IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA

FIRST INSTANCE DIVISION

(Coram: Johnston Busingye, PJ, John Mkwawa, J Isaac Lenaola, J.)

REFERENCE NO. 5 OF 2011

SAMUEL MUKIRA MOHOCHI.....APPLICANT

AND

THE ATTORNEY GENERAL OF THE

REPUBLIC OF UGANDA.....RESPONDENT

DATE: 17th MAY, 2013

JUDGEMENT OF THE COURT

INTRODUCTION

1. The Reference dated 13th June, 2011, was brought under Articles 6(d), 7(2), 27, 30, 38 and 104 of the Treaty for the Establishment of the East African Community (hereinafter referred to as "the Treaty"), Article 7 of the East African Common Market Protocol (hereinafter referred to as "the Protocol") and Rule 1(2) and 24 of the East African Court of Justice Rules of Procedure (hereinafter referred to as "the Rules") and all enabling provisions of the law. (sic).

2. The Applicant, Mr Samwel Mukira Mohochi, is a citizen of the Republic of Kenya and an Advocate of the High Court of Kenya. In this Reference he is also introduced as "an accomplished human rights defender". He is represented by two Counsel; Mr Mbugua Mureithi wa Nyambura and Mr Donald Deya.

3. The Respondent is the Attorney General of the Republic of Uganda, who is the Chief Legal Advisor to the Government of Uganda, and is being sued on behalf of the Government of Uganda. Representing the Respondent is Ms Peruth Nshemereirwe, State Counsel and Ms Maureen Ijang, State Attorney.

4. When this Reference was filed, the Secretary General of the East African Community had been impleaded as the 2nd Respondent but after the filing, by a Notice of Withdrawal filed in the Registry on the 4th October 2011, the Applicant withdrew the Second Respondent from the Reference.

BACKGROUND

5. The Applicant travelled to Uganda from Kenya on 13th April 2011 on a Kenya Airways flight. He was part of a 14-member-delegation of the International Commission of Jurists- Kenya Chapter (ICJ Kenya) scheduled to meet The Chief Justice of Uganda, the Honourable Mr Justice Benjamin Odoki, on the 14th April 2011. The whole delegation was on the same flight. On arrival at Entebbe International Airport, at 9.00am the Applicant was not allowed beyond the Immigration checkpoint in the Airport. What

happened immediately thereafter is contested. The Applicant says he was arrested, detained and confined by airport immigration authorities. Immigration authorities maintain that that they handed him to Kenya Airways who took him into their custody. What is uncontested is that he was subsequently served with a copy of a "Notice to Return or Convey Prohibited Immigrant" addressed to the Manager, Kenya Airways by the Principal Immigration Officer, Entebbe International Airport, bearing his (the Applicant) names as the prohibited immigrant. It is also uncontested that that same day, at 3.00 pm, he was put on a Nairobi bound Kenya Airways flight and returned to Kenya. The immigration authorities did not inform him, verbally or in writing, why he had been denied entry as well as why he had been declared a prohibited immigrant and subsequently returned to Kenya. The immigration authorities maintain that they owed him no such duty, under the law.

6. The Applicant contends that these actions were violations of his legal rights and Uganda's obligations under the Treaty, the Protocol and The African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter"), and has filed this Reference seeking redress.

The Applicant's Case

7. In the Reference the Applicant alleges that on arrival at Entebbe International Airport, he was denied entry into the country, restrained, confined and detained at the immigration offices at the airport and subsequently deported to Kenya.

8. The Applicant maintains that it was unlawful on the part of the Respondent not to subject him to any legal or administrative process before the decisions of declaration of status of prohibited immigrant, denial of entry and deportation back to Kenya were taken. He contends that he had committed no immigration or criminal offence against the laws of Uganda or the East African Community to warrant the denial of entry into Uganda and deportation back to Kenya.

9. In the premises he asserts that the subject matter of this Reference is that the above actions of the Republic of Uganda under the advice of the Respondent are:

i) in violation of Uganda's obligations under Article 104 of the Treaty.

ii) in violation of the guarantees of free movement and non-discrimination of East African citizens under Article 7 of the Protocol.

iii) illegal, unlawful and in violation of Uganda's obligations under Articles 6(d) and 7(2) of the Treaty with regard, particularly, to the denial of the due process of law or fair administrative process.

iv) in violation of the fundamental rights and freedoms of the Applicant against discrimination, freedom from arbitrary arrest and detention, the right to a fair and just administrative action, the right to information and freedoms of assembly, association and movement guaranteed by Articles 2,6,7,9,10,11 and 12 of the Charter.

v) and that the provisions of Section 52 (a), (b), (c), (d) and (g) of the [Uganda] National Citizenship and Immigration Control Act (Chapter 66 of the Laws of Uganda) bestowing unchecked and overarching discretionary powers to the Minister and the Director of Immigration to unilaterally declare any person, including a citizen of a Partner State of the East African Community, (EAC) as a "Prohibited Immigrant", without affording him or her a hearing, due process of law or any formal administrative process, are inconsistent with and in violation of Uganda's obligations to respect, uphold and observe the rule of law, transparency, accountability and human rights as well as fundamental freedoms under Articles 6 (d), 7 (2) of the Treaty and the guarantee of free movement within the East African Community under Article 104 of the Treaty and Article 7 of the Protocol.

10. The Applicant says that the Reference is premised on Articles 6(d), 7(2), 27,30,38 and 104 of the Treaty, Article 7 of the Protocol and Articles 2, 6, 7,9,11 and 12 of the Charter.

11. The Applicant prays for the following orders:-

(i) A Declaration that the denial of the Applicant, a citizen of one of the Member States of the East African Community, of entry into Uganda without according him a hearing, due process of law or any legal or administrative process is illegal, unlawful and a breach of Uganda's obligations under Articles 6(d) and 7(2) of the Treaty.

(ii) A Declaration that the denial of the Applicant, a citizen of one of the Member States of the East African Community, of entry into Uganda, without Treaty based reasons, is illegal, unlawful and a breach of Uganda's obligations under Articles 104 of the Treaty and 7 of the Protocol.

(iii) A Declaration that the stoppage, restraining, and detention of the Applicant at Entebbe International Airport, denial of entry into Uganda and subsequent deportation back to Kenya without disclosure of the reasons for the declaration of status of prohibited immigrant, without due process of law or any form of administrative process before the declaration of status of prohibited immigrant and subsequent deportation are violations of the Applicant's fundamental rights and freedoms as to freedom from discrimination, freedom from arbitrary arrest and detention, right to fair administrative action, right to information and freedoms of association, assembly and movement contrary to the provisions of Articles 2,6,7,9,10,11 and 12 of the Charter as recognised by Articles 6(d), and 7(2) of the Treaty.

(iv) A Declaration that the provisions of Section 52 (a), (b), (c), (d) and (g) of the Citizenship and Immigration Control, Chapter 66 of the Laws of Uganda, bestowing unchecked and overarching discretionary powers on the Minister and the Director of Immigration to unilaterally declare persons who are citizens of Member States of the East African Community, such as the Applicant, the status of prohibited immigrants, are inconsistent with and in violation of Uganda's obligations of observance of the imperatives of the rule of law, transparency, accountability and human rights under Articles 6(d), 7(2), and the guarantee of free movement and residence within the East African Community under Article 104 of the Treaty and Article 7 of the Protocol.

(v) An Order that costs of and incidental to this Reference be met by the Respondent.

(vi) That this Court be pleased to make such further or other orders as may be fit and just in the circumstances of the Reference.

In a response supported by the Affidavit of one Okello Charles Cowards, a Principal Immigration Officer, Entebbe International Airport, the Respondent admits that the Applicant arrived at Entebbe International Airport as alleged and was indeed denied entry into Uganda.

13. Save for the above admission, the Respondent denies that the Applicant was arrested, restrained or detained by immigration authorities and states, instead, that the Applicant was validly denied entry in accordance with Article 7 (5) of the Protocol, that the Respondent was under no legal obligation to give the Applicant reasons for the denial of entry and that the Applicant was handed over to Kenya Airways, with instructions to take him into its custody and ensure that he is removed from the non-permissible area and returned to Kenya on its first available flight.

14. The Respondent also denies that the actions of the immigration officers at the airport on the material date and time contravened Articles 6(d), 7(2), and 104 of the Treaty, Article 7 of the Protocol or violated Articles 2,6,7,9,10,11 and 12 of the Charter, and contends that this Court does not have jurisdiction to enforce Articles 2, 6, 7,9,10, 11 and 12 of the Charter.

15. The Respondent further avers that Section 52 of the Uganda's Citizenship and Immigration Control Act is not in contravention of the Treaty or the Protocol, that neither the Treaty nor the Protocol takes away the sovereignty of the member states to make decisions in the best interest of their national security and, in response to allegations that Section 52 of Uganda's Immigration Act bestows unchecked and overarching discretionary power to declare people, including East African Citizens, prohibited immigrants, further avers that under Article 76(2) of the Protocol, implementation of the Common Market shall be progressive.

16. The Respondent finally avers that, in the alternative and without prejudice to prior averments, the action undertaken by the Government of Uganda to deny the Applicant entry into Uganda was lawful, bonafide, justifiable and in the security interest of the people of the East African Community.

