IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., KOROSSO, J.A., And SEHEL, J.A.)

CIVIL APPEAL NO. 13 OF 2020

AIDAN FREDERICK LWANGA EYAKUZE ..... APPELLANT

VERSUS

1. **THE COMMISSIONER GENERAL OF TANZANIA IMMIGRATION SERVICES DEPARTMENT..... 1ST RESPONDENT**
2. **THE COMMISSIONER OF CITIZENSHIP AND PASSPORT OF TANZANIA IMMIGRATION SERVICES DEPARTMENT..... 2ND RESPONDENT**
3. **THE ATTORNEY GENERAL ..... 3RD RESPONDENT**

(Appeal from the Ruling and Order of the High Court of Tanzania, Main Registry at Dar es Salaam)

(Mlyambina, J.)

Dated the 25th day of October, 2019
in
Misc. Civil Cause No. 11 of 2019

.....

JUDGMENT OF THE COURT

8th July, & 4th December,2020

KOROSSO, J.A.:

This appeal is against the ruling and order of the High Court of Tanzania Main Registry at Dar es Salaam, (Mlyambina, J.) in Misc. Civil Cause No. 11 of 2019 delivered on the 25th October, 2019.

A brief factual background and legal base for the appeal is that on the 19th July, 2018 Mr. Victor Saulo and Mr. Jamal, officers from the offices of the 1st and 2nd respondents went to Twaweza offices situated in Dar es Salaam to look for the appellant who is the Executive Director

of Twaweza, a Non-Governmental Organization, but were unable to meet him because at the material time he was outside the country. After being informed of the appellant's absence, the two officers left a message urging the appellant to report to the Immigration Offices at Kurasini, within Temeke District in Dar es Salaam Region on his return back from the journey.

On the 23rd July, 2018 while the appellant was in his office, he heeded to a message made by way of a telephone call from the 2nd respondent and reported at Immigration Services offices Kurasini, Dar es Salaam around 10.30 hours. Upon arrival at the Immigration offices, he was interrogated by the officers of the 2nd respondent, namely; Mr. Victor and Mr. Jamal who then informed him that his citizenship was under investigations and was given forms to fill. Subsequently, he was allowed to leave the said offices and directed to bring his Tanzanian Passport to the Immigration Offices. On the 24th July, 2018 the appellant duly handed his passport, number AB389800 to the officers of the 1st and 2nd respondents.

On the 26th July, 2018 the appellant wrote a letter to the 1st respondent informing him that he was in need of his withheld passport to enable him to travel outside the country for official duties but he received no response. This led the appellant on the 31st July, 2018 to

apply for an emergency travelling document and was duly granted. On the 1stAugust, 2018 while *enroute* to Kenya with the emergency travelling document, at the Immigration Check-in deck within Julius Nyerere International Airport, officers of the 1st and 2nd respondents stopped him from travelling stating that the appellants' citizenship status was still under investigation.

According to the appellant, when all his efforts to get back his passport were unsuccessful, he decided to pursue justice in court. He first sought and obtained leave of the High Court and then proceeded to file an application, Misc. Civil Cause No. 11 of 2019. The application was predicated under the provisions of section 17 (2)-(4) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap 310 Revised Edition 2002 (the Act) and Rules 4 and 8(1) (a), (b); 8(2)(3) of the Law Reform (Fatal Accidents and Miscellaneous Provisions)(Judicial Review Procedure and Fees) Rules, 2014, GN No. 324 of 2014 (the Judicial Review Rules). Specifically, he sought the following reliefs against the 1st and 2nd respondents: -

One, *certiorari* to be issued to move the High Court to quash and act on the decision made by the 1st and 2nd respondents to demand, seize, retain and refuse to return the appellant's passport and also their decision to prohibit the appellant from travelling abroad on the 1st

August, 2018 and the entire process that led to the issuance and implementation of that decision.

Two, *Mandamus* to issue to compel the respondents to observe the citizenship rights, to return the seized passport to the appellant.

Three, *Prohibition* to bar the 1st and 2nd respondents and their agents and assignees from interfering with the appellant's citizenship rights, and from refusing to renew his passport or issue a new passport when the passport expires or when new digital passports are issued, and also to permanently bar respondents from intimidating and harassing the applicant.

Four, costs and any other order.

The High Court (Mlyambina, J.) upon hearing the parties dismissed the application for lack of merit.

The appellant was aggrieved by the High Court decision and filed the current appeal to this Court advancing seventeen (17) grounds in the memorandum of appeal which have been paraphrased into what is now fourteen (14) grounds of appeal as follows: -

1. That the Presiding Judge erred to reject the application for reason that it was filed prematurely since investigations by the 1st and 2nd respondents on the appellant's citizenship spearheaded were still

ongoing vide section 16 of the Immigration Act, Cap 54 RE 2016, and disregarded that the said section allows conduct of such investigations only when the investigated has committed or is about to commit an offence under the Act or any other written law.

2. That the Presiding Judge erred to find that the matter before him hinged on whether the appellant was being investigated by the 1st and 2nd respondents; un-reasonability of the said investigations; and whether the applicant was denied the right to be heard although the parties neither participated in the framing of the said issues nor given an opportunity to address the court on the same.
3. That the Presiding Judge erred in law to rely on **Director of Public Prosecutions v. Shaban Donasian and 10 others** Criminal Appeal No. 196 of 2017 (Court of Appeal of Tanzania) which was distinguishable since its *ratio decidendi* was on nullification of the proceedings of the High Court for want of adherence to the principle of the right to be heard when exercising its revisional powers; and a criminal case where the Court ruled that there was no time limit for criminal investigations.
4. The Presiding Judge erred to shift the burden of proof to the investigated to prove that unreasonable time has been taken by the investigator in investigation of the matter under scrutiny ignoring the

acts of the investigators in unlawfully demanding and seizing the Appellant's passport without disclosing any violation committed by the Appellant;

