


<b>AFRICAN UNION</b>		<b>UNION AFRICAINE</b>
<b>الاتحاد الأفريقي</b>		<b>UNIÃO AFRICANA</b>
<b>AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES</b>		

**THE MATTER OF  
HAMMADI RAHMANI AND OTHERS**

**V.**

**REPUBLIC OF TUNISIA**

**APPLICATION NO. 008/2024**

**RULING  
(PROVISIONAL MEASURES)**

**3 OCTOBER 2024**



**The Court composed of:** Modibo SACKO, Vice-President; Suzanne MENGUE, Tujilane R. CHIZUMILA, Chafika BENSOUOLA, Blaise TCHIKAYA, Stella I. ANUKAM, Dumisa B. NTSEBEZA, Denis D. ADJEI, Duncan GASWAGA, Judges, and Robert ENO, Registrar.

Pursuant to Article 22 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol") and Rule 9(2) of the Rules of Court (hereinafter referred to as "the Rules"), Judge Rafaâ BEN ACHOUR, a national of Tunisia, did not hear the Application.

In the matter of:

Hammadi RAHMANI, Makram ben MOHAMED HASSOUNA, Sami ben TAHAR HOUIDI and Ms. Khira bent TAHAR BEN KHLIFA  
Represented by Brahim BELGUITH, member of the Tunisian Bar, and the Pan-African Lawyers' Union (PALU)

Versus

REPUBLIC OF TUNISIA  
Unrepresented

After deliberation,

*Issues the present Ruling:*

## **I. THE PARTIES**

1. Hammadi ben Amira RAHMANI, Makram BEN MOHAMED HASSOUNA, Sami BEN TAHAR HOUIDI and Madame Khira BENT TAHAR BEN KHLIFA (hereinafter referred to as the “Applicants”), are former judicial officers of the Republic of Tunisia. They allege the violation of their rights as a result of their dismissal as judicial officers by Presidential Decree No. 2022-516 of 1 June 2022 (hereinafter referred to as “Decree on the dismissal of judicial officers ”) and, in relation to Decree-Law No. 2022-35 of 1 June 2022 supplementing Decree-Law No. 2022-11 of 12 February 2022 on the establishment of the Provisional High Judicial Council (CSPM) (hereinafter referred to as the “Amended CSPM Decree-Law”).
2. The Application is filed against the Republic of Tunisia (hereinafter referred to as “the Respondent State”), which became a Party to the African Charter on Human and Peoples’ Rights (hereinafter referred to as “the Charter”) on 21 October 1986 and to the Protocol on 5 October 2007. Furthermore, on 2 June 2017, the Respondent State deposited with the Chairperson of the African Union Commission the Declaration provided for under Article 34(6) of the Protocol (hereinafter referred to as “the Declaration”) by virtue of which it accepts the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organisations (hereinafter referred to as “NGOs”).

## **II. SUBJECT MATTER OF THE APPLICATION**

3. It emerges from the main Application that the President of the Republic enacted the Decree-Law No. 2022-11 of 12 February 2022 establishing the Provisional High Judicial Council (hereinafter referred to as “the CSPM Decree-Law”) to replace the previous High Judicial Council (CSM), established pursuant to Organic Law No. 2016-34 of 28 April 2016 adopted by the Assembly of the People’s Representatives.

4. It also emerges from the record that the said CSPM Decree-Law repealed certain provisions of Organic Law 2016-34, namely those relating to the independent governance of the High Judicial Council and the Plenary Assembly of Judicial Councils, the latter being the oversight body of the three Judicial Councils, which are the judiciary council, the administrative judiciary council and the financial judiciary council.
5. According to the Applicants, Article 1 of the Amended CSPM Decree-Law, empowers the President of the Republic to dismiss judicial officers.<sup>1</sup>
6. The Applicants further aver that on 1 June 2022, the President of the Republic also issued a presidential decree dismissing the four Applicants from their positions as judicial officers together with 53 other judicial officers including 34 judges and 23 prosecutors.

