

CASE NOTE

KENNEDY GIHANA & OTHERS v REPUBLIC OF RWANDA, APPLICATION NO 017/2015

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I INTRODUCTION

This case note discusses *Kennedy Gihana v Republic of Rwanda, Application No 017/2015* ('*Kennedy*').¹ The case addressed whether the invalidation of the appellants' passports was an arbitrary deprivation of nationality, rendering them stateless and significantly impacting their enjoyment of a significant number of fundamental rights.

The right to a nationality has obtained noteworthy consideration within the African human rights system. In particular, three court rulings of the African Court on Human and Peoples' Rights ('AfCHPR') in 2018–19 have clarified the understanding of the right to nationality and the prohibition of its arbitrary withdrawal in the African regional context.²

Two AfCHPR cases brought against Tanzania in 2018 and 2019 referred directly to art 15 of the *Universal Declaration of Human Rights* ('UDHR'), which prohibits arbitrary deprivation of nationality. In doing so, the Court asserted that the prohibition is customary international law, and further affirmed that the right

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¹ *Kennedy Gihana v Republic of Rwanda, Application No 017/2015 (Judgment)* (African Court on Human and Peoples' Rights, App No 017/2015, 28 November 2019) ('*Kennedy*').

² *The World's Stateless: Deprivation of Nationality* (Report, Institute on Statelessness and Inclusion March 2020) 42 ('*The World's Stateless*') <<https://www.institutesi.org/resources/worlds-stateless-2020>>.

to a nationality is implied within the concept of ‘legal status’ in art 5 of the *African Charter on Human and Peoples’ Rights* (‘*African Charter*’).³

Specifically, in 2018 the AfCHPR dealt with the case of *Anudo Ochieng Anudo v United Republic of Tanzania* (‘*Anudo*’)⁴ where it held that the revocation of Anudo Ochieng Anudo’s Tanzanian citizenship amounted to a violation of his right not to be arbitrarily deprived of a nationality under art 15(2) of the *UDHR*.⁵ The *Anudo* judgment was followed by *Robert John Penessis v United Republic of Tanzania* (‘*Penessis*’) in 2019, where the AfCHPR ruled that the respondent state had ‘violated the applicant’s right to Tanzanian nationality as guaranteed by Article 5 of the [*African Charter*] and Article 15(2) of the *UDHR*’.⁶ In the *Penessis* case, the applicant had been arrested on the grounds of alleged ‘illegal entry and presence in Tanzania’.⁷

In both the *Anudo* and *Penessis* cases, the Court established that it may be impossible for an ordinary resident to prove citizenship; the burden of proof rests on the applicant and is difficult to meet should the state question the claim.⁸ It also established the important principle that the key issue in these matters is the entitlement to citizenship, rather than the possession of the correct supporting documents. *Kennedy* reiterates the decisions in *Anudo* and *Penessis*; that the burden of proof regarding citizenship lies primarily with the respondent state, particularly because they have the resource pool prove citizenship where it exists.

II FACTS

The seven applicants in *Kennedy* were all of Rwandese origin and were residing in South Africa at the time of filing the application.⁹ They approached the Court upon realisation that their passports were unilaterally and without notice declared invalid by the government of Rwanda.¹⁰ The invalidation of their passports came to light after one of the applicants was informed, on applying for a visa to the United States of America, that their name appeared on a list prepared by the Rwandan government indicating invalidity of their passport and others.¹¹ The applicants also put forward that none of the people whose passports were declared invalid were given an opportunity to appeal or defend the decision, especially

3 *ibid*; *Robert John Penessis v United Republic of Tanzania* (Judgment) (African Court on Human and Peoples’ Rights, App No 013/2015, 28 November 2019) (‘*Pennessis*’); *Anudo Ochieng Anudo v Tanzania* (Judgment) (African Court on Human and Peoples’ Rights, App No 012/2015, 22 March 2018) (‘*Anudo*’); *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) (‘*UDHR*’); *African Charter on Human and Peoples’ Rights*, opened for signature 27 June 1981, 1520 UNTS 217 (entered into force 21 October 1986) (‘*African Charter*’).