5. That the Presiding Judge failed to appreciate the case before him as it dealt with the reliefs of prerogative orders and not a criminal investigation;
6. That the Presiding Judge erred in law to hold that so long as an investigation is ongoing "*there is no necessity of interfering the government agency*" ignoring that where investigation interferes with the enjoyment of any citizenship's right it must strictly adhere to law and procedures, without undue delay and must not be whimsical and malicious;
7. That the Presiding Judge erred in fact and law to bless the 1st and 2nd respondents' oral decision, action, and refusal to return the appellant's passport on unproved claims of ongoing investigations of the appellant's citizenship without the appellant having acted in any manner to show cause or has been charged or suspected to have violated the legal requirements of holding a Tanzanian passport under the Passport and Travel Documents Act No 20 of 2002;
8. That the Presiding Judge wrongly held that the appellant's counsel argument that the Immigration Act Cap 54 R.E. 2016 does not apply

to Tanzanian Citizens is not valid since the Judge's holding was due to having misquoted section 2(2) of the Immigration Act Cap 54 R.E. 2016 by the word not putting the word "not" since the section provides that "*Subject to this section this Act shall **not** apply to any citizen of Tanzania except that...*". The Act does not empower Immigration Officers to seize any passport from a Tanzanian citizen unless the said officer believes that the said person has committed an offence or is about to commit an offence and the said passport is evidence required to prove the commission of the alleged offence;

9. That the Presiding Judge erred to hold that sections 2(2)(a) and 16 of Cap 54 do not exclude Tanzanians but covers any person whom the immigration officer has good reason so to investigate a person who has committed an offence, or is about to commit an offence under the said Act, or any other law;
10. That the Presiding Judge erred when he formed an opinion and judgment that the respondents had a good case against the appellant without any base having been laid;
11. That the Presiding Judge erred in not finding that the respondents' oral decision, actions and refusal were unreasonable in that a passport is a final product of other documents submitted by an applicant

seeking a passport and cannot be the main basis of investigating one's citizenship as investigation can continue without it;

12. That the Presiding Judge erred in law in not finding that the appellant's right to be heard was infringed when the respondents prevented him from traveling to Nairobi on the 1st of August 2018 at Julius Nyerere International Airport;

13. That the Presiding Judge erred to hold that the procedure taken by the respondents was legal and that it was premature to assert that rules of natural justice were violated as the respondents had not concluded their investigations; and

14. That the ruling and the drawn order of the High Court emanated from a total misunderstanding of the matter before it and misinterpretation of the law leading to injustices committed by the respondents against the appellant being condoned by the Presiding Judge.

On the day of hearing the appeal, Dr. Rugemeleza A. K. Nshala learned counsel entered appearance for the appellant while the 1st, 2nd and 3rd respondents were represented by Mr. Deodatus Nyoni, learned Principal State Attorney assisted by Ms. Hosana Mgeni, learned State Attorney.

At the outset we wish to express our appreciation for the industry exhibited by the learned counsel for both sides in preparation and

submissions of their respective arguments and the references shared. However, we hasten to state that it has not been possible to narrate each and every detail of what was presented before us, it should suffice to say, we have considered all those relevant contentions we gorged sufficient for disposal of the appeal before us.

The learned counsel for the appellant commenced his submissions by adopting the written submission made in support of the appeal filed on the 28th of March, 2020 and then argued the grounds of appeal generally. It is important to note that in the written submissions the grounds of appeal have been amplified in groups by stating that the 3rd, 4th, 5th, 7th and 8th grounds of appeal (upon paraphrasing are now 3rd, 4th, 6th and 7th) of the memorandum of appeal were to be argued conjointly, then the 1st, 9th and 10th (now 1st, 8th and 9th) were to be amplified in unison. Moreover, the 11th, 12th and 13th grounds of appeal (paraphrased and now is 10th) were also to be argued together, the 16th and 17th grounds of appeal (paraphrased and now 13th and 14th) were to be addressed jointly and the 2nd, 6th, 14th and 15th grounds of appeal (paraphrased and now the 2nd, 5th, 11th and 12th) to be argued separately.

The counsel for the appellant's submissions regarding the paraphrased 3rd, 4th, 6th and 7th grounds of appeal **first**, basically

challenged the learned High Court Judge's reliance on the decision of **DPP vs Shaban Domician Others** (supra) decided by this Court while misconstruing the holding therein, while the 6th ground were complaints on the learned High Court Judge's handling of the application before him by addressing the ongoing investigations on the appellant's citizenship as a criminal investigation instead of dealing with the reliefs sought, that is, prerogative orders. **Second**, challenged the learned High Court Judge's failure to find that the investigations on the appellant's citizenship were uncalled for not having a legal base since the appellant has no formal charges or reason to doubt his citizenship and that at the same time investigations were prolonged and the long delay was prejudicious and unreasonable.

Exemplifying on the import of the decision in **DPP vs Shaban Domician and Others** (supra), the counsel stated that the case had first been determined by the High Court (Rumanyika, J.) in Criminal Revision Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 of 2017. The learned counsel inferred that the High Court Judge in Misc. Cause No. 11 of 2019, imputed different meaning to the decision of the Court when he used it to determine that the one year the respondents used to investigate the citizenship of the appellant cannot be said to be unreasonable. He contended further that since investigations cannot be

predicted and fixed to be done at a certain interval or period of time then its determination should be considered in terms of the circumstances of a particular case.

The learned counsel further argued that despite this finding by the High Court, there was nothing in the finding of the Court of Appeal in **DPP vs Shaban Domician and Others** (supra) that the prosecution can carry on investigations *ad infinitum* and that the misconstruction of the Court findings by the learned High Court Judge is what led to the erroneous judgment.

The learned counsel for the appellant also faulted the three issues framed by the learned High Court Judge in the ruling found at page 107 of the record of appeal, stating that the first two issues were outside the scope of what was before the High Court for determination. The three issues drawn by the learned High Court Judge which the learned counsel faulted were; **One**, whether there is a set time limit for investigation done by the government machinery. **Two**, whether the ongoing one-year investigation of the appellant's citizenship is unreasonable and **Three**, whether the appellant has been denied the right to be heard.

The learned counsel argued that what was before the High Court for consideration and determination was whether the seizure of the

passport was lawful and contended that in seizing the appellant's passport, the 1st and 2nd respondents went beyond what they are mandated by the law, that is, section 4(2) of the Tanzania Passports and Travel Documents Act, No. 20 of 2002 (the TPTDA), which requires the holder of the passport to remain with it unless it's validity expires or there is a lawful reason to remove it from the holder. He contended further that the law does not vest the 1st and 2nd respondents with powers to seize a passport from the holder when conducting investigations under section 16 of the Immigration Act, Cap 54 RE 2016 (the Immigration Act), which empowers the 1st and 2nd respondent to only investigate any person when they are in contravention of the law.

