



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI COUNTY

COURT NAME: MILIMANI HIGH COURT

CASE NUMBER: HCCHRPET/E596/2024

REFUGEE LEGAL NETWORKS AND SEMHAR WELDEMICAHEL HAILE VS STATE LAW OFFICE
AND COMMISSIONER FOR REFUGEE SERVICES AND 1 OTHERS

JUDGMENT

BEFORE HON. MR. JUSTICE GREGORY MUTAI

Introduction

1. On 30th September 2024, the Department of Refugee Services, under the hand of the Commissioner for Refugee Affairs, published a notice titled "NOTICE TO ALL REFUGEES AND ASYLUM SEEKERS: SURRENDER PASSPORTS FROM COUNTRY OF ORIGIN". The Notice declared a "MORATORIUM on the possession and use of such passports by refugees" and required "all refugees and asylum seekers in Kenya" to surrender their country-of-origin passports to the Department within thirty (30) days. It warned that failure to comply "may lead to legal implications including cancellation of refugee status and subsequent expulsion from the country of asylum as provided by Section 17 of the Refugees Act", and then set out the text of section 17(1) of the Act. On 24th October 2024, the Department published a follow-up poster on its official Facebook page, requesting all refugees and asylum seekers to submit their passports at any of seven listed offices, including the Kakuma and Dadaab camps (together, "the impugned directive").
2. The Petitioners challenge the impugned directive by a Petition dated 28th October 2024, filed together with a Notice of Motion of the same date seeking conservatory orders. The 1st Petitioner, Refugee Legal Networks, is a company limited by guarantee, incorporated on 4th October 2022, which provides pro bono legal representation to refugees and asylum seekers. The 2nd Petitioner, Semhar Weldemicahel Haile, is an Eritrean national recognised as a refugee in Kenya and holder of Refugee Identity Card No. 10206312, issued on 29th October 2023. She also holds a passport issued by the State of Eritrea. She sues on her own behalf and on behalf of other refugees and asylum seekers.
3. The 1st Respondent is the Commissioner for Refugee Affairs, whose office is established under section 8 of the Refugees Act, 2021 (Cap. 173) ("the Act") and who heads the Department of Refugee Services established under section 7. The 2nd Respondent is the Ministry of Interior and National Administration, within which the State Department for Immigration and Citizen Services sit. The 3rd Respondent is the Attorney General, sued under Article 156 of the Constitution of Kenya, 2010.
4. The Kenya National Commission on Human Rights, Katiba Institute and the Legal Caravan are the



Interested Parties, while Kituo Cha Sheria was admitted as amicus curiae.

5. The Petition invokes Articles 2, 3, 10, 20, 21, 22, 23, 24, 27, 39, 47, 258 and 259 of the Constitution of Kenya, 2010, the Refugees Act, the 1951 United Nations Convention Relating to the Status of Refugees and its 1967 Protocol ("the 1951 Convention"), and Regulations 4, 18 and 31 of the Refugees (General) Regulations, 2024 (Legal Notice No. 39 of 2024) ("the Regulations"). The Petitioners seek the following reliefs:

- (i) A declaration that the 1st Respondent's directive dated 30th September 2024, that failure by refugees to surrender passports from their country of origin shall lead to cancellation of their refugee status and risk of expulsion from Kenya, threatens the rights and fundamental freedoms of the Petitioners and other refugees and asylum seekers residing in Kenya and violates Articles 27, 28, 39 and 47 of the Constitution of Kenya, 2010;
- (ii) A declaration that the government directive issued by the 1st and 2nd Respondents in the Notice dated 30th September 2024 demanding all refugees and asylum seekers to surrender passports from their country of origin is contrary to the provisions of sections 4, 18(2) and 31 of the Refugee (General) Regulations, 2024 as a requirement for the grant of a Conventional Travel Document;
- (iii) A declaration that refugees and asylum seekers are not required to surrender their passports from the country of origin to the State in order to be granted a Conventional Travel Document under the Refugee (General) Regulations 2024;
- (iv) Judicial Review order of certiorari to quash the 1st and 2nd Respondents' directive dated 30th September 2024 demanding all refugees and asylum seekers to surrender passports from their Country of Origin;
- (v) Judicial Review by an order of prohibition directed to the 1st and 2nd Respondents, barring them from collecting, confiscating or retaining the original passports of refugees or asylum seekers issued by their country of origin;
- (vi) Judicial Review by way of an order of mandamus directing that the 1st and 2nd Respondents return collected/surrendered passports of refugees or asylum seekers issued by their countries of origin;
- (vii) Costs of and incidental to the Petition; and
- (viii) Any other order that the Honourable Court deems fit to grant in the circumstances Court deems fit and just.

The Petitioner's Case

6. The Petitioners' case is set out in the Petition and in the supporting affidavits of David Muthama, a director of the 1st Petitioner, and that of the 2nd Petitioner, both sworn on 28th October 2024. The two affidavits are in materially identical terms.

7. The 2nd Petitioner depones that she has resided in Kenya since 2018. She avers that she cannot use her Eritrean passport to travel outside Kenya, but maintains that she has the right to keep her belongings, including that passport. The passport she exhibits as annexure "SWH-2" was issued on 27th February 2013 and expired on 26th February 2018.

8. The Petitioners plead that the impugned directive:

- (a) is not founded on any provision of law. Nothing in the Act or the Regulations empowers the Commissioner to demand the surrender of passports, or to cancel refugee status for failure to surrender them. Section 17 of the Act, which the Notice invokes, deals with fraud and new evidence, not passports;
- (b) contravenes Regulation 18(2), which requires that original documents presented by an asylum seeker be copied and returned, with only copies kept on the case file. It also sets a condition for a Conventional Travel Document ("CTD") that Regulation 31 does not prescribe;
- (c) was issued without notice, hearing, consultation or reasons, contrary to Article 47 of the Constitution and the Fair Administrative Action Act (Cap. 7L);
- (d) threatens the rights of refugees and asylum seekers to equality and freedom from discrimination (Article 27), human dignity (Article 28) and freedom of movement, including the right to leave Kenya (Article 39); and



(e) is inconsistent with Kenya's obligations under Articles 12, 27 and 28 of the 1951 Convention, Articles 4 and 6 of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and Article 12 of the International Covenant on Civil and Political Rights ("ICCPR"), all of which form part of the law of Kenya by virtue of Article 2(6) of the Constitution of Kenya, 2010 and section 28(1) of the Act.

9. The Petitioners say that unless the Court intervenes, refugees and asylum seekers who do not comply with the requirements face cancellation of their status and expulsion, which would violate the Constitution of Kenya, 2010, and Kenya's international obligations.

The Responses of the Respondents

(i) The 1st and 2nd Respondents

10. The 1st and 2nd Respondents opposed the Petition through two replying affidavits deposed on 7th November 2024 and 10th June 2025 by John Burugu, then Commissioner for Refugee Affairs.

