REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI COUNTY

COURT NAME: MILIMANI HIGH COURT

CASE NUMBER: HCCHRPET/E596/2025

REFUGEE LEGAL NETWORKS AND REFUGEE CONSORTIUM OF KENYA AND 3 OTHERS VS COMMISSIONER OF REFUGEE AFFAIRS AND CABINET SECRETARY INTERIOR AND CORDINATION OF NATIONAL GOVT. AND 1 OTHERS

JUDGMENT

BEFORE HON. MR. JUSTICE GREGORY MUTAI

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. E596 OF 2025

BETWEEN

REFUGEE LEGAL NETWORKS.....1ST PETITIONER

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS.....2ND PETITIONER

REFUGEE CONSORTIUM OF KENYA.....3RD PETITIONER

KITUO CHA SHERIA.....4TH PETITIONER

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SANCTUARY FOUNDATION.....5TH PETITIONER

VERSUS

COMMISSIONER FOR REFUGEE AFFAIRS.....1ST RESPONDENT

MINISTRY OF INTERIOR AND NATIONAL ADMINISTRATION.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

AND

GLOBAL STRATEGIC LITIGATION COUNCIL FOR REFUGEE RIGHTS.....INTERESTED PARTY

JUDGMENT

Introduction

1. On 31st July 2025, the Acting Commissioner for Refugee Affairs issued a memorandum to the field offices of the Department of Refugee Services headed "Temporary Suspension of Selected Services" ("the Notice"). The Notice contained four items. Item 1 suspended the registration of asylum seekers of Eritrean and Ethiopian nationalities "until further notice" ("Directive 1"). Item 2 suspended "the exemption applications of processing change of address and data transfer which allows refugees to reside outside designated areas" ("Directive 2"). Item 3, invoking section 4(2)(b) of the Refugees Act, 2021, stated that individuals who have already sought asylum in another country are not eligible for registration, and suspended the registration of "onward movers" ("Directive 3"). Item 4 directed that all asylum and refugee services in Nairobi be offered strictly at the General Mathenge field offices. The Notice is annexed as "BM1" to the supporting affidavit of Dr Bernard Mogesa. Item 4 is not challenged.

2. The Petitioners are Refugee Legal Networks, the Kenya National

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Commission on Human Rights ("KNCHR"), Refugee Consortium of Kenya, Kituo Cha Sheria and Sanctuary Foundation. By a Petition dated 16th September 2025, they contend that the Notice is *ultra vires* the Refugees Act, 2021 ("the Act") and the Refugees (General) Regulations, 2024 ("the Regulations"); that it discriminates on the ground of nationality; that it was issued without reasons or a hearing; and that it exposes Eritrean and Ethiopian asylum seekers, including children, to arrest, detention and refoulement, contrary to Articles 21, 27, 28, 29, 39, 47 and 53 of the Constitution and Kenya's obligations under international law.

3. The 1st Respondent is the Commissioner for Refugee Affairs ("the Commissioner"), whose office is established under section 8 of the Act. The 2nd Respondent is sued as the Ministry of Interior and National Administration, and the 3rd Respondent is the Attorney General. The Respondents oppose the Petition. They say that the Notice is a temporary, lawful administrative measure taken under sections 7 and 8 of the Act to address human trafficking, smuggling, data integrity and national security, and that genuine asylum seekers from the two countries continue to be registered on a case-by-case basis.

4. The Global Strategic Litigation Council for Refugee Rights, an international non-governmental organization comprising lawyers, advocates and refugee-led organizations, supports the Petition.

The Petitioner's Case

5. The Petition is supported by the affidavits of Dr Bernard Mogesa, the Secretary/Chief Executive Officer of the KNCHR, and of David Muthama, the Executive Director of the 1st Petitioner, both sworn on 16th September 2025. The Petitioners plead that the 1st, 3rd, 4th and 5th Petitioners are non-profit organisations that provide legal aid and outreach services to refugees, asylum seekers and returnees, and that the KNCHR is the national human rights institution established under Article 59 of the Constitution. They bring the Petition in the public interest under Articles 22 and 258 of the Constitution.

6. In the Petition, the Petitioners pray for the following orders, which are reproduced verbatim:

   i. A Declaration that the 1st Respondent has violated the Petitioners' Legitimate expectations in issuing an arbitrary directive dated **31st July 2025**, suspending the registration of

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asylum seekers of Eritrean and Ethiopian nationalities and further halting fundamental applications and administrative processes, thus affecting their rights and protections due to all refugees and asylum seekers in Kenya;

ii. A Declaration that by publishing the directive dated **31st July 2025** suspending the registration of asylum seekers of Eritrean and Ethiopian nationalities, the 1st Respondent violated the principle of non-refoulement and the rights thereto, against all the asylum seekers of Eritrean and Ethiopian Nationals, within the Republic of Kenya;

iii. A Declaration that by publishing the notice dated **31st July, 2025,** the 1st Respondent violated the rights and fundamental freedoms of all the Asylum Seekers and Refugees in Kenya, of Eritrean and Ethiopian origin as enshrined under **Articles 27 and 28 of the Constitution of Kenya, 2010** on the basis of their nationality;

iv. A Declaration that by publishing the notice dated **31st July 2025** the 1st Respondent violated the rights and fundamental freedoms of all the Asylum Seekers and Refugees in Kenya as enshrined under **Article 47 of the Constitution of Kenya 2010**;

v. A Declaration that Directives 1 and 2 of the Notice dated **31st July, 2025** published by the 1st Respondent, suspending the registration of Refugees and asylum seekers of Eritrean and Ethiopian nationalities within the Republic of Kenya are in violation of **Section 8 (2) (b & c) of the Refugees Act** and **Regulation No. 4 of the Refugee (General) Regulations, 2024**;

vi. A Declaration that Directive No. 2 published by the 1st Respondent in a notice dated **31st July, 2025**, suspending the applications for exemption processing, change of address and data transfer which allows refugees to reside outside designated areas violates **Sections 8(2)(p)** and **31 (4)** of the **Refugee Act, 2021**;

vii. A Declaration that Directives Nos. 1 and 2 published by the 1st Respondents in a notice dated 31st July, 2025 are discriminatory to the Refugees and asylum seekers of Eritrean and Ethiopian descent;

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viii. A Declaration that Directives Numbers 1 and 2 by the 1st Respondent published in a notice dated **31st July, 2025** are *ultra vires;*

ix. A Declaration that Directives Numbers 1, 2, and 3 published by the 1st Respondent in a Notice dated 31st July, 2025, violate **Articles 32 and 33 of the 1951 Refugee Convention;**

x. A Declaration that Directives Numbers 1, 2, and 3 published by the 1st Respondent in a Notice dated 31st July, 2025 violate **Article 12(3) and (5) of the African Charter on Human and People's Rights (ACHPR);**

xi. A Prerogative writ of Certiorari quashing the directive dated **31st July, 2025** issued by the 1st Respondent, suspending the registration of asylum seekers of Eritrean and Ethiopian nationalities and the suspension of exemption applications for processing change of address and data transfer which allows refugees to reside outside designated areas violates **Articles 27 and 39 of the Constitution of Kenya, 2010;**

xii. A Prerogative writ of mandamus compelling the 1st and 2nd Respondents to forthwith resume registration of asylum seekers of Eritrean and Ethiopian Nationalities, and determination of exemption applications of all Refugees under **Section 8(2) and 31(4) of the Refugees Act, 2021;**

xiii. Costs of this Petition; and

xiv. Any other order that this Honourable Court deems fit and just to grant in the circumstances.

