AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

DISSENTING OPINION OF JUSTICE BEN KIOKO

IN THE MATTER OF

SAFINAZ BEN ALI AND LAMIA JENDOUBI

V.

REPUBLIC OF TUNISIA

APPLICATION NO. 009/2023

RULING OF 3 SEPTEMBER 2024

1. In the above-mentioned matter, the Court properly addressed itself in its Ruling to the admissibility requirements specified in Rule 50 (2) of the Rules, which substantially reproduces the provisions of Article 56 of the Charter. Nevertheless, I do not agree with the finding of the majority regarding non-exhaustion of local remedies, hence this dissenting opinion made pursuant to the provisions of Rule 70 (2) of the Rules of Court.

2. Firstly, I join issue with the majority on the inordinate delay in addressing the Applicants' request for provisional measures based on arbitrary detention.

3. Secondly, having carefully evaluated the pleadings and the evidence, I am of the view that local remedies must be deemed to have been exhausted before the filing of the application, for the reasons set out hereinbelow.

FACTS OF THE CASE

4. The facts of this matter are quite straight forward as stated in the judgment. For the purposes of this opinion, I will only restate some aspects of the facts on record with addition of relevant aspects not set out in the Ruling .

5. It emerges from the Application that in September 2021, the Tunisian authorities opened a criminal investigation against Instalingo, a digital content production company relating to several alleged activities, including disseminating suspicious content on Facebook pages and managing financial and technological resources. The Applicants and other individuals were accused and charged with money laundering related to funds received from foreign clients particularly from Turkey and Qatar, and of having infiltrated the State particularly at the level of appointments, by favouring individuals linked to the Ennahda Political Party with the aim of destabilising political life in Tunisia and supporting the said political party. The Applicants also alleged that the Tunisian authorities were targeting political opponents.

6. On 21 June 2022 and 5 July 2022, as part of the criminal investigation, the Sousse II Criminal Court issued a committal warrant against the Applicants, along with forty-eight (48) others, including against the owners of Instalingo, its journalists and members of the board of directors and others, all alleged leaders or supporters of the Ennahda political party, resulting in their detention at Mssaidine prison. Since then, they have been held in detention without any legal proceedings having been initiated against them.

7. Under Tunisian law, pre-trial detention may not exceed a period of 14 months, that is, 420 days, in accordance with Article 85 of the Criminal Procedure Code (CPC). Mrs. Safinaz was detained on 21 June 2022, and therefore ought to have been released before midnight on 13 August 2023. Similarly, Ms. Lamya who was detained on 5 July 2022, ought to have been released before midnight on 25 August 2023.

8. The Applicants submitted several applications for mandatory release to relevant Tunisian authorities because the maximum pre-trial detention period had been reached. These applications, copies of which were filed in Court, were ignored, despite the legal obligation to release them at the end of the maximum pre-trial detention period set by law.

9. The Applicants contended that as of the date of filing the application before the Court, no action had been taken by any of the above-mentioned parties who are part of the organs of the Tunisian State, which constitutes a flagrant violation of the law and an act of arbitrary and illegal detention under Article 250 of the Tunisian Penal Code, and which attracts harsh sentences under its Article 251, in the event of pre-trial detention exceeding one month without a valid legal basis.

10. The Applicants, also applied for mandatory release to the Sousse Court of Appeal, which is vested with jurisdiction except in certain circumstances, but the Court refused to deal with it and referred the case back to the Criminal Court, in violation of Article 92, which explicitly allows applications for provisional release to be lodged with the Court of Appeal. The date of this application has not been specified.

11. Recently on 21 August 2024, the Court was informed by one of the Applicants' lawyers based in Switzerland that "after strenuous efforts, almost uninterrupted since May 2024, Mr. Mokhtar El Jamai, one of the Applicants' defence lawyers had received an illegible handwritten copy of the decision of the Cassation Court on Monday 19 August 2024, according to which the case was dismissed in substance and accepted in form". The request for release was denied and the matter referred to the Criminal Chamber of the Sousse Court of Appeal.