4 In 2012, Anudo approached the police to resolve his documentation in preparation for his wedding. The police refused to return his passport, saying there were ‘suspicions’ about his citizenship. The confiscation of his passport ultimately led to an official declaration that he was not a Tanzanian, and then to his deportation to Kenya. But the authorities in Kenya did not recognise him as a citizen either, and he was soon expelled back to Tanzania: *Anudo* (n 3).

5 ‘No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality’: *UDHR* (n 3) art 15(2); *Anudo* (n 3) 20 [88].

6 *Penessis* (n 3) 41 [168](v).

7 *ibid* 2 [1], 2–3 [4].

8 *Anudo* (n 3) 18 [80]; *Penessis* (n 3) 24–26 [90]–[96].

9 *Kennedy* (n 1) 2 [1].

10 *ibid* 2 [3]–[4].

11 *ibid*.

considering none of them were informed of the invalidation.¹² When interviewed by the *Mail and Guardian* as to why the passports had been cancelled, Vincent Karega, High Commissioner of Rwanda to South Africa, said that the reasons ‘could range from a person being implicated in “crimes” in Rwanda to a person having refugee status, which, he claimed, “is incompatible with having a passport”’.¹³ At the time of writing, there is no indication as to whether this list is a regular practice of the respondent state.

III ISSUE

The Court summarised the applicant’s allegations as follows:

The Applicants allege that the invalidation of their passports is an arbitrary deprivation of nationality, it has rendered them stateless, and has a significant impact on the enjoyment of a number of universally accepted fundamental human rights specifically, the right to: (i) participation in political life; (ii) freedom of movement; (iii) citizenship; (iv) liberty; (v) family life; and (vi) work.¹⁴

These points became the primary issues in the matter.

IV HOLDING

A *Was the Revocation of Passports Arbitrary?*

On the issue of whether the revocation of the passports was arbitrary, the Court revisited its decision in *Anudo*, where it ruled that such revocation must:

i) be founded on a clear legal basis; ii) serve a legitimate purpose that conforms with international law; iii) be proportionate to the interest protected; iv) respect prescribed procedural guarantees, allowing the concerned to challenge the decision before an independent body.¹⁵

Whilst art 34 of the 2011 *Law No 04/2011 of 21/03/2011 on Immigration and Emigration in Rwanda* (*‘Rwandan Immigration and Emigration Law’*) provides that ‘[a] travel document is the property of the state. It may be withdrawn from the holder in case it is evident that he/she uses it or may use it in an inappropriate manner’,¹⁶ the respondent state had not shown cause as to whether any of the applicants had used their passports in an ‘inappropriate manner’.¹⁷

In line with its reasoning in the *Anudo* case, the Court shifted the burden of proof to the state, leaving them to prove the applicant’s passports were revoked in line with art 34 of the *Rwandan Immigration and Emigration Law*:

since the Applicants allege that their passports have been revoked arbitrarily, they are required to prove their claim. However, considering that, it is the Respondent state's agencies which have the access to records and monopoly of regulating the

¹² *ibid.*

¹³ Thalia Holmes, ‘Rwanda Cancels Exiles’ Passports’, *Mail and Guardian* (online, 12 November 2012) <<https://mg.co.za/article/2012-11-30-00-rwanda-cancels-exiles-passports/>>.

¹⁴ *Kennedy* (n 1) 3 [5].

¹⁵ *ibid* 20 [82], citing *Anudo* (n 3) 18 [79].

¹⁶ *Law No 04/2011 of 21/03/2011 on Immigration and Emigration in Rwanda* (2011) art 34 (*‘Law No 04/2011’*).

¹⁷ *Kennedy* (n 1) 21 [87].

issuance and revocation of passports, the Respondent State is in a position of advantage over the Applicants since its agencies have all relevant information relating to process of issuance or revocation of passports has found that the Respondent State violated the Applicants' rights to freedom of movement and their right to freely participate in the government of their country. The reparations claims will therefore only be assessed in relation to these wrongful acts.¹⁸

It added that Rwanda ratified arts 12(2) and (3) of the *International Covenant for Civil and Political Rights* ('ICCPR'), which has provisions similar to art 12(2) of the *African Charter* providing for the freedom of movement of civilians.¹⁹ The Court, thus, required the respondent state to prove that the arbitrary deprivation was in line with the ICCPR.²⁰