Dr. Nshala also faulted the finding by the learned High Court Judge that the Immigration Act applies to Tanzanians while generally it does not except as specified in the Act. He asserted that while it is not disputed that section 11 of the TPTDA alludes that an investigation can be conducted on any passport or travel documents under the proviso thereto in case they want to take the passport for any lawful cause, they are expected to write a letter disclosing reasons to the concerned person why they are holding the passport. According to the learned counsel, this was not done to the appellant. In addition, the learned counsel stated that the appellant in the present case was summoned to the

Immigration offices and ordered to surrender his passport without use of reasonable means.

The learned counsel also challenged the learned High Court Judge's holding that so long as the investigations were on going, the investigations should not be interfered with without having regard to the fact that such investigations have to be lawful and should not interfere with the enjoyment of any citizenship right and must not be whimsical and malicious and be conducted without undue delay. On the contrary, he argued was the opposite to what occurred in the investigations on the appellant's citizenship leading to seizure of his passport thereby hindering his travel outside the country. The counsel then urged us to find the grounds of appeal meritorious.

On the part of the respondents, the oral submissions amplified the contents of their filed written submissions and thus generally responded in accordance to the way the appellant's written submissions had amplified the grounds of appeal. On the merit of the appeal the respondents' counsel stated that they fully support the High Court Ruling as a whole.

Responding to the paraphrased 3rd, 4th, 6th and 7th grounds of appeal, the learned Principal State Attorney argued that the finding by

the High Court that the application hinged on the issue on the time spent for investigation of the citizenry of the appellant was proper. This he said, is because duration of the investigations was an issue discussed by both parties during the cause of hearing and both parties were heard on the issue as found in the record of appeal. Thus, in his submission, clearly, it was not something the learned High Court Judge invented on his own.

Discussing the finding of the learned High Court Judge and use of the holding in **DPP vs Shaban Donasian and Others** (supra), the learned Principal State Attorney stated that in **Republic vs Shaban Donasian and Others**, Miscellaneous Criminal Revision No. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 of 2017 (Unreported) decided by the High Court of Tanzania and **DPP vs Shaban Donasian and Others** (supra) decided by this Court, the High Court judge only emphasized the fact that the law does not provide the time limit for investigations and nothing else and so it was proper for the High Court to be guided by the said decisions. According to him, it was appropriate for the learned High Court Judge to discuss the holding in the stated cases because in the said case, among other things, it is the prolonged investigations which led to the delay in conducting committal proceedings and this issue arose there and nothing related to setting limit of time for investigations.

Essentially, he argued that the reference to the said case only was on impact of delayed investigations to trials and hence the learned High Court Judge's reference to these cases. On his part, he understood that it was in that regard that the Court did not discuss or hold on setting time limit of investigations the findings of the Court on this issue, and that's how the learned High Court Judge construed the said holding when deliberating on the matter subject to this appeal and not otherwise.

In responding to claims that the seizure of the appellant's passport and the delay in investigations of the appellant's citizenship is unreasonable, the learned Principal State Attorney contended that, guided by the provisions of section 16 of the Immigration Act, the officers of the 1st and 2nd respondents were correct when they seized the passport and initiated investigations because they believed the appellant's citizenship was at stake. He emphasized that the said officers orally communicated with the appellant regarding the suspicion they had and their intention. According to the learned Principal State Attorney, it should be borne in mind that the law does not provide for a procedure for seizing a passport and thus what was done by the officers of the 1st and 2nd respondents was for a lawful purpose within the confines of section 4(2) of the TPTDA.

The learned Principal State Attorney argued further that section 4(1) of the TPTDA states that a passport is issued in the name of the President and is a property of the Government, thus when all the relevant legal provisions are read together, they confer powers of seizure of the passport. He also denied allegations that officers of the 1st and 2nd respondents infringed on the freedom of movement of the appellant arguing that section 11 of the TPTDA is clear that a person can move freely inside the country without the need of a passport but that it is obvious that once investigations that relate to a seized passport have been initiated, undoubtedly, the right to travel outside the country is curtailed.

With regard to assertions that the appellant never discussed the issue of the long delay in investigations during hearing and that this was drawn out as an issue for determination by the learned High Court Judge *suo motu* without any involvement of the parties, Mr. Nyoni contended that the issue of duration of the investigation was discussed by both parties during the hearing as outlined at page 179 of the record of appeal. He thus invited the Court to find that it was proper for the learned High Court Judge to raise the said issue and deliberate upon it in his decision.

The appellant's rejoinder on the stated grounds was to reiterate on what was stated in the submission in chief, that the learned High Court judge misconstrued the principle outlined by this Court in **DPP vs Shaban Donasian and Others** (supra) and to state that the application was premature and implored the Court to find the grounds of appeal meritorious.

We have carefully considered the submissions by the appellant and respondents counsel related to the 3rd, 4th, 6th and 7th grounds of appeal as paraphrased. The first issue for deliberation is whether the High Court when deliberating on the judgment subject of this appeal, misconstrued the holding of this Court in **DPP vs Shaban Donasian and Others** (supra). For ease of reference it is important to reproduce the relevant part of the said holding found at page 198 of the record of appeal:

> *"the Court of Appeal set aside and nullified the decision of the High Court by stating that the learned Judge denied the parties an opportunity to be heard when the revisional proceedings were being conducted. In essence, the Court of Appeal did not find time limit of investigations in Criminal matters".*

Indeed, after having stated his understanding of the Court's holding, the learned High Court judge went on to conclude by his own construction of the Court's judgment that investigations done by the respondents on the appellant which by then had lasted about a year cannot be said to be unreasonable. We took time to carefully go through the judgment of this Court referred to, that is, in **DPP vs Shaban Donasian and Others** (supra), and as rightly pointed out by the learned counsel for the appellant, we find nowhere that the Court discussed or held that criminal investigations have no time limit or where such a finding can be inferred even in passing.

