**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURT**

**H.C. MISC CIVIL APPLI 1546 OF 2004 (O.S.)**

**IN THE MATTER OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF AN APPLICATION UNDER SECTION 84 OF THE CONSTITUTION OF KENYA FOR ENFORCEMENT FO FUNDAMENTAL RIGHTS AND FREEDOMS**

**BETWEEN**

**ADEL MOHAMED ABDULKADER AL-DAHAS ……..…..... APPLICANT**

**V E R S U S**

**ATTORNEY GENERAL ……1ST RESPONDENT**

**PRINCIPAL IMMIGRATION OFFICER …….…….2ND RESPONDENT**

**MINISTER FOR STATE FOR PROVINCIAL ADMINISTRATION & INTERNAL**

**SECURITY……..…….3RD RESPONDENT**

**AND**

**UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR) …….INTERESTED PARTY**

**J U D G E M E N T**

## THE APPLICATION

By an Application brought by way of an Originating Summons pursuant to the provisions of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2001, (now revoked by the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of Individual)Practice and Procedure Rules 2006 (L.N. No 6 oft 2006), one Adel Mohammed Abdukader AL-Dahas (the Applicant) sought the declarations following against the Hon. the Attorney-General, (1st Respondent), the Principal Immigration Officer (2nd Respondent), and the Minister of State for Provincial Administration and National Security (3rd Respondent). The United Nations High Commission for Refugees (UNCHR) was joined as an Interested

Party. The declarations sought are namely-

***(a) A declaration that the Declaration of the Minister of State dated 25th May, 2001 declaring that the entry and presence of the Applicant (in Kenya) is contrary to the national interests (of Kenya) is unconstitutional to the extent that it is not based on any facts at all.***

***(b) A declaration that the Declaration by the Minister of State dated 25th May, 2001, declaring that the Applicant be immediately removed from Kenya to his country of origin IRAQ is in breach of the United Nations Convention relating to the Status of Refugees.***

***(c) A Declaration that the Universal Declaration of Human rights (UDHR) 1948 bars the Respondents from continued infringement of the rights of the Applicant.***

***(d) A Declaration to the extent that the Applicant was removed from Kenya on 6/10/2001 and remained outside Kenya until 8/10/2001 by the Minister's declaration of 21st May, 2001 ceased to have effect.***

***(e) A Declaration that the continued detention of the Applicant at Kileleswa Police Station or any other Police Station or prison is unconstitutional to the extent that there is no lawful order for his continued detention,***

*(f)* ***A Declaration that the Respondents forthwith release the Applicant to the Interested Party***

*and*

***(g) An order that the Applicant's costs of the Application be borne by the Respondents.***

The Originating Summons was supported by the Affidavit of the Applicant sworn on 10th November, 2001 and filed with the Application on 11th November, 2001, and the following grounds-

***(a) the Ministerial declaration made on 25th May, 2001 under Section 3 of the Immigration Act, (Cap. 172, Laws of Kenya) is unconstitutional,***

***(b) the Ministerial Declaration made on 25th May, 2001 under Section 8 of the Immigration Act (Cap. 172) has been spent and has ceased to have any effect,***

***(c) the Applicant has been unlawfully detained in police custody for an inordinately long period without charge,***

***(d) that the Applicant has already been accorded refugee status by the Interested Party herein and ought to be in their custody,***

***(e) save for being a refugee in this country, the Applicant has not committed any offence,***

*(f)* ***the incarceration of the Applicant in the circumstances is a flagrant violation of his fundamental rights enshrined in the Constitution of Kenya, and in the numerous international human rights instruments to which Kenya is a party particularly the*** *United Nations Convention relating to the Status of Refugees.*

In addition to the grounds and the Supporting Affidavit of the Applicant, the Applicant's Counsel Mr. Otieno, instructed by the firm of Swaleh Kanyeki & Co. Advocates, also filed Skeleton Arguments dated 31st May, 2005, together also with decided cases some of which I shall refer to in due course.

On their part, the Respondents through the Attorney-General filed a Replying Affidavit sworn on 24th

March, 2005 by one ***Evans Kinyanjui***, an Immigration Officer attached to the Department of Immigration headquarters at Nairobi. The Attorney-General also prepared and filed on 30th October, 2006, skeleton Arguments dated 11th October, 2006.