12. The lawyer further noted that although the judgment was dated 28 May 2024, "it was only delivered in this initial state of disrepair in handwritten form on 19 August 2024. In the meantime, a policy of complete ambiguity was pursued, with the judgment being delivered without being handed over to the defendants. Had it not been for the continuous protests of the defence lawyers, even this unscripted version would not have been found".

13. Regarding the hearing before the Criminal Chamber, the lawyer noted that "since 28 May 2024, a hearing was organised on 3 June 2024 in which all the defence's demands, including the release of the defendants, were rejected and the hearing was postponed to 8 July 2024, where it was also postponed, in accordance with the systematic policy of procrastination, to 28 October 2024. These hearings are part of the Court of Cassation's referral of the case to the Criminal Chamber. Of course, the defendants were not allowed to attend the 3 June 2024 session, and the judge merely received the defence's demands orally and responded immediately by refusing release and postponing the case to 8 July 2024, and then to 28 October 2024". He concluded by stating that "there is no hope that the defendants will be released before 28 October 2024, nor is there any indication that the court will change its attitude of refusing to deal with the requests for release that are submitted at every session of the court.

BACKGROUND TO THE FILING OF THE CASE

14. The Applicants also provided a background to the filing of the case. They stated that "since July 2021, President Kaïs Saïd has assumed exceptional powers in Tunisia, dissolved Parliament, promulgated decree-laws restricting freedom of expression, and sought to strengthen his influence over the judiciary".

15. Further, "he has arbitrarily dismissed judges and branded opposition figures as "terrorists." UN Special Rapporteurs have expressed concern about the independence of the judiciary and the harassment of judges and lawyers in Tunisia. Amnesty International has denounced the abuse of pre-trial detention to silence political opposition in Tunisia, highlighting the use of vague provisions in the legislation on pre-trial detention". In addition, most of the leaders of the opposition including those of the Ennahda Political Party are either in jail or in exile.

16. The attention of the Court has been drawn to the prevailing situation in the Respondent State through pleadings filed in virtually all the recent applications instituted at the Court against the Respondent State[1].

THE REQUEST FOR PROVISIONAL MEASURES (REQUEST)

17. The Application together with a request for provisional measures was filed at the Registry on 25 September 2023 and served on the Respondent State on 25 October 2023, for its Response to the request for provisional measures and to the Application within fifteen (15) and ninety (90) days, respectively.

18. In their request, the Applicants prayed the Court to (i) Order the Respondent State to release the Applicants immediately and; (ii) order the Respondent State to

[1] There are about 19 Applications filed recently against the Respondent State. See for example, *Saalheddine Kchouk v Tunisia*, Application No. 006/2022; M*oadhi Kheriji Ghannouch & another v Tunisia*, Application 004/2023; *Brahim Ben Mohamed Ben Ibrahim Belgith v. Republic of Tunisia*, ACtHPR, Application No. 017/2021, Judgment of 22 September 2022 (merits and reparations); *Ali Ben Hassan Ben Youssef Ben Abdelhafid v. Republic of Tunisia*, Application No. 033/2018, Ruling of 25 June 2021.

process without delay the requests for release submitted by the Applicants before its judicial authorities.

19. In the Merits, the Applicants prayed the Court, *inter alia,* to declare that the continued detention of the Applicants beyond the legal limits constitutes a serious violation of their fundamental rights, particularly those protected by Articles 6, 7 and 9 of the Charter, as well as by Article 9 of the Universal Declaration of Human Rights (UDHR) and Article 9 of the International Covenant on Civil and Political Rights (ICCPR). They also requested the Court to find that they have been unlawfully detained and to order their immediate release.

THE REQUEST WAS NOT HANDLED EXPEDITIOUSLY

20. In accordance with 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. In addition, Rule 59 of the Rules of Court (2020), which restates the above provision, also authorises the President of the Court to obtain the views of the Judges, in case of extreme urgency, by all appropriate means. The current Rule 59(2) has, therefore, removed the necessity of the President summoning an extraordinary Session of the Court simply to deal with a request for provisional measures as required by the previous Rules of Court (2010).[2]

