REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTTUTIONAL & HUMA RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 227 OF 2016

IN THE MATTER OF ARTICLES 2, 3, 10, 20, 21, 22, 24, 27, 47 AND 259 OF THE CONSTITUTION OF THE REPUBLIC REFERENCE UNDER ARTICLE 22 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF ARTICLES 22, 23 AND 258 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA 2010

AND

IN THE MATTER OF THE REFUGEES ACT NO. 3 OF 2006

AND

IN THE MATTER OF THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1969 PROTOCOL

AND

IN THE MATTER OF THE 1969 OAU CONVENTION GOVERNING THE SPECIFIC ASPECTS OF REFUGEE PROBLEM IN AFRICA

AND

IN THE MATTER OF THE UNITED NATIONS CONVENTION AGAINST TORTURE OF 1987

AND

IN THE MATTER OF THE DISBANDMENT OF THE DEPARTMENT OF REFUGEE AFFAIRS BY THE GOVERNMENT OF KENYA

AND

IN THE MATTER OF THE INTENDED CLOSURE OF DADAAB REFUGEE CAMP BY THE GOVERNMENT OF KENYA NOVEMBER 2016

AND

IN THE MATTER OF THREATENED & IMMINENT REFOULEMENT OF REFUGEES AND ASYLUM SEEKERS OF SOMALI ORIGIN BY THE GOVERNMENT OF KENYA

BETWEEN

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS.....1ST PETITIONER

LEGAL ADVICE CENTRE T/A KITUO CHA SHERIA.....2ND PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL.....…….....….1ST RESPONDENT

THE MINISTRY OF INTERIOR & COORDINATION

OF NATIONAL GOVERNMENT.....2ND RESPONDENT

MAJOR GENERAL (RTD) JOSEPH NKAISSERY.....3RD RESPONDENT

DR. (ENG) KARANJA KIBICHO…….....4TH RESPONDENT

AND

AMNESTY INTERNATIONAL.....INTERESTED PARTY

JUDGEMENT

This petition brings into sharp focus Kenya's obligations under international law, international and regional conventions, the Refugee Act and the application of the Bill of Rights to persons enjoying refugee status within the Republic of Kenya and the circumstances under which refugee status can legally cease to exist.

Briefly, the facts giving rise to this petition are that on 6th May 2016 the 4th Respondent issued a directive by way of press release entitled "Government Statement on Refugees and Closure of Camps" whose details are, *inter alia* that "owing to national security, hosting of refugees has come to an end and that the Department of Refugee Affairs (DRA) has been disbanded and that the Government is working on mechanism for closure of the two refugee camps (Kakuma and Dadaab) within the shortest time possible."

On 10th May 2016, the 3rd Respondent issued a press statement confirming the disbandment of the department of refugee affairs as well as the Gazettement of a Task Force to implement repatriation of refugees to Somalia and also affirmed that the Dadaab Refugee Camp Complex will be closed by November 2016 and stated that the Task force had until May 2016 to furnish him with a plan of action.

On 29th April 2016 the 3rd Respondent, revoked the *prima facie* status refugees of Somali origin vide Gazette Notice No. 46 and that the revocation effected by said Gazette notice failed to take into consideration the country of origin information and lacked stakeholders input, hence it offends the provisions of Article **47** of the constitution which requires lawful, reasonable and fair administrative action and that disbanding the Department of Refugees Affairs was not preceded by Public participation, and that it is *ultra vires* the powers of the Minister because the said body can only be disbanded by way of a legislative process and that equating refugees to criminals exposes them to danger of persecution and discrimination. It is also pleaded that the threatened closure of camps and forced repatriation offends various international legal instruments protecting refugees as well as those prohibiting torture, cruelty, degrading and inhuman treatment.

It is submitted that the blanket condemnation and labelling refugees of Somali origin as terrorists is discriminatory and violates the principle of "individual criminality." It is also the petitioners case that the decision to disband the Department of Refugees Affairs did not take into account the fact that Kenya hosts refugees from several other countries and that asylum seekers will have no access to asylum procedures in contravention of Kenya's obligations under the 1951 convention and refugees whose identification documents have expired will have nowhere to renew their documents and that the decision will undermine protection of refugees and that the acts in question violates the constitution, namely Articles 10, 2 (1), 94 (5), 129 (1) and 73, and that under Article 259 the constitution must be interpreted in a manner that promotes its purposes, values and principles; advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights and permits the development of the law and contributes to good governance.

In a replying affidavit filed on 21st June 2016, the 4th Respondent stated that the scope of the governments past and present affairs are guided by the constitution, the law and the country's international obligations, that the government of Kenya is signatory to a number of international and regional instruments on refugee affairs such as the United Nations Convention Relating to the status of Refugee (1951), Universal Declaration on Human Rights, the Cartagena Declaration on Refugees (1984) and the Organization of African Unity Refugee Convention (1969) and that Kenya has hosted refugees from Uganda, Somalia, South Sudan, Ethiopia, Eritrea, Rwanda, Burundi and Democratic Republic of Congo as a result of rampant political instability in the said countries.

The 4th Respondent stated that the decision complained of was informed by two factors, namely, **(a)** the cessation of the circumstances giving rise to the refugee status and **(b)** the justifiable emergent challenges that render Kenya incapable of continued hosting of refugees and that the conditions stated in section 3 of the Refugee Act (namely persecution for reasons of race, religion, sex, nationality, membership of a particular social group or political opinion, external aggression, occupation, foreign domination or events disturbing public order) are no longer in existence in Somalia and that the situation in Somalia, Uganda, Congo and Burundi has normalized. The 4th Respondent also cited justification under Article 24 of the constitution, overcrowding in the camps, terrorists attacks, huge economic costs, human trafficking, proliferation of arms, strained government resources and insecurity.

The 4th Respondent also cited a Tripartite Agreement on repatriation of Somalia refugees in November 2013 with UNHCR and Federal Republic of Somalia which is to be implemented in three years terminating on 13th November 2016. Under the a Tripartite agreement, a Commission was formed with membership drawn from the three actors. The said commission was mandated to develop and oversee implementation of a comprehensive repatriation plan to guide the process. The 4th Respondent also detailed arrangements made to facilitate the repatriation, and stated that 14,000 refugees have since been repatriated to Somalia.

He further averred that due to dishonesty from the international community, the government was forced to reconsider implementation mechanisms of the repatriation, hence the government's decision to appoint a Task Force to come up with modalities, timelines and costs of the repatriation while ensuring safety and human dignity and the Task force recommended *inter alia* that the government pronounces the commencement date for the repatriation.

The Secretary/CEO of the first petitioner filed a further Replying affidavit on 30thSeptember 2016 in which she denied that the governments' actions have always been guided by the constitution, the law and international organizations as claimed, and reiterated that the objective of this petition is get the government to uphold the spirit and letter of the various instruments to which it is a signatory and which acquire the force of law by virtue of the constitution and that reliable reports still point at insecurity in Somalia and cited a report entitled UNHCR Position on Returns to Southern and Central Somalia highlighting the high level of insecurity in many parts of Somalia and that the challenges cited by the Government do not meet the threshold as to justify a limitation of rights under Article 24 of the constitution.

She also averred that the measures taken are draconian and will expose the lives of innocent, helpless refugees to the danger of trauma, torture, harm an possible loss of life and that the *re-foulment* in question does not meet the proportionality test required to justify a limitation under Article 24 of the constitution. It is also averred that the improved situation in Somalia as alluded to by the government is not fundamental, enduring, stable so as to warrant the invocation of the principle of ceased circumstances. She also reiterated that the repatriation complained of is only targeting refugees of Somali origin, hence discriminative.

On record is also a further affidavit filed on behalf of the second petitioner dated 25th July 2016 in which it is averred *inter alia* that it is not true that the government has in the past or present been guided by its international obligations within the comity of nations, the law or the constitution and that in the past the court has found the Government to have contravened both municipal law and international laws protecting refugees and asylum seekers[1] and reiterated that that this petition targets both past and present actions of the government targeting refugees of Somali origin including systematic profiling which is not only discriminatory and arbitrary but also unconstitutional. It is also averred that Kenya is bound by the international conventions to which it is a party to abide by the conventions, hence issues pertaining to hosting refugees ought not to be confused to be acts of charity and that deportation of refugees must be supported by facts and the law. It is also averred that the alleged compelling reasons ought not to apply to persons whose refugee status arose out of previous persecution and that the intended mass repatriation does not take into account the individual cases with compelling reasons who may not be willing to avail themselves to the protection of their country of origin.