When this matter came for hearing before me on 20th November, 2006, the Applicant was represented by Mr. Otieno, while the Respondents were all represented by Mr. Kaka, State Counsel.

THE APPLICANT'S CASE

The Applicant's case is that he is a refugee, and he is entitled to all the fundamental rights and freedoms as envisaged in the Universal Declaration of Human Rights, (1985), the ***International Covenant on Civil and Political Rights, the United Nations Charter, the 1957 Convention relating to the Status of Refugees and the 1969 OAU Convention on Specific Aspects of Refugee Problems in Africa***, and more specifically as those rights are enshrined under Chapter V- ***Fundamental Rights and Freedoms of the Individual of the Kenya Constitution.*** Mr. Otieno argued that detention of the Applicant after unsuccessful efforts to deport him were a breach of the Applicant's fundamental rights under the said Chapter of the Constitution, and that the Court should so find, and grant the several declarations sought as outlined above.

THE RESPONDENT'S CASE

The Respondent's case was, as expected quite to the opposite, Mr. Kaka learned State Counsel, argued that in essence, the Applicant's Counsel's case was one seeking orders of ***Habeas corpus*** – production of the Applicant and his release from police custody. Although, Mr. Otieno the Applicant's counsel in reply, protested against this argument, in essence this was the Applicant's Counsel's Case, the release of the Applicant to the Interested Party, the United Nations High Commission for Refugees, Nairobi Office.

**ANALYSIS OF THE APPLICATION**

I will consider this application at two levels. Firstly in its narrow aspect, namely on the declarations sought that Sections 3 and 8 of the Immigration Act, are in light of Sections 3, 47, and 123 of the Constitution inconsistent with the Constitution and are to the extent of such inconsistency void.

The Second level of consideration of the application is what Mr. Otieno, learned Counsel for the Applicant argued in his submissions to the court, namely that the Application was based upon the provisions of Section 84 (1) of the Constitution which empowers any person who alleges that any fundamental rights and freedoms of the individual as enshrined in Sections 70-83 (inclusive) of the Constitution have been contravened or are threatened with contravention in relation to him, or in respect of a detained person, to file an application in the High Court and seek a redress and the Court has wide discretion under Section 84 (2) of the Constitution. Where appropriate the court has exercised its wide discretion and granted damages. Such was the case in ***MARETE -VS- ATTORNEY-GENERAL [1987] K.L.R. 696*** where Shields J, awarded the Applicant his lost wages, as well as his capitalized pension, and also general damages. Such was also the case in ***DOMINIC ARONY AMOLO –VS- ATTORNEY-GENERAL (H.C. Misc. Application No. 494 of 2003) (unreported)*** where the 3 judge bench awarded the Applicant damages, costs and interest.

These cases, as I shall presently show in discussing the first, and what, I refer to as the narrow aspect of this Application have no recourse to the Applicant's case. The Applicant does not seek any such redress of damages for his incarceration in the Police custody. The Applicant's contention is merely that his continued detention is unconstitutional in the sense that it is contrary to the provisions of Section 70 (a) of the Constitution. Although the application was vague and did not, contrary, to the precedent in these matters, that a party who alleges contravention of his fundamental rights or freedoms must state which right had been contravened, and the manner of such contravention, Section 70 (a) provides as follows-

***70. Whereas every person in Kenya is entitled to the fundamental rights and freedoms of the***

***individual, that is to say, the right whatever his race, tribe, place of origin or residence or other local connection, political opinions, colour creed or sex, but subject to the respect for the rights and freedoms of others and for the public interest to each and all of the following namely-***

*(a) life, liberty, security of the person and the protection of the law,*

(b) ……

(c) ……

***the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."***

In this context the only issue to determine is whether the continued detention of the Applicant at the Kileleswa Police Station after aborted efforts to deport him, is contrary to the said provisions of Section 70 (a) of the Constitution.