In the above cited case, what the Court considered and made a finding upon was whether the right to be heard was observed by the High Court during revisional proceedings which were appealed against. There was nothing related to the propriety of the time spent in conducting the investigation which delayed the committal proceedings thereto. It is obvious as rightly pointed out by the learned counsel for the appellant that the learned High Court Judge misunderstood the Court's findings on the matter, by failing to recognize that the application was premature and the long time taken by the respondents in investigating the appellant's citizenship did not in any way pass the test of reasonability. On the contrary, for reasons we have stated above,

we are of the view that the finding by the learned High Court Judge was under the circumstances, erroneous.

Whilst it is true that there is no legal provision in either the Immigration Act or the TPTDA that outlines the procedure for seizing a passport or investigating on the citizenship, such investigation should be initiated only where there is reasonable cause within the confines of the law. Section 16 of the immigration Act states:

> *"An immigration officer shall have powers to investigate and make inquiry on any person who has contravened or he has reasonable cause to believe that the person is or about to contravene any provisions of this Act or any other written law".*

Moreover, under Section 20(1) of the Immigration Act, the Immigration officer is conferred with the same powers as those exercised by a police officer under the Criminal Procedure Act, Cap 20 RE 2002 (the CPA) in examination of any person during the cause of investigations but there is nothing specifying the duration of such investigation.

We are of the considered view that the key words in the provisions of section 16 of the Immigration Act are that, to initiate such an investigation, the immigration officer has to suspect that that the

provisions of the said Act or any other written law have been contravened or there is a possibility of such contravention.

When considering the above position what then should also be considered is the provision of section 11 of the TPTDA which states that:

> *"The holding of a passport or travel document shall be prima-facie evidence of the nationality or domicile of the holder and of his entitlement to state protection.*
>
> *Provided that, a mere possession of a passport or travel document shall not operate as a bar to inquiry, investigation or judicial proceedings against the holder if there are reasons to warrant such a course of action".*

Certainly, what can be discerned from the above cited section is that, holding a Tanzanian passport is an important and sensitive matter because citizenship may be presumed therefrom. Hence competent authorities such as the 1st and 2nd respondents as defined under section 2 of the TPTDA may initiate investigations where they feel it is warranted and there is a cause to do so as outlined by the law.

Our perusal of the submissions and record of appeal, have found that there was no written evidence submitted before the High Court to show that the immigration officer suspected or framed suspicions

against the appellant that he might have contravened any of the provisions of the Immigration Act. The only information is found in the appellant's averment in his affidavit conceding to have been informed orally by an officer of the 1st and 2nd respondents that his citizenship was being questioned. There is no dispute, that through the oral communication to the appellant that his citizenship was suspected which in effect meant that there was suspicion that he was in contravention of the Immigration Act on matters related to his citizenship.

Therefore, in the absence of any clear procedure on modality to conduct investigations or requirement of a written notice found in the Immigration Act or the TPTDA, the fact that the appellant was not informed of the inquiry formally by a written notice or otherwise should not be seen to have abrogated any law or rights. The most important issue was the fact that the appellant was informed of why he was being questioned and investigations were initiated from suspicions that his citizenship was being questioned.

The next issue for our deliberation relates to 1st, 4th, 5th and 6th grounds of appeal, starting with the legality of the respondent's act of seizing the appellant's passport and whether the time spent to investigate his citizenship was reasonable under the circumstances. The arguments by the appellant's counsel on the need for written notice

although desirable, cannot lead to vitiating the initiated investigations against the appellant's citizenship as he was duly informed of the reasons through oral communication.

On the part of the appellant, they also argued that the seizure of the passport was unlawful and especially since it was taken under the guise of being part of ongoing investigations of the appellant's citizenship, and the said seizure in effect led to curtailing the freedom of movement of the appellant, a development which was improper and an infringement of the appellant's rights and in contravention of section 4(2) of the TPTDA. On the other hand, the respondents argued that the seizure of the appellant's passport was in line with section 4(2) of the TPTDA and section 16 of the Immigration Act.

We have already hereinabove reproduced section 16 of the Immigration Act and we now make reference to section 4(1) and (2) of TPTDA which reads as follows:

> *"(1) A passport issued pursuant to the provisions of this Act, shall be issued in the name of the President and shall remain to be the property of the Government.*
>
> *(2) Notwithstanding subsection (1), a passport validly held under the provisions of this Act shall remain in the possession of its holder until its*

validity expires or until such time as there is lawful cause to believe that it is not desirable that it remains in the possession of its holder".

What the above provisions inform us is that **first**, any type of Tanzania's passport issued to a citizen of the United Republic of Tanzania under section 10 of the TPTDA shall at all time remain to be the property of the Government. **Second**, the respective passport shall be in possession of its holder until its validity expires or such time there is a lawful course to believe that it is not desirable that it remains in the possession of its holder. Thus, under subsection 2 of section 4 of TPTDA, a competent Authority can take the passport if convinced that there is a lawful cause to believe that it is not desirable that it remains in the possession of its holder.

It follows that, despite arguments from the appellant's counsel that it was not proper to seize the said passport, as rightly pointed out by the learned Principal State Attorney, under section 4(2) of the TPTDA, a passport holder only remains in possession of the same and not the owner. Ownership remaining with the Government of United Republic of Tanzania. Therefore, the law clearly permits a competent Authority as defined therein which includes the 1st and 2nd respondents to take possession of the passport from the holder where its validity

expires or where there is lawful course to believe that it is not desirable that it remains in the possession of its holder.

This being the position, we are of the view that where there is a question of citizenship, like the case before us, since according to section 10 of TPTDA, a passport holder must be a citizen of the United Republic of Tanzania and similarly, under section 11 of TPTDA, holding a Tanzanian passport is *prima facie* evidence of being a citizen of the United Republic of Tanzania. It follows then that a query or investigations into the said citizenship undoubtedly, can be taken to be a lawful cause which can lead to the temporary taking possession of a passport from a holder for the purpose of aiding investigations. We are of firm view that the appellant's passport was validly taken by competent authorities, the 1st and 2nd respondents, for investigation purposes.

After the above finding, the next question is whether the time spent for investigations of the appellant's citizenship was reasonable. The appellant's submissions on this issue encompassed disgruntle with the prolonged holding of his passport by the 1st and 2nd respondents arguing that this delimited his planned travels outside the country and thus the denial of his right to freedom of movement. The fact that the appellant travel outside the country stood truncated was conceded by

the learned Principal State Attorney when he stated that a person without a passport is unable to travel outside the country although he argued that this fact alone cannot be taken to mean that the appellant's freedom of movement was infringed since the appellant was not hindered to move within the country.