The respondent state failed to respond to the applicants' allegation that it revoked their passports arbitrarily. As a result, the Court noted that this amounted to the respondent state not having denied the claim against it.²¹ The Court further mentioned that

the Respondent State [did] not [provide] proof that the revocation of the Applicants' passport was based on their use of the passports in an inappropriate manner as required under art 34 of its Immigration and Emigration Law.²²

The above, combined with the fact that the respondent state failed to demonstrate that the revocation of the applicants' passports was for the purposes of the restrictions set out in art 12(2) of the *African Charter* and art 12(2) and (3) of the ICCPR, led to the Court to find that the respondent state had arbitrarily revoked the passports of the applicants.²³

B *Did the Revocation of the Applicants' Passports Render Them Stateless?*

The applicants alleged that they were rendered stateless following the revocation of their passports.²⁴ On this question, the Court stated:

the Court has determined that the Applicants have not been deprived of their nationality. They are still Rwandan nationals. The Court therefore finds that the Applicants' claim that they have been rendered stateless is moot and it is consequently dismissed.²⁵

¹⁸ Kennedy (n 1) 20 [84] citing *Anudo (Merits)* (n 3) 17 [74], [77].

¹⁹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR') art 12(2): 'Everyone shall be free to leave any country, including his own'. At art 12(3):

The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (order public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

See also *African Charter* (n 3).

²⁰ Kennedy (n 1) 21–22 [88]–[92].

²¹ *ibid* 21 [86].

²² *ibid* 21 [86]–[87]; *Law No 04/2011* (n 17) art 34.

²³ *ibid* 22 [91]–[92].

²⁴ *ibid* 23–24 [99]–[100].

²⁵ *ibid* 24 [102].

C *Were the Applicants' Rights to Freedom of Movement, Political Participation, Citizenship, Liberty, Family and Work Violated?*

On the right to freedom of movement, the Court followed its ruling in *Anudo* that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable. A State Party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country.²⁶

By arbitrarily revoking the applicants' passports, the respondent state deprived the applicants of their travelling documents, which resulted in them being prevented from 'returning to their country and travelling to other countries and thus exercising their right to freedom of movement as provided under art 12(2) of the *African Charter*'.²⁷

With regards to the right to political life, the Court noted that the rights set out in art 13(1) of the *African Charter* are mainly exercised when citizens are the territory of their state.²⁸ However, there are certain rights that can be exercised outside the territory of the state. The Court noted that the arbitrary revocation of the applicants' passports prevented them from returning to the respondent state, severely restricting their right to freely participate in the government of their country.²⁹

On their rights to liberty, the applicants linked this form of violation to the issue of prolonged detention without trial as set out in art 6 of the *African Charter*.³⁰ The Court noted that art 6 of the *African Charter* refers to a situation of prolonged detention without trial.³¹ The standards in art 6 require a person to be brought promptly before a judge and to be tried within a reasonable time.³² In this case, the applicants made general statements regarding the alleged violation of their rights to liberty.³³ They did not provide evidence to establish that the respondent state has arbitrarily deprived them of their liberty contrary to the aforementioned provisions.³⁴

When it came to the violation of the right to family life, the Court was of the view that the applicants did not demonstrate:

how the Respondent State's actions or omissions had an adverse impact on the needs and interests of their families or how it prevented them from fully benefitting

²⁶ *Anudo* (n 3) 21 [98], citing Human Rights Committee, *General Comment No 27: Article 12 (Freedom of Movement)*, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) [21].

²⁷ *Kennedy* (n 1) 24–25 [105]–[109].

²⁸ *ibid* 26 [114]. *African Charter* (n 3) art 13(1) provides that: 'Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law'.

²⁹ *Kennedy* (n 1) 26 [114].

³⁰ *African Charter* (n 3) art 6 provides that:

Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

³¹ *Kennedy* (n 1) 27 [119].

³² *ibid*.

³³ *ibid* 27 [120].