ANSWER TO THE NARROW ISSUE

To answer this wider issue I will first revert to the narrow issue as set out above, and in the application, whether sections 3 and 8 of the Immigration Act, are contrary to the provisions of the Constitution and therefore void being contrary to Section 3 of the Constitution which declares the supremacy of the Constitution and voids any other statute or law to the extent of the inconsistency. Section 3 (1) (a) –(l) of the Immigration Act sets out twelve incidences or descriptions of a prohibited immigrant. Section 3(1) (f), (h) and (k) are the most relevant in the case of the Applicant. Under those subsections, a prohibited immigrant means a person who is not a citizen of Kenya and who is –

***(f) a person who in consequence of information***

***received from any government or from any other source considered by the Minister to be reliable, is considered by the Minister to be an undesirable immigrant;***

***(h) a person who, upon entering Kenya or seeking to enter Kenya, fails to produce a valid passport to an immigration officer on demand or within such time as that officer may allow,***

***(k) a person in respect of whom there is in force an order made or deemed to be made under Section 8 directing that such person shall be removed from Kenya and remain out of Kenya"***

Although Section 3(3) of the Immigration Act confers upon an immigration officer power to issue a prohibited immigrant's pass to a prohibited immigrant, subsection 2 of the said Section prescribes that the entry and presence in Kenya of a prohibited immigrant is unlawful, and permission shall be refused to a person who is a prohibited immigrant whether or not he is in possession of any document which, were it not for this provision would entitle him to enter Kenya.

Section 8 (1) of the Immigration Act empowers the Minister to remove persons unlawfully in Kenya in these terms-

8(1) ***The Minister may, by order in writing, direct That any person whose presence in Kenya was, immediately before the making of that order, unlawful under this Act, or in respect of whom a recommendation has been made to him under Section 26 A of the Penal Code, shall be removed from and remain out of Kenya either indefinitely or for such period as may be prescribed in the order.***

(2) a person to whom an order made under this section relates shall-

***(a)*** be removed to the place whence he came or ***with the approval of the Minister, to a place in the country to which he belongs, or to any place to which he consents to be removed if the Government of that place consents to receive him;***

***(b) if the Minister so directs,, be kept in prison or in police custody until his departure from Kenya, and while so kept shall be deemed to be in lawful custody;***

***(c) any order made or directions given under this section may at any time be varied or revoked by the Minister by further order in writing;***

***(d) until a decision has been made under this section (****for the removal of any person unlawfully in Kenya)* ***the Court may order the detention of such person in prison or police custody for a period not exceeding fourteen days."***

Mr. Otieno, learned Counsel for the Applicant argued passionately in both his submissions and skeletal written arguments that the Application herein was brought against the backdrop of human rights, the spirit of upholding our own Constitution as outlined in Section 70 thereof, the protection of fundamental rights, and freedoms of the individual and which embodies all the tenets and/or characteristics of human rights, that is, universality, non-discrimination, inalienability, rights are equal and indivisible, internationally guaranteed, legally protected, protects both individuals and obliges state and state actors as well as non-state actors.

**OF HUMAN RIGHTS INSTRUMENTS IN INTERNATIONAL LAW**

I have already made reference to the relevant provisions of the Constitution and the law of Kenya. I will now refer to the relevant instruments in international law on human rights and in particular in relation to the protection of refugees.

The Republic of Kenya ***(Kenya***) is a player in the comity of nations, Kenya is an active member of the United Nations Organization and being a member thereof is also a member of its specialized agencies. By being a former Colony of Britain, Kenya is bound by the treaties and conventions made by Britain as a colonial power for itself and its erstwhile ***Colonies, Dominions and Overseas Territories.*** Such instruments include the Charter of the United Nations itself established as a consequence of the United Nations Conference on International Organisation held at San Francisco and was brought into force on 26th June, 1945 and the ***Statutes of the International Court of Justice, the 1948 Universal Declaration of Human Rights*** (described in human rights field as the mother of all human rights documents), the ***1951 Convention Relating to the Status of Refugees.***

Kenya is, after Independence from Britain, a signatory to the ***1967 Optional Protocol on the Status of Refugees,*** a member of the ***Charter of the Organisation of African Unity*** *and now the African Union and also a signatory to* ***the 1969 OAU Convention on Specific Problems of Refugees in Africa.***

These conventions, treaties and protocols all have one theme, the promotion and protection of human rights and with particular reference to the status of persons who for reasons of race, nationality, religion, colour, sex, language, political or other opinion national, or social origin, property, birth or other status are forced or obliged by circumstances to flee their homes and countries of origin. I will take a few examples.

1. ***Universal Declaration of Human Rights – (1948)***

"***Preamble***

The General Assembly.