The Responses

The Respondents' Replying Affidavit

7. The Respondents rely on the Replying Affidavit of Mwasaru Mercy, the Acting Commissioner for Refugee Affairs, sworn on 30th September 2025. Its substance is as follows:

(a) The directive was issued under sections 7 and 8 of the Act, which make the Department responsible for all administrative matters relating to reception, registration, protection, welfare

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and documentation of asylum seekers and refugees. Having been issued in exercise of a statutory mandate, it was not subject to public participation (paragraphs 3 and 4);

(b) The Commissioner was not required to give reasons. The Petitioners did not request reasons under section 6 of the Fair Administrative Action Act, 2015 ("the FAA Act"), or write to the Department under "Article 31" of the Constitution, before filing the Petition, which is therefore premature (paragraphs 5 and 6);

(c) Non-refoulement is not absolute. Article 33(2) of the 1951 Convention reserves to each State the right to apply internal administrative measures to prevent abuse of the asylum process by organized crime, and other States in the region take similar measures (paragraphs 7 and 8);

(d) The directive was issued because the Department learnt that Ethiopian and Eritrean nationals "usurp the asylum process" while being trafficked and smuggled through Kenya to South Africa and Libya, and that some registered asylum seekers from those countries had left for third countries, using the asylum process as a "conveyor belt" (paragraphs 9 and 10);

(e) The directive is not a blanket suspension. Genuine asylum seekers are considered case by case, with "affirmative action" for women, children, persons with disabilities and persons who have suffered trauma. Since the directive, the Commissioner has approved "over 150" applications or "over 100" applications from the two countries; copies are annexed as "MM-001";

(f) The Petitioners have not identified any genuine asylum seeker who has been arrested, detained or deported, nor demonstrated with particularity which rights have been violated; and

(g) The Court should balance the national interest and national security against Kenya's international obligations, and should not restrain the Commissioner from performing a statutory mandate.

8. The affidavit also exhibits a letter dated 16th July 2025 from the Commissioner to the Senior Resident Magistrate, Kapenguria, in

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Criminal Case No. E041 of 2025. The letter records that 107 Eritrean nationals were arrested at Alale, West Pokot County, on 5th July 2025; that the Department conducted "individual preliminary interviews"; that the majority cited avoidance of compulsory military conscription, which the Department considered unsubstantiated; and that it recommended that the accused be charged with unlawful presence under section 53(1)(j) of the Kenya Citizenship and Immigration Act, 2011 and that "an order do issue for repatriation to the country of origin".

The Interested Party's Replying Affidavit

9. Professor Ian Mathew Kysel, an Associate Clinical Professor of Law at Cornell Law School, swore an affidavit on behalf of the Interested Party on 28th January 2026. He deposed that refugees are recognised by Kenyan courts as vulnerable persons; that Article 28 of the Constitution protects every person irrespective of nationality; that any limitation of rights must satisfy Article 24; that the indefinite suspension is discriminatory and prejudicial to children born to asylum seekers; and that Kenya may not invoke its internal law to justify non-performance of a treaty obligation (Article 27 of the Vienna Convention on the Law of Treaties). He fairly acknowledged that, under Article 39(3), the right to enter, remain in, and reside anywhere in Kenya belongs to citizens.

The further affidavits in support of the Petition

10. In response to the Respondents' Replying Affidavit, Dr Mogesa swore a Supplementary Affidavit on 1st October 2025. He deposed that while the KNCHR acknowledges the Commissioner's mandate under sections 7 and 8 of the Act, that mandate is subject to the Constitution and to Kenya's international obligations. He averred that Article 33(2) of the 1951 Convention permits exclusion from protection only upon an individualised assessment of a specific person, and cannot justify a blanket measure. He annexed the ruling of the Senior Resident Magistrate at Kapenguria, sitting at Alale, delivered on 5th August 2025 in *Republic v Biniam Tesfalim & 103 Others*, Criminal Case No. E041 of 2025, in which the court directed that no deportation, removal or repatriation proceedings be taken against the accused persons until their refugee status had been assessed and communicated to them in writing in accordance with the Act. He also annexed the Special Rapporteur's Report on the Situation of Human Rights in Eritrea, dated

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12th May 2025, which urges States, including Kenya, to provide effective protection to Eritreans fleeing persecution, and the Human Rights Watch World Report 2025 on Ethiopia.

11. David Muthama, the Executive Director of the 1st Petitioner, swore a further affidavit on 1st October 2025. He deposed that in the course of his work he had encountered Ethiopian and Eritrean asylum seekers who presented themselves at the border, were branded victims of trafficking, were held in police stations without any refugee status determination interview, and were served with removal orders. He stated that, to the 1st Petitioner's knowledge, several had been deported, and that many were afraid to come forward in their own names.

12. Lidiya Belachew Shiferaw, an Ethiopian asylum seeker residing in Jamhuri, Nairobi, swore an affidavit on 22nd October 2025. She deposed that after learning of this Court's conservatory order of 2nd October 2025, she obtained a referral form from the 1st Petitioner and went to the Department's offices at Corporate Place, Upper Hill, to be registered. Officers at the gate denied her entry and told her that Ethiopian and Eritrean nationals were still not being registered. She was similarly turned away at the offices of the United Nations High Commissioner for Refugees ("UNHCR"). On 21st October 2025, she lodged her referral form and affidavit at the Ministry, which received them, but she has not been registered or issued with an asylum seeker pass.

13. The Petition was filed on 16th September 2025 together with an application for conservatory orders. On 25th September 2025, the Court gave directions for the filing of responses. The Respondents filed their Replying Affidavit on 30th September 2025, and the KNCHR and the 1st Petitioner filed further affidavits on 1st October 2025.

14. On 2nd October 2025, in the presence of counsel for the Respondents, the Court issued a conservatory order suspending the implementation of the Notice until 22nd October 2025.

15. Ms Shiferaw's affidavit of 22nd October 2025 was filed to bring to the Court's attention what the Petitioners describe as continued non-compliance with the conservatory order. No application to punish for contempt was filed, and the Court makes no finding of contempt. The affidavit is nevertheless evidence on the merits of how the Notice operated in practice, and the Court has treated it as such.

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16. The Interested Party was joined to the proceedings on 25th February 2026. Its affidavit and submissions are described as those of a "proposed" interested party in places, and its affidavit is headed a "Replying" affidavit although it supports the Petition. Nothing turns on these descriptions. The Court has considered the Interested Party's material on the basis that it was admitted, bearing in mind that an interested party may not introduce a new cause of action, and that legal argument in an affidavit is properly treated as submission.

17. The Petition was canvassed by way of written submissions. The Petitioners filed submissions dated 30th January 2026, the Interested Party filed submissions dated 3rd March 2026, and the Respondents filed Final Written Submissions dated 22nd April 2026. The Respondents earlier filed submissions opposing the conservatory application, which the Court has also considered. Two copies of the Respondents' final submissions, identical in content, appear on the record.

