Judgment of Samia Zorgati v. Republic of Tunisia

Application No. 016/2021

Dissenting Opinion
By Judge Modibo Sacko
Vice-President of the Court

1. I regret that I am unable to join the majority of the Court in the judgment in *Samia Zorgati v. the Republic of Tunisia*, delivered on 13 November 2024. My disagreement concerns the admissibility of the Application. I cannot agree with the reasoning of the judgment as to whether the Application should be lodged within a reasonable time, still less with its operative part on this point. I consider, so to speak, that the Application should have been declared inadmissible because, in my humble opinion, the period of four years, one month and twenty-four days within which it was lodged is not reasonable, within the meaning of Article 56 restated in Rule 50(2)(f) of the Rules.

2. It is important to bear in mind that, in judicial practice, the question of time limits for bringing proceedings has always arisen with acuteness and has been the subject of much debate[1] which, no doubt, has led to the postulate that any dispute should be settled promptly, failing which society should ignore the offence in order to preserve peace and maintain social order. This is why the sacrosanct principle that *the courts should never remain seised indefinitely* takes on its full meaning and is given concrete form by the introduction of time limits for bringing proceedings or the extinctive statute of limitations on legal action.

[1] Thomas d'Aquin (1225 -1274) ; Jean-François Suarez (1530-1580) ; Francisco de Victoria, (1483-1560) ; Francisco Suárez (1548-1617) ; Domingo de Soto (1548-1590)

3. With the benefit of this introductory observation, I consider it useful, if not essential, for a better understanding of this dissenting opinion, to give a brief recap of the facts of the case. The case originated in an application lodged on 26 July 2021 by Mrs. Samia Zorgati (the Applicant) against the Republic of Tunisia (the Respondent State). The Applicant states that, shortly after the President was sworn in, in January 2011, the President of the Republic took the view that the 1959 Constitution was no longer applicable. He thus issued the Decree-Law of 23 March 2011 to reorganise the public authorities and then promulgated the Constituent Law on the provisional organisation of public authorities of 16 December 2011, by which the National Assembly had suspended the 1959 Constitution.

4. Other decree-laws that followed led to the adoption of Organic Law 2014-014 of 18 April 2014 on the Provisional Authority for the Control of the Constitutionality of Draft Laws (IPCCPL), which supplanted the Constitutional Court. The culmination of these reforms was the adoption, without a referendum, of the Constitution of 27 January 2014.

5. According to the Applicant, these events led to the collapse of the rule of law, the disintegration of its institutions and institutional deadlock. Subsequently, she alleged a breach of the Tunisian people's right to self-determination protected by Article 20 of the Charter, and of the obligation to guarantee the independence of the courts, pursuant to Article 26 of the Charter.

6. As indicated in the first paragraph, this dissenting opinion will deal with the submission of the application within a reasonable time. The Court found that this condition had been met, on the grounds that, on the one hand*, "the present Application raises allegations that jeopardize public order and social cohesion, which are eminently in the public interest […] In such circumstances, the reasonable time requirement should be assessed with circumspection and applied in context.".*

7. On the other hand, the Court considered that *"even assuming that the Applicant was aware of the filing of the Declaration on the above-mentioned date, she inevitably must have taken time not only to decide whether or not to seize this Court but could have also taken the time required to prepare her application. The process can take a considerable amount of time, which must be taken into account when determining whether or not the time limit for referral is reasonable*".

8. I am far from convinced by these reasons insofar as the triptych of public policy, social cohesion and general interest, which for the purposes of this dissenting opinion can be summed up as public interest, is highly equivocal with regard to the assessment of the reasonable period (I). Moreover, the lodging of an application before the Court cannot, all things considered, require a period of reflection of four years, one month and twenty-four days (II).

I. Public interest: an ambiguous criterion for assessing reasonable time

9. In its judgment, having found that there were no remedies available,[2] the Court fixed the starting point for calculating the reasonable period of time as the date on which the defendant State lodged its declaration of acceptance of jurisdiction,[3] that is, 2 June 2017. Between that date and the date on which the application was lodged, a period of four years, one month and twenty-four days had elapsed. To justify the reasonableness of this period, the Court appealed, of its own motion, to the concepts of public policy and social cohesion, which, in its view, are eminently in the public interest. It added that, in these circumstances, "the requirement that a case be referred to it within a reasonable time must be applied flexibly and assessed in context".[4] This reasoning, far from convincing, is the epicentre of my disagreement with the majority.