17. The Respondent prays that the Reference be dismissed with costs .

SCHEDULING CONFERENCE

18. At a Scheduling Conference held on 24 February 2012 it was agreed that the following were the issues to be determined by the Court:

i) Whether the Reference is properly before the Court;

ii) Whether the Treaty and the Common Market Protocol take away the sovereignty of Uganda to deny entry to unwanted persons who are citizens of Partner States of the EAC;

iii) Whether the Applicant was detained at Entebbe International Airport and whether the actions complained of, of the Republic of Uganda, were in conformity with Articles 6 (d) and 7(2) of the Treaty;

iv) Whether the actions of the Republic of Uganda were in conformity with Article 104 of the EAC Treaty and Article 7 (6) of the Common Market Protocol;

v) Whether the Provisions of section 52 of the Uganda Citizenship and Immigration Act are inconsistent and in violation of Articles 6 (d), 7 (2) and 104 of the Treat and Article 7 of the Protocol;

vi) Whether the Applicant is entitled to the prayers sought.

CONSIDERATION AND DETERMINATION OF THE ISSUES

Whether the Reference is properly before the Court

Submissions

19. The question as to whether this Reference is properly before the Court was a point of law challenging the Court's jurisdiction and was raised by the Respondent. It was argued by Ms Maureen Ijang, the Respondent's Counsel, who submitted that this Court lacks jurisdiction to hear the Reference basically for two reasons:

i) that the Reference is mainly based on allegations of human rights violations and that this Court lacks jurisdiction to try such violations by virtue of the "clear provisions of Article 27 of the Treaty which expressly put allegations of human rights violations in the Court's extended jurisdiction which is not yet in place..." (sic) It was her contention that "the intention of the framers of the Treaty was that this Court would not interpret human rights matters until a protocol allowing it to do so is concluded." (sic) In support of this argument, Counsel referred us to the case of James Katabazi & 21 Others v Attorney General of Uganda, EAC Reference No. 1 of 2011 (The Katabazi case), as well as to that of the Attorney General of Kenya v Independent Medical Legal Unit EACJ Appeal No. 1 of 2011 (the IMLU Case) in which the Appellate Division stated that for the Court to claim and exercise jurisdiction in any matter, it has to find and supply, through interpretation of the Treaty, the source and basis for such jurisdiction, in the circumstances of the matter before it. Similarly Counsel submitted that to the extent that the Applicant is alleging human rights violations by the Respondent and seeking declarations that the actions of the Respondent violated "the human rights provisions in the Treaty",(sic) the Court should find and supply the basis of its jurisdiction through interpretation of the Treaty and not simply by relying on the Katabazi case.(supra)

ii) that Article 6 (d) of the Treaty, which the Applicant alleges was infringed by the Respondent, consists of aspirations and broad policy provisions for the Community which are futuristic and progressive in application and that it raises political questions which cannot be answered by this Court. That the provision is not capable of being breached and, therefore, it is not justiciable. In support of her stance, Counsel cited the authority of a Ugandan case, Centre for Health Human Rights and Development & 3 others versus The Attorney General of Uganda, [Constitutional Petition No 16 of 2011], where the Constitutional Court of Uganda declined to entertain a Petition premised on allegations that the Government was not investing sufficiently in maternal health services with dire consequences for women and children, because it was political in character and concerned policy issues.

20. Mr Mbugua Mureithi argued the case for the Applicant. In answer to the issue of want of jurisdiction, he asserted that the Reference was properly before the Court in accordance with Article 30 (1) of the Treaty which provides that:

"Subject to the provisions of Article 27 of this Treaty, any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty".

21. He further submitted that in determining a matter in question under the above Article, the Court is required to review the lawfulness of that matter and whether it amounts to an infringement of the Treaty.

22. In response to the Respondent's assertion that the cause of action in this Reference is human rights violations, Counsel argued that while agreeing that the jurisdiction of the Court is subject to the provisions of Article 27 of the Treaty, the crux of the Applicant's plea, as exhibited in the Reference, is that the actions complained of are breaches of Uganda's obligations under Articles 6(d), 7(2) and 104 of the Treaty and Article 7 of the Protocol. It is on the basis of the foregoing, that the Applicant is asking the Court to pronounce itself on the alleged breaches of the said Treaty obligations by Uganda in light of his grievances.

23. Furthermore, relying on the authority of the Katabazi case (supra), Counsel submitted that this Court's jurisdiction is not ousted merely on the basis that the acts complained of are based on allegations of human rights violations.

24. Finally, Counsel submitted that Article 7 of the Protocol creates subjective rights to which citizens of the East African Community are entitled in their individual capacities and those rights are enforceable vide the Court's jurisdiction under Articles 27 and 30(1) of the Treaty and it matters not whether those rights are said to be "human rights" or rights by whatever lexicon.

25. In answer to the Respondent's assertion that Articles 6 (d) and 7(2) of the Treaty contained aspiration and broad policy provisions not capable of being breached and therefore not justiciable, Counsel cited the IMLU Case (supra) as his authority to show that the Articles create obligations that Partner States have voluntarily entered into and that to breach them is a Treaty violation. To drive his point home, Counsel pointed out that in the Applicant's view, provisions of Article 6 (d) are, in fact, foundational to the Community in that they are conditions precedent to a foreign country being granted membership of the East African Community under Article 3 clause 3 (b) of the Treaty. Counsel distinguished the authority cited by the Respondent's Counsel from the present Reference and submitted that whereas the issues before Uganda's Constitutional Court in that Petition were about provision of sufficient maternal health services in the country, and that that is why the Court held that it was a matter of resource allocation which should be determined by the Executive and other political organs of the State, the issues in the present case are about crystallised provisions of Articles 6 and 7 of the Treaty which are foundational and core to the continued existence of the Treaty.

We have considered the rival positions of the parties in support of their respective positions on this matter and we opine as here under:

26. It is common ground that under Article 27 (1) of the Treaty, this Court has jurisdiction over the interpretation and application of the Treaty, where such jurisdiction is not conferred by the Treaty on organs of Partner States. We think this is plain enough. ***This Court does have jurisdiction to interpret and apply any and all provisions of the Treaty*** save those excepted by the proviso to Article 27. While we agree, with the Respondent that the Court's jurisdiction will be extended via a Protocol as envisaged by Article 27 (2), we do not consider that the envisaged extension, in any way, acts to prohibit the Court from interpreting and applying any provision of the Treaty. In particular, this Court has consistently held, and the Appellate Division has consistently upheld, that mere inclusion of allegations of human rights violations in a Reference will not deter the Court from exercising its interpretation jurisdiction under Article 27(1) of the Treaty- (see especially the Katabazi case, Attorney General of the Republic of Rwanda v. Plaxeda Rugumba, Appeal No. 1 of 2012 and Attorney General of Uganda v Omar Awadh and 6 Others, Appeal No 2 of 2012.)

27. We also need to reflect on the Respondent's assertion that, in the present Reference, the Applicant is alleging human rights violations as well as seeking declarations that the actions of the Respondent violated the human rights provisions in the Treaty. We hasten to make two points here:

28. First, that the Treaty is neither a Human Rights Convention or a Human Rights Treaty as understood in international law. It is rather a Treaty to govern the widening and deepening of, inter alia, the political, economic, social, cultural, research, technology, defence, security, legal and judicial cooperation between the Partner States, see**- Article 5 of the Treaty and Attorney General of Uganda v. Omar Awadh (supra).**

29. Secondly, we are not aware of a chapter, article or provision in the Treaty, Protocols and Annexes which designates any provisions therein as *"the human rights provisions"* . The Respondent merely referred to them but did not show us which ones they are, where they are located and the evidence she relies on. Under Article 1: ***"Treaty" means the Treaty establishing the East African Community and any annexes and protocols thereto***, and it is our view that provisions therein are provisions of the Treaty, plain and simple. The object and scope of each provision is reflected in the titles and sub-titles of the chapters and articles therein. For a litigant to unilaterally sub-designate some Treaty provisions into human rights provisions, just to bring them within the

purview of the yet to be given jurisdiction under Article 27 (2) is mischievous, to say the least.

30. In the instant matter, the Applicant's allegations against the Respondent are that he was denied entry, restrained, arrested, detained, declared a prohibited immigrant, returned to Kenya, denied any legal or administrative process and was not furnished with reasons for these actions. He alleges that these actions violate specific provisions of the Treaty including Articles 104, 6(d), 7(2) and Article 7 of the Protocol. Where he alleges violations of various provisions of the African Charter on Human and Peoples' Rights, he qualifies it with "as recognised by Article 6(d) and 7(2) of the Treaty". In effect, we understand the cause of action in his case to be the alleged infringement of a Partner State's Treaty obligations which we find to be a matter which lies outside the province of human rights. -see **Attorney General of Uganda v Omar Awadh** (supra).

31. What matters, in our view, is that the Application seeks that this Court determines whether the actions and decisions of the Respondent were an infringement of specific Treaty provisions. It is the interpretation and application of these provisions in order to determine whether the impugned actions and decisions are infringements that provides the jurisdiction of this Court under Article 27(1).