The Submissions of the Parties

The Petitioners' submissions

18. The Petitioners framed four issues for determination: whether the Notice violates the principle of non-refoulement; whether it is *ultra vires* section 8 of the Act; whether it discriminates on the basis of nationality; and whether it violates Articles 21, 27, 28, 39, 47 and 53 of the Constitution.

19. On non-refoulement, they relied on **Kenya National Commission on Human Rights & another v Attorney General & 3 others [2017] KEHC 8086 (KLR)** where Mativo J (as he then was) described non-refoulement as the basic principle of refugee law, prohibiting not only individual removal but also mass expulsion. They submitted that the Notice does not fall within the narrow exceptions in Article 33(2) of the 1951 Convention, and that denying registration and documentation creates the conditions for indirect expulsion.

20. On legality, they submitted that registration is a continuous statutory duty under section 39 of the Act and Regulation 4, which cannot be suspended administratively, and that under Article 10 every exercise of public power must be grounded in law.

21. On discrimination, they relied on Article 27 of the Constitution, Article 19(3)(a), and Article 3 of the 1951 Convention, which requires

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its provisions to be applied without discrimination as to race, religion or country of origin. They argued that selective exclusion by nationality replaces individual assessment with collective punishment.

22. On the remaining rights, they relied on **Kituo Cha Sheria & 8 others v Attorney General [2013] eKLR** on the consequences of closing urban registration centres, and on **Refugee Consortium of Kenya & another (suing on behalf of DL (Minor) & 47 others) v Attorney General & 2 others [2015] KEHC 8005 (KLR)** on the heightened vulnerability of refugee children. They submitted that Directive 2 imposes a de facto restriction on movement and residence without individual assessment, and that the abrupt suspension defeated the legitimate expectation that the statutory processes would continue.

The Respondents' submissions

23. In their submissions on the conservatory application, the Respondents relied on Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others [2016] eKLR to support the proposition that courts do not inquire into how the Executive performs duties within its discretion. They submitted that a person does not automatically become a refugee on entry; that under the Act an applicant must report within thirty days and be screened, including for exclusion under section 4; and that Article 31 of the 1951 Convention allows a State to apply internal measures necessary to protect national security.

24. In their Final Written Submissions, the Respondents submitted that the central issue is whether the temporary suspension fell within the Commissioner's lawful discretion. They contended as follows:

(a) There was no blanket denial of access to asylum, since genuine asylum seekers continued to be registered case by case, and the Petitioners have not produced an affidavit from any individual who was denied access, denied the opportunity to express an intention to seek asylum, or refouled. They relied on Anarita Karimi Njeru v Republic (1979) 1 KLR 154;

(b) The Petitioners conflate registration with protection. Non-refoulement prohibits return to danger; it does not require immediate registration regardless of operational or security considerations;

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(c) Sections 11 to 15 of the Act show that registration is not automatic, that verification and exclusion screening are mandatory, and that the Commissioner has administrative discretion;

(d) Article 31(2) of the 1951 Convention, Article III of the OAU Convention and UNHCR's 2019 registration guidance permit temporary restrictions for verification, anti-fraud, security screening and operational constraints;

(e) Article 238 of the Constitution, the Counter-Trafficking in Persons Act and the Palermo Protocol oblige the State to take preventive measures against trafficking, and the suspension was protective, not punitive; and

(f) The measure was lawful, reasonable, proportionate and time-bound, and the Petitioners have not demonstrated the conditions in Ethiopia and Eritrea that put asylum seekers at risk. The Petition should be dismissed with costs.

The Interested Party's submissions

25. The Interested Party's submissions addressed equality, non-refoulement and children's rights. It relied on the Dadaab closure case, in which this Court held that targeting refugees of a single nationality "amounts to discrimination and unfair treatment" and that a failure to identify and prosecute individuals involved in crime while condemning a whole group "poses the risk of punishing the innocent". It also cited the African Commission's decision in **Union Inter Africaine des Droits de l'Homme & others v Angola (Communication 159/96)** for the proposition that action directed at specific national groups is generally discriminatory.

26. On non-refoulement, it relied on *Republic v Khadar & 5 others* [2023] KEHC 25813 (KLR), on Article II(3) of the OAU Convention, which extends protection to persons whose status has not yet been recognised, and on Inter-American Advisory Opinion OC-21/14, to the effect that denying an alien the opportunity to have his or her risk assessed is itself inconsistent with non-refoulement. It submitted that even if national security is a legitimate aim, a nationality-wide suspension is over-inclusive and disproportionate where less restrictive measures, such as individual security vetting, are available.

27. On children, it submitted that the suspension exposes children

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born to unregistered asylum seekers to a heightened risk of statelessness, and that the best interests of the child must be a primary consideration under Article 3(1) of the Convention on the Rights of the Child, as explained in General Comment No. 14 and Joint General Comment No. 3/22 (2017). On remedies, it relied on **Fose v Minister of Safety and Security [1997] ZACC 6** and on **Kidero & 4 others v Waititu & 4 others [2014] KESC 11 (KLR).**

Issues for Determination

28. Having considered the pleadings, the affidavits and the submissions filed by the parties, the Court considers that the following issues arise for determination:

(i) Whether the Petition is premature for want of a request for reasons or for failure to exhaust statutory remedies, and whether it is pleaded with sufficient precision;

(ii) Whether the Notice was lawfully issued by the Commissioner, and whether it complied with Article 47 of the Constitution and the Fair Administrative Actions Act, including whether the doctrine of legitimate expectation applies;

(iii) Whether the Notice violated or threatened the principle of non-refoulement and the rights of asylum seekers and refugees under Articles 27, 28, 29, 39 and 53 of the Constitution and, if so, whether the limitation is justifiable under Article 24; and

(iv) What reliefs should issue, and who should bear the costs.

Analysis for Determination

(i)Whether the Petition is premature, and whether it is pleaded with sufficient precision

29. The Respondents contend that the Petition is premature because the Petitioners did not first ask for reasons under section 6 of the Fair Administrative Action Act, and did not exhaust the remedies under the Act. The reference in the Replying Affidavit to a request for reasons under “Article 31” of the Constitution evidently refers to Article 35, and the Court treats it as such.

30. The objection fails for three reasons. First, section 6 of the Fair Administrative Action Act gives a person affected by administrative

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action a right to request reasons; it does not make such a request a condition for approaching the Court. The duty under Article 47(2) to give written reasons arises where a right or fundamental freedom "has been or is likely to be adversely affected by administrative action". It is a duty owed by the decision-maker, not a burden placed on the person affected.

31. Secondly, there is no statutory forum to which the Petitioners could have taken this dispute. The Refugee Status Appeals Committee, established under section 11 of the Act, hears appeals against the Commissioner's decisions on individual applications and on the cancellation, revocation, or termination of refugee status. It has no jurisdiction over a general directive addressed to whole classes of persons, still less to determine whether that directive is constitutional. The doctrine of exhaustion applies only where the alternative mechanism is capable of resolving the dispute.