It is also averred that Somalia is still volatile as evidenced by a report prepared by Amnesty International highlighting blatant violation of International Law and high level of insecurity in many parts of Somalia. The deponent also reiterated that it is the governments obligations to provide security to its citizens and non-citizens and that responsibility cannot be reversed to refugees and asylum seekers who are seeking protection. The second petitioner further avers that it is the government's responsibility to screen persons entering the country and that the insinuation that refugee camps have become breeding grounds for terrorists and smugglers is an admission of failure by the government to fulfil its functions under the Refugee Act, 2006 and other laws and also there is no evidence linking any particular refugee or asylum seeker to a particular criminal activity. It is the second petitioners case that restriction of refugees ought to be rational, justifiable and proportionate. The second petitioner also stated that the principal behind the tripartite agreement was that the refugees would return voluntarily and without undue influence or pressure.

All the parties filed written submissions which they highlighted orally before me. Counsel for the first petitioner submitted that issues in this petition concern both interpretation of the constitution and its application and that the directive by the 2nd Respondent has implications on certain constitutional rights that are to be enjoyed by refugees and that the limitation of the said rights does not fulfil the requirements of Article 24 of the constitution and that by acceding to the 1951 convention, the 1967 protocol, 1969 OAU convention as well as other international human rights instruments such as the 1966 International Covenant on Civil and Political Rights and the 1981 African Charter on Human and People's Rights, Kenya entered no reservations, hence, the said conventions apply without any reservations. Counsel also submitted that some provisions within the international instruments have already attained the status of international customary law such as the principal of *non-refoulment* and that Kenyan legislations that regulate refugee affairs have directly incorporated certain provisions from the international instruments, and hence domesticated those provisions. Also, article 2 (5) of the constitution provides that "general rules of international law shall form part of the law of Kenya" & article 2 (6) provides that "Any treaty or convention ratified by Kenya shall form part of the law of Kenya under the constitution."

Counsel further submitted that Article 20 of the constitution on the bill of rights is to be enforced in favour of all persons hence no distinction is made between nationals and non-nationals and that a directive subjecting asylum seekers and refugees *en masse* to forcible return to their countries of origin through closure of camps is punitive and amounts to a breach of a State's obligations in international law and a breach of the principle of *non-refoulment* as expressed under Article 33 of the 1951 Convention Relating to the Status of Refugees and that the obligation of *non-refoulment* is the cornerstone of

international refugee protection and has crystallized into a norm of customary international law, binding on all states. This obligation is codified *inter alia* in Article 33 (1) of the 1951 Convention and Article 11 (3) of the 1969 OAU Convention. The said obligation extents to return in any manner whatsoever (whether repatriation, removal, expulsion, deportation, extradition, rejection at the frontier or non-admission, or induced return to a territory in which a refugee is at risk to his or her freedom. The above principle is captured under section 18 of the Refugees Act, 2006. It was strongly submitted that from the impugned press statement, the intended repatriation would be unlawful under international law.

Counsel also submitted that section 33 (2) of the 1951 Convention allows *refoulment* in two limited circumstances, namely, in respect of a refugee who there are reasonable grounds for regarding as a danger to the security of the country or having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country and that the said provision must be applied only on an individual and in exceptional basis, but, the said provision has been overridden by Article 11 (3) of the OAU Convention and international Human Rights Law protections and further that exceptions to the principle of *no-refoulment* must be construed restrictively.

Counsel further submitted that Article 11(3) of the OAU Convention permits no exceptions to the prohibition of *refoulment* and that in the event of a conflict of laws, the said provision applies and that the decision in question ought to have been arrived at after due process. It is was further submitted that repatriation can either be voluntary or upon cessations of the refugee status, hence repatriation through coercion , threats, intimidation cannot be voluntary and that the Tripartite agreement with specific time limits cannot be voluntary.

The first petitioners counsel also reiterated that the decision complained of violated the constitution particularly articles 27, 28, 47, 10 & 25 and that the said constitutional provisions can only be limited under the provisions of Article 24 of the constitution and that the state has not demonstrated that the actions complained of fall under the limitations under Article 24. The first petitioner also submitted that the purported disbandment of the Department of Refugees is an act of blatant breach of statute.

Counsel for the second petitioner submitted *inter alia* that refugees are by virtue of their situation considered vulnerable and that Article 21 (3) of the constitution imposes specific obligations on the state in relation to vulnerable persons, and that the decision complained of did not consider the vulnerability of the refugees and the implications of the decision on their lives and that singling out refugees of Somali origin is discriminatory and goes against the provisions of Article 27 of the constitution, and that the 4th Respondent violated Article 3 of the 1951 convention, Article 33 (1) of the 1951 convention and section 18 of the Refugee Act 2006.

The Respondents counsel submitted that the directive complained of met the standards set in article **1 C** of the 1951 convention with respect to a declaration of cessation, and that circumstances have since changed to warrant repatriation to their countries of origin, and cited exceptions to *refoulment* among them where a refugee becomes a threat to state security or is involved in criminal activities, then such a refugee can be repatriated to his/her country of origin. Counsel also submitted that the government's decision did not in any manner violate the constitution or the Refugee Act, 2006 and that *"the decision to close the camp is not within the purview of the court since it is not for the court to supervise administrative arrangement of institutions performing specific duties"* and added that the decisions complained of were taken in public interest.

At the outset, I must point out that I do not agree with the submission that it is not for the court to supervise administrative arrangements of institutions. The said submission seems to question the powers and jurisdiction of this court to test the legality or otherwise of government bodies. A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written laws.[2] **Article 165(3) (b)** grants jurisdiction to this Court in jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened; **Article 23** of the Constitution also grants this Court authority to uphold and enforce the Bill of Rights. Further, the high court has powers to supervise and review decisions made by Government bodies and if it is satisfied that they contradict the

constitution or the law, then it is the duty of the court quash such decisions and or declare such decisions to be unconstitutional, hence null and void.

Our Constitution makers in their wisdom thought that no fetters should be placed on the right of an aggrieved party to seek relief from this court under Article 22 of the constitution. Article 22 of the Constitution which I describe as the "heart and soul" of the Constitution guarantees the right to move the High Court for the enforcement of all or any of the fundamental rights conferred by chapter four of the Constitution. The Bill of Rights therefore, guarantees fundamental rights to all including refugees and it is in this backdrop that I will address the issues raised in this petition.

Article **165 (3) (d) (i) & (ii)** of the Constitution provides that the High Court has power to hear any question respecting the interpretation of the Constitution including the determination of the question whether or not any law is inconsistent with or in contravention of the constitution and also the question whether anything said to be done under the authority of the constitution or of any law is inconsistent with, or in contravention of, the constitution. I have no doubt in my mind that this matter is properly before the court and that this court by dint of the above provisions has the requisite jurisdiction to examine and determine the constitutionality or otherwise of the actions complained of. Judicial function includes the power to determine and apply the law, and this necessarily includes the power to determine the legality or constitutionality of decisions or actions or purported decisions or brought before the court.

Before addressing the crucial issues raised in this petition, I find it appropriate to make some key observations which in my view will inform the basis of my determination of this case.

States have been granting protection to individuals and groups fleeing persecution for centuries; however, the modern refugee regime is largely the product of the second half of the twentieth century. Like international human rights law, modern refugee law has its origins in the aftermath of World War II as well as the refugee crisis of the interwar years that preceded it. Article 14(1) of the Universal Declaration of Human Rights (UDHR), which was adopted in 1948, guarantees the right to seek and enjoy asylum in other countries. Subsequent regional human rights instruments have elaborated on this right, guaranteeing the "right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions."

The controlling international convention on refugee law is the 1951 Convention relating to the Status of Refugees (1951 Convention) and its 1967 Optional Protocol relating to the Status of Refugees (1967 Optional Protocol). The 1951 Convention establishes the definition of a refugee as well as the principle of *non-refoulement* and the rights afforded to those granted refugee status. Although the 1951 Convention definition remains the dominant definition, regional human rights treaties have since modified the definition of a refugee in response to displacement crises not covered by the 1951 Convention.