³⁴ *ibid*.

from the filial and social interaction necessary for the maintenance of a healthy family life.³⁵

Lastly, ‘the Court further [noted] that the claims made by the applicants as regarding the alleged violation of their rights to work [under art 15 of the *African Charter* were] general in nature’.³⁶ They did not elaborate on how the respondent state acted contrary to, or made omissions in relation to, the requirements in the provision of art 15. These being unsubstantiated claims, the Court consequently dismissed them.³⁷

V REASONING

In its reasoning, the Court observed that:

one is entitled to a passport of a specific country because he or she is its national or meets the conditions provided for the issuance of a passport under the applicable law.³⁸

A passport is, first and foremost, a travel document required for travel outside one's country, to return to the said country, and to go to or leave a foreign country. It is a general principle that a passport is also an identification document in a foreign country. A passport may also prove nationality, due to the presumption that, when one carries a passport of a specific state, he or she is a national of that state and it is incumbent upon the entity claiming otherwise to rebut this presumption.³⁹

Article 34 of the *Rwandan Immigration and Emigration Law* provides that ‘[e]very Rwandan is entitled to a travel document’.⁴⁰ It is clear from this law that a passport is one of the forms of travel documents issued by the respondent state.⁴¹ The Court noted further that:

for people such as the Applicants who are living outside of their country, the passport is their main identification document. For such persons, not having a valid passport exposes them to challenging situations, such as difficulty in securing employment, renewing their residence permit, accessing education and health services in the country they are residing in, and restrictions in travel to their own country and to other countries. In such circumstances, the revocation of a passport is not *tantamount* to a revocation of nationality, rather it impedes the full and effective enjoyment of their civic and citizenship rights as Rwandan nationals.⁴²

³⁵ *ibid* 28 [126]. *African Charter* (n 3) arts 18(1), (2) provide:

1. The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.
2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.

³⁶ *Kennedy* (n 1) 29 [132]. *African Charter* (n 3) art 15 provides that: ‘Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work’.

³⁷ *Kennedy* 29 [132].

³⁸ *ibid* 22 [94].

³⁹ *ibid* 22 [95].

⁴⁰ *Law No 04/2011* (n 16) art 34.

⁴¹ *Kennedy* (n 1) 22–23 [96].

⁴² *ibid* 23 [97] (emphasis added).

The Court therefore found that the revocation of the applicants' passports did not amount to deprivation of their nationality.⁴³ Because the applicants remained registered as nationals of Rwanda, they had to be considered Rwandan nationals despite the cancellation of their travel documents.⁴⁴ This is important; it brings into light the relevance of identity documents and registration in a particular country.

The Court noted:

an individual's identity and sense of belonging is intrinsically tied to the social, physical and political connections that they have with their country of origin. The Court further notes that the arbitrary revocation of the Applicants' passports resulted in the violations found against the Applicants. Since 14 May 2012, when the said passports were arbitrarily revoked, the Applicants had been unable to leave their country of residence and to travel back to their country of origin and to other countries. This adversely affected the aforementioned connections that the Applicants had with their country of origin. The Court finds that this caused them emotional anguish and despair, occasioning them moral prejudice, therefore this entitles them to reparation.⁴⁵

The Court awarded an amount of Rwandan Francs to each of the applicants as fair compensation for the moral prejudice caused.⁴⁶ The Court further ordered the reinstatement of the passports within three months of the order as an appropriate measure for the respondent state to take as restitution to the applicants.⁴⁷

VI CONCLUSION

The *Kennedy* case deals with the arbitrary revocation of documents linked to one's nationality. The court affirmed its position on how the arbitrary revocation of passports affects freedom of movement using art 12 of the *African Charter* and the *ICCPR*.⁴⁸ It also consolidated views previously developed in its own decisions on the burden of proof in cases such as *Anudo and Pennesis*.⁴⁹ In particular, the Court reinforced the notion that the state must bear the burden of proof in matters regarding whether or not documentation has been arbitrarily revoked, as the state has more resources.⁵⁰ This notion was only made more clear by the fact that the revocation of the applicants' passports meant that they were unable to travel to prove their citizenship.

This case confirms the importance of civil registration in proving one's nationality. Had the applicants not been registered, the ruling might very well have had a different outcome. This case is vital because it highlights that, although documents linked to one's nationality can be withdrawn, it does not necessarily result in being considered stateless.⁵¹

⁴³ *ibid* 23 [98].

⁴⁴ *ibid* 24 [102].

⁴⁵ *ibid* 31 [143].

⁴⁶ *ibid* 32 [144].

⁴⁷ *ibid* 33–34 [153](ix).

⁴⁸ *ibid* 25 [108].

⁴⁹ *ibid* 20–21 [84]–[85].

⁵⁰ *ibid*.

⁵¹ *ibid* 24 [102].