32. Thirdly, the Petition alleges violations of fundamental rights. In **Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties) (Petition E007 of 2023) [2023] KESC 113 (KLR) (28 December 2023)**, the Supreme Court affirmed that courts should ordinarily exercise restraint where a statute provides an alternative mechanism for resolving a dispute. At paragraphs 104-105, it held that "the availability of an alternative remedy does not necessarily bar an individual from seeking constitutional relief", and that a court is not restrained where the alternative mechanism has no jurisdiction to determine the alleged violations of the Constitution, or is inadequate to address the issue at hand. Both conditions are met here. The Petitioners were entitled to come directly to this Court.

33. On precision, the Petition identifies the impugned Notice, its operative directives, the provisions of the Constitution, the Act, the Regulations and the treaties said to be contravened, and the manner of contravention. That satisfies the test in **Anarita Karimi Njeru v Republic [1979] eKLR; (1979) KLR 154**, as restated by the Court of Appeal in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others (Civil Appeal 290 of 2012) [2013] KECA 445 (KLR) (26 July 2013)**. The existence and terms of the Notice are not in dispute. Much of what the Petitioners must prove is established by the Respondents' own affidavit, which explains why and how the Notice was issued.

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34. The Court accepts, however, that parts of the Petitioners' evidence are thin. Mr Muthama's affidavit speaks of asylum seekers detained at unnamed police stations, served with unidentified removal orders and deported to unknown places, without names, initials, dates or documents. The Court understands that affected persons may fear coming forward, but anonymized particulars could have been provided. The Court gives those general averments little weight and does not rely on them for any finding of actual deportation. Paragraphs 10 and 11 of his affidavit are also identical. The Petitioners' case does not, however, depend on that affidavit.

35. Contrary to the Respondents' submission that no affected individual has sworn an affidavit, Ms Shiferaw has done so. Her evidence is specific and has not been answered. The Petition is neither premature nor lacking in particularity, and the objection is therefore dismissed.

(ii) Whether the Notice was lawfully issued by the Commissioner, and whether it complied with Article 47 of the Constitution and the FAA Act, including whether the doctrine of legitimate expectation applies

36. The first question in any challenge to administrative action is whether the decision-maker had the power it purported to exercise. In **Kenya Revenue Authority v Export Trading Company Limited (Petition 20 of 2020) [2022] KESC 31 (KLR) (17 June 2022)**, the Supreme Court, reaffirming its decision in **Wanderi & 106 others v Engineers Registration Board & 7 others; Egerton University & another (Interested Parties) (Petition 19 of 2015 & 4 of 2016 (Consolidated)) [2018] KESC 54 (KLR) (17 July 2018)**, restated the test of legality under Article 47(1) as follows:

> **"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**

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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."

37. The presumption of authority is rebuttable. Where a public officer is challenged on the ground that there was no power, the officer must point to its source. The Respondents point to sections 7 and 8 of the Act, which establish the Department and the office of the Commissioner and make the Department responsible for administrative matters concerning refugees and asylum seekers.

38. Those provisions establish the Department and describe its responsibilities. They are not a free-standing grant of power to suspend the very duties the Act imposes. Section 8(2) lists the Commissioner's functions, which include to "receive, register and maintain a register for all refugees in Kenya" and to "receive and process applications for refugee status". Section 12 requires a person seeking asylum to apply to the Commissioner, requires an interview, entitles the applicant to a pass pending determination, and requires the Commissioner to make a determination within ninety days, extendable for reasonable cause. Section 39 requires the Department to keep a register, and Regulation 4 of the Regulations prescribes the registration of asylum seekers. Section 22 gives an applicant and his or her family the right to remain in Kenya while the application is determined and any appeal is heard.

39. These are duties expressed in mandatory terms. The Act gives the Commissioner genuine discretion in how applications are assessed and decided, but it does not give the Commissioner any power to decline to receive applications from persons of a particular nationality. A function to "receive" and "register" cannot be read as including a power to refuse to receive or register a defined class of persons indefinitely.

40. Where Parliament intended to limit protection on grounds of security or criminality, it said so, and it did so by reference to individuals. Section 4(1) excludes from refugee status a person who has committed specified crimes or acts, or who "is determined to be a threat to national security", and section 4(2) disqualifies a person who, among other things, has not availed himself or herself of the protection of another State of nationality without a valid reason. Section 29(2) withdraws protection against refoulement from a

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refugee or asylum seeker whom there are reasonable grounds to regard as a danger to Kenya's national security. Each of these provisions requires an inquiry into a particular person. None authorizes refusing to process the applications of an entire nationality before any inquiry is made. The Act's express provision for individual exclusion implies that a collective exclusion was not intended.

41. Parliament also identified who may make general rules under the Act. Section 44 requires the Cabinet Secretary to make regulations to give effect to the Act, subject to the scrutiny Parliament applies to statutory instruments. Article 94(5) of the Constitution provides that no person or body, other than Parliament, may make provision having the force of law except under authority conferred by the Constitution or by legislation. A notice by the Commissioner that suspends statutory processes for whole classes of persons, until further notice, is in substance a rule of general application. It was not made under any power to make rules, and it cannot override the Act or the Regulations.

42. The Respondents also relied on international instruments as a source of power. The Supreme Court has explained that treaties operate within the domestic legal order subject to the Constitution. See **Attorney General (On Behalf of the National Government) v Karua (Reference E001 of 2022) [2024] KESC 21 (KLR) (31 May 2024)**. A public officer cannot derive from a treaty that binds the State a power over individuals that neither the Constitution nor an Act of Parliament has given. In any event, as explained at paragraphs 71 and 72 below, none of the treaty provisions relied on authorises what the Notice did.

43. Directive 2 stands on a different footing but meets the same end. Sections 8(2)(p) and 31 of the Act give the Commissioner powers to grant exemptions and permissions concerning residence outside, or movement between, designated areas, having regard to a refugee's particular needs. Those are discretions to be exercised on the merits of each application. A public body that has a discretion must exercise it; it may adopt a policy, but it may not adopt a rule that it will not consider any application at all. That is a fetter on discretion, and an unlawful one. Directive 2 did not regulate how applications would be considered; it stopped their consideration altogether for every refugee in the country, without a time limit.

44. Notably, the Replying Affidavit says nothing at all about Directive

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2. Every reason it gives (trafficking, smuggling, onward movement) concerns Eritrean and Ethiopian asylum seekers. It offers no reason for suspending exemption, change-of-address, and data-transfer processes for refugees of all nationalities. That limb of the Notice is unexplained and unanswered.

45. Directive 3 requires separate consideration. The grounds of the Petition do not discuss it, but it forms part of the Notice annexed to the Petitioners' supporting affidavit; it is expressly challenged in prayers (ix) and (x); and the Respondents, who issued it, have had every opportunity to defend it. No prejudice arises from the Court determining it. Directive 3 states that, "pursuant to Section 4 (2) (b) of the Refugees Act", individuals who have already sought asylum in another country are not eligible for registration, and it suspends the registration of "onward movers". That is not what section 4(2)(b) provides. The provision disqualifies a person who "has sought asylum in another country or has been granted refugee status in another country prior to entry in Kenya and can be re-admitted to that country and benefit currently and in the future in that country from effective protection". Disqualification therefore turns not only on an earlier asylum claim, but also on whether the person can be readmitted to that country and will enjoy effective protection there. Those are questions of fact about a particular person.