11. The 1st and 2nd Respondents' position is summarized as follows:

(a) The directive complies with the international conventions and protocols to which Kenya is a party and with "global practice". It is intended to help refugees and asylum seekers uphold the rule of law;

(b) Under Articles 12, 27 and 28 of the 1951 Convention, refugees are entitled to civil, identity and travel documents. On 19th September 2023, the Cabinet Secretary published Legal Notice No. 143 of 2023, declaring six documents to be refugee identification documents, including the machine-readable CTD;

(c) Under the 1951 Convention and section 8(2)(i) of the Act, the CTD is "the only travel document for refugees to travel outside Kenya". A refugee may use it to travel anywhere except to the country of origin;

(d) The Department noted with concern that some refugees and asylum seekers were travelling out of Kenya on passports issued by their countries of origin. This threatens national security because such persons present themselves as refugees on the one hand and as nationals of their countries of origin on the other. Travel on a national passport shows that the traveller enjoys the effective protection of the country of origin;

(e) The decision was not abrupt and complied with Article 47 of the Constitution of Kenya, 2010 because a 30-day moratorium was given. It had no ulterior motive and was intended to protect refugees' status;

(f) The directive does not infringe Article 39 of the Constitution of Kenya, 2010, Article 12 of the ICCPR or Article 6 of the OAU Convention, because the CTD is a lawful travel document. Nor is it discriminatory under Article 27, since it seeks only to standardize the status of refugees;

(g) Refugees and asylum seekers often do not have national passports or cannot safely use them, and stateless persons cannot obtain one; and

(h) Regulations 4 and 18(2) concern registration and not travel documents, so the Petitioners' reliance on them is misplaced. The Court should balance national security against refugees' rights, discharge the conservatory orders and leave the Respondents room to implement policies that regulate refugee affairs.

12. Annexure JB-2 lists thirteen individuals by name, passport number, country of origin (Rwanda, Somalia, Ethiopia, Burundi, Turkey, South Sudan and Afghanistan), passport expiry date, dates of exit from and entry into Kenya, date of registration, case number and status. Seven are described as "asylum seekers" and six as "refugees". Several entries record departures from Kenya to Uganda, Tanzania and India. One entry records a departure to Somalia on 30th September 2024 by a Somali national registered as a refugee in 2008. Some passports were issued long after the holder was registered with the Department. For example, the holder at entry 1, registered in 2002, holds a Rwandan passport issued in June 2023, and the holder at entry 11, registered in 2009, holds a Somali passport issued at Nairobi in September 2022.

(ii) The 1st Interested Party

13. The 1st Interested Party supports the Petition through a replying affidavit sworn on 13th December 2024 by Victor Kamau, its Deputy Director and Head of Legal Services. The 1st Interested



Party describes itself as the national human rights institution established under Article 59 of the Constitution of Kenya, 2010, and invokes its mandate under Article 249(1) of the Constitution of Kenya, 2010. It depones that:

- (a) the directive was issued without public participation, contrary to Article 10(2), even though refugees and asylum seekers would bear its effects;
- (b) no reasons were given, and no internal appeal mechanism was identified, contrary to Article 47 and the Fair Administrative Action Act;
- (c) the national security justification is vague, overbroad and open to abuse. The Respondents bear the burden of showing a rational link between the limitation and its purpose, and have not discharged it;
- (d) Regulation 18(2) offers a less restrictive means of achieving any legitimate documentation purpose, so the directive fails the test in Article 24; and
- (e) a national passport is not among the documents Regulation 31(1) requires in support of a CTD application. Had the rule-maker intended otherwise, it would have said so.

(iii) The 2nd Interested Party

14. The 2nd Interested Party filed a Replying affidavit in support of the Notice of Motion application and Petition sworn by Emily Kinama on 15th December 2024, which was adopted by the 3rd Interested Party.

15. The Petition and the Notice of Motion came before the Court on 29th October 2024 under a certificate of urgency. On that date, the Court issued interim conservatory orders restraining the Respondents and their agents from acting on the directive pending the hearing of the application inter partes.

16. On 26th May 2025, the parties agreed by consent that the interim orders of 29th October 2024 be extended pending the hearing and determination of the Petition. The court disposed of the Notice of Motion on those terms, with costs in the cause. The conservatory orders have remained in force since then.

17. Directions on the Petition were issued on 16th February 2026 wherein parties were to file written submissions to the Petition. I note the following inconsistency in the pleadings regarding the parties. First, the Petitioners' submissions list the Kenya Human Rights Commission as the 2nd Interested Party and the Katiba Institute as the 1st Interested Party. Paragraph 3 of the Kenya Human Rights Commission's affidavit avers that it is sworn on behalf of "the 2nd Interested Party". The 3rd Interested Party filed its submissions under the title "2nd Interested Party's submissions". The Kenya Human Rights Commission's submissions date the impugned notices to 2025 instead of 2024. However, none of these errors shall cause prejudice to any party in the determination herein.

18. Secondly, the Respondents' written submissions go beyond their evidence in several respects. They submit that the passports are "placed into the protective custody of the Commissioner", and that the Commissioner deponed on oath that "no refugee or asylum seeker will be returned to their country of origin or expelled as an automatic consequence of this registration exercise". Neither statement appears in either of the Commissioner's affidavits. The Notice itself threatens cancellation of status and expulsion. It is settled that submissions are not evidence, and assertions of fact made from the bar cannot fill gaps in the evidence. The Court will therefore decide the matter on the Notice as published and on the sworn evidence before it.

19. Thirdly, the Respondents cite Attorney General v Kituo Cha Sheria & 7 others as authority that the State "retains an unyielding, sovereign mandate to manage public order dynamically". However, this decision dismissed the Attorney General's appeal and upheld the quashing of a blanket refugee directive. The Respondents also cite Community Advocacy & Awareness Trust (CRAWN TRUST) v Director of Citizenship and Immigration Control & 2 others, but provide no full citation or copy, and the proposition attributed to it cannot be verified. The Court places no reliance on it.

20. Fourthly, the matter has been pending for almost two years. The 3rd Interested Party submits, without contradiction, that the delay was partly caused by the Respondents' undertakings to revisit the Notice, which they never carried out. In their final submissions, the Respondents ask the Court



to "uphold" the Notice. The dispute is therefore live. The thirty-day window has passed, but that is only because this Court suspended the directive. The State still seeks to enforce it; Annexure JB-2 shows that at least some passports have been surrendered. The Court is satisfied that the questions raised are not moot.

The Submissions of the Parties

(i) The Petitioners' submissions

21. The Petitioner filed submissions dated 20th January 2026 which frame three issues: whether the directive violates constitutional rights; whether it is ultra vires the Act and the Regulations; and whether the reliefs should issue. On the first issue, they rely on *Nganga v Law Society of Kenya & 2 others* [2025] KECA 1384 (KLR) for the meaning of direct and indirect discrimination. They rely on *Ngugi v County Government of Nakuru & another* [2023] KEHC 22624 (KLR), which quotes *S v Makwanyane* [1995] ZACC 3, on dignity as a foundational value. They submit that the Notice was published without giving the affected persons any hearing, and invoke *Legal Advice Centre t/a Kituo Cha Sheria & 5 others v Attorney General & 4 others* [2024] KEHC 2973 (KLR) (the Dadaab and Kakuma camp closure case) and *Dry Associates Limited v Capital Markets Authority & another* [2012] eKLR. They argue that the directive treats refugees as passive objects of administrative command, not as holders of rights.