### **III. ALLEGED VIOLATIONS**

7. In the main Application, the Applicants allege violation of the following rights:
  - i. The right to participate freely in the governance of their country as protected by Article 13(1) of the Charter and Article 25 of the International Covenant on Civil and Political Rights (ICCPR)<sup>2</sup> on account of the promulgation of Decree-Law No. 2022-35 of 1 June 2022, Article 1 of which provides that the President of the Republic

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<sup>1</sup> Article 1 - The following provisions are added to Article 20 of Decree-Law No. 2022-11 of 12 February 2022, relating to the creation of the Provisional High Council of the Judiciary:

The President of the Republic may, in an emergency, or where public security or the higher interests of the country are at stake, and on the basis of a reasoned report from the competent authorities, issue a Presidential decree dismissing any judicial officer for an act attributed to him or her and likely to compromise the reputation of the judiciary, its independence or its proper functioning.

Public proceedings shall be instituted against any judicial officer removed from office within the meaning of this article. No appeal may be lodged against a Presidential decree concerning the removal of a judicial officer until an irrevocable criminal judgment has been handed down in respect of the acts of which he or she is accused.

<sup>2</sup> The Respondent State became a party to the ICCPR on 18 March 1969.

has the power to dismiss judicial officers, thereby undermining the idea and principle of the independence of the judiciary;

- ii. The right to a fair trial, which requires respect for the independence of the judiciary as an institution and of individual judges, security of tenure, the principle of the separation of powers, and respect for legal safeguards for litigants and judges, in accordance with the provisions of Articles 1, 7 and 26 of the Charter and Articles 3(2) and 14 of the ICCPR;
- iii. The right to work and to hold public office in accordance with the provisions of Article 15 of the Charter, Article 25(c) of the ICCPR and Article 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>3</sup> as well as the right to equality and non-discrimination in accordance with the provisions of Article 3 of the Charter and; Articles 2 and 4 of the ICCPR;
- iv. The rights, obligations and freedoms enshrined in the Charter, in accordance with the provisions of Article 1 thereof and Article 2(2) of the ICCPR.

#### **IV. SUMMARY OF THE PROCEDURE BEFORE THE COURT**

8. On 18 July 2024, the Registry received the Application together with a request for provisional measures which were served on the Respondent State on 9 August 2024. The Respondent State was requested to appoint its representatives within 30 days and to file its response to the request for provisional measures and the main Application within ten and 90 days respectively.
9. On 30 August 2024, the Respondent State requested for additional time to file its response to the request for provisional measures. The Court did not grant the Respondent State additional time given the urgent nature of the request for provisional measures.

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<sup>3</sup> The Respondent State became a party to the ICESCR on 18 March 1969.

## V. PRAYERS OF THE PARTIES

10. The Applicants pray the Court to:

- i. Declare that it has jurisdiction to hear the Application;
- ii. Find that the Application satisfies the admissibility requirements;
- iii. Find that the Respondent State violated the right to participate freely in the government of one's country, protected by Article 13(1) of the Charter and Article 25 of the ICCPR;
- iv. Find that the Respondent State violated the right to a fair trial within the meaning of Articles 7 and 26 of the Charter and Article 14 of the ICCPR by violating the principles of fair trial, separation of powers and independence of the judiciary;
- v. Hold that the Respondent State violated the right to work, access to high office and equality, protected by Articles 3 and 15 of the Charter and Articles 2, 4 and 7 of the ICESCR; and
- vi. Hold that the Respondent State failed to fulfil its human rights obligations and violated Article 1 of the Charter and Article 2(2) of the ICCPR.

11. The Respondent State did not respond to the request for provisional measures.

## VI. *PRIMA FACIE* JURISDICTION

12. The Applicants submit that the Court has jurisdiction to consider the request for provisional measures.

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13. The Respondent State did not make any submission on the request for provisional measures.

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14. The Court takes note that, under Article 3(1) of the Protocol:

The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.