The right to freedom of movement is enshrined under Article 17(1) of the Constitution of the United Republic of Tanzania 1977 (as amended) (the Constitution) which states:

> *"17(1) Every citizen of the United Republic has the right to freedom of movement in the United Republic and the right to live in any part of the United Republic, to leave and enter the country, and the right not to be forced to leave or be expelled from the United Republic*
>
> *(2) Any lawful act or any law which is intended to –*
>
> *(a) curtail a person's freedom of movement and to restrain or imprison him".*

The fact that courts have powers to review administrative actions challenged before them is not in question as held by this Court in **Patman Garments Industries Ltd vs Tanzania Manufacturers Ltd** [1981] TLR 303. We are however, aware that in practice courts

generally tend to avoid compelling agency actions and when there is no statutory deadline for the agency action and courts are usually guided by the consideration of reasonability of the action within the confines of balancing the agencies priorities among lawful objectives, consideration of the victim's need for prompt action and if need be, addressing indications of legislative intent.

In deliberating the matter before us, we need to do no more than borrow and adopt the persuasive guidelines relevant to the case at hand found from a decision from the United States of America in D.C. Circuit in **Telecommunication Research and Action Center vs FCC ("TRAC"), [48].** Specifically, the guidelines set forth aimed for courts consideration when determining whether an agency delay in taking action is reasonable or not and whether it warrants mandamus so as to compel the agency to act. The Court of Appeal of the District of Columbia stated: -

> *"In the context of a claim of unreasonable delay, the first stage of judicial inquiry is to consider whether the agency delay is so egregious as to warrant mandamus".*

The court then enumerated several factors to consider when answering this question. These are: -

"(i) The time agencies take to make decisions must be governed by a "rule of reason".

(ii) Where Parliament has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason;

(iii) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake;

(iv) The court should consider the effect of expediting delayed action on agency activities of a higher or competing priority;

(v) The court should also take into account the nature and extend of the interests prejudices by delay; and

(vi) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed".

We find the above guidelines relevant to our case and we proceed to adopt them. Thus, applying the above factors in the current case, we are constrained to deliberate on whether the time spent by the 1st and 2nd respondent in conducting investigations on the appellant's citizenship is governed by rules of reason. It is not disputed that the appellant's passport was handed to the 1st and 2nd respondents' officers by the

appellant himself on the 24th July, 2018 and that up to the time of the hearing of the application for necessary orders in the High Court, the passport was yet to be handed back to him despite oral and written requests to be availed with his passport. It is also indisputable that at the time of hearing in the High Court on the 20th August, 2019 to the date of delivery of judgment on the 25th October, 2019 the passport was yet to be released. Suffice to say, the status remained the same even when the parties appeared for hearing in this Court.

According to the respondents, as discerned from their submissions, the delay to release the appellant's passport was due to the fact that the 1st and 2nd respondents were conducting investigations into the citizenship of the appellant guided by the law and that the appellant was orally informed of the ongoing investigations and that his application before the High Court was premature since there is no time limit on investigation of a matter, a contention which was affirmed by the High Court Judge in the Ruling.

Having scrutinized the parties' respective documents, the record of appeal and the submissions before the Court, we are not satisfied that the respondents managed to show that the ongoing investigations was governed by rule of reason. The respondents failed to substantiate

reasons for delay to finalize the investigations within reasonable time without any expounded cause.

We are aware of the fact that there is no legal set time limit required for investigations, but we find that investigating the citizenship of a person for one year where all the relevant documents are within the reach of the respondents does not reinforce the argument that the time spent in investigations on the appellant's citizenship is reasonable. There was no sufficient explanation placed before us to assist us to determine whether or not the delay affected the health and welfare of the appellant although from the submissions it is clear it enhanced his mental anguish. This factor might operate in favour of the appellant.

This other factor involves determining the effect of expediting delayed action on agency activities of higher or competing priority and the nature and extent of the interests prejudiced by the delay. We are of the view that there is clear evidence that the appellant was prejudiced by the long delay since the delay meant he was without a passport and could not travel outside the country and his travel was curtailed after he was stopped at the airport while on his way to Kenya. Indisputably, this was an interference in the appellant's right to travel outside the country.

Taking all the above factors into consideration, there is no doubt that on the balance of probability, the time taken by the 1st and 2nd

respondents to conduct investigation on the citizenship of the appellant has been prolonged and caused the appellant's right to movement to be infringed, and thus it is unreasonable. At the same time, in light of the foregoing reasons, the holding by the High Court that the application was premature was misconceived. Had the High Court Judge considered all the surrounding circumstances and the legal provisions critically, he would not have made such findings. We thus find that whilst the paraphrased 3rd ground of appeal lacks merit, the 1st, 4th, 5th and 6th grounds of appeal are meritorious.

With regard to paraphrased 8th and 9th grounds of appeal, the appellants counsel contention was that the High Court Judge misquoted section 2(2)(a) of the Immigration Act, and not considering the word "not" between words "shall" and "apply" in the provision. That this error led the High Court Judge to conclude that Tanzanian citizens are generally subject to investigation as a general rule which is not the case since according to the said provision they can only be investigated on very exceptional circumstances. He also argued that under the circumstances the provision was not applicable since the respondents never preferred any charges against the appellant or asserted in any document that they were invoking their powers under the Immigration

Act to investigate the citizenship of the appellant as provided by sections 16, 18(1) and (5) of the Immigration Act.

The appellant counsel contended further that section 12(a)–(u) of the Immigration Act provides general functions of the immigration officers but these functions do not include to demand, seize and hold the passport of Tanzanian citizens, unless there are reasons to believe that an offence was committed under the Act and that section 16 of the Immigration Act only comes into play if an immigration officer has reasons to believe that the investigated has violated it or any other law. He also argued that it is a general rule of statutory interpretation that if there is a specific law dealing specifically with an issue then it at the specific law that is to be followed and not the general law.