22. On ultra vires, the Petitioners rely on the definition in *Black's Law Dictionary* (11th Edition), on *Okoiti & 3 others v Anne Waiguru & 5 others* [2021] KEELRC 2306 (KLR) and on *Republic v Kenya Revenue Authority ex parte Style Industries Limited* [2019] KEHC 11965 (KLR). They submit that Regulation 18(2) requires original documents to be copied and returned, and that nothing in the Act or the Regulations authorizes the Commissioner to demand passports or to cancel status for failure to surrender them. Section 17 exhaustively sets out the grounds for cancellation. They ask that all reliefs be granted with costs, invoking Article 159(2)(a) of the Constitution of Kenya, 2010.

(ii) The Respondents' submissions

23. The Respondent filed submissions dated 10th June 2026 which frame three issues: whether the Notice serves a legitimate purpose and is a lawful administrative action under Article 47 of the Constitution and Article 12(3) of the ICCPR; whether it is ultra vires Regulations 4 and 18(2); and whether it amounts to an arbitrary deprivation of property or a prospective breach of non-refoulement.

24. On the first issue, they submit that freedom of movement is not absolute and that Article 12(3) of the ICCPR permits restrictions provided by law and necessary to protect national security and public order. The Department found that some asylum seekers were claiming refugee protection while travelling internationally, unmonitored, on their national passports, which created a "security blind spot". Relying on *Attorney General & 2 others v Kituo Cha Sheria & 7 others*, they submit that the State retains a sovereign mandate over public order. They say Article 27 of the Constitution of Kenya, 2010 is not engaged because a distinction based on legal status is not discrimination, and that Article 47 of the Constitution of Kenya, 2010 was satisfied by the 30-day window.

25. On the second issue, they submit that Regulations 4 and 18(2) govern only intake registration and do not limit the State's "separate, overarching sovereign authority" under the Act to regulate travel documents. They argue that the Act does not allow refugees to enjoy protection from their country of origin while also receiving refugee protection.

26. On the third issue, they reject the term "confiscation", submitting that the passports are held in protective custody and that the CTD is a lawful substitute satisfying Article 28 of the 1951 Convention and section 28 of the Act. They argue that, under Article 1C(1) of the 1951 Convention, using a national passport signals voluntary re-availment of the protection of the country of origin, which ends refugee status, so holding the passports preserves the integrity of refugees' status. They ask that the Petition be dismissed, the conservatory orders discharged and the Notice upheld.

(iii) The 1st Interested Party's submissions

27. The 1st interested Party's written submissions dated 27th April 2026 frames four issues: legality; reasonableness and procedural fairness; non-refoulement; and remedy. On legality, it relies on



Network for Adolescents and Youth of Africa & another v Attorney General & 4 others [2019] KEHC 3035 (KLR) and Thirdway Alliance Kenya & another v Head of the Public Service & 2 others [2020] eKLR for the proposition that a public body must point to the source of its power. It relies on Republic v County Government of Nyandarua; ex parte Nyandarua Recreational & Entertainment Self Help Group [2019] KEHC 3639 (KLR) and submits that section 8(2)(b) of the Act and Regulation 18 make the Commissioner the custodian of refugee information, but not of original documents, which must be returned.

28. On Article 47, it submits, relying on Wanderi & 106 others v Engineers Registration Board & 7 others (paragraphs 126 and 128), that an ultra vires act is void and the inquiry stops there. It argues that sections 4 and 5 of the Fair Administrative Action Act were not complied with. It relies on Legal Advice Centre t/a Kituo Cha Sheria & 5 others v Attorney General & 4 others; Kenya National Commission on Human Rights & another (Interested Parties) [2024] KEHC 2973 (KLR) and Kenya National Commission on Human Rights & another v Attorney General & 3 others [2017] KEHC 8086 (KLR) and on Republic v Kenya Bureau of Standards & 4 others; ex parte United Millers Limited [2019] KEHC 11292 (KLR) to argue that a blanket decision that does not consider individual circumstances is arbitrary.

29. On non-refoulement, the interested Party argues that the phrase "or be subjected to any similar measure" in section 29(1) of the Act is deliberately broad. It submits that a directive making lawful stay conditional on surrendering passports, on pain of expulsion, is a coercive "similar measure" amounting to constructive refoulement. It urges a purposive interpretation under Articles 20(3), 20(4) and 259, citing Council of Imams and Preachers of Kenya, Malindi & 4 others v Attorney General & 5 others [2015] eKLR, and prays that the Petition be allowed in full.

(iv) The 3rd Interested Party's submissions

30. The 3rd interested Party's submissions are dated 15th May 2026. They adopt the other supporting parties' case and raises additional points:

(a) Non-refoulement - The principle is a peremptory norm that cannot be qualified by national security, relying on UNHCR's 2007 Advisory Opinion on extraterritorial application of non-refoulement, *Chahal v United Kingdom* (ECtHR, 1996) and *Kituo Cha Sheria & 7 others v Attorney General* [2013] eKLR. The threat of expulsion aimed at a defined class is an anticipatory violation that the Court should declare;

(b) Property and dignity- A passport is an identity document and a record of personal history, not merely a travel document. The State cannot dispossess a person of property because it regards that property as of little use to the holder. Reliance is placed on Article 40 of the Constitution, Article 17 of the Universal Declaration of Human Rights, Article 14 of the African Charter on Human and Peoples' Rights and *Bhe v Magistrate, Khayelitsha* [2004] ZACC 17;

(c) Proportionality - Relying on Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others [2014] eKLR, Inter-American Court Advisory Opinion OC-17/02 and UN Human Rights Committee General Comment No. 27, it argues that the directive applies to all refugees without individual assessment, treating a refugee who has never travelled on a national passport the same as one who has misused one, and that less restrictive means exist; and

(d) Statelessness and legitimate expectation - For refugees from countries such as Somalia, South Sudan and Afghanistan, which appear in JB-2, a surrendered passport may be impossible to replace, creating a risk of de facto statelessness, contrary to CERD General Recommendation No. 30. It also argues that refugees had a legitimate expectation, based on Regulation 18(2), that their original documents would stay with them, relying on *Republic v Kenya Revenue Authority & another ex parte Darasa Investments Limited* [2017] eKLR.

31. It asks for specific declarations on non-refoulement and on arbitrary deprivation of property, an order for the return of the passports, and costs.