15. The Court further notes that under Rule 49(1) of the Rules of Court: "... it shall ascertain its jurisdiction and the admissibility of an Application in accordance with the Charter, the Protocol and these Rules". However, as regards requests for provisional measures, and in line with its jurisprudence, the Court does not have to establish that it has jurisdiction on the merits of the case, but merely that it has *prima facie* jurisdiction.<sup>4</sup>
16. In the present case, the Court recalls that the Respondent State has ratified the Charter and the Protocol; and deposited the Declaration. Furthermore, as indicated in paragraph 7 of this Ruling, the rights whose violation is alleged by the Applicants are protected by the Charter, the ICCPR and the ICESCR, instruments to which the Respondent State is a party.
17. In light of the foregoing, the Court considers that it has *prima facie* jurisdiction to examine the present request for provisional measures.

## VII. PROVISIONAL MEASURES REQUESTED

18. In their request for provisional measures, the Applicants pray the Court to order the Respondent State to stay the implementation of the amended CSPM Decree-Law. They also pray the Court to order any other provisional measures it deems appropriate.

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<sup>4</sup> See *African Commission on Human and Peoples' Rights v. Great Socialist People's Libyan Arab Jamahiriya* (provisional measures) (25 March 2011) 1 AfCLR 17, § 10; *Komi Koutche v. Republic of Benin* (provisional measures) (2 Decembre 2019) 3 AfCLR 725, § 14; *Ghati Mwita v. United Republic of Tanzania* (provisional measures) (9 April 2020) 4 AfCLR 112, § 14; *Symon Vuwa Kaunda & 5 Others v. Republic of Malawi* (provisional measures) (11 June 2021) 5 AfCLR, 174, § 12.

19. The Court notes that Article 27(2) of the Protocol provides:

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.

20. The Court observes that the provisions of Article 27(2) of the Protocol are restated in Rule 59(1), which 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.

21. In light of the foregoing, the Court shall be guided by the applicable law in deciding, on a case-by-case basis, whether or not to issue a Ruling on provisional measures.

22. The Court recalls that the urgency inherent in extreme gravity means “a real and imminent likelihood that irreparable harm will be caused before the Court renders its final decision”.<sup>5</sup>

23. The Court emphasizes that the requirements of urgency or extreme gravity and of irreparable harm are cumulative, so that if one of them is not met, the provisional measures requested cannot be ordered.

24. Therefore, when deciding on requests for provisional measures, the Court is guided by the principles set out above and bears in mind, in particular, the fact that provisional measures are preventive in nature and can therefore only be granted if a party fulfils all the necessary conditions.<sup>6</sup>

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<sup>5</sup> *Sébastien Germain Marie Aïkoué Ajavon v. Republic of Benin* (provisional measures) (17 April 2020) 4 AfCLR 123, § 61.

<sup>6</sup> *Ibid.*, § 60.



25. The Court reiterates its position that it is not required at this stage to examine the merits of the Applicants' allegations that violations were committed, but only to determine whether the particular circumstances of the case require it to order provisional measures in relation to the Respondent State.<sup>7</sup>
26. The Court will consider the Applicants' sole request for provisional measures that the Respondent State should be ordered to stay the implementation of the CSPM Decree-Law.

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27. The Applicants submit that in line with the Court's jurisprudence, a request to stay the implementation of a law that violates human rights is not of the same nature as an alleged violation of human rights due to the implementation of the said law. Consequently, the request to stay implementation of the law does not amount to a prayer to repeal the said law upon consideration of the merits of the case.
28. The Applicants further submit that the stay is a preventive measure that holds in abeyance the effect of the law which is likely to violate human rights without necessarily repealing the law. They also contend that the purpose of the request is to prevent the amended CSPM Decree-Law from being used to perpetuate the removal of judicial officers without any guarantee of due process, until the main Application is decided on the merits. Is it the Applicants' contention that the stay being sought will preserve the independence of the judiciary, which is one of the tenets of the rule of law in a democratic society. They therefore aver that the request for stay is based on a preliminary assessment of the Applicants' allegations about the law, its effects and the credibility of the request, and does not imply or mean a decision on the merits.

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<sup>7</sup> *Sébastien Germain Marie Aïkoue Ajavon v. Republic of Benin* (provisional measures) (2021) 5 AfCLR 150, §30; *Adama Diarra alias Vieux Blen v. Republic of Mali* (provisional measures) (2021) 5 AfCLR 124, § 23.