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[2] See to the same effect *Urban Mkandawire v. Malawi*, (admissibility) (21 June 2013) (2013) 1 AfCLR 283, para 36; *Wanjara and Others v. Tanzania* (merits and reparations) (25 September 2020) (2020) 4 AfCLR 673, para 51;

[3] *Urban Mkandawire v Malawi*, (admissibility) (21 June 2013) (2013) 1 AfCLR 283, §36; *Wanjara and Others v Tanzania* (merits and reparations) (25 September 2020) (2020) 4 AfCLR 673, § 51;

[4] See paragraph 53 of the judgment.

10. The Court states[5] that the reasonableness of the time-limit for bringing a case before it depends on the circumstances of each case. Among those "circumstances" is the fact that the litigation before it is in the public interest. In order to establish this "circumstance" more clearly in the present case, the Court cites two judgments in support, namely *Robert John Penessis v. Tanzania*[6] and *Ali Hassen Ben Youcef Den Abdlhafid v. Tunisia.*[7] In the latter, it did not refer to the public interest, while in the former, the question of reasonable time was not addressed. The Court also cited a provisional measures order in *Glory Cyriaque Hossou and another v. the Republic of Benin*[8], yet the question of reasonable time could not arise in such a decision.[9]

11. I do not find that public policy and the public interest can justify a flexible interpretation or application of a rule of law. Moreover, these concepts are not absent from the Court's case law, which, however, refers to them for reasons other than those related to the issue of reasonable time. One example is *Houngue Eric Noudehouenou v. Republic of Benin,*[10] handed down on 4 December 2020.

12. In that case, the Respondent State had argued that the Application was inadmissible because the Applicant had no interest in bringing proceedings. In rejecting the objection, the Court held that '[...] the fact that an application raises issues of general public interest does not prevent individuals from bringing such an application before the Court. In any event, [...] neither the Charter, nor the Protocol, nor the Rules of Court require an Applicant to be a direct victim of

[5] See paragraph 52 of the judgment
[6] The Court gave the following reference in a footnote: *Robert John Penessis v. United Republic of Tanzania* (merits and reparations) (28 November 2019) 3 AfCLR 593, §§ 44-46.
[7] The Court gave the following reference in a footnote: *Robert John Penessis v. United Republic of Tanzania*, (merits and reparations) (28 November 2019) 3 AfCLR 593, §§ 44-46
[8] The Court gave the following reference in a footnote: *Glory Cyriaque Hossou and another v. Republic of Benin*, (provisional measures) (2020) 4 AfCLR 538, § 20.
[9] See footnote 13 of the judgment.
[10] *Houngue Eric Noudehouenou v. Republic of Benin* (merits and reparations) (4 December 2020) 4 AfCLR 538

human rights violations or to manifest an interest or standing in a case in order to apply to the Court.[11]

13. The Court thus considers that the fact that the Applicant is not a victim is irrelevant where the facts disclose a matter of public or general interest. More explicitly, the Court has consistently held that the provisions of the Charter and the Protocol do not require individuals or NGOs to show a personal interest in an application in order to have access to the Court, especially where the dispute concerns a standard of review or an objective dispute.[12] The only precondition is that the Respondent State, in addition to being a party to the Charter and the Protocol, has made the declaration.

14. The Commission and the Court have consistently held that any person may bring an action alleging massive or serious violations of human rights or situations of general interest, without having to demonstrate victim status or direct interest, and that direct victims of such violations may experience practical difficulties in bringing such actions.