The learned counsel stated that passports are issued under the TPTDA which does not confer powers to the Immigration to seize and detain any passport to a Tanzanian unless the said person has committed prohibited acts listed under section 17(1) of the Act. That under section 17(1) of the TPTDA, the 1st respondent is required when exercising such powers to inform the affected person in writing reasons behind the decision and require the handover of the passport and the affected person has a right to appeal to the Minister for Home Affairs, whose decision is final under section 18 of the said Act.

Dr. Nshala submitted further that it is section 11 of the TPTDA that allows investigations being conducted on the holder of the passport but does not state that the said investigations should lead to the taking of the passport from the holder. That section 4(2) of the TPTDA requires the holder of a Tanzanian passport to remain with it until there is a lawful cause that the authority thinks it is not desirable for him not to remain with it. That in this case the respondents did not state under which provision of the law they were exercising their powers to enable the appellant defend himself properly, and thus he was condemned unheard similarly to a situation when a person does not know the mistake he has committed and the law he has violated. That the act by the 1st and 2nd respondents was capricious and arbitrary and to this day they have failed to lay any charge against the appellant and have assumed powers they do not possess by taking the appellant's passport and retaining it refusing to return the same to him and that the High Court Ruling has acquiesced this act of impunity by the respondents.

Responding to the appellant's allegations, the Principal State Attorney argued that the trial judge was correct to mention the provisions of section 2(2)(a) of the Immigration Act, since it confers powers to an immigration officer as they related to citizens in when exercising their duties. That section 16 of the Immigration Act, deals

with power of investigations and to make an inquiry and that with the two provisions they without doubt show that immigration officers have powers to investigate. That when discussing the stated provisions, the High Court judge was only expounding on provisions related to investigations in light of the appellant's complaints that investigations related to his citizenship status was not backed by law.

When the grounds of appeal under scrutiny are considered, all three of them dealt with the issue of arbitrariness and reasonability of the investigations on the appellant's citizenship which in effect are issues which we have already considered and dealt with above when determining the previous grounds. We have already dealt with the import of section 16 of the Immigration Act. With regard to section 2(2)(a) of the Immigration Act we start by extracting it as hereunder: -

> "2(2) *Subject to this section this Act shall not apply to any citizen of Tanzania, except that-*
>
> (a) *an immigration officer may exercise any of the power conferred upon him by or under this Act, in relation to any Person who is a citizen of Tanzania in so far as the exercise of Power is necessary to determine the status of that person*".

The argument put forth by the counsel for the appellant is that, when considering the above provision, the High Court judge did not consider that prior to subsection (a) of Section 2(2) which starts with: *"Subject to this section the Act shall not apply to any citizen of Tanzania"*. The argument emerges from what was held by the High Court judge at page199 of the record of appeal, after misquoting the above section and forgetting to insert the word "not" between "shall" and "apply" stated that:

> *"It is the finding of this Court that investigations held under Section 2(2)(a) and 16 of Cap 54 does not exclude Tanzanian. It covers any person whom the immigration officer has good reason so to investigate"*.

Taking this under consideration, although the assertion by the learned counsel for the appellant are true that the High Court judge misquoted the said provision, we are of the view that in light of the circumstances of the case, and the fact that paragraph (a) of section 2(2) is in effect a proviso, the underlying factor is what was in essence stated by the High Court judge especially when the said provision is read together with section 16 of the Immigration Act.

As stated earlier in our deliberation, the legal position is still that an immigration officer may initiate investigation on a Tanzanian citizen if

there is a cause to do that in line with what is specified under section 16 and 2(2)(a) of the Immigration Act. Therefore, we are of the view that the misquoting of the provision by the High Court judge did not occasion any injustice nor prejudice the appellant. We have also failed to find anything in the ruling of the High Court to lead us to determine the application before her that the learned High Court Judge failed to consider the application before him as one seeking judicial review and dealt with it as dealing with time used for criminal investigations. In the premises, the paraphrased grounds of appeal under scrutiny lack merit.

Amplifying on the 2nd ground of appeal, the learned counsel for the appellant challenged the framing of issues by the High Court Judge, especially in considering whether there were investigations being conducted by the respondents and whether the investigations were unreasonable, issues not framed by the High Court before the parties as required by Rule 5 of Order XIV of the CPC. He alluded that, application of the Civil Procedure Code is by virtue of Rule 17 of the Judicial Review Procedure Rules. That the issues framed by the High Court Judge did not embrace the essence of the application before him because, there was no allegations that the investigations had exceeded the time limit set for conducting them nor that the investigations were unreasonable.

That the matter before the High Court was the taking of the appellant's passport under the guise of "investigating his citizenship" without there being informed of any offence committed or alleged to have been committed and that the taking of the appellants passport and refusal to return it was without authority and contrary to the law. He thus argued, that the High Court Judge having framed issues contrary to the prayers sought is what led to an erroneous ruling.

The respondent's counsel response on this ground of appeal was to concede that the High Court Judge did frame three issues relying on what was before him from the submissions by the counsel for the parties. He argued that when you consider the appellant's submission before the High Court, they discussed the duration and dates used to follow-up his passport and that the appellants further to this also spent a lot of time submitting on denial of his right to be heard. The other argument from the respondent as expounded by the learned Principal State Attorney was the reference to section 17 of the TPTDA upon revocation of passport. He argued that Order XIV rule 5 of the CPC is not applicable in the present case because it discusses matters in a main suit where parties are given chances to frame their issues before hearing and not in the case like the present where there was just an

application before the High Court and in such situation, issues are framed by the court itself drawing from the submissions by the parties.

We have considered the submissions and cited references by the counsel for the parties and indeed, we agree that the learned High Court Judge did frame three issues to guide him in his determination of the matter before him as reflected at page 197 of the record of appeal. These were:

> *"1. Whether there is a set time limit for investigation done by a government machinery.*
>
> *2. Whether the ongoing one-year time investigation of the applicant's citizenship is unreasonable.*
>
> *3. Whether the applicant has been denied the right to be heard.*

Suffice to say, from the record, certainly, the said issues were drawn by the High Court in the ruling while considering and determining the pleadings and submissions before the High Court. This was after summarizing the contents of the pleadings and the submissions from the counsel for the parties, before highlighting the said issues, he stated;

> *"At any pace of reasoning, from the supporting affidavit, counter affidavit and extensive*

submission from the learned counsel, there are three issues to be determined in this matter...".