The overarching goal of the modern refugee regime is to provide protection to individuals forced to flee their homes because their countries are unwilling or unable to protect them. I also find it necessary to here below list the international and regional instruments relating to refugees. These include:-

- *1951 Convention relating to the Status of Refugees*
- *1967 Optional Protocol relating to the Status of Refugees*
- *Universal Declaration of Human Rights (art. 14)*
- *American Declaration on the Rights and Duties of Man (art. 27)*
- *American Convention on Human Rights (art. 22)*
- *Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama (Cartagena Declaration)*
- *African [Banjul] Charter on Human and Peoples' Rights (art. 12)*
- *OAU Convention Governing the Specific Aspects of the Refugee Problem in Africa*
- *Arab Charter on Human Rights (art. 28)*
- *Cairo Declaration on Human Rights in Islam (art. 12)*
- *European Convention on Human Rights (arts. 2, 3, and 5)*
- *Council Regulation EC No 343/2003 of 18 February 2003 establishing the criteria and*

mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national
- *Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted*
- *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 3)*
- *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa*
- *Convention on the Rights of the Child (art. 22)*

Article 1(A)(2) of the 1951 Convention defines a refugee as an individual who is **outside his or her country of nationality or habitual residence** who i**s unable or unwilling to return** due to a **well-founded fear of persecution** based on his or her **race, religion, nationality, political opinion, or membership in a particular social group.**

Refugee law and international human rights law are closely intertwined; refugees are fleeing governments that are either unable or unwilling to protect their basic human rights. Additionally, in cases where the fear of persecution or threat to life or safety arises in the context of an armed conflict, refugee law also intersects with international humanitarian law.

The basic principle of refugee law is, *non-refoulement* which refers to the obligation of States not to *refoule*, or return, a refugee 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."[3] *Non-refoulement* is universally acknowledged as a human right. It is expressly stated in human rights treaties such as Article 3 of the Convention against Torture and Article 22(8) of the American Convention on Human Rights.

Additionally, both regional and domestic courts have interpreted the rights to life and freedom from torture to include a prohibition against *refoulement*.[4] The principle of *non-refoulement* prohibits not only the removal of individuals but also the mass expulsion of refugees.[5]

There are two important restrictions to this principle. Persons who otherwise qualify as refugees may not claim protection under this principle where there are "reasonable grounds" for regarding the refugee as a danger to the national security of the host country or where the refugee, having been convicted of a particularly serious crime, constitutes a danger to the host community.[6]

Kenya hosts a large asylum-seeking and refugee population. This is due largely to the country's location in a conflict-prone area. For example, neighboring countries like Somalia and South Sudan have experienced civil wars that caused internal and external displacement of large segments of their population. According to the United Nations High Commissioner for Refugees (UNHCR), there were a total of 625,250 refugees and asylum seekers in the country in 2014.[7] This figure increased to 650,610 in 2015.[8] The majority of these people (close to 70%) were Somali citizens, while persons from South Sudan made up around 20% of the asylum-seeking and refugee population.[9] The remainder included Ethiopians, Congolese, and around 20,000 stateless persons.[10]

Refugees in Kenya primarily reside in the Dadaab refugee complex (which is in Garissa County and consists of five camps: Dagahaley, Hagadere, Ifo, Ifo II, and Kambios) and the Kakuma Refugee Camp located in Turkana County.[11] In addition, as of April 2014, there were reportedly over 50,000 urban refugees in Nairobi.[12]

Kenya is signatory to a number of international treaties applicable to individuals seeking asylum and protection. For instance, it acceded to the 1951 United Nations Convention Relating to the Status of Refugees on May 16, 1966, and its 1967 Protocol in 1981.[13] Kenya is also a state party to the 1969 African Union (AU) (formerly known as the Organization of African Unity, OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa, which it signed in September 1969 and

ratified in June 1992.[14] In addition, Kenya acceded to the 1984 Convention against Torture and Other Cruel, inhumane or Degrading Treatment or Punishment in February 1997.[15] Of particular relevance to refugee issues is a provision in the Convention on *non-refoulement*, discussed above which states that *"[n]o State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."* ***[16]***

In 2006, Kenya put in place a national legal framework governing refugee matters and assumed partial responsibility for the refugee status determination (RSD) process. It did this when it took a step to implement its obligations under international law by enacting the Refugees Act in 2006, which took effect the next year, and its subsidiary legislation, the Refugees (Reception, Registration and Adjudication) Regulations, in 2009 (Refugees Regulations).[17] Among other things, the Act established the Department of Refugee Affairs (DRA), whose responsibilities include receiving and processing applications for refugee status. Prior to that, refugee matters were governed under the now repealed Immigration Act and Alien Restriction Act, and RSDs and other matters relating to refugee management were delegated to the UNHCR.

I now turn to what I consider to be the issues for determination:-

i. Whether or not the Governments decision violated the principle of non-refoulement.

The principle of ***non-refoulement*** is the cornerstone of asylum and of international refugee law. Flowing from the right to seek and to enjoy in other countries asylum from persecution, as set forth in Article 14 of the Universal Declaration of Human Rights, this principle reflects the commitment of the international community to ensure to all persons the enjoyment of human rights, including the rights to life, to freedom from torture or cruel, inhuman or degrading treatment or punishment, and to liberty and security of the person. These and other rights are threatened when a refugee is returned to persecution or danger. In fact, the observance of the principle of *non-refoulement* is intrinsically linked to the determination of refugee status.

Non-refoulement has been defined in a number of international refugee instruments, both at the universal and regional levels. At the universal level the most important provision in this respect is Article 33 (1) of the 1951 Convention relating to the Status of Refugees, which states that:-

> *"No Contracting State 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."*

This provision constitutes one of the basic Articles of the 1951 Convention, to which no reservations are permitted. It is also an obligation under the 1967 Protocol by virtue of Article I (1) of that instrument. Unlike some provisions of the Convention, its application is not dependent on the lawful residence of a refugee in the territory of a Contracting State. As to the words *"where his life or freedom would be threatened"*, it appears from the *travaux préparatoires* that they were not intended to lay down a stricter criterion than the *words "well-founded fear of persecution"* figuring in the definition of the term "*refugee*" in Article 1 A (2). The different wording was introduced for another reason, namely to make it clear that the principle of *non-refoulement* applies not only in respect of the country of origin but to any country where a person has reason to fear persecution.

Also at the universal level, mention should be made of Article 3 (1) of the UN Declaration on Territorial Asylum unanimously adopted by the General Assembly in 1967 [res. 2312 (XXII)].

> *"No person referred to in Article 1, paragraph 1, shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution."*

At the regional level the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969 gives expression in binding form to a number of important principles relating to asylum,

including the principle of *non-refoulement*. According to Article II (3):

> *"No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2."*

Again, Article 22 (8) of the American Human Rights Convention adopted in November 1969 provides that:-

> *"In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status or political opinions."*

In the Resolution on Asylum to Persons in Danger of Persecution, adopted by the Committee of Ministers of the Council of Europe on 29th June 1967, it is recommended that member governments should be guided by the following principles:-

> *"1. They should act in a particularly liberal and humanitarian spirit in relation to persons who seek asylum on their territory.*
>
> *2. They should, in the same spirit, ensure that no one shall be subjected to refusal of admission at the frontier, rejection, expulsion or any other measure which would have the result of compelling him to return to, or remain in, a territory where he would be in danger of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion."*

Finally, Article III (3) of the Principles concerning the Treatment of Refugees adopted by the Asian-African Legal Consultative Committee at its Eighth Session in Bangkok in 1966, states that:-

> *"No one seeking asylum in accordance with these Principles should, except for overriding reasons of national security or safeguarding the populations, be subjected to measures such as rejection at the frontier, return or expulsion which would result in compelling him to return to or remain in a territory if there is a well-founded fear of persecution endangering his life, physical integrity or liberty in that territory."*

In addition to statements in the above international instruments, the principle of *non-refoulement* has also found expression in the constitutions and/or ordinary legislation of a number of States.