46. The Regulations prescribe how they are to be answered. Regulation 4(8) requires the refugee officer to identify onward movers and refer them for an onward mover assessment. Regulation 5 requires each of them to be interviewed to determine whether he or she has sought or been granted asylum elsewhere, whether he or she can be readmitted to that country, and whether he or she has a protection need, and requires the officers to recommend to the Commissioner whether the person should be disqualified or proceed to refugee status determination. Regulation 8 bars registration only where the person has been granted asylum in another country, can be readmitted there, and has effective protection there.

47. Directive 3 replaces that individual assessment with a blanket rule. It treats the mere fact of an earlier asylum claim as disqualifying, a test narrower than Regulation 8, which requires a grant of asylum elsewhere, and it suspends registration of the whole category, so no onward mover assessment takes place at all. A person who sought asylum in a country that will not readmit him or her, or that cannot

protect him or her, is thereby left without access to protection anywhere. The Replying Affidavit does not address Directive 3. The concern it describes, that registered asylum seekers leave Kenya for third countries, is a different matter from the position of persons who arrive in Kenya after seeking asylum elsewhere, and cannot justify a rule that misstates the provision it invokes. Like Directives 1 and 2, Directive 3 was issued without legal authority.

48. The Court therefore finds that Directives 1, 2 and 3 were issued without legal authority. Directives 1 and 2 are *ultra vires* sections 8, 12, 22, 31 and 39 of the Act and Regulation 4 of the Regulations, and Directive 3 is *ultra vires* section 4(2)(b) of the Act and Regulations 4(8), 5 and 8 of the Regulations. All three are void. On the authority of **Kenya Revenue Authority v Export Trading Company Limited (Petition 20 of 2020) [2022] KESC 31 (KLR) (17 June 2022)**, that finding would ordinarily end the inquiry. Because the Notice has been defended at length on its merits, and because the remaining issues bear on the appropriate relief, the Court will nevertheless address them.

49. Article 47(1) of the Constitution entitles every person to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Under Article 47(2), where administrative action has been or is likely to adversely affect a person's right or fundamental freedom, the person has the right to be given written reasons for the action. The Fair Administrative Action Act gives effect to these rights. Section 4(3) requires prior and adequate notice of the nature and reasons for the proposed action and an opportunity to be heard. Section 5(1) provides that where proposed administrative action is likely to materially and adversely affect the legal rights or interests of a group of persons or the general public, the administrator must issue a public notice of the proposed action inviting public views, consider all views submitted, and give reasons for the action taken.

50. The Notice is plainly administrative action within the meaning of section 2 of the Fair Administrative Action Act. It affects the legal rights of every Eritrean and Ethiopian asylum seeker in Kenya through Directive 2, of every refugee who needs an exemption, a change of address or a data transfer, and, through Directive 3, of every onward mover. No prior notice was given, no representations were invited from the persons affected, the UNHCR, the KNCHR or anyone else, and the Notice gives no reasons. The reasons the Respondents now

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advance appear for the first time in an affidavit sworn after the Petition was filed. Reasons given after the event to defend litigation are not the reasons Article 47(2) requires.

51. The Respondents' position that a measure taken in the exercise of a statutory mandate is not subject to public participation or to the duty to give reasons cannot stand. Almost all administrative action is taken under some statutory mandate; that is what makes it administrative action. The Court of Appeal rejected a similar argument in **Attorney General v Kituo Cha Sheria & 7 others (Civil Appeal 108 of 2014) [2017] KECA 773 (KLR) (17 February 2017)**, which concerned a Government directive relocating all urban refugees to camps on security grounds. The Court of Appeal dismissed the Attorney General's appeal and endorsed the High Court's finding that "there is a legal obligation to consult the public in making and implementing public policy affecting refugees". It also upheld the finding that the failure to consider the individual circumstances of the refugees affected by that blanket directive rendered it unreasonable and in breach of Article 47(1). That decision binds this Court and is squarely in point.

52. The Supreme Court's recent statement of the principles of public participation in **Cabinet Secretary for the National Treasury and Planning & 4 others v Okoiti & 52 others; Bhatia (Amicus Curiae) (Petition E031, E032 & E033 of 2024 (Consolidated)) [2024] KESC 63 (KLR) (29 October 2024)** arose in the legislative context, but its underlying principle applies here with equal force: participation must be meaningful, which means that those affected must have a real opportunity to influence the outcome. That can only happen before the decision is made. The persons most affected by this Notice are members of vulnerable groups whose needs Article 21(3) obliges every State organ to address.

53. The Notice is also unreasonable in substance. In **Dande & 3 others v Inspector General, National Police Service & 5 others (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated)) [2023] KESC 40 (KLR) (16 June 2023)**, the Supreme Court held that where judicial review relief is sought under the Constitution, the court is not confined to the decision-making process and may, to the extent necessary, examine the merits. A measure that suspends a statutory process indefinitely, without criteria, without any exceptions written into it and without any time limit, and whose second directive is

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accompanied by no reason at all, is not one that a reasonable administrator, properly directing itself on the Act, could adopt. The Respondents' description of the Notice as "temporary" and "time-bound" is not supported by its terms.

54. The Court therefore finds that the Notice violated Article 47(1) and (2) of the Constitution and sections 4 and 5 of the Fair Administrative Actions Act.

55. Prayer (i) seeks a declaration that the Notice violated the Petitioners' legitimate expectations. In **Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others (Petition 14, 14A, 14B & 14C of 2014 (Consolidated)) [2014] KESC 53 (KLR) (29 September 2014)**, the Supreme Court explained that a legitimate expectation arises from an express, clear and unambiguous promise by a public authority, or from a regular practice which the claimant can reasonably expect to continue, and that there can be no legitimate expectation against clear provisions of the law or the Constitution. The Petitioners' complaint is not that a promise was broken but that statutory duties were suspended. The proper characterisation of that complaint is illegality, which the Court has upheld. The Petition does not plead any promise or practice founding a separate expectation, and the Petitioners, as organisations, have not shown an expectation personal to them. The Court therefore declines Prayer (i) without diminishing its findings on illegality and Article 47.

(iii)Whether the Notice violated or threatened the principle of non-refoulement and the rights under Articles 27, 28, 29, 39 and 53 of the Constitution and, if so, whether the limitation is justifiable under Article 24

56. Article 27(1) guarantees every person equality before the law and the right to equal protection and equal benefit of the law. Article 27(4) and (5) prohibit direct or indirect discrimination by the State or any person "on any ground, including" race, ethnic or social origin, colour, culture, language or birth. The Petitioners submit that Article 27(4) expressly lists nationality. It does not. But the list is introduced by the word "including", and is therefore illustrative, not exhaustive. Nationality is, in any event, closely connected to the listed grounds of ethnic or social origin, culture and language. Article 20(1) makes the Bill of Rights applicable to every person. In **NGOs Co-ordination**

Board v EG & 4 others; Katiba Institute (Amicus Curiae) (Petition 16 of 2019) [2023] KESC 17 (KLR) (24 February 2023), the Supreme Court confirmed both that the grounds in Article 27(4) are not exhaustive and that rights stated to belong to "every person" belong to everyone, including unpopular or marginalised groups.

