THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
MISCELLANEOUS APPLICATION NO. 688 OF 2003

TESFAYE SHIFERWA AWALA…….APPLICANT

VERSUS

ATTORNEY GENERAL…….RESPONDENT

BEFORE: HONOURABLE JUSTICE GIDEON TINYINONDI:

RULING:

The Applicant proceeded under section 38(1) b, c and e, section 38 (2) of the Judicature (Amendment) Act 2002, Rules 3 and 5, Law Reform (Misc. Provisions) (Rules of Court) Rules S1 74-1 and Article 50 of the Constitution.

He sought the following orders;

> ***"1. Certiorari to quash and declare as null and void or otherwise unconstitutional, ultra-vires and illegal a decision of;***
>
> > ***(a). Refugee Eligibility Committee denying the Applicant refugee status for lack of grounds.***
> >
> > ***(b). Refugee Eligibility Committee ordering the Applicant to leave the country within ninety days.***
>
> ***2. Prohibition directed to the Refugee Eligibility Committee stopping them or its agents from deporting the Applicant to Kenya or Ethiopia.***
>
> ***3. Declaratory order that the Applicant's application for refugee status/asylum was wrongly and illegally rejected.***
>
> ***4. Injunction restraining the Respondent and/or his agents from arresting, detaining and subsequently deporting the Applicant before the determination of the main application.***
>
> **5. Costs of the application."**

The grounds of the application were said to be

> ***"1 That the Applicant is an Ethiopian national who came to Uganda through Kenya.***
>
> ***2. That the Applicant led student demonstrations in April 2001 over bad administration and was arrested and tortured by Government agents.***
>
> ***3. That the Applicant and the president of student's union were released and put under house arrest.***

4. That the Applicant escaped to Kenya after a tip off that he was to be arrested after the University Examinations with other student's leaders.

5. That while in Kenya, UNHCR granted refugees status to the President of student union and the rest of the students including the Applicant were denied refugee status.

6. That the Applicant leading other students protested over the denial of refugee status after their applications were considered as a group.

7. That the Applicant as a leader of the students during hunger strike was denied refugee status in Kenya.

8.That the Applicant was arrested and charged in Kenya Courts for illegally staying in Kenya and was convicted and sentenced to six months with an order of deportation to Ethiopia.

9. That the applicant escaped from Kenya Prison with assistance from other members of the student movement moving to Uganda.

10. That the Applicant applied for refugee status in Uganda and was interrogated or interviewed by the Uganda Police (SpecialBranch.)

11. That on the basis of the interrogation by the Police, the Applicant was denied refugee status on the basis that the Applicant was denied refugee status in Kenya.

12. That the Applicant appealed to the Refugee Eligibility Committee, which also turned, denied the applicant refugee status on the basis that his application for asylum lacked grounds and relied on irrelevant considerations.

13. That the Applicant has been treated unfairly and unconstitutionally and the Committee did not ascertain the relevant facts of the case.

The notice of motion application was accompanied by the Applicant's affidavit wherein he deponed the following:

"1. That I am a male adult Ethiopian of sound mind.

2. That I was a fourth year student of mathematics and physics at Bahir Dar University, Ethiopia.

3. That I was a student representative member of the Bahir Oar University Senate and the Vice President of the Bahir Oar University Students Council (BDUSC). (See annexture A and B attached).

4.That I was involved in the organisation of a peaceful student demonstration supporting the demands of the University students in Addis Ababa which took place on 19th April 2001 in Bahir Oar town.

5. That on the day of the demonstration, the president of the BDUSC (Mebrate Techane) and I were violently arrested by security forces and taken to a military camp (Mokod) outside Bahir Oar town.

6. That during my detention at the said camp I was several times tortured and interrogated and forced to confess on radio that I had been involved in setting up the students demonstration in April 2001 and made to sign a document declaring that I was responsible for the illegal actions of the students and for putting the peace and security of the people in danger.

7. That due to pressure from students who refused to sit their exams unless we were released, Mebrate Techane and I were released from military detention but kept under house arrest at the said University.