Because of its wide acceptance, it is UNHCR's considered view, supported by jurisprudence and the work of jurists, that the principle of *non-refoulement* has become a norm of customary international law.[18] This view is based on a consistent State practice combined with a recognition on the part of States that the principle has a normative character. As outlined above, the principle has been incorporated in international treaties adopted at the universal and regional levels to which a large number of States including Kenya have now become parties. Moreover, the principle has also been systematically reaffirmed in Conclusions of the Executive Committee and in resolutions adopted by the General Assembly, thus demonstrating international consensus in this respect and providing important guidelines for the interpretation of the aforementioned provisions.[19]

International human rights law provides additional forms of protection in this area. Article 3 of the 1984 UN Convention against Torture stipulates that no State Party shall expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.[20] Similarly, Art. 7 of the International Covenant on Civil and Political Rights has been interpreted as prohibiting the return of persons to places where torture or persecution is feared.[21] In the regional context, Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms has been interpreted by the European Court of Human Rights as implicitly prohibiting the return of anyone to a place where they would face a "real and

substantiated" risk of ill-treatment in breach of the prohibition of torture or inhuman or degrading treatment or punishment.[22] While Art. 33 (2) of the 1951 Convention foresees exceptions to the principle of *non-refoulement*, international human rights law and most regional refugee instruments set forth an absolute prohibition, without exceptions of any sort.

In fact, respect for the principle of *non-refoulement* requires that asylum applicants be protected against return to a place where their life or freedom might be threatened until it has been reliably ascertained that such threats would not exist and that, therefore, they are not refugees. Every refugee is, initially, also an asylum applicant; therefore, to protect refugees, asylum applicants must be treated on the assumption that they may be refugees until their status has been determined. Without such a rule, the principle of *non-refoulement* would not provide effective protection for refugees, because applicants might be rejected at the frontier or otherwise returned to persecution on the grounds that their claim had not been established.

That the principle of *non-refoulement* applies to refugees, irrespective of whether they have been formally recognized as such - that is, even before a decision can be made on an application for refugee status - has been specifically acknowledged by the UNHCR Executive Committee in its Conclusion No. 6 on *Non-Refoulement*. And indeed, where a special procedure for the determination of refugee status under the 1951 Convention and the 1967 Protocol exists, the applicant is almost invariably protected against *refoulement* pending a determination of his or her refugee status.

Whenever refugees - or asylum-seekers who may be refugees - are subjected, either directly or indirectly, to such measures of return, be it in the form of rejection, expulsion or otherwise, to territories where their life or freedom are threatened, the principle of *non-refoulement* has been violated. While the principle of *non-refoulement* is basic, it is recognized that there may be certain legitimate exceptions to the principle.

Article 33 (2) of the 1951 Convention provides that the benefit of the *non-refoulement* principle may not be claimed by a refugee *'whom there are reasonable grounds for regarding as a danger to the security of the country ...* or *who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country'*. This means in essence that refugees can exceptionally be returned on two grounds:- **(i)** in case of threat to the national security of the host country; and **(ii)** in case their proven criminal nature and record constitute a danger to the community. The various elements of these extreme and exceptional circumstances need, however, to be interpreted.

With regard to the 'national security' exception (that is, having reasonable grounds for regarding the person as a danger to the security of the country), in 1977, the European Court of Justice ruled that "there must be a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society."[23] It follows from state practice and the Convention *travaux* preparations that criminal offences without any specific national security implications are not to be deemed threats to national security, and that national security exceptions to *non-refoulement* are not appropriate in local or isolated threats to law and order.

With regard to the interpretation of the 'particularly serious crime'-exception, two basic elements must be kept in mind. First, as Article 33 (2) is an exception to a principle, it is to be interpreted and implemented in a **restrictive manner**, as confirmed by Executive Committee Conclusion No. 7. Second, given the seriousness of an expulsion for the refugee, such a decision should involve a careful examination of the question of proportionality between the danger to the security of the community or the gravity of the crime, and the persecution feared. The application of this exception must be the ultima ratio (the last recourse) to deal with a case reasonably.

For Article 33 (2) to apply, therefore, it is generally agreed that the crime itself must be of a very grave nature. UNHCR has recommended that such measures should only be considered when one or several convictions are symptomatic of the basically criminal, incorrigible nature of the person and where other measures, such as detention, assigned residence or resettlement in another country are not practical to prevent him or her from endangering the community. Read in conjunction with Articles 31 and 32 of the 1951 Convention, a State should allow a refugee a reasonable period of time and all necessary facilities to obtain admission into another country, and initiate *refoulement* only when all efforts to obtain admission

into another country have failed.

The prohibition of *refoulement* to a danger of persecution under international refugee law is applicable to any form of forcible removal, including deportation, expulsion, extradition, informal transfer or "renditions," and non-admission at the border in the circumstances described below. This is evident from the wording of Article 33(1) of the 1951 Convention, which refers to expulsion or return *(refoulement)* "in any manner whatsoever." It applies not only in respect of return to the country of origin or, in the case of a stateless person, the country of former habitual residence, but also to any other place where a person has reason to fear threats to his or her life or freedom related to one or more of the grounds set out in the 1951 Convention, or from where he or she risks being sent to such a risk.[24]

The application of Article 33(2) requires an individualized determination by the country in which the refugee is that he or she comes within one of the two categories provided for under Article 33(2) of the 1951 Convention. Thus, this rules out group or generalized application or collective condemnation. Unfortunately, the averment by the Government that the two exceptions discussed herein are applicable and not based on individual consideration or determination to each affected refugee but are dangerously generalized in a manner that is a kin to collective punishment.

In conclusion, in view of the serious consequences to a refugee for being returned to a country where he or she is in danger of persecution, the exception provided for in Article 33 (2) should be applied with the greatest caution. It is necessary to take fully into account all the circumstances of the case and, where the refugee has been convicted of a serious criminal offence, any mitigating factors and the possibilities of rehabilitation and reintegration within society.

I must add that in the present case, there is no clear evidence of involvement of crime and conviction. It is alleged that the refugees are a threat to public security and that the refugee camps have become breeding grounds for criminal activities. No single arrest or conviction has been cited nor has it been established why a blanket condemnation should be applied to all refugees nor is it clear why the government with its capable and mighty state machinery has not been able to identify any refugees involved in crime and prosecute them instead of mounting a blanket condemnation at the risk of punishing minor children, women and innocent persons.

The principle of *non-refoulement* underpins the prohibition of torture by creating an extra-territorial obligation that renders acts of r*efoulement* tantamount to positive violations. States that *refoul*e (or expel) individuals to be persecuted, via a domestic refugee determination process, violate the Refugee Convention, the CAT and the ICCPR to the same degree as the persecutor. Article 7 of the ICCPR provides that *'[n]o one shall be subject to torture or to cruel or degrading treatment or punishment.'* The Human Rights Committee's jurisprudence

articulates this negative obligation by emphasizing that placing individuals in another jurisdictions where there is a risk of torture is equivalent to a positive act of torture itself. Treaties that affect human rights cannot be interpreted in such a manner as to constitute denial of human rights as understood at the time of their application.[25] In the circumstances, I find no difficulty in concluding as I hereby do, that the government's decision complained of in this petition violates the principle of *non-refoulement* and is therefore a breach of international law, international conventions and the country's obligations under the various conventions to which it's a signatory and above able our constitution.

ii. Whether the Governments' Decision violates the Refugees' Rights to a fair administrative action.

Fairness is what justice really is about. It is a constitutional imperative that administrative action which negatively affects the rights of the public as a group or class should be procedurally fair. **Article 47** provides that, *"Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."* It is the duty of the court to interrogate the policy and where it is inconsistent with the provisions of the Bill of Rights or the fundamental values in the Constitution to declare that policy inconsistent with the Constitution.

The right to fair administrative action is enshrined in the Constitution of Kenya 2010 and has been given content and meaning by the Fair of Administrative Act, 2015. The Act gives effect to the scope and meaning of this constitutional right to procedural fairness by prescribing particular procedures, from which the public official must choose to ensure that administrative action affecting the public is procedurally fair. The aspiration of the requirements of procedural fairness to the public is to create a public administration that is justifiable and accountable in an open and democratic society.

sections 4, 5 and 7 of the *Fair Administrative Action Act, 2015* not only elaborates on the right to fair administrative action but also prescribes the grounds under which an administrative action can be challenged.