32. Consequently, we think the Applicant has passed the test established by the Appellate Division of this Court in the **IMLU Case (supra).** It is not violations of human rights under the Constitution and other laws of Uganda or of the international community that is the cause of action in the Reference, rather the cause of action is constituted by allegations of infringements of specific Treaty provisions by the Ugandan Government. Applying the IMLU test to the present case, as the Respondent urged us to do, we do find, indeed, that *the Treaty provisions alleged to have been violated have, through Uganda's voluntary entry into the EAC Treaty, been scripted, transformed and fossilised into several principles, obligations and treaty guarantees now stipulated in, among others, Articles 6(d), 7(2), 104 of the Treaty and 7 of the Protocol, breach of any of which by Uganda would give rise to infringement of the Treaty. It is that alleged infringement which, through interpretation of the Treaty under Article 27(1) constitutes the cause of action in the instant Reference, and consequently, establishes the legal foundation of the jurisdiction of this Court in this Reference.*

33. The import of Article 27(2) became a point of contention in submissions and at the hearing. Article 27 (2) is framed as follows:

"The Court shall have such other original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable subsequent date. To this end, the Partner States shall conclude a protocol to operationalise the extended jurisdiction."

34. Again a plain reading of the incremental language of the aforesaid provision would be enough. The provision says that the Court shall have other jurisdiction at some future time. We think that if the intention of the framers of the Treaty had been to deny the Court any type of jurisdiction, as claimed by the Respondent, they would have categorically and expressly provided so, in a prohibitive phrase, like "*The Court shall not have original, appellate, human rights jurisdiction and other jurisdiction....*" or words to precisely convey such intent. Indeed the framers used such a phrase in Article 30(3). It is quite obvious to us that the import of the Article, as we have said before, and do repeat here, is that the framers merely intended to extend, progressively add to or widen the jurisdiction of the Court. In ***Plaxeda Rugumba v. The Attorney General of Rwanda, Reference No 10 of 2010***, we said, inter alia, ***that; "there is no doubt that the use of the words, "...other original, appellate, human rights and other jurisdiction...." is merely in addition to, and not in derogation to, existing jurisdiction....".***

35. Clearly, the sub-article is intended to provide for the giving to this Court of ***other*** jurisdiction, which Council will determine, at a suitable subsequent future date. It does not in any way impinge on the Court's jurisdiction, under Article 27 (1), to interpret and apply any and all provisions of the Treaty.

36. The Respondent submitted that the provisions of Articles 6 (d) of the Treaty are aspirations and broad policy provisions which are futuristic and progressive in application and that they raise political questions which cannot be answered by this Court. Further, that they are not capable of being breached and, therefore, are not justiciable. We find this stance erroneous for the following reasons:

i) Article 6 provides the six Fundamental Principles of the Community. **Black's Law Dictionary** defines "Principle" as "a basic rule, law or doctrine".(**9th Edition at p 1313**) Our understanding of "Fundamental Principles" as used in this Article, aided by the above definition, is that these are rules that ***must*** be followed or adhered to by the Partner States in order that the objectives of the Community are achieved.

Paragraph 11 of the Preamble to the Treaty provides that the Partner States are;

"resolved to adhere themselves to the fundamental and operational principles that will govern the achievement of the objectives..."

Article 146(1) of the Treaty provides, inter alia, that a Partner State **may be suspended from taking part in activities of the Community if that State fails to observe and fulfil the fundamental principles and objectives of the Treaty.**

Article 147(1) provides, inter alia, that a Partner State may be **expelled from the Community for gross and persistent violation of the principles and objectives of the Treaty.**

These provisions show that the framers of the Treaty, attached the greatest importance to the fundamental principles, among very few other provisions. Why then, would they attach to them such importance, including severe sanctions for non-observance thereof, if they were, as the Respondent claims, no more than mere aspirations"

Fortified by the above provisions of the Treaty, we agree with the Applicant that these principles are foundational, core and indispensable to the success of the integration agenda, and were intended to be strictly observed. Partner States are not to merely aspire to achieve their observance, they are to observe them as a matter of Treaty obligation. In our view, all the six principles in the Article were each carefully thought out, negotiated, appropriately weighted, individualized and crafted the way they are for a particular effect. Integration depends on each of them singly and collectively.

ii) The principle in Article 6(d), which was the main target of the Respondent's attack, is good governance. "Good governance" means many things in many contexts. Wikipedia, the online Encyclopedia defines it in descriptive terms. We paraphrase it thus:

"Good governance is an indeterminate term used in international development literature to describe how public institutions conduct public affairs and manage public resources. The concept "good governance" centres around the responsibility of governments and governing bodies to meet the needs of the masses. Because the term "good governance" can be focused on any one form of governance, organisations and authorities will often focus the meaning of good governance to a set of requirements that conform to the organisation's agenda, making good governance imply many different things in many different contexts."

We fully associate ourselves with the above description and we are of the firm belief that herein lies the explanation why the framers of the Treaty went beyond stating the principle and instead negotiated and agreed upon a specific minimum set of requirements that constituted the good governance package that, in their wisdom, suited the EAC integration agenda. That package, for purposes of the EAC integration, as set out in Article 6 (d), includes;

a)adherence to the principles of democracy,

b) the rule of law, accountability,

c) transparency,

d) social justice,

e) equal opportunities,

f) gender equality, as well as

g) the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights.

Apart from asserting that the provisions are aspirations and broad policy provisions for the Community, political in character and with a futuristic and progressive application, Counsel did not substantiate. They did not explain how and why these fundamental principles are mere aspirations. They failed to show us why we should depart from the position of this Court succinctly stated in the

IMLU Case(supra) that these provisions constitute responsibilities of Partner States to citizens which, through those States' voluntary entry into the EAC, have crystallised into actionable obligations, breach of which gives rise to infringement of the Treaty.

We examined the authority which Counsel told us she was fortified with. We found that the Petitioners' contention in that authority, ***Centre for Health Human Rights and Development and 3 others Versus the Attorney General, Petition No 16 of 2011,*** was that the State failed to provide basic indispensable health items in Government facilities for expectant mothers and that as a result of this failure, together with the imprudent and unethical behaviour of health workers, the maternal mortality rate in Uganda was high.

It is basically this contention that the Court considered and held, inter alia, that the Executive has the political and legal responsibility to determine, formulate and implement Government policy and that the Court has no power to determine or enforce its jurisdiction on matters that require analysis of the health sector government policies, make a review of some and later on, their implementation and that, if it did that, it would be substituting its discretion for that of the executive granted to it by law.

We failed to find the connection between the facts of the authority cited and the present Reference, where the contention is whether a Partner State violated specific provisions of the Treaty.

It is clear to us that the provisions of Article 6 (d) of the Treaty are solemn and serious governance obligations of immediate, constant and consistent conduct by the Partner States. In our humble view, we know of no other provisions that embody the sanctity of the integration process the way the above do.

37. In view of the foregoing, we find and hold that the Reference is properly before the Court.

Whether the Treaty and the Common Market Protocol take away the sovereignty of Uganda to deny entry to unwanted persons who are citizens of Partner States of the EAC

Submissions

38. Mr Mbugua Mureithi, for the Applicant, submitted on this issue as follows:

i) That neither the Treaty nor the Protocol takes away the sovereignty of the Republic of Uganda to deny entry to unwanted persons who are citizens of Partner States of the EAC. It is his contention however, that the exercise of sovereign power by any EAC Partner State to deny entry to citizens of Partner States is heavily qualified and, strictly governed by the Treaty and the Protocol.

ii) That under Article 104 of the Treaty, the Partner States undertook to guarantee to all citizens of the EAC free movement of persons, labour and services and to ensure their right of establishment and residence.

iii) That by Article 7 of the Protocol, the EAC Partner States guaranteed the free, non-discriminatory movement of citizens of the Partner States within the EAC countries without visas, and that the only limitation to the guarantee of free movement of persons that a Partner State can lawfully impose are contained in Article 7(5) of the Protocol and confined to matters of public policy, public security and public health.

iv) That the right of EAC citizens to free movement within the Community is a treaty-right guaranteed by Article 7 of the Protocol, and that Article 7 is in the character of a directly applicable provision which confers upon the individual, rights, and that national governments or their institutions cannot jeopardise, delay or curtail their full, complete and uniform application in the Partner States

v) That under the Protocol, Uganda or any other Partner State of the EAC can limit the guaranteed right of free movement of a citizen of any Partner State, such as the Applicant, only pursuant to duly invoking the provisions of Article 7 (5) of the Protocol and declaring or notifying the same to other Partner States and the EAC Secretary General in accordance with Article 8 (3) (c) of the Treaty and Article 7 (6) of the Protocol. It is his contention that this is the only residual sovereignty left to Partner States of the EAC within the EAC.

Vi) That the unsubstantiated insinuation that the Applicant is a threat to the security of the people of the EAC or a threat to the national interest of Uganda, not having been notified to the EAC Secretary General and the Partner States in accordance with

Articles 8(3)(c) of the Treaty and 7(6) of the Protocol, remains a unilateral action that cannot prevail over the Applicant's guaranteed right of free movement within the EAC.

