African Court Jurisprudence: Emmanuel Joseph Uko and Others v The Republic of South Africa

By Harriet Page

Periodically, ARC reviews the jurisprudence of the African Court of Human and Peoples' Rights. In respect of Application No 004/2012, Emmanuel Joseph Uko and Others v The Republic of South Africa, the following case summary has been prepared by Harriet Page on behalf of ARC. It is noteworthy that the African Court has not issued a "case summary" in relation to this application and it is therefore not possible for the public to know the precise facts of the application. ARC takes the view that such an approach infringes the notion of access to justice.

Application

In an application dated 20th February 2012, the Applicant who was a national of the Federal Republic of Nigeria, seized the African Court on Human and Peoples' Rights on his behalf and on behalf of his family members who were residing in South Africa. The petition against the Republic of South Africa claimed violations of articles 2, 3, 4, 5, 6, 7, 10, 11, 18 and 19 of the African Charter on Human and Peoples' Rights, as well as provisions of the African Charter on the Rights and Welfare of the Child, and articles 7, 10, 12, 13, 14, 17, 19, 23, 24 and 26 of the International Covenant on Civil and Political Rights. Crucially, the African Court has not issued a case summary in relation to this application and it not therefore possible to know the outline facts of the application.

Decision

The Court noted that the Republic of South Africa has not made the Declaration under Article 34 (6) of the Protocol which allows individuals to petition the Court directly.

On the 30th March 2012, in view of Articles 5 (3) and 34 (6) of the Protocol, the Court held that it lacked jurisdiction to receive the Application.

Dissenting Opinion of Judge Fatsah Ouguergouz

Judge Ouguergouz concurred that the application filed by Emmanuel Joseph Uko must be rejected. However, he believes that due to the manifest lack of jurisdiction *ratione personae,* the application should not have been dealt with by a decision of the Court but should rather have been rejected *de plano* by a letter from the Registrar.

Judge Ouguergouz argued that by proceeding with judicial consideration of the application, the Court failed to take into account its own interpretation of Article 34 (6) of the Protocol. This Article states the Court, "shall not receive any petition under article 5 (3) involving a State Party which has not made such a declaration". Judge Ouguergouz argued that the word "receive" should be taken to mean "physically receiving" an application, rather than

referring to its “admissibility”. The Judge argued that by considering the application and delivering a decision, the Court actually “received” the application. The Judge argued that the Court should not examine an application if the State Party concerned has not made the optional declaration under Article 34(6).

Judge Ouguergouz also noted the failure of the Court to inform South Africa that an application had been lodged, thereby violating the adversarial principle *audiatur et altera pars*. The failure of the Court to transmit the application to South Africa also deprived the State of the possibility of accepting the jurisdiction of the Court by way of *forum prorogatum*.

Comment

This decision follows previous jurisprudence whereby applications have been rejected for lack of jurisdiction due to State Parties not having made the optional Article 34(6) declaration which enables individuals to petition the Court directly.

The adoption of Judge Ouguergouz’s pragmatic approach may be considered a way in which the Court could save time and resources in the future, thereby enabling the Court to deliberate more timeously on admissible cases. Further consideration should be given to Judge Ouguergouz’s approach.