This being the case, as rightly advanced by the Principal State Attorney it is doubtful whether Order XIV rule 5 of CPC is applicable. Rule 5 of Order XIV states:

> *"(1) The court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit; and all such amendments or additional issues as may be necessary for determining the matters In controversy between the parties shall be so made or framed."*

A scrutiny of the above rule clearly shows that it envisages being applied during hearing of a suit where it is expected that parties are involved in the process of drawing out issues for consideration and it is not envisaged in a judgment or ruling where a court mainly draws issues derived from pleaded facts and the evidence before it when determining a matter. It is clear from the provision that an obligation is cast on the court to read pleadings, and then determine the material propositions of fact or law on which the parties are at variance and it is expected that parties will be accorded an opportunity to participate in the process.

It is clear that Order XIV rule 5 of the CPC is mandatory as stated in **SGS Societe Generale De Surveillance SA and Another vs VIP Engineering and Another,** Civil Appeal No. 127 of 2017 (unreported). The obligation vested on a court when writing a judgment or ruling is to draw out issues from the pleaded facts and the evidence meted in court. In **AGRO Industries Ltd vs Attorney General** [1994] TLR, the Court held as follows:

"A court may base its decision on an unpleaded issue if it appears from the course of the trial that the issue has been conclusively decided then"

In the present appeal, the issue of the time taken by the respondents to investigate the appellant's citizenship was agreed upon by the parties thus, the High Court was correct in determining the said issue. We thus find that this ground to be misconceived and without merit.

As regards the paraphrased 6th ground of appeal, the appellant's counsel alleged that the High Court Judge while considering what guides the court in judicial review, dealt with the application using criminal law and not judicial review principles and did not address himself as to the procedures that the public body was supposed to adhere to before it

demanded and seized the appellant's passport. That the High Court did not address the appellant's claim that the respondents have no power to seize a Tanzanian citizen's passport unless there was transgression as provided under section 17(1)(a)-(e) of TPTDA. That had the High Court Judge considered these issues he would have found that the 1st and 2nd respondents acted illegally and the order of certiorari should issue, because he treated the matter before him as if it was on whether there was a limitation period for a public authority to conduct investigations and whether the said decision was reasonable which was erroneous.

The learned Principal State Attorney objected to the appellant's counsel contention arguing that in the judgment of the High Court there is nowhere the appellant's complaints can be inferred and prayed for the Court to dismiss this ground.

We have carefully gone through the submissions, and the issue of whether or not the taking of the appellant's passport and the investigations conducted was lawful has already been dealt with above, but suffice to say, having gone through the impugned Ruling of the High Court, we have also failed to draw out where the said assertion comes from. As shown above, most of the High Court's deliberation are drawn from the three issues framed by the court, that is, emanating from the pleadings before it, grounded on prayers for prerogative orders.

At the same time, on page 201 of the record of appeal the High Court judge relied on **Sanai Murumbe and Another vs Muhere Chacha** [1990] TLR 54 which charted out circumstances under which prerogative orders may be issued. Then after reproducing them he proceeded to import them in the case before him and then made his findings. Hence, the contention that the High Court dealt with the application using criminal law and not judicial review principles, we find is flawed. The other complaint that the High Court judge did not address himself as to the procedures that the public body was supposed to adhere to before it demanded and seized the appellant's passport is also unfounded since the High Court judge applied the guidance found in **Sanai Murumbe and Another vs Muhere Chacha** (supra).

Suffice to say, it is well understood that in judicial review proceedings, the court's duty is usually to inquire on the legality of the impugned decision or order to see whether the decision-making authority acted within its jurisdiction, whether it complied with the rules of natural justice or whether the decision reached is reasonable or is otherwise an abuse of its powers as stated in **Jama Yusuph vs Minister for Home Affairs** [1990] T.L.R. 80 and **Sanai Murumbe and Another vs Muhere Chacha** (supra). The learned High Court Judge did consider the circumstances governing judicial review though

in brief and arrived at a decision, thus whether the decision was correct or wrong, is another issue but we find there was no confusion nor disregard of the fact that what was before the High Court was a matter for judicial review and not criminal investigations. For the stated reasons we find this ground lacks merit.

Venturing to amplify the paraphrased 12th and 13th grounds of appeal which discussed the appellants claims of being denied the right to be heard, the appellants counsel contended that the learned High Court Judge found the assertions to be premature since the respondents were yet to finalize their investigations which they are empowered by the law to conduct and thus found the application lacked merit.

The learned counsel faulted this position by the learned High Court Judge since the issue was not whether there is a limitation period to conduct investigation but rather whether the 1st and 2nd respondents had the power to do what they did and whether they adhered to the cardinal principles of due process. He contended that the law does not allow the 1st and 2nd respondents to take one's passport when conducting investigations and while there were no charges leveled against the appellant for any alleged transgression of the law which would have disentitled him from possessing the passport. He thus

argued that there was no legal basis for the respondents act against the appellant.

The learned counsel queried the holding by the learned High Court judge that the application was premature arguing that where there are claims of infringement of a right by an authority, it should not matter reasons behind such abrogation. He contended that an Administrative or public body is supposed to act in accordance with the law and once it acts to the contrary or fails to adhere to due process its decisions and actions are subject to judicial review. That the learned High Court Judge holding meant he was oblivious to the said principle of natural justice. Dr. Nshala argued further that the fact that it should not matter whether an Agency is proved to be right but the paramount issue for consideration is whether their actions were in accordance with the law and they respected the rights of concerned persons. That when an administrative body is found to have acted unfairly then the courts have to invoke their supervisory powers and welcome those who come to seek redress. He argued that the learned High Court Judge's finding on this issue led to reaching an unfair outcome and thus prayed the Court to allow this ground.

On the part of the respondents, the learned Principal State Attorney alleged that the appellant's passport was taken to facilitate

further investigation of his citizenship and prior to this the appellant was orally informed of the undertaking. He objected to the assertion that the passport was taken unlawfully and argued that in any case, the appellant cannot come at this stage with such claims having failed to comply with section 110(1) and (3) of the Tanzania Evidence Act, Cap 6 Revised Edition 2002 (The Evidence Act).