15. It is clear to me that the Court cannot examine the reasonableness of the time taken to bring the case before it in such an expeditious manner, disregarding the importance of the issue[13]. In order to hold that the period of four years, one month and twenty-four days taken by the Applicant to bring the case before the Court was reasonable, the Court felt it had to invoke the concepts of public interest or general interest. It also noted that 'the Application raises allegations affecting public policy and social cohesion [and therefore] it is appropriate to apply the reasonable time requirement flexibly and assess it in context'. It is here that we find the singularity of the judgment, which relies on public policy, social cohesion and the general interest to call into question a requirement based on the need for

[11] Ibid. *Noudehouenou v. Benin* § 40.
[12] *Sébastien Ajavon v. Republic of Benin* (merits and reparations) (4 December 2020) 4 AfCLR 133 § 59.
[13] *Dexter Eddie Johnson v. Republic of Ghana* (jurisdiction and admissibility) (28 March 2019), 3 AfCLR 99, Dissenting Opinion of Judge Rafaâ Ben Achour § 7.

legal and judicial certainty,[14] the sanctioning of a negligent creditor,[15] the need for stability in legal relationships, and the preservation of general social order[16] there are many reasons to justify the need for legal deadlines.

16. Public interest cannot, therefore, constitute a reason for an Applicant to wait several years before applying to the Court. The same applies to "time for reflection".

II. The problem of "time for reflection"

17. Paragraph 54 of the judgment is a real source of perplexity. The Court states the following: "Moreover, even supposing that the Applicant could have been aware that the declaration had been lodged, she must necessarily have had time to decide whether to bring the matter before the Court, and also time to prepare her application. The process involved may require a relatively considerable amount of time, which cannot be disregarded in determining whether or not the time-limit for bringing the case before the Court is reasonable".

18. It is surprising that the Court's reasoning is linked to "time for reflection" on the advisability of bringing the case before it or for preparing the application, as if this did not apply to any person wishing to bring a case before it. In the final analysis, this argument adds nothing in particular.

19. Admittedly, as is the case with other human rights protection bodies, the Court has maintained that in order to determine the reasonableness of the time-limit for

[14] *Dexter Eddie Johnson v. Republic of Ghana*, 3 AfCLR 99, Dissenting Opinion of Judge Rafaâ Ben Achour, op cit, § 4.
[15] Francisco de Victoria: *Reflection on the Law: Conceptual Foundations of Procedural Time Limits*, Archives académiques
[16] Domingo de Soto: *Justicia distributiva*, Oxford Academic: time limits are established so that, in the event of an offence, the transgressor who has overstepped his role and created an imbalance is brought before the courts so that reparation can quickly erase the offence in order to preserve social well-being. And when this is not done, after a period of time, society should be able to ignore the offence, as a sanction for the negligent creditor and a means of stabilising social relations.

bringing a case before it, it carries out an analysis on a case-by-case basis. Thus, only a serious statement of reasons based on evidence can justify whether or not a time-limit is reasonable, whereas in the present case I observe that the judgment lacks a statement of reasons that can withstand rigorous legal analysis.

20. On that basis, in my view, even raising the ultimate purpose of the application, namely the protection of public interest, the Court should have gone further and discussed whether or not the Applicant had been diligent.

21. I am pleased to point out that the Court has already answered in the affirmative the question whether an Applicant can rely on any interest, in the context of facts which concern the general interest and the rights of citizens.[17] As in the above-mentioned case, in the present case the Applicant is challenging the adoption of a new Constitution without a referendum and alleging adverse consequences for the life of the nation and the daily lives of all citizens, including herself. She was therefore entitled to bring the case before the Court from that date, since the Respondent State had already made the Declaration.

22. Furthermore, in order to reach its decision, the Court should have examined the question of the Applicant's level of education. She had, in fact, acted without the assistance of counsel and had raised relevant legal questions in relation to a situation that prevailed in her country. There can be no doubt that she was sufficiently educated and familiar with constitutional issues. It follows that her “period of reflection” could not reasonably have taken so many years and that she could have acted with all due diligence after the filing of the Declaration by the Respondent State. Having failed to consider this issue in more detail, the majority appears to have ignored the essence of the question, just as it has ignored the Applicant's passive attitude for at least four long years.

[17] Ibid. *Noudehouenou v. Benin*, (merits and reparations) (4 December 2020) 4 AfCLR 133 § 39.

23. In my humble opinion, these are matters on which the Court should have considered whether, in this case, the Applicant has shown diligence and, if not, consider the time-limit of four years, one month and twenty-four (24) days to be unreasonable and subsequently declare the application inadmissible.

Judge Modibo Sacko, Vice-President

Done at Arusha, this Thirteenth Day of November Two Thousand and Twenty-four, the French version being authoritative.