

**JUDGME
NT NO.
01/2021
FROM 19 May 2021**

**EXTRACT FROM THE MINUTES OF THE
REGISTRY**

**COURT OF JUSTICE OF THE WEST
AFRICAN ECONOMIC AND
MONETARY UNION (WAEMU)**

PUBLIC HEARING ON 19 MAY 2021

**Preliminary ruling No RP 20 RP005 of 24
April 2020, lodged by the Cour de Cassation
of Burkina Faso**

Parties to the main proceedings

**: OUEDRAOGO Azise, YAMEOGO Jean-
Baptiste Sidpayangdé, SEBEGO Désiré,
ZONGO Nabonswindé Barthélémy and
LAMIEN Ahmed Faso (Mr Bénéwendé S.
SANKARA, Mr Prosper FARAMA, Mr
Seydou R. YAMBA)**

Against

**The Bar Council of Burkina Faso (SCP
YANOOGO Bobson)**

Composition of the Court :

- Mr Daniel A. TESSOUGUE, Chairman
- Mr Euloge AKPO, Judge
- Mrs Joséphine S. EBAH TOURE, Judge-
Rapporteur
- Mrs. Victoire Ms El.
ALLAGBADA, 1^{er} General
Counsel
- Me Hamidou YAMEOGO, Court
Clerk

The Court of Justice of the WAEMU, meeting in
ordinary public session on the nineteenth (19th)
of May two thousand and twenty-one (2021), in
which were seated :

Mr Daniel Amagoïn TESSOUGUE, Chairman ;
Mr Euloge AKPO, Judge ;
Ms Joséphine Suzanne EBAH TOURE, Judge-
Rapporteur ;

at in the presence of Victoire Eliane
ALLAGBADA, Advocate General;

with the assistance of Mr Hamidou YAMEOGO,
Court Clerk ;

In reply to the appeal for a preliminary ruling
registered at the Registry of the Cour de céans
under No RP 20 RP005 of 24 April 2020, brought
by the Cour de Cassation du Burkina Faso, in the
main proceedings between :

OUEDRAOGO Azise, YAMEOGO Jean-Baptiste
Sidpayangdé, SEBEGO Désiré, ZONGO
Nabonswinde Barthélémy and LAMIEN Ahmed,
avocats stagiaires, with Maître Bénéwendé
Stanislas SANKARA, Maître Prosper FARAMA
and Maître Seydou Roger YAMBA as counsel,
Applicants on the one hand;

Visit

Conseil de l'Ordre des Avocats du Burkina Faso,
represented by Société Civile Professionnelle
YANOOGO Bobson, Defendant of the other part;

Delivers the following judgment:

THE COURT

VU the Treaty of the West African Economic and Monetary Union dated 10 January 1994, as amended on 29 January 2003;

VU Additional Protocol I on the supervisory bodies of the WAEMU ;

HAVING REGARD TO Additional Act n°10/96 of 10 May 1996 on the Statutes of the Court of Justice of the WAEMU ;

HAVING REGARD TO Regulation n°01/96/CM of 05 July 1996 on the Rules of Procedure of the Court of Justice of the WAEMU;

HAVING REGARD TO Regulation n°01/2012/CJ of 21 December 2012 on the Administrative Rules of the Court of Justice of the WAEMU;

HAVING REGARD TO the Minutes n°02/2016/CJ of 26 May 2016 relating to the swearing-in and installation of the members of the WAEMU Court of Justice;

HAVING REGARD TO Minutes No. 2019-08/AI/02 of 28 May 2019 concerning the appointment of the President of the Court and the distribution of functions within the Court;

HAVING REGARD TO the Minutes n°2019-09/AP/07 of 03 June 2019 relating to the installation of the President of the WAEMU Court of Justice;

HAVING REGARD TO Order n°050/2020/CJ of 21 October 2020 fixing the days of the Meetings of the Court of Justice of the WAEMU;

HAVING REGARD TO Order No. 08/2021/CJ of 17 March 2021 on the composition of the plenary session to sit in ordinary public hearing on 07 April 2021;

HAVING REGARD TO order n°13/2021/CJ of 03 May 2021 on the composition of the plenary session to sit in ordinary public hearing on 19 May 2021;

HAVING REGARD TO the reference for a preliminary ruling from the Cour de Cassation of Burkina Faso, registered at the Registry of the Court of Justice of the WAEMU on 24 April 2020, under number 20 RP005;

HAVING REGARD TO the written observations of the parties to the main proceedings, the WAEMU Commission, Benin, Niger, Senegal and Togo ;

HAVING REGARD TO the summonses sent to the parties to the main proceedings ;

HAVING REGARD TO the other documents in the file ;

HEARD the Judge-Rapporteur in his report;

HEARD counsel for the applicants in the main proceedings in his oral

observations; **WHEREAS** counsel for the defendant in the main proceedings

did not appear; **ORDERED** the Advocate General to deliver his Opinion;

Having deliberated in accordance with Community law :

I. Facts and procedure

• Facts of the main dispute

Considering that having passed, in April 2017, the examination for the Certificate of Aptitude to the Profession of Lawyer (CAPA), organised by the Burkina Bar Association, the applicants OUEDRAOGO Azise, YAMEOGO Jean-Baptiste Sidpayangdé, SEBEGO Désiré, ZONGO Nabonswindé Barthélémy and LAMIEN Ahmed, all trainee Lawyers, have applied to the President of the Bar Association for admission to the Bar's training course ;

That subsequently, the Bar Council granted their request by deliberation, n°011/2017 of 21 July 2017 and set the duration of their training period at three years, starting from their swearing-in, pursuant to Article 27 of Regulation n°05/CM/UEMOA relating to the harmonisation of the rules governing the profession of lawyer in the UEMOA area;

OUEDRAOGO Azise and the four (4) others considered that they could not be subject to the probationary period provided for by the aforementioned Rules and brought an action before the joint appeal court of the Ouagadougou Court of Appeal seeking a partial reversal of the decision of the Council of the Ordre, in particular, to annul article 4 of the said decision, which set the duration of the traineeship at three years, and to set it at two years, pursuant to article 34 of Law 016-2000 regulating the legal profession in Burkina Faso;

That the joint court having dismissed the application and upheld all the provisions of the contested deliberation, the applicants lodged an appeal in cassation and requested that a preliminary ruling be ordered before the Court of Justice of the West African Economic and Monetary Union (WAEMU) for an interpretation of Article 27 of Regulation No 05 of 25 September 2014 on the harmonisation of the rules governing the legal profession in the WAEMU area ;

• Preliminary ruling procedure

Whereas a reference for a preliminary ruling was made to the Cour de céans by the Cour de Cassation of Burkina Faso, registered on 24 April 2020, under number 20 RP005, for the purpose of answering the question whether the application of Article 27, of Regulation No 5/CM/UEMOA, of 25 September 2014 on the harmonisation of the rules governing the legal profession in the WAEMU area, is subject to the prior enactment of the implementing regulation and the implementing act provided for successively in Articles 23 and 29 of the same regulation ;

Whereas notification was effected by the Registry, by letters of 27 April 2020, in accordance with Article 27(1) of the Administrative Rules of Court, to the parties to the dispute, the Council of Ministers, the President of the Commission and the States of Burkina Faso, Benin, Côte d'Ivoire, Guinea-Bissau, Mali, Niger, Senegal and Togo;

Whereas the Court of Justice has received observations :

- of the parties in the main proceedings on 25 and 26 June 2020 ;
- of the WAEMU Commission on 14 May 2020 ;
- Togo, 1^{er} June 2020;
- Niger, 30 June 2020 ;
- Benin, 02 July 2020 ;
- and Senegal on 16 July 2020 ;

II. Summary of comments

- **Observations of the parties to the main proceedings**

Considering that the applicants in the main proceedings maintain, in their written observations developed by their counsels Maître Bénéwendé Stanislas SANKARA, Maître Prosper FARAMA and Maître Seydou Roger YAMBA, that from 2000 to 2013, access to the profession of lawyer was governed by Law 016-2000 regulating the profession of lawyer in Burkina Faso and Decree 2006-426 of 13 September 2006 on the organisation of the profession of lawyer;

They add that these texts instituted an examination for the Certificate of Aptitude for the Legal Profession (CAPA) and a two (2) year legal traineeship;

They point out that in 2014 decree no. 2014-580/PRES/PM/MJ/MEF/MESS/MFPTSS/MJFPE was issued to create the Burkina Faso Lawyers' Professional Training Centre (CFPA-B), pursuant to article 34 of the law regulating the legal profession in Burkina Faso;

That this decree lays down two conditions for taking part in the examination for the Certificat d'Aptitude à la Profession d'Avocat (CAPA):

- pass the CFPA-B entrance exam;
- complete an 18-month theoretical and practical training course (reduced to 12 months by Decree 2017- 0542 of 3 July 2017 amending the Articles of Association of the Centre de formation professionnelle des Avocats ;

Considering that the applicants state that it was in this legal context, together with the adoption of Regulation No. 5/CM/WAEMU of 25 September 2014, that they passed the CFPA-B entrance examination during 2015;

They add that, at the end of an 18-month training course at the CFPA-B, they passed the examination for the Certificate of Aptitude for the Legal Profession (CAPA), organised in April 2017, solely on the basis of national provisions, before applying for registration on the training list of the Burkina Faso Bar;

That they consider that, instead of Article 27 of WAEMU Regulation No. 5, which provides for a probationary period of three (3) years, national law, which provides for a probationary period of two (2) years, is applicable to them, insofar as they passed the CAPA, organised under the aegis of Law 016-2000;

In addition, they maintain that Article 27 of the aforementioned Regulation No. 5 cannot be interpreted in isolation without regard to the rules laid down in Articles 23, 24, 26 and 29 of the said Regulation No. 5;

Considering that the defendant in the main proceedings, the President of the Bar, representing the Bar Council, and having as counsel the Société Civile Professionnelle YANOGO Bobson, states, after having recalled the fundamental principles of Community law, in particular the principle of primacy, that insofar as the two texts differ on the duration of the probationary period, it is the provisions of Article 27 of Regulation No. 5 that take precedence over Article 34 of the law of Burkina Faso;

He adds that the fact that the WAEMU legislator has not adopted an act on the initial and continuing training of lawyers does not mean that the provisions of Regulation No. 5 on the duration and conditions of the training period are incomplete;

That it considers the provisions of this regulation to be clear, precise, complete, legally perfect and unconditional in the sense that they do not require any further clarification in order to be applicable;

It therefore concludes that the probationary period lasts for three years from the date of entry on the roll and the taking of the oath;

Finally, it seeks the rejection of any claim that the provisions of the Burkinabe law on the legal profession should govern the applicants' traineeship, given that this law, which predates the Regulation, is contrary to the Regulation in that it provides for a period of two years instead of the three years provided for by the Regulation;

- **Observations of the WAEMU Commission**

Whereas the UEMOA Commission, in its observations received on 14 May 2020, recalls that a law is applicable when it is sufficiently precise and its application is not dependent on the enactment of any other text;

It considers that this is the case with Article 27, which sets the duration of the legal training period at three years;

- **Comments from States**

Considering that the State of Togo maintains, in its observations received on 19 June 2020, that, on the one hand, the Conseil de l'Ordre du Barreau du Burkina and the Court of Appeal have correctly interpreted Article 27 and, on the other hand, that the Court of Justice should deliberate along the same lines by giving primacy to Community law over national law;

Considering that the State of Niger, in its observations, received on 30 June 2020, develops that the internal provisions of Burkina Faso cannot be taken into account insofar as, on the one hand, Article 92 of Regulation No. 5, referred to above, states that "this Regulation repeals and replaces all previous provisions to the contrary" and that, on the other hand, Article 6 of the WAEMU Treaty provides that "the acts adopted by the organs of the Union to achieve the objectives of this Treaty and in accordance with the rules and procedures established by it, shall be applied in each Member State notwithstanding any prior or subsequent national legislation to the contrary";

Considering that the State of Benin, in its observations received on 2 July 2020, points out that Article 27 is in no way subordinate to the prior adoption of the implementing regulation specifying the procedures for the issue of the CAPA or of the implementing regulation defining the conditions and procedures for initial training;

Whereas the State of Senegal, in its observations, received at the Registry on 16 July 2020, states that under the terms of Article 43(1) of the amended WAEMU Treaty, regulations are of general application, binding in their entirety and directly applicable in the Member States;

The State of Senegal points out that, while Articles 4, 23, 29 and 38 of the above-mentioned Regulation No. 5 require implementing acts for their application, Article 27 does not require such acts for its entry into force;

It concludes that the reservation under Article 24(4) has no effect on the duration of the probationary period, which is set at three years, and considers that the application of Article 27 is not subject to the prior adoption of the implementing regulation and the implementing act provided for successively in Articles 23 and 29 of the same regulation;

III. Discussion

- **Form**

Considering that under the terms of Article 27 of Additional Act No. 10/96 of 10 May 1996 on the Statute of the Court of Justice of the WAEMU, *"the Court shall have jurisdiction to hear in particular (...) references for preliminary rulings as provided for in Article 12 of Additional Protocol No. 1"*;

Article 12 of Additional Protocol No. 1 provides that *"The Court of Justice shall give preliminary rulings on the interpretation of the Union Treaty, on the legality and interpretation of acts adopted by Union bodies, and on the legality and interpretation of the statutes of bodies set up by an act of the Council, when a national court or tribunal or an authority having a judicial function is called upon to give a ruling in a dispute. National courts or tribunals adjudicating at last instance are required to refer cases to the Court of Justice. Referral to the Court of Justice by other national courts or tribunals or authorities having judicial functions shall be optional"*;

Whereas Article 15.6 of Regulation N°01/96/CM laying down the Rules of Procedure of the Court of Justice repeats the aforementioned article by providing that *"Where a problem of interpretation of the Union Treaty, of the legality and interpretation of acts adopted by the organs of the Union, of the legality and interpretation of the statutes of bodies set up by acts of the Council, arises before a national court or tribunal against whose decisions there is a right of appeal, that court or tribunal may, if it considers it necessary, refer questions to the Court for a preliminary ruling.*

Where a question of the same nature is raised before a national court or tribunal adjudicating at last instance, that court or tribunal shall be obliged to refer the matter to the Court;

Considering that under the terms of Article 28 of the Administrative Rules of the Court of Justice of the WAEMU, *"the Court, deliberating on the reference for a preliminary ruling, shall verify its own jurisdiction..."*; That in the present case, the question relates to provisions of the rules governing the profession of lawyer in the WAEMU area, in particular those of Article 27 of Regulation No 05 of 25 September 2014 on the harmonisation of the rules governing the profession of lawyer in the WAEMU area...;

That it is therefore an action for interpretation of a Community rule brought by a national court ruling at last instance, in this case the Cour de cassation of Burkina Faso;

That, consequently, there is no particular problem either of jurisdiction or of formal admissibility;

- **Background**

- **Legal framework of the reference for a preliminary ruling**

Whereas the first Community initiative to regulate the legal profession led to the adoption of Regulation No 10/06/CM/WAEMU of 25 July 2006 on the free movement and establishment of lawyers who are nationals of the Union within the WAEMU area;

Considering that nationality barriers have been overcome, with the possibility for every WAEMU lawyer to set up practice in any State of the Union, it was neither possible to maintain the national nature of the rules governing the entry, exercise and exit of the legal profession, nor judicious to have the status of WAEMU lawyers governed by different standards;

That this is how Regulation N°05/CM/UEMOA of 25 September 2014, relating to the harmonisation of the rules governing the legal profession in the UEMOA space, was adopted ;

Considering that under the terms of Article 91 of the said text, ***"the provisions of the national laws and regulations of the Member States which are not contrary to this Regulation shall continue to apply"***;

That this therefore implies that the rules governing the Bars at national level remain applicable insofar as they are not contrary to the said Regulation;

Considering that according to article 27 of the Regulation relating to the harmonisation of the rules governing the profession of lawyer in the WAEMU area: *"Subject to the provisions of article 24 paragraph 4 of these Regulations, the duration of the traineeship is three (3) effective years. It may, exceptionally, be extended twice (2) by one year at the request of the trainee or if the Bar Council considers that the trainee has not fulfilled the obligations arising from the provisions of article 26 of these Rules. The trainee must be heard by the Council of the Ordre before his or her training period is extended;*

That the provisions of article 23 of these Rules state that *"An examination is instituted to obtain the Certificate of Aptitude to the Profession of Lawyer (C.A.P.A.). Implementing regulations will specify the procedures for issuing the Certificat d'Aptitude à la Profession d'Avocat (C.A.P.A.);*

Considering finally that the provisions of article 29 specify that: *"Initial and continuing professional training is compulsory for all Lawyers registered with one of the Bars of the WAEMU, in accordance with the conditions and procedures defined in an act adopted in application of these Regulations and the internal regulations of the various Bars";*

Considering that in this case the question referred for a preliminary ruling is worded as follows: is the application of Article 27 of Regulation No 5/CM/WAEMU of 25 September 2014 on the harmonisation of the rules governing the legal profession in the WAEMU area subject to the prior adoption of the implementing regulation and the implementing act provided for successively in Articles 23 and 29 of the same regulation?

Whether the application of the provisions of Article 27 of By-law No. 05 is subject to the adoption of other texts?

In other words, does Article 27 apply immediately and unconditionally?

- **The Court's reply to the question referred for a preliminary ruling**

Considering that the applicants, trainee lawyers, claim the benefit of the provisions of Article 34 of the law regulating the profession of lawyer in Burkina Faso, which provide for a training period of two (2) years, whereas Regulation No 5/CM/UEMOA 25 September 2014 on the harmonisation of the rules governing the profession of lawyer in the UEMOA area, in its Article 27, provides for a period of three (3) years ;

Although the CAPA and the initial and continuing training of lawyers are subject to implementing regulations (which were finally adopted in 2019 following Implementing Regulation No. 001/2019/COM/UEMOA on the Certificate of Aptitude for the Legal Profession in the UEMOA region and Implementing Regulation No. 002/2019/COM/UEMOA on the initial and continuing training of lawyers registered with one of the Bars in the UEMOA region), the duration of the training period, on the other hand, has been regulated by the WAEMU Community legislator in a precise manner, in particular in three respects

(3) effective years ;

That the Cour de céans had the opportunity to recall, in its judgment N°005/2020 of 08 July 2020, that the WAEMU Treaty instituted its own legal order, integrated into the legal system of the Member States upon its entry into force and which is binding on their jurisdictions;

That this particularity of WAEMU law is described in Article 6 of the WAEMU Treaty in the following terms: *"Acts adopted by the organs of the Union for the achievement of the objectives of this Treaty and in accordance with the rules and procedures established by it, shall be applied in each Member State notwithstanding any prior or subsequent national legislation to the contrary"*;

States also have a duty to ensure that a provision of national law which is incompatible with a provision of Community law which meets the commitments they have entered into cannot be validly relied on against the latter;

Thus, where there is a conflict between Community law and a rule of national law, the national court must give precedence to the former over the latter by applying the former and disregarding the latter;

Moreover, within the meaning of Article 43(1) of the WAEMU Treaty, *"regulations shall have general application. They shall be binding in their entirety and directly applicable in all Member States"*;

That, in any event, Regulation No 05/CM/WAEMU of 25 September 2014, which entered into force on 1^{er} January 2015, given its intrinsic characteristics, is sufficient in itself and does not require any other conditionality to be applied in a preferential manner to any domestic standard;

Furthermore, Article 92 of the said regulations *"repeals and replaces all previous provisions to the contrary"*;

That this express reference rightly recalls the non-invocable nature of the provisions of earlier domestic law governing the same field, contrary to the analysis made by the applicants, who are trainee lawyers;

That, in so doing, the incompatible national rule remains inapplicable and the national court and the national authorities are obliged to set it aside;

Consequently, the application of the aforementioned Article 27 is not subject to any condition;

- **Costs**

Considering that, under the terms of Article 86 in fine of the Rules of Procedure of the Court of Justice, "*It shall be for the national court or tribunal to decide on the costs of the preliminary ruling proceedings*";

That, consequently, jurisdiction to rule on costs lies with the referring court, in this case the Court of Cassation of Burkina Faso;

FOR THESE REASONS :

In answer to the question referred for a preliminary ruling by the Cour de Cassation of Burkina Faso, on the basis of a reference registered on 24 April 2020;

IN THE FORM :

- declares itself competent ;
- declare the present action for a preliminary

ruling admissible; **THE FUND :**

- Declares that the provisions of Article 27 of Regulation No 05/CM/UEMOA of 25 September 2014, on the harmonisation of the rules governing the profession of lawyer in the UEMOA area, are directly and unconditionally applicable, notwithstanding the failure to adopt the implementing regulation and the implementing act provided for successively in Articles 23 and 29 of the said Regulation ;
- refers the case back to the Cour de Cassation of Burkina Faso for costs.

Thus made, judged and pronounced in public hearing in Ouagadougou on the day, month and year above.

Signed by the Chairman and the Registrar.
Illegible signatures follow.
Ouagadougou, 21 May 2021

For the Registrar
The Deputy
Registrar

Hamidou YAMEOGO