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AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

Urban Mkandawire v. Republic of Malawi

(Application No. 003/2011)

Application for interpretation and review of the judgment of 21 June 2013

Separate Opinion of Judge Gérard Niyungeko

1. In its judgment of 28 March 2014 in the matter of *Urban Mkandawire v. The Republic of Malawi*, *Application for interpretation and review of the judgment of 21 June 2013*, the Court concluded that the request for review was inadmissible, in the absence of new evidence which was not known to the Applicant when the first judgment of the Court was rendered (Article 28(3) of the Protocol establishing the Court) (herein after the Protocol) and Rule 67 of the Rules of Court (herein after, the Rules)) (paragraphs 16 and 15).

It also concludes that the application for interpretation fails and is struck out, notably on the ground that the points raised are not related to the operative provisions of the judgment in question(Article 28(4) of the Protocol and Rule 66 of the Rules) (paragraphs 16 and 7).

2. I agree with the conclusions reached by the Court on both issues; I however differ with it on the fact that, with regard to the application for interpretation, in spite of its principled position stated above, it decided to interpret Article 28(1) of the Protocol and Rule 59(2) of the Rules, and to

consider the Applicant's grievance on the composition of the Court which rendered the judgment of 21 June 2013 mentioned above.

I. Interpretation of Article 28(1) of the Protocol and Rule 59(2) of the Rules

3. Article 28(1) of the Protocol provides that «[t]he Court shall render its judgment within ninety (90) days of having completed its deliberations»[1].

Rule 59(2) of the Rules, which is aligned to the English version of Article 28(1) of the Protocol, provides that « [t]he decision of the Court shall be rendered by the Court within ninety (90) days from the date of completion of the deliberations ».

4. In his application, the Applicant requested for the interpretation of the date of the judgment rendered on 21 June 2013 in terms of these two provisions, and asked the Court whether it was "within the province of Article 28(1) of the Protocol and Rule 59 (2) of the Rules of the Court for the Court to deliver its judgment on 21/6/2013; 11 days after the due date of 10/6/2013 had elapsed".

5. In its judgment of 28 March 2014, the Court considered this matter and responded in substance that the deadline of ninety days starts running from the end of deliberations and that the final date is an internal matter of the Court (paragraph 8).

6. In my view, the Court did not have to respond to such a question. *In fact, first of all, this question is not related to the operative provisions of the judgment to be interpreted.*

In terms of Rule 66(2) of the Rules, the application for interpretation of a judgment must « state clearly the point or points in the operative provisions of the judgment on which interpretation is required ». This means that the application for interpretation can only concern the operative provisions (which excludes notably, the part of the judgment dealing with reasons),

[1] In its French version, this provision provides for a different rule : « La Cour rend son arrêt dans les quatre-vingt-dix (90) jours qui suivent *la clôture de l'instruction de l'affaire*" (italics added).

and that in the same manner, therefore, the Court can only interpret a point which is part of the operative provisions of the judgment in question.

The operative provisions of the judgment of 21 June 2013 provides as follows: « The Court declares this application inadmissible in terms of Article 6(2) of the Protocol, read with Article 56 (5) of the Charter » (paragraph 41).

The Applicant's request for the interpretation of Article 28(1) of the Protocol and Rule 59(2) of the Rules mentioned above is in no way related to these operative provisions which have to do with the inadmissibility of the application for failure to exhaust local remedies. It is even strictly unrelated to the reasons of the judgment. It concerns an issue which is outside the scope of the judgment.

Besides, the Court itself had just admitted this in one of the preceding paragraphs of its judgment where it declared that « [I]he eight 'points' posed by the Applicant can never be points for interpretation as they do not relate to the operative paragraphs of the judgment» (paragraph 7).