The scope of Article 47 of the Constitution and the unyielding rigour with which the protection it affords are to enforced have been the subject of several decisions of this Honourable Court, such as ***Geothermal Development Company Limited vs. Attorney General & 3 others.*** ***[26]*** Also relevant is the South African decision in ***President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others.*** ***[27]*** Article 47 gives fair administrative action a constitutional standing whose principles should be developed with the use of common law as guiding principles.

In order to give meaning to the notion of procedural fairness to the public, a number of concepts need to be explained. In order to identify the administrative action affecting the public, the following test may be applied:- the administrative action must **(a)** have a general effect; **(b)** the general effect must have a significant public effect; and **(c)** constitutional, statutory (i.e. by means of enabling legislation), or common-law rights of members of the public must be at issue.

The rights of the public must be affected. These rights are interpreted widely to include constitutional, statutory and common-law rights. These are the rights held collectively by the public as members of a group or class.

The effect of the administrative action on the rights of the public must be material and adverse. The material effect seems necessary to ensure that matters of a trivial nature (that are fundamentally insignificant in their effect on rights) escape the application of the procedures for fairness to the public. The adverse effect seems to indicate that the rights of the public must have been negatively affected by the administrative action. Since the requirements of procedural fairness to the public are set in motion by administrative action adversely affecting the public, it is important to establish who constitutes the public. The word “public” is defined as including any group or class of the public. The reference to “group or class” may imply a link between the individuals to constitute a definable group or class of persons. Any administrative action which affects the public (generally, impersonally and non-specifically) as opposed to individuals must satisfy the requirements of Section 4 for procedural fairness. To ensure that administrative action affecting the public is procedurally fair (i.e. before the implementation of a particular decision), the public official must strictly adhere to the provisions laid down under the Act.

Considering the fact that the decisions in question were made in total disregard of the provisions of the act, I find no difficulty in concluding that the decision(s) in question violated the clear provisions of Article 47 of the constitution and the fair Administrative Act, hence, the same is *ultra vires*, null and void. As was stated by court in *Minister of Health and Others v Treatment Action Campaign and Others:-* ***[28]***

> *“The Constitution requires the State to respect, protect, promote, and fulfill the rights in the Bill of Rights. Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself.”*

A decision that does not make provision for examination of individual circumstances and anticipated exceptions is unreasonable and a breach of **Article 47(1)** is not fair and reasonable within the meaning of **Article 47(1)** in so far as it does not provide for application of due process in adjudicating the rights of

persons with refugee status.

I find, as I hereby do, that the decisions complained of in this petition violated the provisions of Article 47 of the constitution and the Fair Administrative Act, and consequently, such decisions, to the extent that they affect, or purport to affect the rights o Refugees of Somali origin or any other refugees cannot be allowed to stand and the same are null and void to the extent that they violate the said clear provisions of the law.

iii. Whether the Governments' decision violates the constitutional rights of the refugees.

The inherent dignity of all people is a core value under recognized in the Constitution. It is a guaranteed right under **Article 28** and it constitutes the basis and the inspiration for the recognition that is given to other more specific protections that are afforded by the Bill of Rights. The rights to life and dignity are the most important of all human rights, and the source of all other personal rights. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others.[29] The importance of dignity as a founding value of our constitution cannot be over emphasized. Recognizing a right to dignity is an acknowledgment of the intrinsic worth of human beings; human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched.[30]

The right to dignity is underpinned by other international human rights instruments. The ***UDHR*** recognizes this right in its preamble in the following words; *"Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."* **Article 1** of the ***UDHR*** goes on provides that, *"All human beings are born free and equal in dignity and rights …"* **Article 5** of ***The African Charter*** similarly provides as follows; *"Every individual shall have the right to the respect of the dignity inherent in a human being."*

The provisions of the Bill of Rights cited by the petitioners include **Article 28** which protects the right to dignity, **Article 27** which prohibits discrimination and protects the right to equality, **Article 47** discussed above. It is important to emphasize that the Bill of Rights applies to all persons within our borders irrespective of how they came into the country.[31]Thus, refugees are entitled to enjoy the constitutionally guaranteed rights while within our borders.

In considering the nature and extent of these rights, the Court is obliged by **Article 259(1)** to interpret the Constitution in a manner that promotes its purpose, values and principles, advances the rule of law and the human rights and fundamental freedoms in the Bill of Rights and permits development of the law and contributes to good governance.[32] **Article 259(1)** commands a purposive approach to interpretation of the Constitution. My discernment from the foregoing jurisprudence is that in interpreting the Constitution, the court should attach such meaning and interpretation that meets the purpose of guaranteeing Constitutionalism, non-discrimination, separation of powers, and enjoyment of fundamental rights and freedoms.

The petitioners complaint is that the government's decision and the repatriation in question is an act of discrimination in that it targets refugees of Somali origin. In fact the gazette notice dated 29 April 2016 specifically mentions *"revokes the prima facie refugee status of asylum seekers from Somalia…"*hence the petitioners contention that it is discriminatory and amounts to profiling refugees of Somali origin.

"Racial Profiling" refers to the discriminatory practice by law enforcement officials of targeting individuals for suspicion of crime based on the individual's race, ethnicity, religion or national origin. Criminal profiling, generally, as practiced by police, is the reliance on a group of characteristics they believe to be associated with crime. Any definition of racial profiling must include, in addition to racially or ethnically discriminatory acts, *discriminatory omissions* on the part of law enforcement as well.

According to its most simple definition, racial discrimination refers to unequal treatment of persons or groups on the basis of their race or ethnicity. Differential treatment occurs when individuals are treated unequally because of their race. Whatever definition we may adopt, racial profiling results in group

condemnation and is discrimination of the worst kind and has no place in modern democracy. In my view, the gazette notice referred to above to the extent that it refers to a particular community yet as earlier stated Kenya hosts refugees from several other countries amounts to discrimination and unfair treatment. Further, failure to investigate and identify any refugees who may be involved in criminal activities and purporting to condemn all refugees of Somali origin poses the risk of punishing the innocent.

Article 20(3) provides that a court, in applying the Bill of Rights shall develop the law to the extent that it does not give effect to a right or fundamental freedom and adopt the interpretation that most favours the enforcement of a right or fundamental freedom. **Article 20(4)** obliges the court, in interpreting the Bill of Rights to promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom and the spirit, purport and objects of the Bill of Rights. The provisions that protect these rights must also be infused with the values and principles of governance articulated in **Article 10**. These values include human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized.

Equally important is the fact that the law governing refugees is regulated by International Law. Under **Article 2(5)** and **(6**) the general rules of international law and any treaty or convention ratified by Kenya form part of the law of Kenya under the Constitution.

Article 19(1) reminds us that the Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies. Equally important is that under **Article 19(3)(a)** the petitioners are entitled to enforce any other rights recognized or conferred by law, except to the extent that they are inconsistent with the Bill of rights. The petitioners are therefore entitled to assert the rights conferred by International law, which is part of Kenya's law by dint of **Article 2(5)** and **(6).**

Refugees are a special category of persons who are, by virtue of their situation, considered vulnerable. **Article 21(3)** therefore imposes specific obligations on the State in relation to vulnerable persons. It is against the background of these broad principles that the government's decision need to be examined.

The Press Release in question cited immense security challenges such as threat of *Al Shabaab* and other related terror groups and stated that the government has been forced to reconsider the whole issue of hosting refugees and stated that the government had decided to disband the Department of Refugees as a first step and that the government was working on a mechanism for closure of the two refugee camps within the shortest time possible and vide Gazette notice dated 29th April 2016, the government revoked the *prima facie* Refugee status of asylum seekers of Somali origin.

