

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

IN THE MATTER OF

LOHÉ ISSA KONATÉ

V.

BURKINA FASO

APPLICATION NO. 004/2013

ORDER OF PROVISIONAL MEASURES



The Court composed of: Sophia A.B. AKUFFO, President; Bernard M. NGOEPE, Vice-president; Gérard NIYUNGEKO, Fatsah OUGUERGOUZ, Augustino S. L. RAMADHANI, Duncan TAMBALA, Elsie N. THOMPSON, Sylvain ORÉ, El Hadji GUISSÉ, Ben KIOKO and Kimelabalou ABA - Judges; and Robert ENO - Registrar,

In the Matter of:

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After having deliberated,

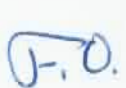
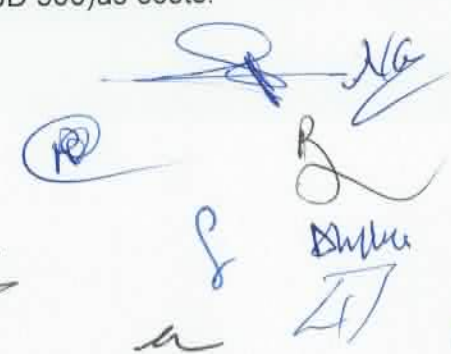
Makes the following Order.

I. Subject of the Application

1. The Applicant, Lohé Issa Konaté, who is the Editor-in-Chief of "Ouragan", a Burkinabé weekly, filed an Application dated 14 June 2013, which was received at the Court on 17 June 2013, and registered as Application No. 004/2013.
2. The Applicant is represented by Advocates Yakaré Oulé (Nani) Jansem and John R. W. D. Jones.
3. In a criminal matter brought against him, the Ouagadougou High Court in its ruling sentenced the Applicant to a one year term of imprisonment for libel and to a fine of 1,500,000 Francs (USD 3,000). In a civil suit, the same Court ordered the Applicant to pay the sum of 4,500,000 Francs (or USD 9,000) as damages to the parties and 250,000 Francs (USD 500) as costs.



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4. The Applicant submits that his sentence to a one-year term of imprisonment and to the payment of a substantial fine as damages and costs are in breach of his right to freedom of expression, which is protected by various treaties to which Burkina Faso is party. He alleges, in particular, the violation of his rights under Article 9 of the African Charter on Human and Peoples' Rights and Article 19 of the International Covenant on Civil and Political Rights.
5. On the merits, the Applicant prays the Court:

"1. To declare that his sentence, in particular, to a term of imprisonment and to the payment of a substantial fine as damages and costs, amounts to a violation of his right to freedom of expression;

2. To declare that the laws of Burkina Faso with regard to libel and slander are inconsistent with the right to freedom of expression or, failing that, to find that the term of imprisonment for slander is inconsistent with the right to freedom of expression and therefore, to order Burkina Faso to amend its legislation accordingly; and

3. To Order Burkina Faso to pay him compensation, *inter alia* for the loss of income and benefits, and as damages for the moral hardship he has suffered".

6. In his Application, the Applicant, who was immediately sent to prison, seeks provisional measures "requiring Burkina Faso to release him immediately or, alternatively, to provide him with adequate medical care".

II. Proceedings before the Court

7. By letter dated 10 July 2013, addressed to Counsel for the Applicant, the Registrar acknowledged receipt of the Application pursuant to Rule 34 (1) of the Rules of Court.



8. By another letter dated 10 July 2013, addressed to the Foreign Minister of Burkina Faso, the Registrar forwarded a copy of the Application to the Respondent, pursuant to Rule 35 (2) of the Rules. In the letter, the Respondent was asked to indicate, within thirty (30) days of receipt of the Application, the names and addresses of its representatives as required under Rule 35 (4) of the Rules and to respond to the Application within sixty (60) days as required under Rule 37 of the Rules.
9. By letter dated 10 July 2013, addressed to the Chairperson of the African Union Commission, the Registrar informed her and through her, the Executive Council of the African Union and other States Parties to the Protocol establishing the Court (hereinafter referred to as "the Protocol") of the filing of the Application, pursuant to Rule 35 (3) of the Rules.
10. By Note Verbale dated 18 July 2013, addressed to the Court, the Embassy of Burkina Faso and Permanent Mission to the African Union in Addis Ababa, acknowledged receipt of the Registrar's letter mentioned in the preceding paragraph.