It is important to note that, we have hereinabove already determined the issue whether the respondents are empowered to conduct such investigations when they have a lawful course and seizing of a passport cannot be said to contravene the investigative powers invested in the respondents. We have also already dealt with the issue above, of whether or not the appellant was denied the right to be heard under the circumstances. That is whether the oral communication which he acknowledged to have received was inadequate in the absence of established procedure for such undertakings. We thus find no need to dwell on this issue further.

In the 14th ground of appeal, the learned counsel for the appellant contended that the 1st and 2nd respondent's action were unreasonable since a passport is issued after a long process including filling various documents which all stay with the respondents. He challenged seizure of the appellant's passport as unnecessary alleging that investigations

could have been launched by the respondents at any time without taking the passport and that's why the law does not provide for the respondents to demand and seize a citizen's passport.

On the part of the respondents, his response was a reiteration of what had been stated before and challenged the assertions that the High Court judge did not observe principles of a fair trial is unfounded and prayed the Court to find that the grounds of appeal lack merit.

This ground of appeal basically faults how the learned High Court Judge dealt with the application arguing that the importance of taking into consideration principles of natural justice were not considered and that the matter was just taken generally without due consideration on the fact that it sought for prerogative orders. It is a well settled principle that even where there are no statutory provisions or guidelines with clear procedure on conduct of investigation or inquiry on citizenship or when a passport is seized, should not lead to infringement of rights since rules of natural justice, demands of due process, good faith and fairness and compliance with the principles of good administration which are ordinarily inferred in decision making. This is because demand of sound administration entails the need to act reasonably, in good faith and relevant consideration.

In the current case subject of this appeal, the issue to determine is whether the appellant proved any of the conditions enumerated above against the 1st and 2nd respondents. The appellant assertion is that the respondents exceeded their powers when the appellant was ordered to surrender his passport and proceeded to hold it for an unreasonable time and that at the same time that he was denied an opportunity to be heard on the issue prior to the actions taken by the respondents. We have scrutinized the submissions, pleadings and all the supporting references before us and it is a fact that the appellant's passport was taken by the 1st and 2nd respondents arguably for investigation purposes.

We have also considered the guidance on how to deal with a similar situation found in an article by **Prof. Jeffrey Powell**; "*Beyond the Rule of Law: Towards Constitutional Judicial Review*", to which the counsel referred us to. The article describes the proportionality test involving a four-stage process posing four questions to establish a prima facie violation of a fundamental right: **First,** Did the action pursue a legitimate aim? **Second,** were the means employed suitable to achieve that aim? **Third,** Could the aim have been achieved by a less restrictive alternative? and **fourth,** Is the derogation justified overall in the interests of democratic society.

Applying the test which we had reproduced earlier on in this Judgment to our scenario, having already determined that although the holding of the passport was for a lawful purpose since it was in line with section 16 and 2(2)(a) of the Immigration Act, but when the retention is unduly prolonged as it did in the present case, invariably the act of retaining the said passport becomes unreasonable and without justification. That the argument that it was to facilitate a legitimate purpose of investigating on the citizenship of the appellant was no longer plausible since as stated in various cases, justice must not only be done but seen to be done. The holding in **Sadick Athuman vs Republic** [1986] T.L.R. 235 that justice must not only be done but must manifestly be seen to be done placed emphasis on that principle.

Without doubt, the act of the 1st and 2nd respondents of retaining the appellant's passport for more than a year, without providing him with any information on his citizenship status while also refraining his movements and there being no evidence of the appellant having denounced his citizenship, are in effect acts that infringed on his freedom of movement and thus prejudicial to his rights. (See **Simeon Manyaki vs The Executive Committee and Council of Institute of Finance Management** [1984] T.L.R. 304 and **Donald Kilala vs Mwanza District Council** [1973] T.L.R. 19)

With regard to issuance of Mandamus, the learned counsel invited the Court to be moved by the conditions set in the case of **John Mwombeki Byombalirwa vs The Regional Commissioner and Regional Police Commander Bukoba** [1986] T.L.R. 7. On application of section 4(2) of the TPTDA, he argued that this provision applies where there are genuine reasons to cast doubts and those reasons must be shared in writing with the passport holder relying on the provision of section 17(7) of the TPTDA, which specified that causes be presented in writing.

The appellant's prayers before the High Court were for orders of certiorari, mandamus and prohibition. All the said remedies are discretionary and courts are entitled to take into account the nature of the process against which judicial review is sought and satisfy itself whether there is a reasonable basis to justify the orders sought.

Taking into account all matters before this Court we find that the 1st and 2nd respondents' failure to take timely action upon seizing the appellant's passport without sufficient explanation to him on the continued investigations and his citizenship status entails infringement of his rights. This is so because no communication be it oral or written was made to the appellant despite his efforts to move them to hand the passport back so that he could enjoy his rights commensurate with the

possession of a passport being disregarded. Undoubtedly the 1st and 2nd respondents' inaction cannot be said to be reasonable.

Having found that the action of the 1st and 2nd respondents in continuing to retain the appellant's passport without any communication is unreasonable. For the foregoing reasons, having been satisfied that the appellant deserved to be granted some of the sought orders. In the circumstances, we agree with the appellant's counsel that the learned High Court Judge erred in failing to find that the respondents' continued withholding of the appellant's passport was not justified.

We therefore do hereby quash the impugned decision of the High Court and hereby order as follows:

(a) The 1st and 2nd respondents are directed to finalize investigations on the appellant's citizenship status within Sixty (60) days of this order.

(b) The 1st and 2nd respondents are further ordered to return the seized passport to the appellant immediately after lapse of the period of Sixty (60) days granted above and/or allow him to acquire a new passport upon fulfillment of the due process in the event the passport is no longer valid for reason of expiration or otherwise.

With the above orders, we find no need to issue an order for prohibition as the same is, under the circumstances, unnecessary.

In the end, the appeal is allowed to the extent shown in this judgment. We make no order as to costs.

DATED at **DAR ES SALAAM** this 2nd day of December, 2020.

A. G. MWARIJA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The judgment delivered this 4th day of December, 2020 in the presence of Dr. Chacha Murungu holding brief for Mr. Rugemeleza Nshalla, learned counsel for the appellant and Mr. Narindwa Sekimanga, learned State Attorney for the respondents is hereby certified as a true copy of the original.

E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL