandatory enforcement is justified by the aim pursued.[20] The inter-ministerial order of 22 July 2019 is a measure of domestic public order having the value of a police act that does not disregard respect for the presumption of innocence provided for under Article 7 of the Charter.

43. The basis, it must be repeated, is also general. Public authorities cannot delay in taking measures that are required to maintain public order. Two more general and theoretical elements can be added to the above argument: firstly, one will recall the famous *Société immobilière de Saint-Just* (T. des conflits, 2 December 1902), which occurred in France, a country with the same legal system as Benin and which applies the policing power of the executive broadly. In order to resolve this issue in terms of the executive's power to act, the Tribunal (*Tribunal des conflits*) had to admit that the executive has the privilege of *ex officio* execution. The decision states:

[18] Debbasch (Ch.), *Droit administratif,* ed. Economica, 2002, 851 p.
[19] v. Debbasch (Ch.), *Droit administratif,* op. cit: "The distinction is also delicate with regard to police stops and identity checks on the public highway: a judicial police operation in the search for the perpetrators of a specific offence; an administrative police operation if the aim is to maintain public order. Legislation in this area has developed by striking a compromise between two competing requirements of constitutional value: safeguarding of public order and individual freedom", p. 452.
[20] Picard (E.), *La notion de police administrative,* LGDJ, 2 volumes, 1984, p. 890 ; Gaudemet (Y.), *Traité de Droit administratif Tome 16*[e] édition, 2016, 918 p. ; *Traité de Droit administratif Tome 2,* 15[e] édition, 2008, 691 p.

> "In taking this decision by order of the Minister of the Interior and Religious Affairs, the Prefect acted within the scope of his powers, as a delegate of the executive...".

44. Secondly, the sociological context of Benin may be considered as requiring careful examination. In recent years many cases have been brought before the Court. These cases were invariably about civil liberties. As guarantor of the balance that should exist between the various socio-political sectors, the Court should always seek to strike a balance between the legitimate powers of public authorities and the rights of the people it is charged with protecting, in line with the African Charter.

45. There is no need to dwell on the other aspects. There are many areas where the presumption of innocence may be limited even if such limitations are not desired. Under ordinary law, a person who cannot justify resources commensurate with their lifestyle is likely to be presumed guilty of something in many systems. The temporary residence permit can be withdrawn from a foreigner who is the subject to certain criminal proceedings, i.e., without any conviction and without judicial review. These are all examples that show the limits of the presumption of innocence.[21]

Conclusion

46. The State has a national margin of appreciation (NAM) on its territory that cannot be ignored[22]. This entitles it to issue measures to restrict rights and freedoms in order to preserve public order. In the present case, the Respondent State based its refusal to issue an official document on the enforcement of an

[21] In some systems, the holder of the vehicle registration certificate is liable for the fine incurred for speeding, unless they prove the existence of theft or other force majeure events.

[22] See European Commission report, *Greece v. United Kingdom*, *Yearbook of the European Convention on Human Rights* Yearbook of the European Convention on Human Rights, 1958-59, vol. 2, pp. 172-197. 3. The Doctrine of the Margin of Appreciation under the European Convention on Human Rights: Its Legitimacy in Theory and Application in Practice, *Human Rights Law Journal*human Rights Law Journal, 1998, No. 19, p. 1; ECHR, *Mennesson v. France,* ECHR, 26 June 2014, req. n° 65192/11, Dalloz actualité, 30 June 2014, obs. T. Coustet notes F. Chénedé1773, chron. H. Fulchiron and C. Bidaud-Garonrendu.

inter-ministerial order, the legality and constitutionality of which were not challenged.

47. The fundamental nature of the right to the presumption of innocence and nationality rights as enshrined in international human rights law were therefore not violated. As I was unable to convince the majority of my Dear and Honourable Colleagues on these points, I resign myself to this dissenting opinion which I would have liked to avoid.

Judge Blaise Tchikaya,

Vice-President of the Court