Issues for Determination

32. Having considered the pleadings, the affidavit evidence and the submissions, the Court identifies the following issues for determination:



- (i) What standard of review applies when considering the impugned directive;
- (ii) Whether the Commissioner had legal authority to issue the impugned directive, or whether the directive is ultra vires the Constitution, the Act and the Regulations;
- (iii) Whether the impugned directive met the requirements of Article 47 of the 2010 Constitution of Kenya and the Fair Administrative Action Act;
- (iv) Whether the impugned directive limits the rights under Articles 27, 28, 39 and 40 of the 2010 Constitution of Kenya, and, if so, whether the limitation is justified under Article 24;
- (v) Whether the threat of cancellation of status and of expulsion is lawful, and whether the directive offends the principle of non-refoulement or creates a risk of statelessness;
- (vi) Whether the State's stated concern, namely the use of national passports by refugees, has a lawful basis within the existing legal framework; and
- (vii) What reliefs should be granted, and who should bear the costs?

I will look at each of them in turn below

Analysis and Determination

- (i) What standard of review applies when considering the impugned directive;
33. The Petitioners seek declarations under Article 23(3)(a) of the Constitution of Kenya, 2010, together with judicial review orders of certiorari, prohibition and mandamus under Article 23(3)(f). The Supreme Court has explained the scope of review when judicial review orders are sought as constitutional relief. In *Dande & 3 others v Inspector General, National Police Service & 5 others* [2023] KESC 40 (KLR), the Court held that, after the Constitution of Kenya, 2010, judicial review is a constitutional right rooted in Article 47 and is no longer merely a common law remedy.
34. Where a party comes to court under the Constitution alleging a violation of rights, the court is not limited to examining the decision-making process. It may, to the extent necessary, examine the merits. The Supreme Court declared that "judicial review proceedings brought under the provisions of the Constitution must involve a review of merits". The Court will therefore examine not only how the directive was made, but also whether it was lawful, rational and proportionate.
35. It is also necessary to identify the impugned directive. The Respondents describe it as a "routine administrative action" and a "registration exercise". Neither description fits. On its face, the Notice does four things. It declares a "moratorium" on the possession, not merely the use, of national passports by refugees. It imposes a positive obligation on every refugee and asylum seeker in Kenya to surrender such passports within thirty days. It attaches a penalty for non-compliance: cancellation of status and expulsion. And it cites the 1951 Convention and the Act as its authority. In substance, it is a rule of general application that creates a new obligation backed by a sanction.
36. The Court also notes the Act's premise. In *Warsame v Director of Immigration Services (Through Attorney General)* [2025] KEHC 19338 (KLR), this Court, differently constituted, observed that a recognised refugee "is not an ordinary foreign national" and that refugee status "triggers a distinct and more protective legal regime". It found that a decision showing "a complete and total disregard for this specific legal framework" could not stand. The same approach applies here. The question is not only whether the State may, as a general matter, regulate non-citizens' travel documents. It is whether the Commissioner acted within the specific protective framework Parliament has enacted for refugees.
- (ii) Whether the Commissioner had legal authority to issue the impugned directive
37. The starting point is the principle of legality. In *Kenya Revenue Authority v Export Trading Company Ltd* [2022] KESC 31 (KLR), the Supreme Court reaffirmed its holding in *Wanderi & 106 others v Engineers Registration Board & 7 others; Egerton University & another (Interested Parties)* [2018] KESC 54 (KLR) that legality is the first question under Article 47(1) of the Constitution of Kenya, 2010. It stated that:
- "In examining Article 47(1) of the Constitution, the starting point is a presumption that the person exercising the administrative power has the legal authority to exercise that authority. Once satisfied as to the lawfulness of the power exercised, the court will then delve into inquiring whether, in the carrying out of that administrative action, there was a violation of Article 47(1). This is the test of



legality. So the question of the unlawfulness or otherwise of the act is at the outset of the inquiry. Where the act done was ultra vires the mandate of the administrative entity, the act is void ab initio, and the inquiry stops there as there is an outright violation of the Constitution."

38. The presumption of authority is rebuttable. Where, as here, a public officer is challenged on the ground that there is no power, the officer must be able to identify its source. The Constitution adds two further constraints. Under Article 94(5), "no person or body, other than Parliament, has power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation". Under Article 129(2), executive authority must be exercised in a manner compatible with the principle of service to the people and for their well-being and benefit. There is no general, free-standing executive power, whether described as "sovereign", "overarching" or otherwise, from which a public officer may create binding obligations for members of the public. The Respondents' reliance on a "separate, overarching sovereign authority under the main Act" therefore has to be tested against the actual provisions of the Act.

39. The Notice relies on "the Refugees Act No. 10 of 2021 and the 1951 United Nations Convention and its 1967 Protocol". The Respondents' affidavits also cite section 8(2)(i) of the Act and Legal Notice No. 143 of 2023. The Court has examined each.

40. Section 8(2) lists twenty-four functions of the Commissioner. None of the functions confers power to demand that refugees surrender documents issued to them by another sovereign, or to prohibit their possession. A function to issue a Conventional Travel Document does not imply a power to confiscate some other document. Such a power would have to be conferred expressly, because it interferes with the person and property of the individual.

41. The Act and the Regulations specify when a refugee or asylum seeker must surrender a document, which document, and to whom:

(a) Regulation 4(3)(c) requires an asylum seeker, on applying for registration, to "surrender any permit issued to the asylum seeker under the relevant written law relating to immigration". It says nothing of a national passport;

(b) Regulation 4(4)(b) requires the asylum seeker to "produce any identification document that he has in his possession". That is a duty to produce, not to surrender;

(c) Regulation 18(2) provides that "any original documents presented for the purposes of the claim of the asylum seeker shall be copied and returned to the asylum seeker and duplicate copies shall be entered in the case file";

(d) Regulation 27(1)(l) requires the Commissioner's register to record the refugee's "passport number where applicable", together with its date and place of issue and its expiry date (sub-paragraphs (m) and (n)). The rule-maker therefore contemplated that registered refugees may continue to hold national passports, and required their particulars to be recorded, not the passports themselves taken;

(e) Regulation 29(2) requires a refugee to surrender the asylum seeker's pass on being issued with a refugee identity card;

(f) Section 37(2) of the Act requires a refugee who leaves on voluntary repatriation, "or who ceases to be a refugee for any other cause", to surrender "all travel documents, identity cards, permits or any other documents which the refugee acquired by virtue of being a refugee". Regulation 49(2) lists those documents: the refugee identification card, Conventional Travel Documents, movement pass, pupil pass and exemption documentation. A national passport is not a document acquired "by virtue of being a refugee" and is not listed; and

(g) Regulation 31(8) provides that a Conventional Travel Document "shall remain the property of the Government of Kenya", and Regulation 31(12) empowers the Commissioner to cancel or withdraw a Conventional Travel Document where, among other things, the holder "uses it to travel to his country of nationality or former habitual residence".

42. This is a detailed scheme. Parliament and the Cabinet Secretary considered which documents a refugee must give up, at which stage and on what trigger. National passports appear in the scheme only as documents to be produced, copied and returned, or whose particulars are to be recorded.