57. The Constitution's guarantee is reinforced by Article 3 of the 1951 Convention, which forms part of the law of Kenya under Article 2(6) and section 28(1) of the Act:

"The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin."

58. In **Gichuru v Package Insurance Brokers Ltd (Petition 36 of 2019) [2021] KESC 12 (KLR) (22 October 2021),** the Supreme Court at paragraphs 48 and 51 of its judgment found that "not all cases of distinction amount to discrimination", and explained that discrimination arises where a person is treated differently from other persons in similar positions on a prohibited ground "without any objective and reasonable justification". The questions are therefore whether there is differential treatment of persons similarly situated, on a prohibited ground, and if so whether it has an objective and reasonable justification.

59. The first two questions answer themselves. The Notice expressly suspends registration of asylum seekers of two nationalities, and of no others. An Eritrean or Ethiopian who arrives in Kenya fleeing persecution stands in the same position under the Act as an asylum seeker of any other nationality: each is entitled to apply, to be interviewed, to remain pending determination and to have the application decided. The distinction drawn is on the ground of national origin, which is precisely the ground Article 3 of the 1951 Convention forbids.

60. The Respondents' position at paragraph 13 of the Replying Affidavit is that the measure is not a blanket suspension because genuine applicants continue to be registered case by case, and that over 150 (or over 100) applications have been approved since the directive. The Court cannot accept this position for four reasons.

61. First, it contradicts the Notice itself, which suspends registration of the two nationalities "until further notice". It contains no exception for

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"genuine" applicants and no criteria by which the genuineness of an application could be judged before the application is received. The "affirmative action" for women, children, persons with disabilities and trauma survivors described in paragraph 11 of the Replying Affidavit does not appear in the Notice. No guideline, circular or other document setting out a case-by-case procedure has been produced.

62. Secondly, the affidavit is internally inconsistent. Paragraph 12 refers to over 150 approvals, while paragraph 13 refers to over 100.

63. Thirdly, the annexure does not bear out either figure. The Court has examined the exhibit. It comprises some twenty-one pages of GOK/UNHCR Proofs of Registration, some of which appear to be repeated, issued in September 2025. They are proofs of registration, not decisions approving refugee status. The exhibit does not show the circumstances in which those persons were registered. The Court notes that the Department's own letter of 16th July 2025 and the Kapenguria ruling of 5th August 2025 show that a criminal court directed the Department to assess the claims of a large group of Eritrean nationals facing prosecution. Registration compelled by a court order is no evidence of a voluntary case-by-case policy.

64. Fourthly, the only direct evidence of how the Notice operated at the Department's door is Ms Shiferaw's. She is a woman, falling within the very category said to benefit from affirmative action. She averred in paragraph 5 of her affidavit that she was turned away at the gate and told that Ethiopians and Eritreans were not being registered, despite the conservatory order being in place. The Court has considered that item 4 of the Notice directs that asylum and refugee services in Nairobi be offered only at the General Mathenge offices, whereas Ms Shiferaw went to Corporate Place. But she was turned away because of her nationality, not the venue, and the Respondents have not suggested otherwise. Her evidence was not controverted.

65. There remains the question of justification. The Respondents aver that Eritrean and Ethiopian nationals are being trafficked and smuggled through Kenya, and that some have used registration as a "conveyor belt" to third countries. Preventing trafficking and smuggling is a legitimate and important aim, and Kenya has binding obligations under the Counter-Trafficking in Persons Act, 2010 and the Palermo Protocol. But the Respondents produced no data, report,

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investigation, or analysis showing the scale of the problem, why it was confined to two nationalities, or why the Act's screening and exclusion procedures could not address it. The assertion that some members of a nationality abused the process does not justify denying every member of that nationality access to it.

66. This Court confronted the same reasoning in **Kenya National Commission on Human Rights & another v Attorney General & 3 others (Constitutional Petition 227 of 2016) [2017] KEHC 8086 (KLR) (9 February 2017)**. There, the Government justified the closure of the Dadaab camps, home largely to Somali refugees, on the ground that the camps had become breeding grounds for crime. Mativo J (as he then was) held:

"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."

66. The observation applies with equal force here. Indeed, the victims of trafficking are persons whom the law requires the State to protect. To deny them access to the asylum process because they may have been trafficked is to penalize them for the crime committed against them.

67. The Court finds that the Notice treats asylum seekers of Eritrean and Ethiopian nationality differently from other asylum seekers on the ground of national origin, without objective and reasonable justification. It is discriminatory and contrary to Article 27(1), (4), and (5) of the Constitution and Article 3 of the 1951 Convention.

68. The principle of non-refoulement is codified in section 29 of the Act, Article 33(1) of the 1951 Convention, Article II(3) of the OAU Convention and Article 3 of the Convention against Torture. It forms part of Kenyan law under Article 2(5) and (6) of the Constitution and section 28(1) of the Act. Article II(3) of the OAU Convention is expressed in particularly broad terms: it forbids "rejection at the frontier, return or expulsion" which would compel a person to return to or remain in a territory where his or her life, physical integrity or liberty would be threatened. The protection extends to asylum seekers

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whose status has not yet been determined, because a person's status cannot be known until it has been assessed.

69. The Respondents submit that the Petitioners conflate registration with protection. The Court does not agree that the Act separates the two. Registration is the gateway to every protection the Act provides. It entitles an applicant to a pass under section 12, to remain in Kenya under section 22, and to section 15 protection against prosecution for unlawful entry or presence for a person who "has made a bona fide application for recognition as a refugee". An asylum seeker who cannot register cannot show that he or she has applied, and is exposed to arrest and prosecution under section 53(1)(j) of the Kenya Citizenship and Immigration Act, 2011 as a person unlawfully present. The Respondents' submissions acknowledge that the Act gives a newly arrived person only thirty days within which to report and begin the process. A suspension of registration "until further notice" means the thirty days will expire for every Eritrean and Ethiopian who arrives during that period.

70. That this risk is real, and not speculative, is shown by the Respondents' exhibit. In the letter of 16th July 2025, the Commissioner, after "preliminary interviews", recommended that 107 Eritrean nationals be charged with unlawful presence and that an order be issued for their repatriation "to the country of origin". The reasons given included that most cited avoiding compulsory military conscription, which the Department dismissed as unsubstantiated. The Special Rapporteur's Report, exhibited by the KNCHR, documents indefinite national service in Eritrea and calls on States to protect Eritreans fleeing it.

71. The magistrate, in the ruling of 5th August 2025, directed that no repatriation be undertaken until the accused persons' refugee status had been duly assessed and communicated to them in writing in accordance with the Act. The question is not whether those individuals are refugees; that is not before this Court. It is that, absent registration and proper determination, the route from arrest to repatriation to the country of origin was very short.

72. The Respondents relied on Article 33(2) of the 1951 Convention. That provision withdraws the benefit of non-refoulement from "a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is", or who, having been

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convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country. It is an exception concerning an individual, to be applied on evidence relating to that individual. It does not, as paragraph 7 of the Replying Affidavit suggests, reserve to States a general right to “apply such internal and administrative measures as it may deem necessary”. Section 29(2) of the Act is to the same effect: it applies to a refugee or asylum seeker whom there are reasonable grounds to regard as a danger to Kenya's national security, not to a nationality.