39. Ms Peruth Nshemereirwe, for the Respondent, argued issues ii and iv together. In a nutshell, she submitted as follows:

i) That neither the Treaty nor the Protocol takes away the Sovereignty of the Republic of Uganda to deny entry to unwanted persons who are citizens of the EAC.

ii) That sovereignty is the supreme political authority of an independent state and, as such, Uganda is an independent state whose sovereignty was not submerged in the creation of the EAC

iii) That Article 104 of the Treaty is subject to the provisions of the Protocol and Article 7(5) thereof gives Uganda a right to restrict movement of persons into Uganda on grounds of public policy, public security or public health and that according to affidavit evidence tendered, the Applicant was denied entry into Uganda under Article 7 (5) of the Protocol.

iv) That the Applicant's argument that Uganda has not complied with the provisions of Article 7(6) to notify the Secretary General of the EAC and The Republic of Kenya about the Applicant's denial of entry is a mere allegation for which the Applicant showed no evidence of non-compliance.

v) That Article 7 (3) of the Protocol provides for compliance with national laws in guaranteeing the protection of citizens, Article 7 (9) provides that implementation of the Protocol shall be in accordance to the EACM (Free Movement of Persons) Regulations specified in ANNEX 1 to the Protocol. That Article 5 (1) of those Regulations provides that a citizen who wishes to enter or exit the territory of another Partner State shall do so at entry or exit points designated in accordance with national laws of the Partner State and shall comply with the established immigration procedures. It was her contention that the key point in the above provisions is "in accordance with national laws" and is in consonance with the concept of sovereignty.

vi) That affidavit evidence on record showed that the national law which was relied on in handling the Applicant was the Uganda Citizenship and Immigration Control Act, Cap 66, and that vide paragraphs 4 and 5 of the affidavit of Charles Okello Cowards, the Applicant was handled in accordance with the law and he was neither confined nor detained as alleged.

vii) That under the above said Ugandan law, immigration officers are empowered under its Section 52, to deny the Applicant or any other person entry into Uganda and are not under any obligation to give reasons. She contended, therefore, that the Applicant was clearly dealt with and denied entry in accordance with national law.

viii) That the cited regulations on free movement of persons under the Protocol are part of the EAC Treaty under Article 151 thereof, that the actions of the Respondent were in conformity with Articles 104 and 7(5) of the Treaty and Protocol respectively, and that, flowing from that, she contended, there was no contravention and or breach of the Treaty.

40. We have carefully considered the rival submissions. We entirely agree, as we think both parties do, that Uganda is an independent sovereign state whose power to deny entry to unwanted persons who are citizens of EAC Partner States was not submerged with the coming into force of the Treaty and the Protocol, but still exists, so long it is exercised in accordance with the requirements of the law. Indeed it was the stance of Counsel for the Respondent that, in the exercise of her sovereignty Uganda denied the entry to the Applicant in accordance with Article 7(5) of the Protocol.

41. What we find to be in contention in the instant Reference, however, are two things namely; the extent of Uganda's sovereignty, given the provisions of Sections 52 and 66(4) of Uganda's Citizenship and Immigration Control Act, Articles 104 and 7 of the Treaty and Protocol respectively, and the application of those provisions in the matter of the Applicant.

42. Article 104 (1) of the Treaty provides that;

"The Partner States agree to adopt measures to achieve the free movement of persons, labour and services and to ensure the enjoyment of the right of establishment and residence of their citizens within the community."

It provides, in 104 (2) that;

"For purposes of this Article, the Partner States agree to conclude a Protocol on the Free Movement of Persons, Labour, Services, and Right of Establishment and Residence at a time to be determined by the Council." That was November 30th 1999.

43. On 20th November 2009, the Protocol envisaged in 104 (2) came into force. The object of its Article 7 is "Free Movement of Persons". The Article then provides as under;

"7 (1) The Partner States hereby guarantee the free movement of persons who are citizens of other Partner States within their territories.

7(2) In accordance with paragraph 1, each Partner State shall ensure non-discrimination of the citizens of the other Partner State based on their nationalities by ensuring:

a) the entry of citizens of other Partner States into the territory of the Partner State without a visa

b) the free movement of persons who are citizens of the other Partner State within the territory of the Partner State

c) that the citizens of the other Partner States are allowed to stay in the territory of the Partner State, and

d) that the citizens of the other Partner States are allowed to exit the territory of the Partner State without restrictions.

7 (5) The free movement of persons shall be subject to limitations imposed by the host Partner State on grounds of public policy, public security or public health.

7(6) A Partner State imposing limitation under paragraph 5, shall notify the other Partner States accordingly

7(9) The implementation of this Article shall be in accordance with the East African Community Common Market (Free Movement of Persons) Regulations, specified in Annex 1 to this Protocol."

44. We find it pertinent to refer to the two following Regulations:

Regulation 2: ***The purpose of these Regulations is to implement the provisions of Article 7 of the Protocol and to ensure that there is uniformity among the Partner States in the implementation of the Article and that to the extent possible, the process is transparent, accountable, fair, predictable and consistent with the provisions of the Protocol.***

Regulation 5 (1)***: A citizen of a Partner State who seeks to enter or exit the territory of another Partner State, shall do so at entry or exit points designated in accordance with the national laws of the Partner State and shall comply with the established immigration procedures.***

45. Counsel for the Respondent submitted that Uganda is an independent state and its sovereignty was not submerged with the creation of the East African Community. We believe that Counsel was referring to Uganda's internal sovereignty ie the power enjoyed by the governmental entity of a sovereign state, including affairs within its own territory and powers related to the exercise of external authority- see Black's Law Dictionary, 9th Ed. at p.1524. And by "power" in this context we take the definition again, in Black's Law Dictionary (supra) at p.1288, as "the legal right or authorisation to act or not to act.".

46. Our view is that, like every other country, Uganda's sovereignty is defined by law. Prior to the entry into force of the Treaty and, subsequently, the Protocol, Uganda's sovereignty to deny entry to unwanted persons was defined by The Citizenship and Immigration Control Act, Chapter 66, Laws of Uganda. The Treaty then came into force.

47. The Republic of Uganda, gave the Treaty the force of law pursuant to Section 3(1) of the East African Community Act, 2002. The Section provides that:

"The Treaty as set out in the Schedule to this Act shall have force of Law in Uganda."

The above Act defines the Treaty as:

"The Treaty for the Establishment of the East African Community dated 30th November 1999, and entered into by the United Republic of Tanzania, The Republic of Uganda, and the Republic of Kenya which is set out in the Schedule to this Act, and as from time to time amended under any provision of the Treaty or otherwise modified"-see Section 2 of the Act. The Common Market Protocol came into force on the 20th November 2009- ***see Article 55, Common Market Protocol.***

Article 151 (4) of the Treaty then specifically provides that:

"The Annexes and Protocols to this Treaty shall form an integral part of this Treaty."

48. The above chronology shows that the Treaty is law applicable in, binding to and in Uganda. It shows, as well, that the Protocol, as of its entry into force, constitutes a modification to and is an integral part of the Treaty. The Treaty created the East African Community, a legal entity comprising of the Partner States. Of particular interest, is the fact that the meaning of foreign country under the Treaty is *"...any country other than a Partner State".(**see: Article 1 of the Treaty)*** The Treaty also defines persons, formerly foreign nationals as between the individual EAC states prior to entry into force of the Treaty, as *nationals or citizens of Partner States,(**see: Article 1 of the Protocol***) The Treaty accorded these persons wide ranging, preferential and superior treatment and rights in terms of movement, establishment, residence and working within the Partner States. With specific regard to the Republic of Uganda, her sovereignty regarding the movement of the citizens of partner states in and out of the Partner States started to be defined and governed by the Treaty, the Protocol and the Citizenship and Immigration Control Act, provisions of the former taking precedence in case of conflict.

49. We would hope that the foregoing brief chronicle of the growth of community law and its direct applicability in the Partner States is helpful to the parties. We certainly recognize that in exercise of her sovereignty, the Republic of Uganda has power to admit persons on, or deny them entry into, her territory, in accordance with the country's law. The law in Uganda, however, includes the Treaty and the Protocol which, also in the exercise of her sovereign power, the Republic of Uganda accepted not only to be bound by, as Community law, but equally as national law.

50. Like in any other Partner State, once the Treaty and, subsequently, the Protocol, were given force of law within Uganda, they became directly enforceable within the country and took precedence over national law that was in conflict with them. Existing legal provisions became qualified and started to be applicable only to the extent that they were consistent with the Treaty and the Protocol. These included provisions in Uganda's Citizenship and Immigration Control Act.

51. The provisions, relevant to the present Reference, that affected the existing law are:

i) Article 104 of the Treaty by which Uganda agreed to adopt measures to achieve the free movement of persons.

ii) Article 7 (2) of the Treaty by which Partner States undertake to abide by principles of good governance including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights.

iii) Article 7 of the Protocol by which Uganda guaranteed free movement of persons who are citizens of the other Partner States within her territory

iv) Article 7(2) of the Protocol by which Uganda bound itself to ensure non-discrimination of the citizens of the other Partner States by ensuring their entry without a visa, their free movement within its territory, their stay and their exit without restrictions.

v) Article 7(5) by which, in respect of citizens of Partner States, Uganda can impose limitations on the free movement of persons only on grounds of public policy, public security and public health.

vi) Article 7(6) by which Uganda must notify the other Partner States if it should impose limitations under Article 7(5).

vii) Article 54(2) of the Protocol, by which Partner States guarantee that persons whose rights and liberties as recognised by the Protocol shall have been infringed upon, shall have a right to redress, even when the infringement has been committed by persons acting in their official capacities; and that the competent judicial, administrative or legislative authority or any other competent authority shall rule on the rights of the person who is seeking redress.