The question that follows is whether the Governments decision falls under the exceptions provided under Article 24 cite above. Human rights enjoy a *prima facie*, presumptive inviolability, and will often 'trump' other public goods,' Louis Henkin wrote in *The Age of Rights*:-[33]

> *"Government may not do some things, and must do others, even though the authorities are persuaded that it is in the society's interest (and perhaps even in the individual's own interest) to do otherwise; individual human rights cannot be sacrificed even for the good of the greater number, even for the general good of all. But if human rights do not bow lightly to public concerns, they may be sacrificed if countervailing societal interests are important enough, in particular circumstances, for limited times and purposes, to the extent strictly necessary."*

A common way of determining whether a law or a decision that limits rights is justified is by asking whether the law is proportionate. Former President of the Supreme Court of Israel, Aharon Barak, said proportionality can be defined as *'the set of rules determining the necessary and sufficient conditions for a limitation on a constitutionally protected right by a law to be constitutionally protected'. **[34]***

Leading Authors G. Huscroft, B Miller and G Webber (eds) have authoritatively stated the jurisprudence of proportionality includes this 'serviceable—but by no means canonical—formulation' of the test:--

i. Does the legislation (or other government action) establishing the right's limitation pursue a

legitimate objective of sufficient importance to warrant limiting a right?

ii. Are the means in service of the objective rationally connected (suitable) to the objective?

iii. Are the means in service of the objective necessary, that is, minimally impairing of the limited right, taking into account alternative means of achieving the same objective?

*iv. Do the beneficial effects of the limitation on the right outweigh the deleterious effects of the limitation; in short, is there a fair balance between the public interest and the private right?**[35]***

According to the above authors, four sub-components of proportionality, a limitation of a constitutional right will be constitutionally permissible if **(i)** it is designated for a proper purpose; **(ii)** the measures undertaken to effectuate such a limitation are rationally connected to the fulfilment of that purpose; **(iii)** the measures undertaken are necessary in that there are no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation; and finally **(iv)** there needs to be a proper relation ("proportionality *stricto sensu*" or "balancing") between the importance of achieving the proper purpose and the special importance of preventing the limitation on the constitutional right.' Proportionality has been called the 'most important doctrinal tool in constitutional rights law around the world for decades'[36] and 'the orienting idea in contemporary human rights law and scholarship.'

A key aspect of whether a limitation on a right can be justified is whether the limitation is proportionate to the objective being sought. Even if the objective is of sufficient importance and the measures in question are rationally connected to the objective, the limitation may still not be justified because of the severity of its impact on individuals or groups.[37]

A classic discussion of the principle of proportionality may be found in the 1986 Canadian Supreme Court case of *R v Oakes*.[38] This case concerned a statute, the *Narcotic Control Act*, which placed a legal burden of proof on the defendant, and so undermined the person's right, under the *Canadian Charter of Rights and Freedoms*, to be presumed innocent until proven guilty. Section 1 of the Canadian Charter guarantees the rights and freedoms in the Charter '*subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society*'.[39] Dickson CJ said that to establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied.

In each case, Dickson CJ said, courts will be '*required to balance the interests of society with those of individuals and groups*'.[40]

In considering decisions limiting fundamental rights, courts look at whether the government's decision is 'reasonably appropriate and adapted to serve a legitimate end.'[41] In this context, the phrase 'reasonably appropriate and adapted' does not mean 'essential' or 'unavoidable', but has been said to be closer to the notion of proportionality.[42]

When employing the language of proportionality the High Court would ask whether the end could be pursued by less drastic means, and it has been particularly sensitive to laws that impose adverse consequences unrelated to their object, such as the infringement of basic common law rights. I have no doubt that repatriation of refugees is a drastic measure that must be done within the confines of the law and any measure that infringes on refugees constitutional rights must be held to be invalid on account of contravention of such rights..

I may perhaps add that 'Proportionality' is… a fluid test which requires those analyzing and applying law and policy to have regard to the surrounding circumstances, including recent developments in the law, current political and policy challenges and contemporary public interest considerations.

The test for determining whether a restriction is appropriate should be one of proportionality as used in international, regional and comparative human rights jurisprudence. A proportionality test is appropriate as it preserves rights, provides a framework for balancing competing rights and enables other important

public concerns, such as national security and public order, to be duly taken into account.

What is reasonably justifiable in a democratic society is an illusive concept – one which cannot be precisely defined by the courts. There is no legal yardstick save that the quality of reasonableness of the provision under challenge is to be judged according to whether it arbitrarily or excessively invades the enjoyment of a constitutionally guaranteed right.[43]

In the Zimbabwean case of *Nyambirai* vs *National Social Security Authority & Another*,[44] Gubbay CJ elaborated the test as follows:-

> *"In effect the court will consider three criteria in determining whether or not the limitation is permissible in the sense of not being shown to be arbitrary or excessive. It will ask itself whether:-*
>
> *(i) the legislative objective is sufficiently important to justify limiting a fundamental right;*
>
> *(ii) the measures designed to meet the legislative object are rationally connected to it; and*
>
> *(iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."*

In my view, the government's decision complained herein does not meet the proportionality test discussed above, it is arbitrary and offends the constitutionally guaranteed rights of the petitioners, international law, international and regional instruments on the treatment of refugees. In any event, the reasons offered by the Government have not been shown to fall within the exceptions to the principle of *non-refoulement* in order to safely state that they are backed by the law, hence falls within the exceptions to the said principle.

iv. Whether the circumstances in Somalia have fundamentally changed to warrant repatriation of the refugees.

The 1951 Convention relating to the Status of Refugees (hereinafter "1951 Convention") recognizes that refugee status ends under certain clearly defined conditions. This means that

once an individual is determined to be a refugee, their status is maintained unless they fall within the terms of the cessation clauses or their status is cancelled or revoked.[45]

Under Article 1C of the 1951 Convention, refugee status may cease either through the actions of the refugee (contained in sub-paragraphs 1 to 4), such as by re-establishment in his or her country of origin, [46]or through fundamental changes in the objective circumstances in the country of origin upon which refugee status was based (sub-paragraphs 5 and 6). The latter are commonly referred to as the "ceased circumstances" or "general cessation" clauses. Article 1C(5) and (6) provides that the 1951 Convention shall cease to apply to any person falling under the terms of Article 1(A) if:

> *(5) He can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality; Provided that this paragraph shall not apply to a refugee falling under section A(1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;*
>
> *(6) Being a person who has no nationality he is, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence; Provided that this paragraph shall not apply to a refugee falling under section A(1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.*

The grounds identified in the 1951 Convention are exhaustive; that is, no additional grounds would justify

a conclusion that international protection is no longer required.[47] When interpreting the cessation clauses, it is important to bear in mind the broad durable solutions context of refugee protection informing the object and purpose of these clauses. Numerous Executive Committee Conclusions affirm that the 1951 Convention and principles of refugee protection look to durable solutions for refugees.[48] Thus the assertion that there is a Government in Somalia is not sufficient. To comply with international law and practices, it must be shown that a durable solution to the circumstances that led to the refugee status is in place.

Accordingly, cessation practices should be developed in a manner consistent with the goal of durable solutions. Cessation should therefore not result in persons residing in a host State with an uncertain status. It should not result either in persons being compelled to return to a volatile situation, as this would undermine the likelihood of a durable solution and could also

cause additional or renewed instability in an otherwise improving situation, thus risking future refugee flows. Acknowledging these considerations ensures refugees do not face involuntary return to situations that might again produce flight and a need for refugee status. It supports the principle that conditions within the country of origin must have changed in a profound and enduring manner before cessation can be applied.[49]

Cessation under Article 1C(5) and 1C(6) does not require the consent of or a voluntary act

by the refugee. Cessation of refugee status terminates rights that accompany that status. It may bring about the return of the person to the country of origin and may thus break ties to family, social networks and employment in the community in which the refugee has become

established. As a result, a premature or in sufficiently grounded application of the ceased circumstances clauses can have serious consequences. It is therefore appropriate to interpret the clauses strictly and to ensure that procedures for determining general cessation are fair, clear, and transparent.

States must carefully assess the fundamental character of the changes in the country of nationality or origin, including the general human rights situation, as well as the particular cause of fear of persecution, in order to make sure in an objective and verifiable way that the situation which justified the granting of refugee status has ceased to exist. [A]n essential element in such assessment by States is the fundamental, stable and durable character of the changes, making use of appropriate information available in this respect, *inter alia*, from relevant specialized bodies, including particularly UNHCR. The only credible report before this court, in my view, is the report by the interested party. The government decision does not appear to have been backed by a report from the "relevant specialized bodies" referred to above.

For cessation to apply, the changes need to be of a fundamental nature, such that the refugee “can no longer ... continue to refuse to avail himself of the protection of the country of his nationality”[50] or, if he has no nationality, is “able to return to the country of his former habitual residence.”[51] Cessation based on “ceased circumstances” therefore only comes into play when changes have taken place which address the causes of displacement which led to the recognition of refugee status.[52]

Where indeed a “particular cause of fear of persecution” has been identified, the elimination

of that cause carries more weight than a change in other factors. Often, however, circumstances in a country are inter-linked, be these armed conflict, serious violations of human rights, severe discrimination against minorities, or the absence of good governance, with the result that resolution of the one will tend to lead to an improvement in others. All relevant factors must therefore be taken into consideration. An end to hostilities, a complete political change and return to a situation of peace and stability remain the most typical situation in which Article 1C(5) or (6) applies. I must point out that the report by Amnesty International has identified areas of serious concern raising doubts as to whether or not the changes that may have taken place are permanent and enduring. In the circumstances, I find that applying the standard laid down by the international conventions governing the issue, the government has not satisfied the required standard to demonstrate the changed circumstances which to me was a prerequisite before the

repatriation. A report by the relevant specialized bodies on the subject would have sufficed.

v. Whether the decision by the first Respondent disbanding the Department of Refugees is invalid and therefore null and void

Section 6 of the Refugee Act provides as follows:-

> *1) There is established a Department of Refugee Affairs which shall be a public office.*
>
> *2) The Department of Refugee Affairs shall be responsible for all administrative matters concerning refugees in Kenya, and shall, in that capacity, co-ordinate activities and programmmes relating to refugees.*

Clearly, the department of refugee Affairs is established under an act of parliament. It is a creation of a statute and in my view it can only be disbanded by amending the law. A public body continues to exist so long as the founding instrument remains in force. Abolishing a body established by or under statute will generally require legislation. It follows from this that a statutory body cannot be dissolved by executive action.

The petitioners have asked this court to issue an order of certiorari to quash the said decision on grounds of illegality. In other words this court is being asked to exercise its supervisory jurisdiction - (reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised). Judicial review is a judicial invention to ensure that a decision by the executive or a public body was made according to law, even if the decision does not otherwise involve an actionable wrong. The superior Courts developed their review jurisdiction to fulfill their function of administering justice according to law. The legitimacy of judicial review is based in the rule of law, and the need for public bodies to act according to law. Judicial review is a means to hold those who exercise public power accountable for the manner of its exercise. The primary role of the Courts is to uphold the fundamental and enduring values that constitute the rule of law. As with any other form of governmental authority, discretionary exercise of public power is subject to the Courts supervision in order to ensure the paramountcy of the law.

Judicial review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the processes followed by the decision-maker are proper, and the decision is within the confines of the law, a court will not interfere.

Broadly, the court is concerned with whether the person or body is under a legal duty to act or make a decision in certain way and is unlawfully refusing or failing to do so; or a decision or action that has been taken is 'beyond the powers' (in latin, 'ultra vires') of the person or body responsible for it.

In *John Wachiuri T/A Githakwa Graceland & Wandumbi Bar & 50 Others vs The County Government of Nyeri & Ano**[53]*** this court had the occasion to discuss supervision of administrative decision making process, that is, did the public body act in a lawful manner in deciding the way it did and in the above decision I emphasized that there are three categories of public law wrongs which are commonly used in cases of this nature. These are:-

> *a. **Illegality**- Decision makers must understand the law that regulates them. If they fail to follow the law properly, their decision, action or failure to act will be **"illegal".** Thus, an action or decision may be illegal on the basis that the public body has no power to take that action or decision, or has acted beyond it powers.*
>
> *b. **Fairness**- Fairness demands that a public body should never act so unfairly that it amounts to abuse of power. This means that if there are express procedures laid down by legislation that it must follow in order to reach a decision, it must follow them and it must not be in breach of the rules of natural justice. The body must act impartially, there must be fair hearing before a decision is reached.*

*c. **Irrationality and proportionality**- The courts must intervene to quash a decision if they consider it to be demonstrably unreasonable as to constitute **'irrationality"** or **'perversity'** on the part of the decision maker.*

Judicial review stems from the doctrine of *ultra vires* and the rules of natural justice and has grown to become a legal tree with branches in **illegality, irrationality, impropriety** of procedure and become the most powerful enforcement of constitutionalism, one of the greatest promoters of rule of law and perhaps one of the greatest and most powerful tools against abuse of power and arbitrariness. [54] It has been said that the growth of judicial review can only be compared to the ever never ending categories of negligence after the celebrated case of *Donoghue vs Stevenson* in the last century.[55]

As pointed out above, the fourth Respondent has in my view no powers at all to disband a body created by an act of parliament, and consequently, I find that the fourth Respondent acted outside his powers, *(ultra vires)* hence the said decision is null and void.

In view of my conclusions enumerated above, I find that this petition is well founded, hence, I allow the petition and make the following Orders/declarations:-

i. A declaration be and is hereby issued declaring that the directive issued by the 4th Respondent namely, Dr. (Eng) Karanja Kibicho on the 6th May 2016 disbanding the Department of Refugee Affairs is ultra vires the 4th Respondents powers and hence null and void.

*ii. A declaration be and is hereby issued decreeing that the directive issued by the 3rd Respondent, namely Major General (RTD) Joseph Nkaissery on the intended repatriation of refugees and asylum seekers of Somali origin on 10th May 2016 is arbitrary, discriminatory and indignifying and hence a violation of Articles **27** and **28** of the constitution and consequently the same is null and void.*

iii. A declaration be and is hereby issued declaring that to the extent that the decision of the Government of the Republic of Kenya to close Daadab refugee camp was undertaken without giving the stakeholders and the affected parties an opportunity to make representations either in person or through their representatives, the right to a fair administrative action as guaranteed by Article 47 of the constitution has been denied, violated, infringed or is threatened, hence the said decision is null and void.

iv. A declaration be and is hereby issued decreeing that that the directive by the 3rd and 4 Respondents to forcefully repatriate refugees based at Dadaab Refugee Camp or anywhere in Kenya is a violation of article 2 (5) and 2 (6) of the constitution and Kenya's International legal obligations under the1951 UN Convention relating to the status or Refugees and the 1969 Organization of Africa Unity Convention Governing the Specific Aspects of Refugee in Africa, hence the said directive is null and void.

v. A declaration be and is hereby issued declaring that the 3rd and 4th Respondents acted in excess and in abuse of their power, in violation of the rule of law and in contravention of their respective oaths of office contrary to Article 2, 3, 10 and 75 (1) (c) of the constitution.

vi. A declaration that the decision of the Government of Kenya to collectively repatriate all refugees in Dadaab Refugee Camp to the frontiers of their country of origin against their will violates the principle on non-refoulement as expressed in Article 33 of the 1951 UN Convention relating to the status of Refugees as well as section 18 of the Refuge Act 2006.

vii. A declaration be and is hereby issued that the Governments decisions specifically targeting Somali refugees is an act of group persecution, illegal, discriminatory and therefore unconstitutional.

viii. An order of certiorari be and is hereby issued to remove into this honourable court for the purposes of quashing the directives of the 3rd and 4th Respondents dated 10h May 2016 and 6th May 2016 respectively.

ix. An order of Mandamus be and is hereby issued directing the 1st, 2nd, 3rd, and 4th Respondents to, with immediate effect, restore the status quo ante predating the impugned directive with regard to administration of refugee affairs in the Republic of Kenya and, to specifically and with immediate effect, reinstate and operationalize the Department of Refugee Affairs.

Orders accordingly. Right of appeal 30 days.

Dated at Nairobi this **9th** day of **February** 2017

John M. Mativo

Judge

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[1] See Kituo Cha Sheria & Others vs The A. G. Pet,. No. 19 & 115 of 2013

[2] Samuel Kamau Macharia v. Kenya Commercial Bank and Two others, Civ. Appl. No. 2 of 2011

[3] see 1951 Convention relating to the Status of Refugees, art. 33(1).

[4] *See R (on the application of) ABC (a minor) (Afghanistan) v. Sec'y of State for the Home Dep't [2011] EWHC 2937 (Admin.) (U.K.); ECtHR, Case of M.S.S. v. Belgium and Greece [GC], no. 30696/09, ECHR 2011, Judgment of 21 January 2011.*

[5] *See, e.g.*, African [Banjul] Charter on Human and Peoples' Rights, art. 12(5).

[6] 1951 Convention, art. 33(2).