*Proclaims* ***- this universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping***

***this Declaration constantly in mind ,shall strive by teaching and education to promote respect of those rights and freedoms by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and of territories under their jurisdiction."***

After the said preamble, articles 1, 2, 3, and 9 provide-

*Article 1*

***All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.***

*Article 2*

***Everyone is entitled to all rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex, language, political or social origin, property, birth or other status.***

***Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non self-governing or under any other limitation of sovereignty.***

*Article 3*

***Every one has the right to life, liberty and security of the person.***

*Article 9*

***None shall be subjected to arbitrary arrest detention or exile.***

2. **INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS.**

*Article 2*

Reiterates the provisions of the Universal Declaration of Human Rights above, as to non-discrimination, of any person within a state's territory on any ground, and

*Article 3 (a)*-

Each State Party to the present Covenant undertakes –

***(a) To ensure that any person whose rights or freedoms are herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;***

3. CONVENTION RELATING TO THE STATUS OF REFUGEES

This Convention was adopted on 28th July, 1951 by the ***UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*** convened under the General Assembly resolution 429 (V) of 14th December, 1950 and entered into force on 22nd April 1954 in accordance with Article 43 thereof. For the purposes of this judgement the relevant provisions are Articles 3, (Non-discrimination), 31 (1) (2) (regarding refugees unlawfully in the country of refuge), 32 (Expulsion) and 33 (Prohibition of expulsion or return ("***refoulement***"), which I set out in full –

(1) Article 3 …. Non-discrimination-

"***The contracting states shall apply the provisions of this Convention to refugees without***

***discrimination as to race, religion or country of origin."***

**(2) Article 31 – Refugees unlawfully in the Country**

(1) The contracting State shall not impose penalties, on account of their illegal entry or pressure, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1 enter or are present in their territory without authorization, ***provided they present themselves without delay to the authorities and show good cause of their illegal entry or presence; (****underlining mine****)***

(2) The contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission to another country. The Contracting State shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

***Article 32 - Expulsion***

(1) The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

(2) expulsion of such a refugee shall only be in pursuance of a decision reached in accordance with due process of law and the refugee is allowed to give evidence to clear himself and to appeal, and to be represented for the purpose of such due process.

(3) The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. ***The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary*** (*underlining mine)*

**Article 33 – Prohibition of Expulsion or return** *("refoulement")*

(1) No Contracting States shall expel or return **(*"refouler"*)** a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

(2) The benefit of the present provision may not however be claimed by a refugee whom there are reasonable grounds for regarding as a ***danger to the security of the country in which he is or who, having been convicted by a final judgment of a particular serious crime constitutes a danger to the community of that country."(****underlining mine)*

ANALYSIS OF THE LAW AND FACTS

Those are the relevant provisions of the Constitution, the statute law of Kenya as well as the applicable articles of the relevant UN, and OAU international conventions. The facts are not in dispute. They are set out in both the Supporting Affidavit of the Applicant which is somewhat skewed to the Applicants situation, but more succinctly in the Replying Affidavit of Evans Kinyanjui an Immigration Officer, a person charged with both the administration or implementation of the Immigration Act under the over all direction and supervision of the Principal Immigration Officer under the provisions of the Immigration Act, with specific statutory functions under Sections 3 and 8 of the said Act, being reserved for the Minister responsible for matters relating to immigration. These are the facts-

***(1) the Applicant did not arrive in Kenya as a refugee or an asylum seeker. He slipped into Kenya ad failed to report to any immigration authorities of Kenya, or seek asylum, instead approached the Interested Party, and sought to be accorded refugee status on the grounds that he was being persecuted in Iraq and (****Paragraph 5 – (6).*

(2) ***Between the 13-12 1999 and the 21-04-2001 a period of approximately 678 days, the***

***Applicant went underground, until he was traced following receipt of information by the Immigration authorities to a Madrasa School in Eastleigh a suburb of Nairobi on 21-04-2001*** (*paragraph 7).*

(3) ***Upon the Applicant's arrest the Applicant was found to be in possession of a Passport No. 100604262, originating from Denmark issued in the name of one Najjir Sharbebi Essa, not the Applicant,*** *(Paragraph (8).*

(4) **Subsequent inquiries by the Kenyan authorities with the Royal Danish Embassy confirmed that the said passport had been lost in Denmark and that as such the Applicant had in his possession a forged documen**t (*Paragraph 9);*

(5) ***Further subsequent investigations carried out by the Kenyan Police and other security agencies established that the Applicant together with nine (9) other Iraq nationals had visited Somalia for reasons unknown and not referred to in the Applicant's supporting Affidavit, and the nine subsequently entered Kenya singly and illegally;*** *(paragraph 10),*

(6) following the Applicant's arrest, he was charged with the following offences-

**(a) being in possession of a forged document,**

**(b) being unlawfully present in Kenya;**

**(c) failing to register as an alien;**

**(d) failing to report his entry into Kenya to the nearest Immigration Office;**

**(7) The Applicant pleaded guilty to the said offences, and was sentenced to four (4) months imprisonment or a fine of Kshs.8,000/= which the Applicant paid (paragraph 7 of the Applicant's Supporting Affidavit)**

**(8) the Applicant was placed under police custody pending the carrying out of the repatriation order (paragraph 9, 11, 12, & 13 of the Replying Affidavit of Evans Kinyanjui),**

**(9) The Respondent's efforts to repatriate the Applicant to his country of origin Iraq, were unsuccessful and the Applicant remained in Police custody.**

Those being the facts, the narrow and simple issue is whether the acts of the Respondents were contrary to the Constitution. The answer to this issue must clearly be in the negative. The facts and the relevant law clearly point to that conclusion.

The Applicant was a run-away fugitive from his country Iraq, and the reasons whether he was fleeing from persecution for his political views or that he was a criminal fugitive are really irrelevant for the purpose of this conclusion. The theory and practice in international law requires that a person fleeing his own country for whatever reason to another or foreign, country will at the first instance upon entering that other country with or without proper entry papers (passport with or without Visa, or appropriate endorsement) present himself to the immigration or security agents of that state. For instance a soldier will show and surrender his weapon or firearm. A civilian will show his identity. The host or receiving country's authorities will usually keep such person under some protective custody or quarantine pending the determination of such person's status.

In notorious cases such as the erstwhile failed state of Somalia, and the war ravaged Southern Sudan, the Kenya authorities would send such person or persons to the already established Refugee Camps, pending the processing of applications for refugee status, and finding them countries willing to take such

persons.

The Applicant's case is different from that scenario. The Applicant slipped into Kenya, and failed to report his presence in Kenya to any of the Kenyan authorities responsible for refugees, or political asylum seekers. He swears that he arrived in Kenya on 13-12-1999, that he presented himself to the UN Refugee Agency. The Agency did not report his presence in Kenya to any of the Kenyan authorities. The Applicant did not report to any of the Kenya authorities responsible for immigration matters or registration of aliens. For the period 13-12-1999 to 14-09-2001 (when the Applicant was granted refugee status by the U.N. Refugee Agency), that is more than 2 ½ years later, the Applicant evaded and avoided the Kenyan authorities, until he was traced to an Islamic Madrasa School in the Eastleigh Suburbs of Nairobi. Now to my mind, that is not a model refugee whatever the Applicant thought of his host country as a possible host for him as an asylum seeker.

Once found, and charged, the Applicant readily pleaded guilty to the charges, he was sentenced to imprisonment of four months, or a fine in lieu of such imprisonment. Having opted to pay the fine, he was not a free man. The other order of Court was for his repatriation, to his country of origin. That order coupled with the Minister's declarations under Sections 3 and 8 of the Immigration Act that the Applicant was a prohibited immigrant could not be carried out. There were several reasons for this hitch. Iraq the Applicant's country of origin was suffering under the sanctions imposed by the United Nations Security Council. There were no direct flights between Kenya and that country. Worse still, the Applicant had conveniently no vital travel documents, and for which the Respondent had to arrange. The Applicant was denied transit through the United Arab Emirates, on 8th October, 2001, and further attempts to remove the Applicant through the Hashemite Kingdom of Jordan in the year 2004 were also not successful.