73. Nor do the other instruments assist the Respondents. Article 31(2) of the 1951 Convention permits restrictions on the movement of refugees unlawfully in the territory only where “necessary”, and only until their status is regularized or they obtain admission to another country. It presupposes that they are being processed; it does not authorize a refusal to process them. Article III of the OAU Convention concerns refugees' duty to refrain from subversive activities. As to UNHCR’s registration guidance of 2019, no copy was placed before the Court, and no passage was identified that sanctions a nationality-based suspension. The Respondents’ assertion of a “regional practice” of similar measures (paragraph 8 of the Replying Affidavit) is not supported by any evidence.

74. Comparative jurisprudence confirms that a State may not use a procedural rule to bypass the individual assessment that non-refoulement requires. In **Scalabrini Centre of Cape Town and Another v Minister of Home Affairs and Others (CCT 51/23) [2023] ZACC 45 (12 December 2023)**, the Constitutional Court of South Africa struck down provisions that deemed asylum applications abandoned, and exposed the applicants to deportation, without any inquiry into the risk of persecution on return. 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 a removal policy unlawful because there were substantial grounds for believing that it exposed asylum seekers to a real risk of refoulement.

75. The Court is not satisfied, on the evidence, that any identified asylum seeker has actually been refouled as a result of the Notice. Mr Muthama’s general averments are insufficient for that purpose. Article 22(1), however, permits proceedings where a right is “threatened”, and Article 23(3) permits relief accordingly. The Court finds that the Notice, by closing the gateway to registration for two nationalities and

for onward movers, created a real and substantial risk of refoulement, and threatened the protection guaranteed by section 29 of the Act, Article 33(1) of the 1951 Convention and Article II(3) of the OAU Convention.

76. The same reasoning applies to Article 29 (freedom and security of the person) and Article 28 (human dignity). The Court accepts the observation of this Court in **Kituo Cha Sheria & 8 others v Attorney General (Petition 19 & 115 of 2013 (Consolidated)) [2013] KEHC 6039 (KLR) (26 July 2013)**, at paragraph 60, that "**undocumented refugees and asylum seekers are left exposed to police harassment, extortion, arbitrary arrest and eventual prosecution for being in the country illegally**", and are unable to obtain services that require identification. A measure that by design leaves a class of persons undocumented, and so liable to arrest, threatens their freedom and security and fails to respect their inherent dignity. The Court finds that Articles 28 and 29 were threatened.

77. As to children, Article 53(2) makes the best interests of the child of paramount importance in every matter concerning the child, and Article 3(1) of the Convention on the Rights of the Child requires that they be a primary consideration in all actions concerning children. The Notice applied to children of Eritrean and Ethiopian nationality and to children of asylum-seeking parents. It contained no exception, safeguard or procedure for them. There is no evidence that their interests were considered at all before it was issued. The "affirmative action" described in the Replying Affidavit is not in the Notice and, as found above, is not shown to have operated. The Court finds that the Notice did not consider the best interests of affected children, which is a further ground on which it was unreasonable under Article 47(1) and incompatible with Article 53(2). The Interested Party's submissions on statelessness raise important concerns, but no child born to an unregistered asylum seeker during the suspension is before the Court, and the Court makes no separate finding on that question.

78. Prayers (ix) and (x) seek declarations that "Directives Numbers 1, 2, and 3" violate Articles 32 and 33 of the 1951 Convention and Article 12(3) and (5) of the African Charter on Human and Peoples' Rights. The three directives are items 1, 2 and 3 of the Notice. Article 32 of the 1951 Convention governs the expulsion of refugees lawfully in the territory, and Article 12(5) of the African Charter prohibits the mass expulsion of non-nationals. No expulsion under the Notice has been

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proved, and to that extent the prayers fail. Article 33(1) of the 1951 Convention embodies the principle of non-refoulement, and Article 12(3) of the African Charter guarantees every individual, when persecuted, the right to seek and obtain asylum in other countries in accordance with the laws of those countries and international conventions.

79. Directives 1 and 3 closed access to registration for whole categories of asylum seekers, defined by nationality and by an earlier asylum claim respectively, without any individual assessment. For the reasons given at paragraphs 68 to 74 above, both threatened those protections. Directive 3 carries a particular risk. An onward mover who cannot be readmitted to, or protected in, the first country of asylum, and who is shut out of the process in Kenya, may be left with no State willing to examine his or her claim, which is how chain refoulement occurs. Directive 2 concerns residence and movement within Kenya and does not engage these provisions. Prayers (ix) and (x) therefore succeed in part, in the terms of order (d) below, and are otherwise declined.

80. The Petitioners contend that Directive 2 violated Article 39. Article 39(1) guarantees every person freedom of movement, but Article 39(3) confines the right to enter, remain in and reside anywhere in Kenya to citizens, as the Interested Party rightly acknowledges. In **Kituo Cha Sheria & 8 others v Attorney General (Petition 19 & 115 of 2013 (Consolidated)) [2013] KEHC 6039 (KLR) (26 July 2013)**, the High Court held that Article 39(1) extends to refugees, that the residence right in Article 39(3) is reserved to citizens, and that any restriction on the movement of refugees must satisfy Article 24. The Court of Appeal upheld that decision in **Attorney General v Kituo Cha Sheria & 7 others (Civil Appeal 108 of 2014) [2017] KECA 773 (KLR) (17 February 2017)** Neither court held that the statutory framework for designated areas is itself unconstitutional. The Court therefore does not accept that refugees have a constitutional right under Article 39 to reside wherever they choose. They are entitled only to have any restriction on their movement imposed in accordance with the law and be justifiable.

81. The Petitioners' complaint about Directive 2 is better founded in the Act. Sections 8(2)(p) and 31 provide the lawful route by which a refugee may obtain permission to live or move outside a designated area, including on grounds of special needs, protection and safety.

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Directive 2 shut that route for all refugees without any reason. The Court has found it *ultra vires* and an unlawful fetter on discretion at paragraphs 43, 44 and 47 above, and in breach of Article 47 at paragraphs 48 to 53 above. To the extent that refugees were thereby denied the opportunity to have their applications considered, their freedom of movement within Kenya under Article 39(1) was restricted otherwise than in accordance with law. The Court so finds, but declines to make the broader declaration sought in prayer (xi) by reference to Article 39 generally.

82. The Respondents' central defence is that national security and the prevention of trafficking justify the measure, and that the Court must balance those interests against the rights of asylum seekers. The Court accepts without hesitation that national security is a legitimate, indeed a pressing, State interest, and that the Executive is entitled to considerable respect in assessing threats to it. The Respondents relied on **Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others [2016] KECA 432 (KLR) (1 July 2016)** for the proposition that courts do not inquire into how the Executive performs discretionary duties. That decision was reversed in material respects by the Supreme Court in **Mitu-Bell Welfare Society v Kenya Airports Authority & 3 others (Petition 3 of 2018) [2021] KESC 34 (KLR) (11 January 2021)**. In any event, respect for executive judgment does not relieve the State of the obligations that Article 24 imposes.

