


AFRICAN UNION		UNION AFRICAINE
الاتحاد الأفريقي		UNIÃO AFRICANA
AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS COUR 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 ON PROVISIONAL MEASURES OF 17 MARCH 2023

DISSENTING OPINION BY JUDGE CHAFIKA BENSAOULA

1. I do not subscribe to the Court's reasoning and findings in its above-mentioned order as regards the dismissal of the request for an order compelling the Respondent State to suspend Decree-Law No. 2022/55 amending and supplementing Organic Law No. 2014 of 26/05 /2014 on elections and referendum, until the consideration of the merits of the case.
2. I therefore wish to write this dissenting opinion in the belief that the Court should declare the application well-founded for the simple reason that it meets the conditions of urgency required to order provisional measures.
3. Article 27 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (the Protocol), in paragraph 2, clearly states that "In cases of extreme gravity and urgency, and where 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 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. A combined reading of these two provisions shows that the conditions for ordering provisional measures remain the urgency or gravity of the cases and the need to avoid irreparable harm.
6. The Court, in paragraph 19 of its Ruling in the instant case, states that urgency, which is, consubstantial with the extreme gravity, means that a real and imminent risk or irreparable harm will be caused before it renders its final decision.
7. It also holds that the risk in question must be real, which excludes a purely hypothetical risk.
8. As to irreparable harm, it should be noted that in paragraph 20 of the Ruling in the instant case, the Court considers that there must be a reasonable likelihood of it occurring, having regard to the context and the personal circumstances of the Applicant.
9. It should be noted that the Court decided, in paragraph 22 of the Ruling, that the Applicants failed to adduce evidence of urgency or extreme gravity, as well as of the irreparable harm that would result from the execution of the said decree-law, and therefore dismissed this request in paragraph 23 of the Ruling.
10. The stay of execution of an act of the State imposing new rules relating to any referendum and elections is closely linked to the application on the merits for the annulment of the impugned act on the merits. It follows that the harm has occurred since organizing any new election or referendum will depend on the new rules which are the subject of the allegations of human rights violations in the Application.
11. The same applies to urgency, on the understanding that if the Court were to find, on the merits, that the impugned decree was issued in violation of the rights

invoked by the Applicant, then the right to restitution in the previous situation would be impossible and pecuniary redress would not be sufficient to remedy this. This would pose a challenge to the very principle of provisional measures mechanism, the rationale of which, as recalled above, is to prevent irreparable harm.

12. As will be seen, the Applicant's applications on the merits allege violation of Articles 2, 10, 13, 18 and 24 of the Charter, as well as provisions of the International Covenant on Civil and Political Rights and Article 1 of the International Covenant on Economic and Cultural Rights.

13. It emerges from the foregoing that to apply the decree which is the subject of the provisional measures requested to elections while applications on the merits are pending before the Court would render the said applications devoid of substance and inevitably undermine the Court's decision on the merits!

14. In my opinion, requests for provisional measures must be kept in the context of the nature of the request itself and expecting the Applicant to show manifest prejudice is antithetical to the very purpose of the provisional measures mechanism. This is all the more so when the harm arises expressly from the offending act itself and its execution.

15. An application for suspension of an act can only be regarded as temporary and for the purpose of avoiding harm, even if that harm may be strictly immaterial or irreparable pending the judgment on the merits.

16. In light of these arguments, I hold the view that the Court should have found the application for suspension to be well-founded, not only because it was provisional, temporary and urgent in view of the enforceable nature of the act at issue, but also because it clearly caused harm to the Applicants.



Judge Bensaoula Chafika