The Applicant's Counsel's argument that once attempts to repatriate the Applicant through the United Arab Emirates had failed, and that Applicant was returned to Kenya, then the Minister's order for removal lapsed, cannot be correct. I think it needs no interpretation of law to say that an order for removal of a prohibited immigrant is only completed when a prohibited immigrant has either been handed over to a third country which has agreed to take him as a refugee, or he has been placed under the authorities of his country of origin. This has not been done, or has not happened in the case of the Applicant. In making the orders for repatriation of the Applicant, the Minister was acting not merely pursuant to the provisions of Section 3 and 8 of the Immigration but also of the Court orders of May, 2001 made pursuant to Section 26 a of the Penal Code which says-

"26A***. Where a person who is not a citizen of Kenya is convicted of an offence punishable with imprisonment, the Court by which he is convicted or any court to which he is committed for sentence or any court to which his case is brought by way of appeal against conviction or sentence, may recommend to the Minister responsible for immigration that he make an order that that person be removed from and remain out of Kenya either immediately or on completion of any sentence of imprisonment imposed."***

In this case the Applicant having pleaded guilty, and having paid the fine in lieu of the full term of four months, there was hardly any question for an appeal, and there was also no application for stay of the order of repatriation. The effect of this is that both the orders of court, and the Minister's order for removal of the Applicant from Kenya remain valid, and are enforceable in accordance with their terms.

**THE ANSWER TO THE NARROW CONSTITUTIONAL QUESTION**

The answer to the narrow question whether or not Sections 3 and 8 of the Immigration Act are inconsistent, with Section 3 of the Constitution must as stated above be in the negative. The answer further whether the Applicant's fundamental rights and freedoms of the individual have been contravened must also be in the negative as I shall presently show on the wider issue of human rights and the U.N. Convention relating to the Status of Refugees.

**OF HUMAN RIGHTS AND CONVENTIONS ON REFUGEES**

Commencing perhaps within the Continent of Africa, the OAU (or now, the Africa Union) ***Convention*** governing specific ***Aspects of Refugees Problems*** in Africa is by Article 8 thereof declared to be an effective regional complement in Africa of the ***1951, United Nations Convention on the Status of Refugees***. Article 8 enjoins African States to cooperate with the office of the United Nations High Commission for Refugees. Article 5 allows voluntary repatriation of a refugee, but, no refugee may be repatriated to his country of origin against his will.

I have already alluded to the prime theme of these conventions, namely the universal promotion or upholding, and protection of human rights across the globe wherever human beings may be found irrespective of their stage of development or in particular of persons seeking asylum in foreign countries. The other equally important and complementary theme is the public interest and the need to maintain security and public order in the host state or state receiving asylum seekers whether on ground of religious persecution, their race (as happened in the infamous mass expulsion of citizens of Asian Origin by Idd Amin in Uganda in the 1970s), nationality, social group or political opinion.

Whereas the ***United Nations Convention Relating to the Status of Refugees*** and indeed the ***Convention Governing Specific Aspects of Refugee's Problems in Africa*** impose stringent obligations upon states not turn away asylum seekers even those who enter and remain in the state illegally, the conventions equally impose strict positive obligations upon an asylum seeker who is present in the country unlawfully, that is without the authorization of the relevant authorities of such country or more specifically who fails to present himself without delay to the authorities and show good cause (for his or their unlawful entry into the country, and their failure to present themselves, on himself to such authorities. (***Article 31 (1) of the United Nations Convention Relating to the Status of Refugees***).

Now, in my book, any person not being a citizen of Kenya entering Kenya, without the necessary authorization, or in terms of the Immigration Act, without a valid visa or other permit or pass, and who fails to regularize his stay or presence in Kenya at the earliest possible opportunity does not qualify to be a refugee, that is, a person deprived of protection of his country of origin on account of persecution for reasons of race, religion, nationality, because of internal upheaval or break down of law and order, or aggression and occupation by foreign powers, is unable to obtain such protection, and is for those reasons unwilling to return to his country of origin.

In my opinion, any person purporting to be a refugee, and who enters Kenya unlawfully, and fails to present himself to the relevant authorities of Kenya at the earliest authority does not qualify to be a refugee. Such a person is in my judgement a fugitive from his country of origin, and from the law of Kenya, and indeed the ***United Nations Convention Relating to the Status of Refugees*** and if he were a person from a member country of the former ***Organization of African Unity,*** and now the Africa Union, in contravention of the ***OAU Convention Governing the Specific Aspects of Refugees Problems in Africa.*** He is or they are, prohibited immigrants under Section 3 (1) (h) of the Immigration Act, and is liable, on conviction to be repatriated to the country of origin under Section 26A of the Penal Code.