21. The Court has therefore put in place the necessary framework to facilitate dealing expeditiously with requests particularly during the intersessions. This approach is inspired by the rationale of extreme gravity and urgency provided for under Article 27(2) of the Protocol and Rule 59 of the Rules of Court. It also informed the decision of the Court to grant the Respondent State fifteen (15) days to respond to the request for provisional measures and ninety (90) days to the merits. Even though the Court has not fixed a constant time limit, the Court has constantly given short time limits for responses to such requests[3] and proceeded to address them, where possible, on a priority basis, unlike in the present case.[4]

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[2] See Rules of Court (2010), which under its Rule 51(2) provided that "in case of extreme urgency, the President may convene an extraordinary session of the Court to decide on measures to be taken. He/she may, in this regard, and by all reliable means, enlist the views of the Members not present".

[3] For example, in *ACHPR v Kenya* (2013) 1 AfCLR 193 § 12), the Respondent State was given thirty days to respond to the request for provisional measures; in *Woyome v Ghana* (provisional measures) (2017) 2 AfCLR 213 § 15, the Respondent State was given nine days to respond to the further request for provisional measures filed by the Applicant; in *Johnson v Ghana* (2017) 2 AfCLR 155 § 6, the Respondent State was given fifteen days to file a response; in *Mugesera v Rwanda* (2017) 2 AfCLR 149 §11the Respondent State was given twenty-one days to comment on the request for provisional measures; in *Laurent Gbagbo v Cote d'Ivoire*, Application No. 25/2020, Ruling of 25 September 2020, the Respondent State was given seventy-two hours to file a response to the request for provisional measures and in *Guillaume Soro and others v Cote d'Ivoire*, Application No. 012/2020, Ruling of 15 September 2020 § 12, the Respondent State was given ten days to respond.

[4] See for example, *Guillaume K. Soro & others v Cote d'Ivoire*, Application 012/2020 (1st Request for Provisional measures filed on 2 March 2020, for which the Court issued its Ruling on 22 April 2020); (2nd Request filed on 7 August 2020 for which the Court issued its Ruling on 15 September 2020); *XYZ v Benin*, Application 003/ 2021 (2nd Request filed on 3 September 2023 for which the Court issued its Ruling on 18 December 2023); *Moadhi K.Ghannouch & another v Tunisia*, Application 004/2023 (Request was filed on 1 June 2023 and the Order of the Court was issued on 28 August 2023); *Houngue*

22. Based on the same principle, the Court has previously acknowledged that there may be situations where it could proceed to issue an order on the request without having to comply with the requirements for service. In *ACHPR v Libya*, the Court stated that:

> …*in the present situation where there is an imminent risk of loss of human life and in view of the ongoing conflict in Libya that makes it difficult to serve the Application timeously on the Respondent and to arrange a hearing accordingly, the Court decided to make an order for provisional measures without written pleadings or oral hearings.*[5]

23. At its 71st Ordinary Session held from 12 February to 8 March 2024, the Court deliberated on the request and on the kind of orders it should issue in this present application. It acknowledged that the Applicants had been held in pre-trial detention for over 19 months, well beyond the period allowed by Tunisian Law, that is, 420 days or about 14 months. However, after lengthy deliberations, the majority decided that the request would be examined together with the merits of the Application, against the objection by two or three judges, including the author.

24. This is indeed unfortunate. Had the Court dealt with the request with the urgency it deserved, as it has previously done, appropriate orders would no doubt have been issued as the condition of exhaustion of local remedies only arises at the stage of merits. Furthermore, the Applicants' prayers to be released on bail and for the Respondent State to process without delay their requests for release, are straightforward and without any apparent complexities. In any event there is no valid reason why the majority did not follow the Court's well-established approach for dealing urgently with requests for provisional measures where personal liberty is at stake.[6]

25. The Court could have applied the provisions of Articles 7 and 9 of the Charter, and Article 9 of the ICCPR[7], which the Applicants had relied upon in their pleadings. In terms of Article 9 (3) and (4) of the ICCPR,

> 9(3) Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

E. Noudehouenou v Burkina Faso & 7 others, Application 010/2021(Request was filed on 25 March 2021 involving many States parties and the Ruling of the Court was issued on 20 December 2022); *Salaheddine Kchouk v Tunisia*, Application No. 006/2022 (Request was filed on 25 October 2022 and the Ruling of the Court was issued on 16 December 2022).

[5] 2011) 1 AfCLR 17 § 13.
[6] supra footnote 4.
[7] Tunisia became a party to the ICCPR on 18 March 1969.

> 9(4) Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

26. The Applicants have asserted that they submitted several applications for mandatory release, to the relevant Tunisian authorities as well as the domestic courts, but no action was taken by any of them despite the harsh sentences under Article 251 of the Penal Code, in the event of pre-trial detention exceeding one month without a valid legal basis.

27. The maximum period of pre-trial detention of 420 days provided under Tunisian Law, is unduly too long and cannot be explained away by any explanation including the complexity of investigations. Additionally, the resultant illegality cannot be sanitised or validated by the fact that the Applicants were subsequently charged in a court of law, as this would be rewarding the Respondent State for the illegality it committed.

28. By delaying its ruling on provisional measures, and combining it with the merits, the Court has ended up prejudicing the rights of the applicants and sanitising the illegal action of the Respondent State. Further, by finding that local remedies were not exhausted at the time of filing the application, the Court has had to dismiss the case on its merits and consequently the request for provisional measures.

29. I join issue with the Court's finding regarding exhaustion of local remedies.

LOCAL REMEDIES NOT EXHAUSTED: OR WERE THEY??

30. In its Ruling, the Court has noted that according to the Respondent State, the investigating judge issued an order on 16 June 2023 referring the Applicants to the Indictment Division. Further, by Decision No. 46375 of 20 July 2023, the Sousse Court of Appeal referred the Applicants to the Criminal Division of the Sousse Court of Appeal, which was appealed against at the Cassation Court by the Public Prosecutor and several defendants, including the Applicants in the present case. According to the Respondent State, the case was sent to the Public Prosecutor's Office of the Cassation Court and was still pending before the Cassation Court, with registration number 10049, at the time of filing this application. [8]

31. On their part, the Applicants submit that in accordance with Article 85 of the CPC, pre-trial detention may not exceed fourteen (14) months, that is, four hundred and twenty (420) days. They maintain that Safinaz Ben Ali was placed in detention on 21 June 2022, and Lamia Jendoubi, on 5 July 2022, and therefore ought to have been automatically released on 13 and 25 August 2023, respectively. They also contend that "before seizing the Court, they filed several applications for release **after the maximum pre-trial detention period provided for by Tunisian law had elapsed** without even receiving an acknowledgement of receipt from the judicial authorities, which constitutes a refusal under Articles 80 to 87 of the Criminal Procedure Code (CCP).

[8] See Paragraph 41 of the Judgment.

32. Based on the foregoing, the Court has found that at the time of filing the present Application, being on 25 September 2023, the cassation appeal against the decision of 20 July 2023 was pending and therefore upheld the Respondent State's objection that the Applicants did not exhaust local remedies. This finding is problematic for several reasons.

OBSERVATIONS

33. For a start, the dates on which the cassation appeals were filed are unknown as neither the Respondent State nor the Applicants have clarified this, despite being requested by the Court to do so. Furthermore, the Parties did not supply copies of the said appeals, even after being specifically requested by the Court to do so. In the absence of clear documentation or clear assertions to which the other party could accept or reject, there was no basis for the Court to conclude that the Applicants filed their cassation appeal before filing their application before the Court. In any case, from the record, it appears that the cassation appeal was pursuing only the issue of bail pending trial, which was subsequently denied.

34. Considering that the Applicants' prayers related only to their release, which had been delayed for a long time, and beyond the period allowed by law, what local remedies were they to exhaust anyway? As indicated above, the Applicants' prayers before this Court were for orders to be released immediately, and for the Respondent State to process without delay the requests for release before its judicial authorities.

35. In addition, the Applicants contend that when the application for mandatory release was submitted to the Sousse Court of Appeal, it refused to deal with it and referred the case back to the Criminal Court, in violation of Article 92, which explicitly allows applications for provisional release to be lodged with the Court of Appeal, which is vested with jurisdiction, except in certain circumstances. They add that given the refusal to process their applications, and "the sheer neglect of the numerous applications for release, without the slightest useful feedback from the authorities", they therefore had no choice but to bring their case before this Court to seek justice. Having disputed the Respondent State's assertion that the cassation appeal had been filed before the application before this Court, the burden of proof on this point clearly rested with the Respondent State, which has made this assertion, and which would benefit from it. In my view, the State did not discharge that burden.

36. In addition to the lack of clarity as to whether the Applicants' cassation appeal was pending as of 25 September 2023, when the Application was filed at the Court, I am also of the view that the majority ought to have considered the following important factors, that could have led it to reach a different conclusion:

    i. Whether the lengthy period of pre-trial detention for a period of more than 14 months from arrest to the filing of the Application and more than 25

months to date, without the trial being commenced, is too long and unconscionable and falls within the principle of undue prolongation of local remedies. From the record, it seems that there was a policy of keeping the applicants in detention for as long as possible as can be seen from the handling of the matter at the various stages of the investigating judge, the cassation appeal, and the Sousse criminal chamber of the Court of Appeal. In my view, this is a clear case where the exception to the rule on exhaustion of local remedies ought to have been applied, with the conclusion that local remedies were unduly prolonged.

ii. The analysis of the Court on the relevant dates for the cassation appeal is not based on any discernible facts[9]. The Applicants have clearly stated that the determination of lawfulness of pretrial detention rests with the Court of Appeal. Further, following the order of the Indictments Division referring them to the Criminal Division of the Sousse Court of Appeal, pursuant to Articles 116 and 119 of the Respondent State's CPC (Decision No. 46375), they filed an appeal to the Court of Appeal praying for release, which was denied. It should be noted that neither the Respondent State, which alleged non-exhaustion of local remedies, nor the Applicant has provided the exact dates when the alleged appeal to the Cassation Court was filed, despite specific requests from the Court. Considering further that no copies of those appeals with date stamps have been provided, the Court had no basis to fix specific dates and conclude that local remedies were not exhausted. Additionally, the Applicants "attached for the consideration of the Court copies of the various applications, all of which were filed after the maximum pre-trial detention period provided for by Tunisian law had elapsed"[10]. None of these documents included a pending application before the Cassation Court. At best, the Court should have given the benefit of doubt to the Applicants or at worst, postponed determination of the matter on merits until the facts had been established.

iii. Whether the pre-trial detention for a period of more than 14 months from arrest to the filing of the application and the continued detention for more than 25 months to date without the trial commencing is arbitrary and unlawful and offends the principles of fundamental human rights and freedoms. These periods cannot be justified by the complexity of the investigations or the trial, which has not yet started, more than another 14 months since the investigating Judge referred his findings to the Court of Appeal, making a total of 28 months since arrest and pre-trial detention. The Applicants' prayed this Court to find, *inter alia,* that their continued detention after the expiry of the legal time limits was a serious violation of their fundamental rights, in particular as protected by Articles 6, 7 and 9 of the Charter and Article 9 of the ICCPR. They further contended that the argument made by the Respondent State that the 14-month period refers

[9] See particularly paragraphs 55 and 57 of the Ruling.
[10] See Page 5 of the Application.

only to the period of detention before referral to the indictment chamber is wrong, as it suggests that the scope of pre-trial detention can be extended indefinitely. According to the Applicants, this would offend the principle of procedural fairness as well as well as Articles 29 of the 2014 Constitution and 35 of the 2022 Tunisian Constitution, which provide that 'the duration of arrest and detention must be defined." Had the Court directed its attention to this issue, I believe it would have realised that its approach of combining the request with the merits, would result in a great injustice to the Applicants, which would leave them at the mercy of national authorities, hell bent on ignoring their plight.

37. Considering the foregoing, I am of the view that the Court should have found that local remedies had been exhausted. In the alternative, the Court should have found that local remedies had been unduly prolonged and thus proceed to dismiss the objection to admissibility based on non-exhaustion of local remedies and declare *the* Application admissible. A further alternative for the Court would have been to deal with the request for provisional measures and postpone the determination of the merits until the relevant facts relating to dates had been established.

Signed:

Judge Ben KIOKO 

Done at Arusha, this Third Day of September in the year Two Thousand and Twenty-Four, the English text being authoritative.