29. The Applicants also aver that the gravity and seriousness of the alleged human rights violations and their legal consequences require the Court to intervene and order the Respondent State to temporarily stay implementation of the Amended CSPM Decree-Law. Finally, they pray the Court to order any other urgent measures that it deems necessary.
30. The Respondent State did not make any submission on the provisional measure sought.

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31. The Court notes that, as it emerges from the record, the Amended CSPM Decree-Law was published on 1 June 2022, which is the same day when the presidential decree dismissing the four Applicants and 53 other judicial officers was issued.<sup>8</sup>
32. The Court observes that Article 1 of the amended CSPM Decree-Law stipulates that: “The President of the Republic may, in situations of emergency, [...] issue a presidential decree dismissing any judicial officer for an act attributed to him or her that is likely to compromise the reputation of the judiciary, its independence or its proper functioning [...]”.
33. The Court also notes that the Presidential Decree on the dismissal of judicial officers and the Amended CSPM Decree-Law issued on the same day, that is on 1 June 2022, were both enacted by the President of the Republic.

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<sup>8</sup> Article one of Decree Law No. 2022-35 – it is added to Article 20 of Decree Law No. 2022 – 11 of 12 February 2022, on the establishment of the provisional Higher Judicial Council of the magistracy with the following provisional measures:

The President of the Republic may, in times of emergency, or to defend public security or for the general interest of the country or based on substantiated reports of competent authorities, issue a Presidential Decree dismissing any magistrate based on the accusations levied against him or her and which could compromise the reputation of the judiciary, its independence or its functioning.

Public action will be taken against any magistrate dismissed under this article.

An appeal against a Presidential Decree dismissing a magistrate can only be lodged after an irrevocable criminal sentence has been passed for the acts of which the judge is accused.

34. The Court observes that, as is generally accepted in constitutional law, the principle of separation of powers requires that the executive branch of government refrains from interfering unduly in the operation of the judiciary.<sup>9</sup> In the present case, the provisions of the CSPM Decree-Law empowering the President of the Republic to dismiss judicial officers poses an actual risk of the executive branch of government interfering with the operation of the judiciary. Such risk in turn poses a threat to the independence of judicial officers and of the judiciary as a whole.
35. The Court considers that the impugned Amended Decree-law having already been promulgated, the risk alleged by the Applicants has materialised. Given that the Applicants remain penalised by the dismissal decision taken in implementation of the said Decree-law, the requirement of urgency relating to the granting of provisional measures under Article 27(2) of the Protocol is also met.
36. In view of the foregoing, the Court finds that it is necessary to stay the implementation of the Amended CSPM Decree-Law, pending consideration of the merits of the main Application.
37. As a consequence, the Court orders the Respondent State to stay implementation of the Decree-Law 2022-35 of 1 June 2022 supplementing the Decree-Law No. 2022-11 of 12 February 2022, on the establishment of the Provisional High Judicial Council, and the Presidential Decree No. 2022-516 of 1 June 2022 until this Court considers the merits of the main Application.

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<sup>9</sup> Basic Principles on the Independence of the Judiciary (United Nations, 1985):

“17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge”. Guidelines on the role of public prosecutors, 6 September 1990 (United Nations): “4. States shall ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability”.

38. For the avoidance of doubt, the Court emphasizes that this Ruling is provisional in nature and does not in any manner prejudice its decision on its jurisdiction; as well as on the admissibility and merits of the main Application.

## VIII. OPERATIVE PART

39. For these reasons,

THE COURT,

*Unanimously,*

- i. Orders the Respondent State to stay implementation of the Decree-Law No. 2022-35 of 1 June 2022 amending the Decree-Law No. 2022-11 of 12 February 2022 on the establishment of the Provisional High Judicial Council;
- ii. Orders the Respondent State to stay implementation of Presidential Decree No. 2022-516 of 1 June 2022 dismissing the Applicants; and
- iii. Orders the Respondent State to report to the Court, within 15 days of notification of the present Ruling, on the measures that it has taken to implement the provisional measures herein ordered.

**Signed:**

Imani D. Aboud, President;



And

Robert Eno, Registrar.



Done at Arusha this Third Day of October in the Year Two Thousand and Twenty-Four  
in Arabic, English and French, the Arabic text being authoritative.