7. The Court justifies its decision to consider this point in spite of the affirmation it just made, in saying that there was a need to remove any doubt on the issue. This justification is however not convincing. The same need to remove any doubt could also be felt in relation to the six other points raised by the Applicant in his application for interpretation which the Court however decided to ignore; and the Court also failed to explain why the interpretation of Article 28(1) and Rule 59(2) had to be treated differently from the other points. The selection of points which the Court did not have to interpret, but which it nevertheless interpreted, necessarily appears to be arbitrary.

8. *Further, parts of the judgment in which the Court gives its interpretation of Article 28(1) of the Protocol and Rule 59(2) of the Rules do not even constitute obiter* dicta.

It is generally acknowledged that a judge may include *obiter dicta* in his judgment. *Obiter dictum* is a Latin expression which means 'said in

passing' and which « qualifies an argument which does not fall within the ambit of *ratio decidendi*, which is not invoked to make a decision»[2]. It is an argument which is not strictly necessary to justify the decision of the judge.

In the instant case however, these parts want to express a decisive and compulsory interpretation of the Article and Rule concerned.

9. *Furthermore, in any case, the Court does not have to, without cause, exercise incidentally its mandate of interpreting human rights legal instruments.*

The Court is charged with the interpretation of human rights legal instruments both in contentious matters (article 3 of the Protocol) and in advisory matters (Article 4 of the Protocol).

It is a mandate which it has to carry out primarily and autonomously within the framework of its dual jurisdiction and in respect of laid down procedure, not just in passing, and not at the sidelines of the interpretation of the operative provisions of a judgment.

It is also a mandate which it has to discharge in a proper manner, that is, by applying notably, the rules of interpretation of international treaties, as provided under Articles 31 to 33 of the Vienna Convention on the Law of Treaties of 23 May 1969.

In the instant case, by giving a hasty and incidental interpretation of Article 28(1) of the Protocol, the Court took the risk of giving an incomplete interpretation of this article, without paying adequate attention to the above-mentioned provisions of the Vienna Convention on the Law of Treaties.

10. *Lastly, if it was the intention of the Court to provide an advisory opinion, it is evident, under Article 4 of the Protocol, that it does not have the jurisdiction to do so when the request is made by an individual.*

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[2] *Lexique des termes juridiques 2014*, Serge GUINCHARD et al. ed. , 21e éd., 2013, p. 635. According to *Black's Law Dictionary* , obiter dictum, is « [a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive)" (Bryan A. GARNER, ed., 9th ed. , 2009, p. 1177).

It is important to underscore this, because the Court seems to understand the Applicant's requests as requests for the "Court's opinion" "on a number of issues" (paragraph 7).

11. For all these reasons, the Court ought to have abstained from responding to the application for interpretation of Article 28(1) of the Protocol and Rule 59(2) of the Rules, in its judgment of 28 March 2014.

II. Consideration of the Applicant's grievance on the composition of the Court which rendered the judgment of 21 June 2013 mentioned above.

12. In his application for interpretation of the Judgment of 21 June 2013, the Applicant also requested for the interpretation of « the date of the Judgment dated June 21, 2013 in terms of Article 15 (2) of the Rules of Procedure of the IAHRC » [sic], in pointing out that whereas in the public hearing he appeared before nine judges, the judgment states that it was rendered by ten judges.

13. In its 28 March 2014 judgment, the Court took time to respond in the following words: « The Court concedes that there is a typographical error and the record should have read six and three judges instead of seven and three and a corrigendum has been issued. Nevertheless, this is not a point for interpretation» (paragraph 9).

14. In my view, the Court did not have to deal with this issue in its judgment. Firstly, as admitted by the Court, it is not a matter for interpretation (this thus places it outside the jurisdiction of the Court in the interpretation of judgments). Secondly, the Court does not have to correct simple typographical errors in a judgment on the interpretation of an earlier decision. In its practice, the Court corrects such errors through an *erratum* attached to the judgment in question. This approach would have been sufficient to solve the problem. In my view, a judicial decision of the Court does not seem to be the right place to deal with such issues.

Judge Gérard Niyungeko

Robert ENO, Registrar