[7]United Nations High Commissioner for Refugees (UNHCR), Global Appeal 2014–2015: Kenya 2 (Dec. 1, 2013), http://www.unhcr.org/528a0a244.html, *archived at* http://perma.cc/68GJ-CQCQ.

[8] UNHCR, Global Appeal 2015 Update: Kenya 2 (Dec. 1, 2014), http://www.unhcr.org/5461e600b.html, *archived at* http://perma.cc/NX7P-GUYZ.

[9] Ibid

[10] Ibid

[11] UNHCR & International Organization of Migration (IOM), Joint Return Intention Survey Report 2014 at 21(updated Feb. 25, 2015), http://data.unhcr.org/horn-of-africa/download.php?id=1535, *archived at* http://perma.cc/57W6-Z8A6; *Kakuma*, International Organization for Migration: Kenya, http://kenya.iom.int/kakuma (last visited Dec. 31, 2015), *archived at* https://perma.cc/7HAD-KS9K.

[12] *UNHCR Seeking Access to Detained Asylum-Seekers and Refugees in Nairobi*, UNHCR (Apr. 7, 2014), http://www.unhcr.org/5342b35d9.html, *archived at* https://perma.cc/UW48-F2GB.

[13] *States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol*, UNHCR, http://www.unhcr.org/3b73b0d63.html (last visited, Dec. 28, 2015), *archived at* https://perma.cc/2NMZ-C8M3.

[14] *Ratification Table: AU Convention Governing Specific Aspects of Refugee Problems in Africa,*

African Commission on Human and Peoples' Rights, http://www.achpr.org/instruments/refugee-convention/ratification/ (last visited Dec. 28, 2015), archived at https://perma.cc/35NK-ZPFG.

***[15]** Status: Kenya, United Nations Treaty Collection, https://treaties.un.org/Pages/ViewDetails.aspx?src=treaty&_mtdsg_no=iv-9&chapter=4&lang=en (last visited Dec. 28, 2015), archived at perma.cc/6XUT-YGU4.*

***[16]** Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85, available on the Office of the United Nations High Commissioner for Human Rights (OHCHR) website, athttp://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx, archived at https://perma.cc/LSG2-DZQT.*

[17] *Sara Pavanello et al., Hidden and Exposed: Urban Refugees in Nairobi, Kenya 15 (HPG Working Paper, Mar. 2010), available on the Overseas Development Institute (ODI) website, at http://www.odi.org/sites/odi.org.uk/_files/odi-assets/publications-opinion-files/5858.pdf, archived at https://perma.cc/MQW7-A464; Refugees Act No. 13 of 2006, 17 Laws of Kenya, Cap. 173 (rev. ed. 2014), available on the Kenya Law website, at http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20173, archived at https://perma.cc/PHC7-67EH; Refugees (Reception, Registration and Adjudication) Regulations, 2009 (Refugees Regulations), 17 Laws of Kenya, Cap. 173 (rev. ed. 2014), http://www.kenyalaw.org:8181/exist/kenyalex/sublegview.xql?subleg=CAP.%20173#KE/LEG/EN/AR/R/CHAPTER%20173/SUBLEG/HC_2_V1, archived at https://perma.cc/Z9BJ-UBT6.*

[18] UNHCR and its Executive Committee have even argued that the principle of *non-refoulement* is progressively acquiring the character of *ius cogens*; see Executive Committee Conclusion No. 25 para. (b); UN docs. A/AC.96/694 para 21.; A/AC.96/660 para. 17; A/AC.96/643 para. 15; A/AC.96/609/Rev.1 para. 5.

[19] See in particular Executive Committee Conclusion No. 6 on *Non-Refoulement*.

[20] See for instance Communications No. 41/1996 (vs.Sweden) and No. 21/1995 (vs. Switzerland).

[21] For more details see M. Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (1993), Article 7 para. 21.

[22] The European Human Rights Convention does not foresee a right of entry or asylum. The interpretation of Article 3 can, however, be seen as a limit to the power of States to expel aliens. For further information see UNHCR, 'The European Convention on Human Rights and the Protection of Refugees, Asylum-Seekers and Displaced Persons', *European Series* 2 (1996), No. 3. As regards recent jurisprudence, see *Ahmed vs. Austria* Judgement 71/1995/577/663 of 17 December 1996 and *Chahal vs. the United Kingdom* Judgement 70/1995/576/662 of 15 November 1996.

[23] Reg. vs. Bouchereau, 2CMLR 800.

[24] See: UNHCR, Note on Non-Refoulement(EC/SCP/2), 1977, para. 4. See also P. Weis, The Refugee Convention,1951: The Travaux Préparatoires Analysed with a Commentary by Dr. Paul Weis, Cambridge University Press, Cambridge (1995), at p. 341.

[25] Gabcikovo-Nagymaros Project (Hungary/Slovakia), Judgment,ICJReports 1997,p.7,atpp.114–15.

[26] **{2013} eKLR**

[27] **(CCT16/98) 2000 (1) SA 1,** at paragraphs135 -136.

[28] {2002} 5 LRC 216, 248

[29] S v Makwanyane and Another [1995] ZACC 3 para 144 Chaskalson P

[30] Ibid

[31] Kituo Cha Sheria & 8 others v Attorney General [2013] eKLR

[32]Ibid

[33] Louis Henkin, The Age of Rights (Columbia University Press, 1990) 4.

[34]Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012) 3.

[35] G Huscroft, B Miller and G Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014). Cf Aharon Barak:

[36] Kai Moller, 'Proportionality: Challenging the Critics' (2012) 10 *International Journal of Constitutional Law* 709, 709.

[37] Parliamentary Joint Committee on Human Rights, 'Guide to Human Rights' (March 2014) 8 <http://www.aph.gov.au/joint_humanrights/>.

[38] R v Oakes [1986] 1 SCR 103 [69]–[70].

[39] The Victorian Charter similarly provides: 'A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—(a) the nature of the right; and (b) the importance of the purpose of the limitation; and (c) the nature and extent of the limitation; and (d) the relationship between the limitation and its purpose; and (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve': *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2). See also, *Human Rights Act 2004* (ACT) s 28; *New Zealand Bill of Rights Act 1990* (NZ) s 5.

[40] Ibid

[41] This is part of the second limb of the *Lange* test. 'The test adopted by the Court in *Lange v Australian Broadcasting Corporation*, as modified in *Coleman v Power*, to determine whether a law offends against the implied freedom of communication involves the application of two questions: 1. Does the law effectively burden freedom of communication about government or political matters in its terms, operation or effect? 2. If the law effectively burdens that freedom, is the law *reasonably appropriate and adapted to serve a legitimate end* in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 of the Constitution for submitting a proposed amendment of the Constitution to the informed decision of the people?': *Hogan v Hinch* (2011) 243 CLR 506, [47] (French CJ) (emphasis added).

[42] Roach v Electoral Commissioner (2007) 233 CLR 162, [85] (Gummow, Kirby and Crennan JJ).

[43] Gubbay CJ in the often-cited case of *In re Munhumeso & Others* 1994 (1) ZLR 49 (S) at 64B-C

[44] 1995 (2) ZLR 1 (S) at 13C-F

[45] See, UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status, (hereinafter "UNHCR Handbook") (1979, Geneva, re-edited Jan. 1992), para. 112. For distinction between cessation and cancellation/revocation see, para. 4 below.

[46] In these Guidelines, “country of origin” is understood to cover both the country of nationality and thecountry of former habitual residence, the latter in relation to refugees who are stateless. For more on Article 1C(1–4), see UNHCR, “The Cessation Clauses: Guidelines on their Application”, April 199

[47] See, amongst others, UNHCR Handbook, para. 116.

[48] See, e.g., Executive Committee Conclusions No. 29 (XXXIV) (1983), No. 50 (XXXIX) (1988), No. 58 (XL) (1989), No. 79 (XLVII) (1996), No. 81 (XLVIII) (1997), No. 85 (XLIX) (1998), No. 87 (L) (1999), No. 89 (L)(2000), and No. 90 (LII) (2001

[49] See Executive Committee Conclusion No. 69 (XLIII) (1992), para. a.

[50] (Article 1C(5))

[51] (Article 1C(6)).

[52] UNHCR Handbook, para. 136

[53] JR No 17 B of 2015

[54] See Ondunga J in J R 112 of 2011 cited above in note 3

[55] Ibid