Under the maxim *expressio unius est exclusio alterius*, where a scheme expressly lists the documents to be surrendered, it cannot be read to include a general power to demand others. The Respondents' argument that Regulations 4 and 18(2) only concern registration is correct as far as it goes. Regulation 18(2) does, in terms, concern documents presented in support of an asylum claim. But this argument does not offer a helping hand to the Respondents. The legality question is not whether some provision forbids the directive. It is whether some provision authorizes it. No provision of the Act or the Regulations has been identified that does, and the Court has found none.

43. In fairness to the Respondents, the Court has examined a point none of the parties raised. The Conventional Travel Document application form prescribed in the Schedule to the Regulations states in note 8 that "all applications must be accompanied by a previous passport, if any". The applicant's declaration includes a statement that "all previous passports granted to me have been surrendered other than passport or travel document No. ... which is not attached". This does not support the impugned directive, for three reasons which this court outlines as below;

44. First, the operative provision is Regulation 31(1), which lists the documents to accompany a Conventional Travel Document application; a copy of the refugee identity card or pass, two photographs, the reason for travel, and "any other relevant document". A national passport is not listed, and a form in a schedule cannot enlarge the substantive regulation it serves. Second, the form, read as a whole, appears to have been adapted from the passport form used for citizens. It refers to the applicant's Kenyan identity card, birth entry numbers and, where there is no Kenyan mission, "the nearest United Kingdom mission". Little weight can be placed on its incidental wording. Third, and most importantly, the form operates only in the context of an individual application for a Conventional Travel Document that a refugee chooses to make.

45. It cannot be the source of a power to require every refugee and asylum seeker in Kenya, whether or not they have applied for a Conventional Travel Document, to surrender their national passports on pain of losing their status. At most, Regulation 31(1)(d) allows the Commissioner, when processing an individual Conventional Travel Document application, to call for a national passport as a "relevant document" to verify identity or check for dual documentation. It must then be dealt with in the manner Regulation 18(2) describes: copied, noted and returned..

46. The Respondents rely on the 1951 Convention both as the source of power and as the basis for the directive's substance. The Convention is part of the law of Kenya under Article 2(6) of the Constitution, and section 28(1) of the Act makes refugees subject to the duties and entitled them to the rights it contains. However, the Convention sets out obligations of the State toward refugees. Article 27 requires the State to issue identity papers. Article 28 requires it to issue travel documents "for the purpose of travel outside their territory". Nothing in the Convention obliges or authorizes a State party to confiscate a refugee's national passport, and nothing makes the mere possession of such a passport unlawful.

47. The Supreme Court has explained that treaties operate within the domestic legal order subject to the Constitution Attorney General (On Behalf of the National Government) v Karua [2024] KESC 21 (KLR), where the Court observed that "the Constitution also envisions a situation where international law (treaty and customary law) to which Kenya is a party is subject to the Constitution within the domestic sphere". A public officer cannot rely on a treaty that binds the State to find a power over individuals that neither the Constitution nor an Act of Parliament has given them. Kenya has given effect to the 1951 Convention through the Act and the Regulations, and the Commissioner's powers are those the Act and the Regulations confer.

48. Legal Notice No. 143 of 2023, made under section 28(7) of the Act and section 56(2) of the Kenya Citizenship and Immigration Act, declares six documents, including the Conventional Travel Document, to be refugee identification documents "for purposes of acquiring services provided by the Government of Kenya". It confirms which documents the State will accept from refugees when providing services. It does not prohibit any other document, nor does it say anything about national passports.

The rule-making power conferred by Parliament



49. Section 44 of the Act empowers the Cabinet Secretary to make regulations to give effect to the Act. Among other things, regulations may provide for "the form and issue of identification and travel documents to refugees and members of their families and the rights that attach to the respective documents" (section 44(2)(d)) and for "circumstances on limitation of rights granted to refugees" (section 44(2)(v)). Consistent with Article 94(6) of the Constitution, sections 44(3) and (4) limit that delegated power and subject it to the Statutory Instruments Act (Cap. 2A), the Interpretation and General Provisions Act (Cap. 2), and the treaties and general rules of international law binding on Kenya.

50. Parliament has therefore specified that if the rights of refugees in relation to their documents are to be limited, the limitation must be made by the Cabinet Secretary through regulations. Those regulations must be published, go through the statutory instrument process, including tabling before Parliament and parliamentary scrutiny, and comply with international law. A notice by the Commissioner on the Department's website and Facebook page cannot take the place of that process. The Statutory Instruments Act defines "statutory instrument" broadly enough to include a "direction" or "guideline" issued in the exercise of a power conferred by an Act. If the Notice were made under the Act at all, it would have been subject to that Act, and the Respondents do not suggest that it complied with it.

Section 17 of the Act

51. The Notice relies expressly on section 17 of the Act as the source of the sanction, and sets out its text. Section 17(1) permits cancellation of refugee status only where a refugee "has fraudulently misrepresented or omitted material facts which, if known, could have changed the decision to recognise that person as a refugee", or where "new evidence becomes available that a person should not have been recognised as a refugee". Even then, section 17(2) to (4) require written notice to the individual, an opportunity to make written representations within fourteen days, an interview at which the refugee may be legally represented, a legal assessment of the individual case and a reasoned decision. That decision is appealable to the Refugee Status Appeals Committee under sections 11(4)(b) and 14, and then to this Court. Failure to surrender a passport is not a ground of cancellation under section 17, and a blanket threat to cancel status for such a failure is not a use of section 17 at all. The same applies to section 18 and section 19 (expulsion, limited to national security and public order, subject to section 29 and to "due process of law" under section 19(3)). The sanction in the Notice therefore had no statutory basis.

52. The Court accordingly finds that the Commissioner had no power under the Constitution, the Act, the Regulations or the 1951 Convention to impose a moratorium on the possession of national passports by refugees and asylum seekers, to require their surrender, or to threaten cancellation of refugee status and expulsion for non-compliance. The impugned directive was issued without legal authority and is contrary to Article 94(5) of the Constitution. Applying *Wanderi*, as reaffirmed in *Export Trading*, it is *ultra vires* and void *ab initio*, and is an outright violation of Article 47(1) of the Constitution of Kenya, 2010.

(iii): Whether the impugned directive met the requirements of Article 47 and the Fair Administrative Action Act

53. The finding on legality is enough to dispose of the Petition under Article 47(1). However, the Court should also address procedural fairness and reasonableness. The Respondents defend the directive on both, and the Court's views will matter to whatever lawful framework the Respondents may develop.

54. Article 47(1) guarantees every person, not only every citizen, administrative action that is "expeditious, efficient, lawful, reasonable and procedurally fair". Article 47(2) requires written reasons where a right or fundamental freedom has been or is likely to be adversely affected. Section 4(3) of the Fair Administrative Action Act requires prior and adequate notice of the nature and reasons for the proposed action, an opportunity to be heard and to make representations, notice of any right of review or appeal, and a statement of reasons. Section 5(1) applies where, as here, a



proposed administrative action "is likely to materially and adversely affect the legal rights or interests of a group of persons or the general public". In that case, the administrator must: issue a public notice of the proposed action inviting public views; consider all views submitted; give reasons for the action taken; notify the public of any internal mechanism for appeal; and specify how and within what period any appeal may be lodged.