83. Article 24(1) permits a right in the Bill of Rights to be limited "only by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom", taking into account all relevant factors, including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the need to ensure that one person's enjoyment of rights does not prejudice the rights of others, and "the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose". Article 24(3) places the burden on the State to demonstrate that it has satisfied these requirements. In **NGOs Co-ordination Board v EG & 4 others; Katiba Institute (Amicus Curiae) (Petition 16 of 2019) [2023] KESC 17 (KLR) (24 February 2023)**, the Supreme Court confirmed that a right may be limited only as the Constitution provides, so that the State organ limiting a right must

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point to a law authorising the limitation and must justify it.

84. The Notice fails at the first step. It is not “law”, it is an administrative notice made without statutory authority, as found at paragraph 47 above. A limitation not prescribed by law cannot be saved by Article 24, however worthy its purpose.

85. It would fail at the later steps too. A five-judge bench of this Court considered a security-based limitation on refugees in **Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & another; Director of Public Prosecution & 6 others (Interested Parties); Law Society of Kenya & another (Amicus Curiae) (Petition 628 & 630 of 2014 & 12 of 2015 (Consolidated)) [2015] KEHC 7074 (KLR) (23 February 2015)**. It struck down section 48 of the Security Laws (Amendment) Act, 2014, which capped the number of refugees and asylum seekers in Kenya, finding that it was inconsistent with the principle of non-refoulement and that the State had not justified the limitation. If an Act of Parliament limiting refugee numbers on security grounds required that justification, an administrative notice must require at least as much.

86. Here the Respondents offered no evidence of the extent of trafficking or onward movement, no explanation why the risk is confined to two nationalities, and no explanation why less restrictive means would not do. The Act already provides those means: individual interviews and screening under section 12, exclusion under section 4, the national-security exception in section 29, cancellation and revocation of status, and prosecution of traffickers and smugglers under the Counter-Trafficking in Persons Act. The Department’s own letter of 16th July 2025 shows it can conduct individual interviews with over a hundred people within days. A measure that excludes every member of two nationalities, including the trafficked, the persecuted and children, together with every onward mover, in order to reach those who abuse the system, is over-inclusive and disproportionate. The Respondents have not discharged the burden under Article 24(3).

87. Nothing in this judgment prevents the Respondents from carrying out rigorous individual screening, verification of identity and data, security vetting, onward mover assessments under Regulation 5, and exclusion or disqualification of persons who fall within section 4 or the exception in section 29, or from prosecuting traffickers and smugglers. What the Constitution and the Act do not permit is to substitute

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nationality, or the bare fact of an earlier asylum claim, for that individual inquiry.

(iv)What reliefs should issue, and who should bear the costs

88. Article 23(3) empowers the Court to grant appropriate relief, including declarations, conservatory orders and orders of judicial review. In **Mitu-Bell Welfare Society v Kenya Airports Authority & 3 others (Petition 3 of 2018) [2021] KESC 34 (KLR) (11 January 2021)**, the Supreme Court affirmed that courts may give structural and supervisory relief where it is needed to make a constitutional remedy effective. Given Ms Shiferaw's unanswered evidence that registration was refused even after the conservatory order, the Court considers that an order requiring the Respondents to report on compliance is necessary.

89. On costs, the Petition was brought in the public interest, and the Petitioners include a constitutional commission. The Respondents acted in the belief that they were protecting national security. The Court considers that each party should bear its own costs.

The Final Orders

90. Based on the foregoing, the Petition dated 16th September 2025 succeeds in part, and the Court makes the following orders:

(a) **A declaration** is hereby issued that items 1, 2 and 3 of the Notice issued by the 1st Respondent on 31st July 2025, suspending the registration of asylum seekers of Eritrean and Ethiopian nationalities (Directive 1), suspending applications for exemption, change of address and data transfer (Directive 2), and suspending the registration of onward movers (Directive 3), were issued without legal authority, are *ultra vires* sections 4(2)(b), 8, 12, 22, 31 and 39 of the Refugees Act, 2021 and Regulations 4, 5 and 8 of the Refugees (General) Regulations, 2024, and are null and void and of no effect;

(b) **A declaration** is hereby issued that Directive 1 of the said Notice discriminates against asylum seekers of Eritrean and Ethiopian nationality on the ground of national origin, contrary to Article 27 of the Constitution and Article 3 of the 1951 Convention Relating to the Status of Refugees;

(c) **A declaration** is hereby issued that the said Notice

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violated the right of the affected asylum seekers and refugees to fair administrative action under Article 47 of the Constitution and sections 4 and 5 of the Fair Administrative Action Act, 2015;

(d) **A declaration** is hereby issued that, by suspending the registration of asylum seekers of Eritrean and Ethiopian nationalities and of onward movers, the said Notice threatened the principle of non-refoulement under section 29 of the Refugees Act, 2021, Article 33(1) of the 1951 Convention, Article II(3) of the 1969 OAU Convention and Article 12(3) of the African Charter on Human and Peoples' Rights, and threatened the rights of the affected persons under Articles 28 and 29 of the Constitution;

(e) **An order of certiorari** is hereby issued, bringing into this Court and quashing items 1, 2 and 3 of the Notice issued by the 1st Respondent on 31st July 2025;

(f) **An order of mandamus** is hereby issued, compelling the 1st and 2nd Respondents forthwith to receive and register applications for asylum by persons of Eritrean and Ethiopian nationality; to receive applications by onward movers and to refer them for onward mover assessment under Regulations 4(8) and 5 of the Refugees (General) Regulations, 2024; and to receive and determine on their individual merits applications for exemption, change of address and data transfer under sections 8(2)(p) and 31 of the Refugees Act, 2021, all in accordance with the Act and the Regulations;

(g) For the avoidance of doubt, nothing in these orders prevents the Respondents from conducting individual identity verification, screening and security vetting of any applicant, or from applying sections 4 and 29 of the Refugees Act, 2021 to any individual in accordance with the law, or from prosecuting persons involved in trafficking or smuggling;

(h) The Respondent is hereby ordered, within 60 days of the date hereof, to file a report with this Court stating the extent of compliance with this judgment, and in particular with Order No 90(f) above;

(i) Prayer (i) of the Petition is declined. Prayers (ix) and (x) are also declined, save to the extent granted in order (d); and

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(j) Each party shall bear its own costs.

91. It is so ordered.

Dated and signed at Nairobi this 19th day of October 2026.

Gregory Mutai
JUDGE

In the presence of:

Ms **Langat**, for the **1st, 3rd, 4th & 5th Petitioner**;

Mr **Osman**, for the **2nd Petitioner;**

Mr **Ochieng' Oginga,** holding brief for Mr **Thande Kuria,** for the **Respondents;**

Mr **Ochieng Odinga**, with Ms **Zahira Nina** and Mr **Wilson Ngao**, for the **Interested Party**; and

Ms **Neema Lwambia, Court Assistant.**

SIGNED BY:
HON. MR. JUSTICE GREGORY MUTAI

THE JUDICIARY OF KENYA.
MILIMANI HIGH COURT
HIGH COURT CONSTITUTION AND HUMAN RIGHTS
DATE: 2026-10-28 15:36:00+03

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