

**AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS**

**SALAH EDDINE KCHOUK**

**v.**

**TUNISIAN REPUBLIC**

**APPLICATION No. 006/2022**

**RULING (PROVISIONAL MEASURES) OF 16/12/2022**

**DISSENTING OPINION**

1. I do not share the Court's findings in its above-mentioned Ruling and the reasons proffered with regard to the dismissal of the Application seeking an Order for the Respondent State to postpone the legislative elections slated for 17 December 2022 until examination of the case on the merits.
2. It is therefore my wish to write this dissenting opinion because I am convinced that the Court should have declared the request well-founded for the simple reason that it meets the requirements of urgency warranting provisional measures.
3. In this regard, Article 27(2) of the Protocol clearly 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".
4. Rule 59(1) of the Rules of Court also clearly provides that 'Pursuant to Article 27(2) of the Protocol, the Court may, at the request of a party, or on its own accord, in case of extreme gravity and urgency and where necessary to avoid irreparable harm to persons, adopt such provisional measures as it deems necessary, pending determination of the main Application".

5. Hence, it emerges from a reading of the above two Rules that the conditions governing provisional measures remain the urgency or the gravity of cases and the need to avoid irreparable harm.
6. In paragraph 22 of its Ruling, the Court declares that urgency, which is consubstantial with extreme gravity, means that an irreparable and imminent risk will be caused before it renders its final judgment.
7. It further provides in its paragraph 23 that the risk in question must be real, which excludes a purely hypothetical risk...
8. With respect to irreparable harm, in paragraph 24 of the Ruling, the Court considers that there must be a "reasonable probability of occurrence" having regard to the context and the Applicant's personal situation.
9. It is noteworthy that the Application seeking the suspension of the legislative elections of 17 December 2022 was filed before the Court on 25 October 2022 with the prayer on the merits, that is, over one (1) month before the elections.
10. It emerges from the Applicant's prayers on the merits (paragraph 4 of the Ruling) that he, *inter alia*, alleges the violation of Articles 13 and 20 of the Charter and Article 14 of the International Covenant on Civil and Political Rights.
11. It is clear from the request for provisional measures that the Applicant seeks the suspension of the elections because they are based on Decree 55/22 which he considers to be unconstitutional.
12. The case file on the merits shows that the decree in question is a decree-law numbered 2022/55 and dated 15/09/2022 amending Organic Law No. 2014/16 of 26/05/2014 **on elections and referenda**.
13. As indicated in paragraph 9 (iv) of the Ruling, the Applicant did indeed, among his claims on the merits, request the suspension and annulment of this decree!

14. It emerges, however, that in paragraph 30 of the Ruling the Court found that the Applicant did not establish any direct link between holding the legislative elections and the decree-law, so that the prayer for provisional measures is indistinguishable from the claims on the merits, especially as in paragraph 31 the alleged violations are not in the context of the election, the suspension of which is sought. Consequently, it is my opinion that the Court has not only misrepresented the Applicant's claims but has also prejudged the merits.
15. It is clear that there is a situation of urgency... because holding elections while substantive claims are pending before the Court would completely destroy the meaning of the said claims and prejudice the decision of the Court on the merits!
16. As for real harm, it is apparent that the Applicant is a Tunisian citizen who aspires to the stability of his country's institutions, and therefore, that organizing premature elections according to his allegations whereas the mandate of the dissolved parliament would expire only in November 2024 cannot but constitute real harm that cannot be restored to the original state if the Court were to declare the measures taken by the Respondent State as being in breach of the principles enshrined in the Charter.
17. In my opinion, prayers for provisional measures must be considered against the backdrop of the nature of the request itself!
18. A request for the **suspension** of an act can only be a request with provisional and momentary effects which abates once the Court renders its decision on the merits.
19. Therefore, in my opinion, the Court should have declared the request for suspension well-founded, insofar as it was not only provisional but also temporary and urgent, given that the event was imminent and unequivocally prejudicial to the Applicant.



**Judge Bensaoula Chafika**