55. None of these steps was taken. The Notice was not a notice of a proposed action inviting views. It announced a decision already made and required compliance. It identified no appeal or review mechanism. Its reasons ran to a single sentence: that "some refugees ... are using PASSPORTS from their country of origin for travelling outside the country". It gave no explanation of why a concern about the conduct of some justified a requirement imposed on all, or why it required surrender and not some lesser measure. The Commissioner's only answer is that there was "a moratorium of 30 days". A period within which to obey an order is not an opportunity to be heard on whether the order should be made. A thirty-day compliance window does not meet the requirements of Article 47 or section 5 of the Act.

56. In *Attorney General v Kituo Cha Sheria & 7 others* (Civil Appeal 108 of 2014) [2017] KECA 773 (KLR) (17 February 2017), the decision the Respondents cite, the Department had directed the relocation of all urban refugees to camps on security grounds. The Court of Appeal dismissed the Attorney General's appeal and expressly approved the High Court's holding that:

"... there is a legal obligation to consult the public in making and implementing public policy affecting refugees. The values of transparency, good governance and public participation mean that public and stakeholder engagement can no longer be wished away."

57. The Court of Appeal also agreed that the failure to consider the individual circumstances of each refugee made the directive unreasonable and in breach of Article 47(1) of the Constitution of Kenya, 2010. The decision therefore does not support the Respondents. It is binding authority against them.

58. The Supreme Court's recent statement of the principles of public participation in *Cabinet Secretary for the National Treasury and Planning & 4 others v Okiiti & 52 others; Bhatia* (Amicus Curiae) [2024] KESC 63 (KLR) arose in the legislative context. Its central point applies with greater force here: participation must be meaningful, must come before the decision, and must give those affected a real opportunity to influence the outcome. The persons most affected by the directive, refugees and asylum seekers, are among the people Article 21(3) describes as members of vulnerable groups whose needs every State organ must address. In this case, they had no opportunity to influence it. Nor were the UNHCR, the Refugee Advisory Committee established under section 9 to advise on refugee policy, or the KNCHR as the national human rights institution.

59. The directive also fails the requirement of reasonableness, and would fail it even if the Commissioner had had the power. Under section 7(2) of the Fair Administrative Action Act, an administrative action may be reviewed if relevant considerations were not taken into account, or if it is so unreasonable that no reasonable person could have taken it. The directive does not distinguish between:

- (a) a refugee who has travelled on a national passport and one who has never done so;
- (b) a national passport obtained or renewed after recognition as a refugee (which, as discussed under issue (vi), may indicate re-availment of the protection of the country of origin) and one issued before the holder fled, which indicates nothing of the kind;
- (c) a valid passport and an expired one. The 2nd Petitioner's passport expired in February 2018 and cannot be used by anyone to travel anywhere; and
- (d) a refugee and an asylum seeker whose claim has not yet been determined and who may still need their national documents to establish identity and nationality in the determination process under Regulations 4, 10 and 18.

59. A measure that treats all these cases alike, and threatens all of them with the same sanction, did not take relevant considerations into account and is not rationally connected to its stated aim. The 2nd Petitioner's position shows the problem. Surrendering her expired passport would not affect the security concern the Respondents describe, yet under the Notice, her refusal would expose her to



loss of status.

60. The 3rd Interested Party also relies on a legitimate expectation. Given the finding of illegality, the Court need not decide whether Regulation 18(2) created a legitimate expectation in the strict sense. It is enough to note that the directive departed, without notice or explanation, from the approach the Regulations themselves require: that original documents be copied and returned, and that passport particulars be recorded on the register.

61. The Court finds that the impugned directive violated Article 47(1) and (2) of the Constitution of Kenya, 2010 and sections 4 and 5 of the Fair Administrative Action Act, because it was procedurally unfair, gave inadequate reasons and was unreasonable.

(iv) Whether the directive limits the rights in Articles 27, 28, 39 and 40, and whether any limitation is justified under Article 24

62. The Bill of Rights applies to "every person" unless a provision is expressly limited to citizens (Article 20(1) and (2)). Refugees and asylum seekers are therefore entitled to the rights in Articles 27, 28, 39(1), 39(2), 40 and 47. See *Non-Governmental Organizations Co-ordination Board v EG & 4 others; Katiba Institute (Amicus Curiae) (Petition 16 of 2019) [2023] KESC 17 (KLR) (24 February 2023)*. The majority held that rights stated to belong to "every person" belong to everyone within the jurisdiction, including unpopular or marginalized groups. It also held that a State organ that seeks to limit such a right must point to a law authorizing the limitation, and must justify it, as Article 24(1) and (3) require. The burden of justification lies on the State.

63. Article 39(1) guarantees every person freedom of movement, and Article 39(2) guarantees every person the right to leave Kenya. The Respondents argue that Article 39 is not engaged because the Conventional Travel Document allows a refugee to leave Kenya. That is partly correct, but it overlooks two things. First, a Conventional Travel Document is not available on demand. It must be applied for in person, may take up to ninety days to issue (Regulation 31(5)), and may be refused (Regulation 31(7)). A refugee who has surrendered a national passport and has no Conventional Travel Document cannot lawfully leave Kenya. Second, and more fundamentally, the Conventional Travel Document cannot, by law, be used to travel to the refugee's country of origin.

64. Section 37(1) of the Act gives every refugee and asylum seeker "the right at any time to return voluntarily to the country of his or her nationality", and prohibits "any action or omission intended to prevent or restrict an asylum seeker or refugee from voluntary repatriation except in the due process of the law". Voluntary repatriation is the first durable solution the Act recognises (section 2) and the Commissioner is required to promote (section 8(2)(g)). The national passport is often the only document with which a refugee can exercise that right independently. Taking it without due process restricts both the right under Article 39(2) and the statutory right under section 37(1). The Court finds that the directive threatened to limit Article 39 of the Constitution of Kenya, 2010.

65. Every person has inherent dignity and the right to have it respected and protected under Article 28. In *Wanderi*, the Supreme Court held that a breach of Article 47 that subjects a person to arbitrary treatment may also violate dignity. Here, a group whose status in Kenya is by definition precarious was told, without being heard, that unless they gave up the identity document linking them to their nationality and personal history, they could lose the protection that stands between them and return to the place they fled. The Court finds that such a demand, made without legal basis, threatened the dignity guaranteed by Article 28.