Speaking therefore from the point of view of the Constitution, these are persons whose rights have been limited and circumscribed in terms of Section 70 (a) of the Constitution, and subjected to the rights of others and to the public interest. The Public interest includes the right to life in a secure environment without fear of the loss of one's life or property by the ordinary citizens of the host or receiving state. The government of the host or receiving state whose primary duty is the security of its citizens and their property, is bound to treat with extra caution any asylum seeker who sneaks into its country unannounced and plays a hide and seek game with such country's security personnel until he is caught and prosecuted, and ordered to be repatriated.

In that regard I would endorse and adopt the speech of Lord Pearce in ***CHANDLER –Vs- DIRECTOR OF PUBLIC PROSECUTIONS [1964] A.C. 763 (HL)*** where he said at page ….

"***Questions of defence policy are vast, complicated, confidential and wholly unsuited for ventilation before a jury. In such a context the interest of the state must in my judgement mean interests of the state according to the policies laid down for it by its recognized organs of Government and authority,***

***the policies of the state as they are, not as they ought, in the opinion of the jury, to be. Anything which prejudices those policies is within the meaning of the Act prejudicial to the interests of the state."***

In our context in the present case, questions of security and public order loom large, and are complicated and confidential unsuitable for ventilation in public at large. In such context therefore, the primary policies of the government of the host country are as laid down in the Constitution (that all individual rights are subject to the enjoyment of those rights by other individuals, and the public interest and are therefore not absolute), and the existing laws. Anything done, by any person and any person who acts contrary to those policies as set out in the law and the Constitution acts in a manner prejudicial to the public interest within the meaning of the Constitution and the relevant law, in this case, the Immigration Act.

On both the narrow, and wider issue whether the Respondents have contravened the fundamental rights and freedoms of the Applicant contrary to the provisions of Chapter V – (the Bill of Rights) of the Constitution of Kenya, and the various United Nations and the Africa Union (***successor to the Organization of African Unity***) relating to Refugees, Conventions I am of the considered view that whereas the fundamental rights and freedoms are universal and the Constitution of Kenya does not make a distinction in the application of the Bill of Rights, as between citizen and non-citizen, that the Applicant (a foreigner and not a citizen of Kenya) is entitled to the protection of his fundamental rights and freedoms, subject only to the limitations as stated in Section 70 of the Constitution). The Respondents have neither contravened any provision of the Bill of Rights as set out in the Constitution of Kenya, and nor have they contravened any provision of the said human rights conventions or conventions relating to status of refugees.

On the contrary, and it ought to be observed to the credit of the Respondents, the Applicant has, despite the standing orders of court for the repatriation of the Applicant, been accorded ample opportunity (over three years), to find a third country to host the Applicant. In the meantime, the Applicant has been kept in lawful custody (in terms of Section 8(2) (b) of the Immigration Act) again pending the finding by the Interested Party, the ***United Nations High Commission for Refugees*** of a suitable third country which would accept and grant the Applicant a home as a refugee.

Besides, over the years of the Applicant's presence in Kenya following the Applicant's conviction for unlawful presence in Kenya and other offences on the Applicant's own plea of guilty, the Respondents have relaxed restrictions upon the Applicant. In those circumstances I am unable to say, as the Applicant prayed, that his fundamental rights and freedoms have been contravened contrary to the relevant provisions of the Constitution of Kenya. Having come to this conclusion no Constitutional law question arises for interpretation of the Constitution under Section 123 thereof, and reference to Section 47 of the Constitution (alteration of the Constitution) had no relevance.

For those reasons, I find no merit whatsoever with Applicant's Originating Summons dated 9th November, 2004, and the same is hereby dismissed with a direction that unless Kenya does accept to host the Applicant as refugee, the Interested Party should find a third country to host the Applicant in terms of the United Nations Convention on the Status of Refugees.

On humanitarian grounds, and taking into account the Interested Party's correspondence with the Respondents that the Applicant may indeed have been a victim of persecution (in his country of origin) within the meaning of the relevant international instruments and in particular the ***United Nations Convention and its 1967 Protocol Relating to the Status of Refugees,*** I direct that each party, the Applicant, the Respondents and Interested Party shall bear their respective costs.

There shall be orders accordingly.

Dated and delivered at Nairobi this 1st day of March, 2007.

**M.J. ANYARA EMUKULE**

**JUDGE.**