52. The import of these provisions is that by accepting to be bound by them, with no reservations, Uganda also accepted that her sovereignty to deny entry to persons, who are citizens of the Partner States, becomes qualified and governed by the same and, therefore, could no longer apply domestic legislation in ways that make its effects prevail over those of Community law.

53. Sovereignty, therefore, cannot not take away the precedence of Community law, cannot stand as a defence or justification for non compliance with Treaty obligations and neither can it act to exempt, impede or restrain Uganda from ensuring that her actions and laws are in conformity with requirements of the Treaty or the Protocol.

54. We are of the view, therefore, that while Uganda can declare a citizen of a Partner State a prohibited immigrant and deny him/her entry, it is clear from the foregoing that such declaration or denial of entry can only be valid if it complies with the requirements of Articles 104 and 7(2) of the Treaty and 7 and 54(2) of the Protocol.

55. Our interpretation is further fortified by the holding of the ECJ in the case of ***Costa vs Enel, Case 6/64,*** where the Court, while interpreting a provision similar to Article 8(4), held, inter alia, that:

"The transfer by the States, from their domestic legal system to the Community legal system, of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail...."

56. In answer, therefore, to the issue under consideration, it is our finding that Uganda's sovereignty to deny entry to persons who are citizens of Partner States was not taken away by the Treaty and the Protocol, but the exercise thereof can only be valid if it is done in strict compliance with the requirements of Articles 104 and of the Treaty and Articles 7 and 54(2) of the Protocol. Where Uganda fails, refuses, ignores or otherwise does not comply with the above provisions of the Treaty and the Protocol, it acts in violation of her Treaty obligations.

Whether the Applicant was detained at Entebbe International Airport and whether actions of the Republic of Uganda were in conformity with Articles 6 (d) and 7(2) of the Treaty;

Submissions:

Mr. Mbugua Mureithi, for the Applicant, submitted on this issue in two parts:-

57. On whether the Applicant was detained at Entebbe International Airport he submitted that on 13.04.2011 the Applicant arrived at the Airport, was denied entry into Uganda, was restrained, confined and detained in the offices of the Uganda Immigration Department at the airport from 9.00 am to 3.00 pm when he boarded a Kenya Airways flight back to Kenya.

58. He further submitted that the Notice signed by the Principal Immigration Officer, Entebbe International Airport, directed Kenya Airways to "return or convey" the Applicant, as a prohibited immigrant and, pending such conveyance, remove him from the non permissible area.

Additionally, Counsel contended that the Respondent admitted that the Applicant was put on the next available flight to Nairobi which was at 3.00pm. Counsel argued that these circumstances showed that on 13.04.2011 between 9.00am to 3.00pm the Applicant was not a freeman, he was restricted and confined in custody, away from the non permissible area at the Entebbe Airport, pending conveyance to Kenya, on the orders of the Principal Immigration Officer at the Airport.

59. Counsel referred the Court to the definition of the verb "detain" in the Advanced Learners Dictionary as ***"1 to keep somebody in an official place eg a police station....2. to prevent somebody from leaving or doing something...."***

60. Counsel further submitted that since the Applicant's detention was pursuant to the orders of the Principal Immigration Officer, it is the Respondent who is liable for the detention.

61. Counsel urged the Court to take judicial notice that airlines within EAC do not have security officers or places of holding persons in custody, adding that it would be improbable that the Ugandan authorities would have left the Applicant to the physical custody of an airline after labelling him a threat to the security of the peoples of the East African Community.

62. Concluding his submissions on the first part, the Counsel contended that on the balance of probabilities he had proved that the Applicant was restrained, confined and detained at Entebbe International Airport on the orders of the Principal Immigration Officer.

63. On whether the actions complained of were in conformity with Articles 6(d) and 7(2) of the Treaty, Counsel submitted that the Respondent's confirmation that the Applicant was denied entry and orders issued to return him to Kenya as a prohibited immigrant, exhibited that he had been declared a prohibited immigrant. He submitted further that he had shown that the Applicant was not given any reasons for any of the adverse actions taken against him and that the Respondent's confirmation, in replying affidavits, that immigration officials were under no obligation to give reasons to the Applicant, confirm that he was not informed why adverse actions were taken against him.

64. It was Counsel's further submission that in light of the Applicant's guaranteed right of free movement within the EAC under the Treaty and the Protocol, and his right of redress under Article 54(2) of the Protocol, the Respondent was obliged to accord him natural justice through a legal process that adhered to the rule of law, accountability, transparency and protection of human rights in accordance with Articles 6(d) and 7(2) of the Treaty.

65. Counsel disputed the Respondent's assertion that the process that the Applicant went through by filling in a card, lining up and waiting to present his travel documents to the immigration control officials at Entebbe Airport, amounts to a legal and administrative process. He contended that this process does not qualify as a hearing as known to the law and natural justice. Counsel further contended, that the reason the Respondent gave for denying the Applicant entry, i.e. that it was in the security interests of the people of East Africa, is a matter that cannot rest with an immigration official at the airport counter as the competent authority to determine after filing in a card, lining up and waiting to present travel documents.

66. Finally, Counsel submitted that since the Applicant had been to Uganda on other occasions immediately preceding the denial of entry on 13.04,2011, then the burden on Uganda to show compliance with the provisions of Articles 6(d), 7(2) and 8(3) of the Treaty and Articles 7(5), 7(6) and 54(2) of the Protocol, is that much higher.

67. In a spirited rebuttal, Ms Nshemereirwe, for the Respondent, denied that the Applicant was detained by the immigration authorities. She submitted that the Applicant was simply handed over to the carrier which had delivered him at the airport to return him wherever he had come from.

68. She submitted further, that since the next Kenya Airways flight was to depart at 3.00pm, it was only logical that Kenya Airways had to place the Applicant somewhere awaiting the next flight. It was Counsel's submission that at that point the Applicant was no longer in the hands of the Respondent and the Respondent was neither responsible nor privy to how the Applicant was kept or taken out of the country. She asserted that the Respondent's only interest was to see the Applicant out of the non-permissible area of the Airport.

69. On whether the actions complained of were in conformity with Articles 6(d) and 7(2) of the Treaty, Counsel submitted that the Applicant was accorded due process in accordance with the Uganda Citizenship and Immigration Control Act. She contended that the discussion the Applicant had with immigration officials before he was informed that he could not be admitted into Uganda, the process of filling in an entry card, taking of finger prints and picture amounted to an administrative process which the Applicant underwent before he was found unworthy of entry into Uganda.

70. We have carefully considered the arguments of both Counsel, examined the law on the subject and we will examine the issues starting with whether the actions of the Republic of Uganda complained of were in conformity with Articles 6(d) and 7(2) of the Treaty. We will examine each action.

Denial of Entry

71. As shown above, Counsel for the Respondent maintained that the Applicant was handled according to the law and was accorded the full benefit of due process. However, on analysing the whole chain of actions complained of and how they happened, with profound respect, we do not agree with the reasoning of Counsel for the Respondent.

72. "***Due process",*** *according to* ***Black's Law Dictionary (supra) at p.575 is defined as*** "***The conduct of legal proceedings according to established rules and principles for the protection of private rights, including notice and the right to a fair hearing before a tribunal with the power to decide the case".*** We adopt this definition.

73. The process that Counsel claimed amounted to due process i.e. filling an immigration card, taking finger prints and pictures and "a discussion" with the desk officer before being found unworthy to enter Uganda, is at variance with the above definition. The Respondent did not show us that the immigration officials had anything against the Applicant. We were not shown that he was informed of any wrong they were holding against him. His treatment seems to have been a result of caprice rather than coherently thought out decisions. We agonised over the Respondent's failure to disclose, even in Court, what it was the immigration officials had against him that warranted the harsh treatment.

74. The Applicant's right to redress was guaranteed by Article 54 of the Protocol. The Article provides that:

i) in accordance with their Constitutions, national laws and administrative procedures and with the provisions of this Protocol, Partner States guarantee that:

a) any person whose rights and liberties as recognized by this Protocol have been infringed upon, shall have the right to redress, even where this infringement has been committed by persons acting in their official capacities; and

b) the competent judicial, administrative or legislative authority or any other competent authority, shall rule on the rights of the person who is seeking redress.

75. Discussing the import of a similar provision the European Court of Justice in ***State v Royer Case 48/75,*** held that:

a decision ordering the deportation of a Community alien may not be carried out, save in cases of urgency which have been properly justified, against a person protected by Community law until the latter has been able to exhaust the remedies guaranteed by Articles 8 and 9 of Directive 64/221.

76. The combined effect of this very persuasive authority and the import of Article 54 of the Protocol, reproduced above, regarding the instant Reference is that the immigration officials had, foremost, an obligation to strictly apply the limitations of the freedom of movement, given its importance to the East African Community Common Market in particular, and integration in general. Failing this, once they decided to infringe upon the Applicant's rights and liberties as recognised by the Protocol, they ought to have guaranteed his right to redress. This entailed, in our view, a duty to give the Applicant sufficient reasons for denying him entry, declaring him a prohibited immigrant and removing him from Uganda. Equally importantly, they had a duty to afford him a fair opportunity to be heard, and, as they made their decisions about him, to take into consideration whatever he had to say. These, in our view, are basic indicators of due process, are the hall marks of the rule of law and they distinguish a potentially just and fair process from a potentially unjust and unfair one. Worthy of underscoring also is the fact that the Applicant was owed these things not as favours from anyone but as hallowed rights guaranteed by the Treaty. The provisions of its own national law, even if they existed, could not exempt the Republic of Uganda from this Community law obligation.

77. What the Applicant proved, and the Respondent failed to disprove, is that he was not aware, and he was not informed, of any offence he had committed or was suspected of having committed, against any law of Uganda or against the Treaty. To us this also is basic. Whatever else Counsel claimed to be due process was but a mockery of the same if it could enable the Immigration to bundle up a citizen of a Partner State, and dispatch him out of the country unheard.

78. In Court we expected Counsel to show us what exactly it was that the Applicant was suspected of and/or charged with and needed due process for in the first place. To our dismay, nothing was shown, despite our prodding.

79. The Applicant is a citizen of a Partner State and, as shown elsewhere above, is a special creature of and protected under the Treaty. The Republic of Uganda is voluntarily and irrevocably bound by the Treaty.

The Applicant's freedom of movement within Uganda was a right guaranteed by the Treaty, specifically Articles 104 and 7 of the Treaty and the Protocol respectively. Article 7(1) of the Protocol provides that;

"The Partner States hereby guarantee the free movement of persons who are citizens of other Partner States within their territories".

80. Those rights could not be interfered with, save as provided by the Treaty. In other words, the provisions of Uganda's Immigration and Citizenship Control Act (supra), that Counsel told us were applied, could only apply to the Applicant only to the extent that they complied with the Treaty.

Alleged Discrimination

81. The Applicant claimed to have been discriminated against. The guarantee of non-discrimination is a clear provision of Article 7(2) of the Protocol. It provides that:

7(2) In accordance with paragraph 1, each Partner State shall ensure non-discrimination of the citizens of the other Partner State based on their nationalities by ensuring:

a. the entry of citizens of other Partner States into the territory of the Partner State without a visa.

b. the free movement of persons who are citizens of the other Partner State within the territory of the Partner State.

c. that the citizens of the other Partner States are allowed to stay in the territory of the Partner State, and

d. that the citizens of the other Partner States are allowed to exit the territory of the Partner State without restrictions.

82. The Applicant was part of a 14 member delegation, on schedule to meet the Honourable Chief Justice of Uganda. It is evident from the visas in his passport that he had visited Uganda on at least three occasions between 01.02.2011 and 13.4.2011. It is amply clear, therefore, that he was not a stranger in Uganda. He was the only member of the delegation who received adverse treatment. Short of a reasonable explanation of this treatment by the Respondent, this failure to treat him equally with the other members of the same delegation, would amount to discrimination. The Respondent, in our view, failed to explain it.

83. We have discussed the import of Articles 6(d) and 7(2) of the Treaty at length elsewhere in this judgment, and we reiterate that position here. The Applicant travelled to a Partner State that is bound by the principles of good governance enshrined in Article 6(d), and had a legitimate expectation of being treated in accordance therewith. We find, however, that the treatment he was subjected to was adverse and discriminatory.

84. That he was singled out of a delegation, declared a prohibited immigrant, denied entry, returned to Kenya, without being furnished with reasons why and without being heard in his defence was clearly at variance with and in violation of Uganda's obligation to adhere to the rule of law, accountability, transparency as well as the recognition and protection of human rights in accordance with the Charter, as provided under Articles 6(d) and 7(2) of the Treaty and 7(2) of the Protocol.

Declaration of Prohibited Immigrant

85. In the Reference the Applicant alleges that save for a copy of the "Notice to Return or Convey Prohibited Immigrant", he was not furnished with any reasons, written or verbal why he was declared a prohibited immigrant. At paragraph 4 of his affidavit evidence, Mr Charles Okello Cowards, the Principal Immigration Officer, avers, inter alia, that he knows that under S.52 of the Uganda Citizenship and Immigration Control Act, Cap 66, Immigration officers are not under the obligation to give reasons for such actions. At the hearing Counsel for the Respondent told Court that the Applicant was handled under S.52 of Cap 66.

86. Section 52 describes who prohibited immigrants are and provides twelve categories of them. We will reproduce the Section verbatim:

"The following persons are prohibited immigrants and their entry into or presence within Uganda is unlawful except in accordance with the provisions of this Act:-

a. a destitute person

b. any person who:-

i) refuses to submit to medical examination after having been required to do so under section 50;

ii. is certified, by a Government medical practitioner, to be suffering from a contagious or infectious disease which makes his or her presence dangerous to the community

c. any person against whom there is in force an order of deportation from Uganda made under this Act or any other law for the time being in force;

d. any person whose presence or entry into Uganda is, or at the time of his or her entry was, unlawful under this Act or any other law for the time being in force;

e. any person who has not in his possession a valid passport issued to that person by or on behalf of the Government of the State of which he or she is a subject or citizen or a valid passport or document of identity issued to him or her by an authority recognised by the Government, such document being complete and having endorsed on it all particulars, endorsements and visas required from time to time by the Government or authority issuing that document and by the Government;

f. any person who is a drug trafficker and who is living, or who prior to entering Uganda was living, on the earnings of drugs or drug trafficking or trade;

g. a person who as a consequence of information received from the Government of any State, or any other source considered reliable by the Minister or the Commissioner, is declared by the Minister or by the commissioner to be an undesirable immigrant; but every declaration of the commissioner under this paragraph shall be subject to confirmation or otherwise by the Minister;

h. any person who, not having received a free pardon, has been convicted in any country, for murder, or any offence for which a sentence of imprisonment has been passed for any term, and who by reason of the circumstances connected with the offence is declared by the Minister to be an undesirable immigrant; except that this paragraph shall not apply to offences of a political character not involving moral turpitude;

i. any person who is a subject or citizen of any country with which Uganda is at war;

j. the children, if under eighteen years of age and dependants of a prohibited immigrant, and any other dependent of a prohibited immigrant; and

k. any person convicted of any offence under this Act.

87. A good faith and plain reading of the aforesaid Section shows that, from (a) through (k), for any person to be declared a prohibited immigrant under any of the twelve categories, there is a formal technical process by which it is ascertained that certain conditions exist and, once ascertained, then the decision to declare him such prohibited immigrant or not is made.

88. Secondly, while a person can be declared a prohibited immigrant under one or more clearly ascertained categories, our reading of the Section indicates that it would be impossible for a person to be declared a prohibited immigrant pursuant to the whole blanket Section 52. From the foregoing, it would seem to us that the Applicant could not have possibly been declared a prohibited immigrant under the whole of Section 52, without reference to any of the twelve categories.

89. At the hearing Counsel were asked what part of Section 52 the Applicant offended for him to be declared a prohibited

immigrant. Ms Ijang replied that it was Section 52(d). When she was told that the Notice to Convey Prohibited Immigrant contained no reference to Section 52, she shifted to Section 66(4).

At that point, Ms Nshemereirwe came to her colleague's aid and told the Court that they were relying on, and we should, as well, on the affidavit evidence of the Principal Immigration Officer, specifically the averment that under Section 52, Immigration Officers were under no obligation to give reasons.

90. Our consideration of this evidence and submissions posed a number of problems. In the first place this was now a court of law, not an immigration desk. While it may be that the immigration officials believed, albeit mistakenly, that they were under no obligation to give the Applicant reasons for denying him entry, we are convinced that, as an administrative authority, at an international airport, in this day and age, they had an obligation, to have a record of, or, at the very least, to know those reasons and, consequently, we would have expected them to disclose them in the Court. The law, this time, put them under obligation to disclose. The Rules of this Court permit the conduct of proceedings in camera, for sufficient cause. In spite of demands and prodding, Counsel did not disclose any reasons. We formed the opinion that there were none.

91. Secondly, much as we perused and combed through Section 52, (and this is why we reproduced it verbatim) we did not find any provision that empowers Immigration Officers in Uganda not to give reasons to persons whom they deem to be prohibited immigrants and/or deny entry into the country. We found no provision that prohibits them from doing so or penalises them for doing so. On the contrary, we found that the Section shows that none of the processes leading up to a decision that one is or is not a prohibited immigrant under any of the categories, can be concluded without informing the immigrant of the reasons and hearing him in his defence or in explanation.

92. Thirdly, even if that power existed under Section 52, the Immigration authorities knew or ought to have known that by Uganda's accession to and domestication of the Treaty and Protocol, that power would be strictly qualified and limited by Articles 104 and 7(2) of the Treaty and 7 and 54(2) of the Protocol. In other words, they were duty bound to treat the Applicant in accordance with those provisions, and not to do so amounted to violation of his rights and Uganda's obligations there under.

93. Finally, in spite of paying close attention to the Respondent's evidence and submissions, we were unable to ascertain whether the Applicant was ever declared a prohibited immigrant, by what procedure and at what point. The only document that was issued was the Notice to Return or Convey Prohibited Immigrant. It was issued under Section 66(4) of the Citizenship and Immigration Control Act. The Section provides as under:

"Where a prohibited immigrant enters Uganda from a ship or vehicle, whether or not with knowledge of the owner, agent or person in charge of it, the agent or person in charge commits an offence and is liable on conviction, to a fine not exceeding one hundred currency points; and provision shall be made by the owner, agent or person in charge, as the case may be, to the satisfaction of an immigration officer for the conveyance out of Uganda of the prohibited immigrant".

The Notice was issued to Kenya Airways, not to the Applicant.

94. The Section penalises the owner or agent of a ship or vessel that brings a prohibited immigrant into Uganda. We were not told whether the Applicant could have been a prohibited immigrant before starting his journey to Uganda or he was declared a prohibited immigrant on arrival.

All we could see was Kenya Airways being condemned to removal, from Uganda, of a prohibited immigrant they had brought into the country but nowhere were we shown how, why, when, and by whom he was so declared. We were not shown whether the declaration was oral or it was documented. The Notice, in our view, was not just irregular, it was unknown to Ugandan law.

95. The foregoing leaves us with four conclusions: Firstly, that the Applicant was not a prohibited immigrant, under the law, because there is no evidence that he was declared so. Secondly, that Immigration Authorities merely labelled him a prohibited immigrant so as to deny him entry. Thirdly, that the Notice was issued in order to corner Kenya Airways into returning him to Kenya and, finally, that the Immigration Authorities resorted to kangaroo methods for want of a lawful procedure by which to swiftly return the Applicant to Kenya.

96. Paragraph 13 of the affidavit evidence of Charles Okello Cowards stated that Uganda's action to deny the Applicant entry was

lawful, bonafide, justifiable and in the security interests of the people of East Africa. We found this to be an important area to consider. Counsel for the Respondent, however, made it anything but easy for us. Beyond the averment we were told/shown nothing else. It would have been immensely helpful for the Court to hear and evaluate what security interests of the people of East Africa the immigration officials considered and how the Applicant's entry into Uganda would put those interests at risk or how his denial of entry did preserve or protect them. We were not told anything. We dismissed the averment as lacking in value.

97. Counsel for the Respondent, in submissions, asserted that the Court should consider the circumstances during the wind of terrorism (sic) and affirm the Ugandan position to deny the Applicant entry into Uganda. Counsel, however, trod carefully and avoided any direct allegation, from the bar, against the Applicant in relation to that wind of terrorism.

98. We find it pertinent to point out here that, at no point, throughout the Applicant's ordeal was such or any allegation of wrongdoing levelled against him. Again, without substantiation, we were of opinion that the assertion was of no ascertainable value. We think that if the Respondent had evidence of wrong doing against the Applicant he would have been prosecuted in Uganda. This Reference was another crucial opportunity to come clean. The documentary evidence he produced to show that he is an Advocate of the High Court of Kenya and also a human rights activist and, therefore, a law abiding citizen of a Partner State, were not challenged.

100. Curiously while the Principal Immigration Officer averred in his affidavit that the Applicant was denied entry in the security interest of East African citizens, the way they handled him pointed in the direction of an individual known to be harmless to the Region. Indeed, we wonder why a person known or suspected to be a risk to Regional security would, once found in one Partner State, not be arrested and charged but just be left to await the next flight to return him to another Partner State, and, once there, remain at large.

101. We entirely understand the terror attacks referred to and we condemn them in the strongest of terms. But even then, for Uganda to take out the consequences of that tense situation on the Applicant the minimum we would expect was evidence that he was a suspect or was in some way connected. Surprisingly the Respondent did not even attempt to allege anything against him in that regard.

102. From evaluation of the evidence, it does not seem to us that the Applicant was a threat or would have failed to explain his presence in or wish to enter Uganda, given the chance, but his fate was sealed the moment the Immigration authorities chose to interpret Section 52 as not obliging them to inform him of any reasons or to hear his side of the story.

Alleged Detention

103. The Applicant alleged that pursuant to his denial of entry, he was restrained, confined and detained in the offices of the Ugandan Immigration at Entebbe International Airport between 9.00 am and 3.00pm when he was deported back to Kenya via Jomo Kenyatta International Airport.

104. According to the Respondent's affidavit evidence, the Principal Immigration Officer avers that he knows that upon denial of entry into Uganda, the Applicant was handed over to Kenya Airways Limited with instructions to take him into their custody and ensure that he is removed from the non permissible area and put him on their next flight proceeding to Nairobi. The "Notice to Return or Convey Prohibited Immigrant" addressed to the Manager Kenya Airways stated, inter alia, that the Applicant had been denied entry in accordance with the law and the Manager was requested to take him into his custody and ensure that he is removed from the non-permissible area.

Black's Law Dictionary defines "detention" as, ***"the act or fact of holding a person in custody; confinement or compulsory delay."***

Custody is defined as the ***"the care and control of a thing or person for inspection, preservation or security".***

105. We have shown above that the "Notice to Convey or Remove Prohibited Immigrant", issued by the Principal Immigration Officer, which contained instructions that the Applicant be taken into custody, was illegal and unjustified. It is undeniable, that he was taken into custody, deprived of his liberty and was not a free man between 9am and 3pm.

106. We think that whether it was Kenya Airways which took him into custody as the Notice requested, or it was the Immigration officials who held him for some time and Kenya Airways the rest of the time, is not material. What we find material is that it was all done in execution of the illegal Notice of the Principal Immigration Officer. Without it, he would have been attending the meeting with Uganda's Chief Justice or remain a free man in Kampala. Consequently, our view is that once the illegal decision to declare the Applicant a prohibited immigrant was made and the Notice to remove him from Uganda was issued the rest of the actions were merely foregone conclusions.

107. What matters is that he was not a free man, and that his Treaty guaranteed freedom of movement within a Partner State was cut short as a result of the actions and decisions of the Partner State's immigration officials, which actions were illegal under the Treaty, the Protocol and national law. The act of pinning Kenya Airways with responsibility for bringing a prohibited immigrant into Uganda narrowed the Applicant's possibilities to one, namely, that he would remain under some custody until he boarded the next available Kenya Airways flight to Nairobi. The detention instruction was complete when the illegal Notice was issued, not when he was put into whichever custody that he was put.

108. Detention is indeed deprivation of liberty. When it is illegal it is not only an infringement of the freedom of movement, but also an act that undermines one's dignity. Furthermore, when a citizen of a Partner State is illegally detained in another Partner State, with no right to be informed why or to be heard in his defence, and the reasons cannot be disclosed, even in a court of law, it is not just a violation of the Treaty, it is indeed a threat to integration.

The High Court of Ireland, in a case where a woman had been denied entry into Ireland and detained for three days, had this to say:

It is a matter of profound regret that a perfectly innocent person who had every right to enter the State was instead refused entry and found herself obliged to spend the equivalent of almost three full days in custody. This must have been a humiliating and degrading experience for her- (***see Raducan & Anor -v- MJELR & Ors [2011] IEHC 224 at para 26),***

Return to Kenya

109. The foregoing analysis clearly shows that the Applicants' return to Kenya was unjustified, high-handed and was procured through unlawful means.

110. Our answer to the issue, therefore, is that the actions and decisions to declare the Applicant a prohibited immigrant, deny him entry into Uganda, detain him and return him to Kenya were illegal, unjustified, unlawful and inconsistent with transparency, accountability, rule of law; and universally accepted standards of human rights and, therefore, in violation of his rights and Uganda's obligations under Articles 6(d) and 7 (2) of the Treaty and Articles 7(2) and 54(2) of the Protocol.

Whether the actions of the Respondent were in conformity with Article 104 of the EAC Treaty and Article 7 (6) of the Common Market Protocol

111. For ease of reference, we shall reproduce the content of the relevant provisions of the Treaty and the Common Market Protocol in this Reference and analyse them systematically.

Article 104 of the Treaty provides that:

1. The Partner States agree to adopt measures to achieve the free movement of persons, labour and services and to ensure the enjoyment of the right of establishment and residence of their citizens within the Community.

2. For purposes of paragraph 1 of this Article, the Partner States agree to conclude a Protocol on the Free Movement of Persons, Labour, Services and Right of Establishment and Residence at a time to be determined by the Council.

Article 7 of the Common Market Protocol provides that:

i) The Partner States hereby guarantee the free movement of persons who are citizens of the other Partner States, within their territories.

ii) In accordance with paragraph 1, each Partner State shall ensure non"discrimination of the citizens of the other Partner States based on their nationalities by ensuring:

a) the entry of citizens of the other Partner States into the territory of the Partner State without a visa;

b) free movement of persons who are citizens of the other Partner States within the territory of the Partner State;

c) that the citizens of the other Partner States are allowed to stay in the territory of the Partner State; and

d) that the citizens of the other Partner States are allowed to exit the territory of the Partner State without restrictions.

3. The Partner States shall, in accordance with their national laws, guarantee the protection of the citizens of the other Partner States while in their territories.

4. The free movement of persons shall not exempt from prosecution or extradition, a national of a Partner State who commits a crime in another Partner State.

5. The free movement of persons shall be subject to limitations imposed by the host Partner State on grounds of public

policy, public security or public health.

6. A Partner State imposing a limitation under paragraph 5,

shall notify the other Partner States accordingly.

7. The Partner States shall effect reciprocal opening of border posts and keep the posts opened and manned for twenty four hours.

8. The movement of refugees within the Community shall be governed by the relevant international conventions.

9. The implementation of this Article shall be in accordance with the East African Community Common Market (Free Movement of Persons) Regulations, specified in Annex I to this Protocol.

112. We should recall for clarity of issues that the actions complained of are the denial of entry to the Applicant, being declared a prohibited immigrant, detention and return to Kenya. We have shown above that these actions were in violation of the freedom of movement of the Applicant which is among the foundational principles of the Common Market. We therefore do not hesitate to hold that the same actions are in violation of Article 104 of the Treaty.

113. As regards the question whether the actions of the Respondent were in violation of Article 7 (6), we also indicated earlier in this analysis that the provision created an obligation on a Partner State imposing a limitation of the freedom of movement of persons under Article 7(5) of the Protocol to notify the other Partner States accordingly.

114. The Respondent argued that the Applicant had a duty to prove that Uganda did not comply with that provision, since he is the party who made the allegation. With respect, we think otherwise. Article 7(6) is a Protocol obligation upon a Partner State imposing a limitation to inform the other Partner States. It is also a Treaty obligation under Article 8(3) (c). It is not dependent on whether there is litigation or not. A notification is, in our view, a notice meant for the public in the Partner States to be known and be complied with by all. With respect, therefore, we think that the burden was on the Respondent to prove that Uganda had or had not made the notification. It would otherwise be an unbearable burden on the Applicant to do so. The Respondent did not discharge this burden.

115. With or without notification, however, we are still of the view that the Applicant's case had to be evaluated on its own merit. A Partner State, before imposing a limitation on an individual would have to satisfy itself that the measure is merited in each particular

case. If, for example the Applicant, was slapped with a limitation because he was a threat to the security interest of the East African people, it was incumbent on the Respondent to satisfy themselves that it was merited, and where he challenged the legality of the limitation in Court, the Respondent had a duty to prove in Court that the Applicant indeed constituted a real threat to regional security.

116. In stating so, we are fortified by the European Court of Justice, which, while interpreting a similar provision, in ***Commission of the European Communities v Kingdom of Spain, Case – 503/03, held, inter alia, that; the Spanish authorities were not justified in refusing entry to the persons concerned without having first verified whether their presence constituted a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.***

We find, from the foregoing, that the actions of the Respondent were not in conformity with Article 104 of the Treaty and Article 7(6) of the Protocol.

Whether the Provisions of section 52 of the Uganda Citizenship and Immigration Act are inconsistent and in violation of Articles 6 (d), 7 (2) and 104 of the Treaty and Article 7 of the Protocol

As Section 52 of the Citizenship and Immigration Control Act 1999 (the Act) is reproduced verbatim and discussed at length elsewhere in this judgment, we do not find it necessary to reproduce it here.

117. The Applicant argued that the Section is in violation because, one, it does not provide for the right of due process before a person is declared a prohibited immigrant. Secondly, that it does not provide for a distinction in treatment between EAC citizens and other immigrants. Thirdly that it does not recognize that limitations can only be imposed pursuant to the Protocol; and finally, that it does not provide for the duty to inform other Partner States when a Partner State imposes limitations.

118. The Respondent, on the other hand, argued that there is no uniform EAC law on the movement of persons and that it is an area regulated in accordance with national law.

119. We have shown above that we disagree with the assertion that Section 52 does not provide for the right to due process. We reiterate our position. We have shown, as well, that Community Law in this area is very much part of the national law in Uganda. The argument of the Respondent that there is no East African Community uniform law on the free movement of persons is, therefore, erroneous. Indeed, Article 7 (9) of the Common Market Protocol provides that the implementation of the freedom of movement of persons shall be in accordance with the Freedom of Movement of Persons Regulations. We have observed earlier that Regulation 2 provides that the implementation process of Article 7 of the Protocol shall *be transparent, accountable, fair, predictable and consistent with the provisions of the Protocol.*

120. While we, respectfully, agree with the Applicant's critique of Section 52, we are of the opinion that the provisions cited no longer have force of law regarding citizens of partner states and are, therefore, not inconsistent with Treaty provisions.

121. We have found and held, in Issues ii and iv, that upon enactment of the Treaty and, subsequently, the Protocol, they became part of national law and law applicable in Uganda as of their dates of entry into force. We reiterated, as well, our position that The Republic of Uganda is bound by the precedence of community laws over national ones in matters pertaining to the implementation of the Treaty.

We think, therefore, that the obligations voluntarily entered into by the Republic of Uganda, and the rights acquired by the citizens of the Partner States, under the Treaty and Protocol, in respect of the movement of citizens of the Partner States, within Uganda, carried with them a permanent limitation against which a provision of existing or subsequent national law incompatible with the Treaty and Protocol, by the Republic of Uganda, cannot stand.

122. The upshot of this, in our view, is that from the dates of entry into force of the Treaty and the Protocol, in Uganda, Section 52 would have to be read together with, and give precedence to, the relevant Treaty and Protocol provisions, on matters pertaining to the determination of whether a citizen of a Partner State is a prohibited immigrant or not. Section 52 is still applicable as it is where citizens of other nations, except the Partner States, are concerned. In matters pertaining to citizens of the Partner States, however, it would result in an infringement of the Treaty. In this Reference it is clear that if the Section had been read together with the relevant Treaty and Protocol provisions, as shown above, the Applicant would have been treated like a citizen of a Partner State but we got

the impression that a procedure, unknown to any law, could have been applied to the Applicant and the immigration officials were conveniently stretching the law to fit.

123. In view of the foregoing, we find and hold that the provisions of Section 52 are neither inconsistent with, nor in violation of Articles 6(d), 7(2) and 104 of the Treaty and Article 7 of the Protocol because, on matters pertaining to citizens of Partner States, any offending provisions of the Section were rendered inoperative as of the respective dates of entry into force of the Treaty and Protocol as applicable law in Uganda. (Emphasis supplied)

Costs

124. We are alive to the provisions of Rule 111 of the Rules of this Court which provides that **"costs in any proceedings shall follow the event unless the Court shall, for good reasons, otherwise order".**

125. We believe that in the filing and prosecution of this Reference the Applicant's objective was to highlight, contest and cause resolution to an issue of regional concern rather than to seek material restitution, for his six hour ordeal, from the Republic of Uganda. We think he has achieved that.

126. It is our belief also that the physical and emotional distress he was subjected to, while tucked away and chilling unnecessarily at Entebbe International Airport, stung the human rights activist in him into seeking to prevent it from happening to another citizen of a Partner State. We would hope he has achieved this or, at any rate, made his contribution to its achievement.

127. Finally, we have no doubt that the issues raised and determined in this Reference will enrich and benefit Community jurisprudence, courtesy of the Applicant.

128. In view of the foregoing, we find that this Reference qualifies as a public interest and a fitting one where each party should bear their costs.

Whether the Applicant is entitled to the prayers sought.

129. In light of the above considerations and findings, prayers i, ii, iii, and iv are granted. Prayer v is not granted.

Conclusion

130. We thank all Counsel for their research which enriched the debate and helped us in the determination of this Reference. We make the following final orders:

i) The Reference is properly the Court.

ii) The Sovereignty of the Republic of Uganda to deny entry to unwanted persons who are citizens of the Partner States is not taken away by the Treaty and the Protocol but, in denying entry to such persons, the Republic of Uganda is legally bound to ensure compliance with the requirements of the relevant provisions of the Treaty and the Protocol. Sovereignty cannot act as a defence or justification for non compliance, and neither can it be a restraint or impediment to compliance.

ii) The denial of entry into Uganda of the Applicant, a citizen of a Partner State, without according him the due process of law was illegal, unlawful and a breach of Uganda's obligations under Articles 6(d) and 7 (2) of the Treaty.

iv) The actions of denial of entry, detention, removal and return of the Applicant, a citizen of a Partner State, to the Republic of Kenya, a Partner State, were illegal, unlawful and in violation of his rights under Articles 104 of the Treaty and 7 of the Common Market Protocol.

v) On matters pertaining to citizens of the Partner States, any provisions of Section 52 of Uganda's Citizenship and Immigration Control Act formerly inconsistent with provisions of the Treaty and the Protocol were rendered inoperative and have no force of law, as of the respective dates of entry into force of the Treaty and the Protocol as law applicable in the Republic of Uganda.

vi) Each party shall bear its costs.

It is so ordered.

DATED, DELIVERED AND SIGNED AT ARUSHA THIS 17th DAY OF May 2013

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JOHNSTON BUSINGYE

PRINCIPAL JUDGE

…..……

JOHN MKWAWA

JUDGE

……..……

ISAAC LENAOLA

JUDGE