66. The Court is not persuaded that a violation of Article 27 has been shown. The directive addresses refugees and asylum seekers because of their legal status, and the Constitution and the Act treat that status as a distinct legal category. Differentiating on the basis of refugee status for a legitimate purpose connected with that status is not, in itself, discrimination. The Petitioners have not identified a comparator who is treated more favourably in a relevantly similar situation. Nor have they shown that the directive disproportionately affected refugees of any particular nationality, ethnicity or religion. The directive's unfairness lies in its lack of legal authority, its unfair procedure, and its failure to distinguish between different situations within the class of refugees. Articles 47, 28, and 39 address those matters. The claim under Article 27 fails.



67. The 3rd Interested Party asks the Court to hold that a passport is the holder's property and that its compulsory surrender is an arbitrary deprivation under Article 40(3). The Court declines to make that finding. It is widely understood that a passport usually remains the property of the issuing State, and no evidence shows the terms on which the passports in question were issued. It is not necessary to decide whether a refugee's lawful possession of a national passport is "property" for the purposes of Article 40. The finding that the State had no power to take possession of it resolves the matter. Instead, the Court has taken the holder's legitimate interest in keeping the document into account under Articles 28 and 39.

68. Because the directive limited rights under Articles 28 and 39, the Respondents must justify it under Article 24. However, they cannot do so, for two reasons:

69. First, Article 24(1) permits a limitation "only by law". As found under issue (ii), the directive is not law and was not made under any law authorizing it. That alone disposes of any justification. See *Non-Governmental Organizations Co-ordination Board v EG & 4 others; Katiba Institute (Amicus Curiae)* (Petition 16 of 2019) [2023] KESC 17 (KLR) (24 February 2023). Article 12(3) of the ICCPR, on which the Respondents rely, has the same effect, as it permits restrictions on freedom of movement only where they are "provided by law".

70. Second, even if the limitation had been made by law, it would fail the proportionality inquiry required by Article 24(1)(a) to (e). The Court accepts that the purposes the Respondents invoke are important and legitimate: the integrity of the refugee protection system, the prevention of abuse of dual documentation, and national security. The Court also accepts that annexure JB-2, taken at face value, shows conduct by some individuals that would legitimately concern the Department. But the relation between the limitation and its purpose (Article 24(1)(d)) is weak. JB-2 identifies thirteen persons, while the directive applies to every refugee and asylum seeker in Kenya, a population that, on any view, numbers in the hundreds of thousands. There are also clearly less restrictive means of achieving the purpose (Article 24(1)(e)), all already provided by law, as discussed under issue (vi).

71. The UN Human Rights Committee's General Comment No. 27 (1999) on Article 12 of the ICCPR states that restrictions on freedom of movement must be the least intrusive means capable of achieving the desired result, and must not impair the essence of the right. A general confiscation of passports from an entire protected population, backed by a threat of loss of status, fails that test.

72. The Court therefore finds that the directive threatened to violate Articles 28 and 39 of the Constitution without justification under Article 24. The claims under Articles 27 and 40 are not made out.

(v) The threat of cancellation and expulsion, non-refoulement and statelessness

73. Non-refoulement is the cornerstone of refugee protection. It is codified in Article 33 of the 1951 Convention and Article II(3) of the OAU Convention, and domesticated in section 29 of the Act. The Court accepts, as was held in *Legal Advice Centre t/a Kituo Cha Sheria & 5 others v Attorney General & 4 others; Kenya National Commission on Human Rights & another (Interested Parties)* [2024] KEHC 2973 (KLR), that the principle has attained the status of customary international law, and that under Article 2(5) of the Constitution it forms part of the law of Kenya.

74. Recent comparative decisions show how courts treat measures that remove protection from a refugee without an individual assessment of the risk on return. In *Scalabrini Centre of Cape Town & another v Minister of Home Affairs & others* [2023] ZACC 45 (12 December 2023), the Constitutional Court of South Africa declared invalid sections 22(12) and 22(13) of that country's Refugees Act and the related regulation. Those provisions deemed an asylum application abandoned and exposed the applicant to treatment as an illegal foreigner liable to deportation merely because the applicant failed to renew a visa in time. The Court held that such an administrative trigger, operating without any inquiry into the risk of persecution on return, was irrational and inconsistent with the principle of non-refoulement, and that administrative convenience could not justify it.

75. In *R (AAA and others) v Secretary of State for the Home Department* [2023] UKSC 42 (15 November 2023), the Supreme Court of the United Kingdom held that a policy of removing asylum seekers to a third country was unlawful because, on the evidence, there were substantial grounds



for believing that they faced a real risk of refoulement. Both decisions show that a State may not use a procedural or administrative rule to bypass the individual, evidence-based assessment that protection against refoulement requires.

76. The Notice has the same defect. It linked a documentary requirement to cancellation of status and expulsion, with no provision for any individual inquiry. Section 29(1) of the Act prohibits not only expulsion and return, but also subjecting a refugee "to any similar measure" that would compel return to a place of persecution or serious harm. The Court agrees with the 1st interested party that these words are meant to prevent evasion of the principle by indirect means. A threat of loss of status and expulsion, directed at an entire class of protected persons for reasons unrelated to any statutory ground, is the kind of measure the provision anticipates. As already found, such a threat has no basis in sections 17, 18 or 19 of the Act.

77. The Court nevertheless declines the 3rd Interested Party's invitation to declare that the directive is a "prospective violation of the peremptory norm of non-refoulement" as a matter of jus cogens. No evidence shows that any refugee's status was cancelled or that anyone was expelled or returned under the directive. The conservatory orders issued the day before the deadline prevented that.

78. Courts decide concrete disputes on the evidence, and should not make broad declarations on contested questions of international law where the case can be fully resolved on narrower grounds. It is enough, and more useful to the parties, for the Court to declare that failure to surrender a national passport is not a lawful ground for cancelling or revoking refugee status or for expulsion. Any such step would contravene sections 17, 18, 19 and 29 of the Act and Article 47 of the Constitution.

79. The same applies to statelessness. Surrendering a passport to the Department would not, in law, deprive the holder of nationality. The claim that surrendered passports could not be replaced for nationals of Somalia, South Sudan or Afghanistan is plausible but has no evidential foundation. The Court makes no finding of a risk of statelessness. It does, however, find that the practical difficulty many refugees face in replacing national documents, which the Commissioner acknowledged when deponing that refugees "often do not have a national passport or cannot safely use their national passport", was a relevant consideration the Commissioner failed to weigh.

(vi) Whether the State's stated concern has a lawful answer within the existing framework

80. The Court should not leave the impression that the Respondents' concern is illegitimate. It is not. A refugee is a person who is unable or, owing to a well-founded fear, unwilling to avail himself or herself of the protection of the country of nationality (section 3(1)(a) of the Act). Refugee status ceases where a person "voluntarily re-avails himself or herself of the protection of the country of his or her nationality" (section 5(a) of the Act, reflecting Article 1C(1) of the 1951 Convention). The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status explains in paragraph 119 that this cessation clause has three elements: voluntariness, intention to re-avail, and actual re-availment. In paragraph 121, it states:

"If a refugee applies for and obtains a national passport or its renewal, it will, in the absence of proof to the contrary, be presumed that he intends to avail himself of the protection of the country of his nationality. On the other hand, the acquisition of documents from the national authorities, for which non-nationals would likewise have to apply — such as a birth or marriage certificate — or similar services, cannot be regarded as a re-availment of protection."

81. Several entries in annexure JB-2 describe conduct that falls within this guidance. Examples include a national passport issued years after the holder's registration as a refugee, or a recorded departure to the country of origin. If those facts are established in an individual case, they may properly found cessation proceedings. However, the guidance targets conduct: applying for, obtaining, renewing, or travelling on a national passport. It does not target mere possession of a passport issued before flight. The 1951 Convention framework does not treat such possession as a wrong, and the Regulations, in requiring passport particulars to be recorded, assume it will happen. The impugned directive reversed that position by treating possession itself as the wrong.

82. The existing law already gives the Respondents lawful and proportionate avenues to deal with



the conduct that concerns them under the Act, to wit;

- (a) Individual cessation proceedings under section 5 of the Act and Regulations 39 to 43, with notice of the grounds, an interview, an opportunity to show a continued need for protection, a reasoned assessment and a right of appeal. Where a refugee is shown to have obtained a national passport after recognition, or to have returned to the country of origin, the UNHCR presumption described above may apply, subject to proof to the contrary;
- (b) Individual cancellation under section 17 of the Act, where recognition was obtained by fraud or new evidence shows it should not have been granted;
- (c) Cancellation or withdrawal of a Conventional Travel Document under Regulation 31(12) where it is used to travel to the country of nationality or on national security grounds;
- (d) Criminal sanctions under section 41 of the Act for false declarations, misleading refugee officers, or use of refugee documents by others;
- (e) Recording, verification and information-sharing: recording passport particulars on the register (Regulation 27(1)(l) to (n)), checking biometric data against national databases (Regulation 4(6)), ensuring the register is interoperable with other databases (Regulation 27(2)(b)), and coordinating with the Director of Immigration (section 8(2)(i)); and
- (f) Regulations under section 44(2)(d) and (v) of the Act. If, after proper consultation, the Cabinet Secretary considers that a general rule on the custody of refugees' national passports is necessary, it may make regulations. Those regulations must comply with the Statutory Instruments Act, the Constitution, including Articles 24 and 47, and Kenya's international obligations.

83. Each of these measures targets the individual whose conduct raises the concern, follows a procedure set by law, and is subject to review. The impugned directive used none of them.

84. The Court also notes a matter from annexure JB-2 that neither party addressed. Seven of the thirteen persons listed are still described as "asylum seekers", although some were registered with the Department as long ago as 2002 and 2009. Section 12(9) of the Act and Regulation 9(1) require the Commissioner to determine an application for refugee status within ninety days, extendable only for reasonable cause. If JB-2 is accurate, some applications have been pending for fifteen to twenty years. This Court has previously granted mandamus against the Department for inordinate delay in performing its statutory duties. See *Haki na Sheria Initiative & 3 others v Attorney General & 4 others* (Petition E008 of 2021) [2025] KEHC 221 (KLR) (21 January 2025).

85. The matter is not before the Court for decision, but the Respondents may wish to consider it. A person left for years without a determination of their status may understandably keep the documents of their country of nationality.

86. Article 23(3) empowers the Court to grant appropriate relief, including declarations, conservatory orders and judicial review orders. In *Mitu-Bell Welfare Society v Kenya Airports Authority & 3 others* [2021] KESC 34 (KLR), the Supreme Court affirmed that courts may give structural and supervisory relief where needed to make a constitutional remedy effective. Annexure JB-2 is titled a "Surrender Report". It shows that the Department has received the passports, and the Respondents describe them as being held in the Commissioner's custody. An order for their return, together with a requirement to report on compliance, is therefore necessary.

Final Orders

87. In the result, the Petition dated 28th October 2024 is allowed in part, and the Court issues the following directions and/or makes the following orders:

- (1) A declaration that the Notice issued by the 1st Respondent dated 30th September 2024 and the follow-up notice published on 24th October 2024 were issued without legal authority, are ultra vires the Refugees Act, 2021 and the Refugees (General) Regulations, 2024, contravene Article 94(5) of the Constitution, and are null and void ab initio;
- (2) A declaration that the impugned directive, including its threat of cancellation of refugee status and expulsion from Kenya, violated the right of refugees and asylum seekers, including the 2nd Petitioner, to fair administrative action under Article 47 of the Constitution and sections 4 and 5 of the Fair Administrative Action Act, and threatened their rights under Articles 28 and 39 of the



Constitution and section 37(1) of the Refugees Act, 2021;

(3) A declaration that neither the Refugees Act, 2021 nor the Refugees (General) Regulations, 2024 require a refugee or asylum seeker to surrender a passport issued by the country of origin as a condition for the grant of a Conventional Travel Document;

(5) An order of certiorari is hereby issued to bring into this Court, and quash, the 1st Respondent's Notice dated 30th September 2024 and the notice published on 24th October 2024;

(6) An order of prohibition is hereby issued prohibiting the 1st and 2nd Respondents, their officers, agents and any person acting under their authority, from collecting, confiscating or retaining the original passports issued to refugees or asylum seekers by their countries of origin;

(7) An order of mandamus is hereby issued compelling the 1st and 2nd Respondents, within thirty (30) days of the date of this judgment, to return to each holder, against a signed acknowledgement, every passport surrendered to or collected by the Department of Refugee Services under the notices quashed by this Court;

(8) The 1st Respondent shall, within forty-five (45) days of the date of this judgment, file and serve an affidavit of compliance stating the number of passports received under the quashed notices, the number returned, and, for any passport not returned, the reason and the legal authority for its retention. The matter shall be mentioned on a date to be fixed by the Deputy Registrar to confirm compliance;

(9) For the avoidance of doubt, nothing in this judgment prevents the Respondents from: (a) taking individual cessation, cancellation or revocation proceedings in accordance with the Refugees Act, 2021 and the Refugees (General) Regulations, 2024; (b) enforcing the offences under section 41 of the Act; (c) cancelling or withdrawing a Conventional Travel Document under Regulation 31(12); (d) recording passport particulars under Regulation 27 and sharing information with the Directorate of Immigration Services in accordance with the law; or (e) developing, through regulations made under section 44 of the Act after public participation and in compliance with the Statutory Instruments Act and the Constitution, a lawful framework on the custody or use of refugees' national passports;

(10) The prayers for a declaration under Article 27 of the Constitution, for a declaration of arbitrary deprivation of property under Article 40, and for a declaration of prospective violation of a peremptory norm of non-refoulement are declined;

(11) Each party shall bear its own costs of the Petition.

88. Orders accordingly.

Dated and signed at Nairobi this 28th day of September 2026.

SIGNED BY:

HON. MR. JUSTICE GREGORY MUTAI



THE JUDICIARY OF KENYA.

MILIMANI HIGH COURT

HIGH COURT CONSTITUTION AND HUMAN RIGHTS

DATE: 2026-10-11 21:56:11+03