III. On the *prima facie* jurisdiction of the Court

11. As stated in paragraph 6 above, the Applicant prays the Court to Order provisional measures.
12. In considering an Application, the Court must ensure that it has jurisdiction to hear the case, pursuant to Articles 3 and 5 of the Protocol.
13. However, before ordering provisional measures, the Court need not conclusively satisfy itself that it has jurisdiction on the merits of the case, but simply needs to satisfy itself, *prima facie*, that it has jurisdiction;
14. Article 3 (1) of the Protocol provides that "the jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation

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and application of the Charter, this Protocol and any other relevant human rights instrument ratified by the States concerned".

15. Burkina Faso ratified the Charter on 6 July 1984 and the Protocol on 31 December 1998, and is therefore party to both instruments; it has equally on 28 July 1998, made the declaration accepting the competence of the Court to receive cases from individuals and non-governmental organisations, within the meaning of Article 34 (6) of the Protocol.

16. In light of the above, the Court finds that it does have *prima facie* jurisdiction to hear the Application.

IV. On the provisional measures sought

17. Article 27 (2) of the Protocol 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".

18. The first provisional measure sought by the Applicant is his immediate release.

19. The Court observes that consideration of the measure sought here, corresponds in substance, to one of the reliefs sought in the substantive case, namely that the punishment of imprisonment is in essence a violation of the right to freedom of expression; in the opinion of the Court, consideration of this prayer would adversely affect consideration of the substantive case.

20. For this reason, the Court cannot grant the Applicant's request for his immediate release within the framework of a provisional measure.

21. The second provisional measure sought by the Applicant is that, in the event his immediate release is denied, the Respondent be ordered to provide him with adequate medical care. He states that his health had deteriorated since his detention and that he needed medication and adequate medical care.

22. The Court observes that, the Respondent, having been duly informed of these allegations, has not raised any objection. In the opinion of the Court, the situation in which the Applicant finds himself appears to be a situation that can cause irreparable harm. The Court is therefore of the opinion that the Applicant is entitled to access all medical care that his health condition requires.

23. For these reasons,

The Court:

- (i) By majority (Justices Ramadhani, Tambala and Thompson dissenting),
Rejects the Applicant's request for immediate release;

- (ii) Unanimously,
 - Upholds his request to be provided with medication and health care for the entire period of his detention, in view of his health situation;
 - Consequently, Orders the Respondent to provide the Applicant with the medication and health care required;
 - Further Orders the Respondent to report to the Court within 15 days from the receipt of this Order on the measures it has taken to enforce the said Order.

Done at Arusha, this Fourth day of October, Two Thousand and Thirteen, in English and French, the French text being authoritative.

Signed:

Sophia A.B. AKUFFO, President



Bernard M. NGOEPE, Vice-president



Gérard NIYUNGEKO, Judge



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F.O.

Fatsah OUGUERGOUZ, Judge

Augustino S. L. RAMADHANI, Judge

Duncan TAMBALA, Judge

Elsie N. THOMPSON, Judge

Sylvain ORÉ, Judge,

Ben KIOKO, Judge

El Hadji GUISSÉ, Judge

Kimelabalou ABA, Judge; and

Robert ENO, Registrar

Pursuant to Article 28(7) of the Protocol and Rule 60(5) of the Rules, the Joint Dissenting Opinion of Justices Ramadhani, Tambala and Thompson is appended to this Order.

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BURKINA FASO

APPLICATION № 004/2013

JOINT DISSENTING OPINION OF JUSTICES

RAMADHANI, TAMBALA AND THOMPSON

1. We have had the privilege of reading the Order of Provisional Measures in draft. We are however having great difficulty agreeing with the reasoning of the majority for refusing the first request by the Applicant, that is, "his immediate release". Surely the Applicant is not saying that he be released without more. He is asking that he be released provisionally pending the determination of his Application before this Court.
2. There is no reason why this cannot be done, especially when the Respondent that has been served with the Application which incorporates the request for provisional measures has not raised any objection.
3. The granting of this leg of the request for provisional measure will in no way touch or prejudice the substantive application. If the Application is refused the Applicant will simply be sent back to jail to complete his sentence.

4. Failure to grant this leg of the application will cause irreparable harm. Admittedly, every case has to be judged on its own merits, but generally it can be said that personal freedom cannot be compensated by monetary damages. In the present case, the Applicant's release from prison will aid, to a great extent, his request for medication and healthcare

Signed:

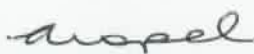
Justice Augustino S. L. Ramadhani



Justice Duncan Tambala



Justice Elsie N. Thompson



Dated at Arusha this 4th day of October, 2013

Dr. Robert Ew
Registrar