8. That Mebrate Techane and I managed to escape from house arrest and fled to Kenya in August 2001.

9. That in Kenya I was denied refugee status because the United Nations High Commissioner for Refugees (UNHCR) in Nairobi had in July 2001 decided to treat Ethiopia student asylum seekers as a group, denying all Ethiopian students refugee status.

10. That Mebrate Techane had his case decided on an individual basis in a refugee camp and was granted refugee status.

11. That I embarked on a hunger strike with other rejected students to protest the UNHCR decision. (See annexture C attached.)

12. That during the said strike I was approached by the UNHCR Protection Officer in Nairobi and verbally informed that it was a mistake that my asylum application had been rejected and that it would be reversed.

13. That the said hunger strike was called off when the students were promised that their cases would be reconsidered. (See annexture D attached.)

14. That on 29th November 2001, I was interviewed by the UNHCR in Nairobi and told that I would be given the results of my interview on 4 December 2001.

15. That on 4th December 2001, I was told that the diskette containing the transcript of my interview could not be opened and I was given another interview date of 18th December 2001.

16. That I was not interviewed on 18th December 2001 but was instead informed that my claim for refugee status had been rejected. (See annexture E attached.)

17. That in January 2002 I was interviewed for the Ethiopian monthly magazine Goh and I made strong statements against the current Ethiopian regime.

18. That on 3rd February 2002 I was arrested by Kenyan police and taken to Pangani Police Station where I was interrogated and beaten by persons whom I believe to have been Ethiopian Government agents.

19.That I was subsequently charged with and convicted of illegal entry and stay in Kenya and sentenced to six months in prison with an order for deportation to Ethiopia upon completion of my sentence.

20. That while in prison, I was repeatedly beaten and interrogated by three Kenyan and two Ethiopian agents based inside the prison.

21. That after three months in prison, my supporters were able to secure my release through bribery and I was able to flee to Uganda.

22. That I entered Uganda on 23rd April 2002.

23.That I was interviewed by the UNHCR Associate Protection Officer in Kampala, Mr. Kofi Dwomo, who on 2nd July 2002 referred me for determination of refugee status through the Refugee Eligibility Committee (REC).(See annexture F attached.)

24. That the Senior Protection Officer in the Directorate of Refugees, Mr. Douglas Asiimwe, refused to submit my case to REC and sent me back to the UNHCR with a note that I should be returned to Kenya.

25. That the said UNHCR Associate Protection Officer told me to wait while he made further investigations with the UNHCR in Nairobi.

26. That on 30th July 2002 the said UNHCR Associate Protection Officer sent me back to the Directorate of Refugees with another referral for determination of refugee status through REC. (See annexture G attached.)

27. That the Directorate of Refugees sent me to Special Branch Police for interviews.

28. That after my interviews with Special Branch Police I was told to await a decision from REC.

29. That in October 2002 I saw my name on a list at the Directorate of Refugees with a note that determination of my case by REC had been deferred and that I should report to the UNHCR.

30. That when I reported to the UNHCR Senior Protection Officer, Mr. Steven Gonah, in November 2002, he told me to await the REC's final decision.

31.That on 27th February 2003 I was given a rejection letter from the Directorate of Refugees stating that the REG had rejected my asylum application because of 'lack of

grounds of persecution' and with a referral to the fact that the UNHCR in Nairobi had already rejected my claim. (See annexture H attached.)

32. That on 28th March 2003, the Refugee Law Project of the Faculty of Law, Makerere University, wrote an appeal to REC. (See annexture I attached.)

33. That on 12th June 2003, I received another rejection letter from the Directorate of Refugees stating that the Refugee Eligibility Committee had rejected my claim for status for 'lack of grounds' and I was given 90 days to leave the country which expired on 12th September 2003.
(See annexture J attached.)

34. That the REC has treated me unfairly and has not properly considered the circumstances surrounding my application for asylum.

35. That I fled Ethiopia and Kenya because of threats to my life.

36. That if I am to be deported to either Kenya or Ethiopia, I am likely to face imprisonment, torture and or death.

37. That the REC should re-evaluate my application and consider it on its merits and accord me with an opportunity to be heard before they make a decision on my case disclosed.

38.That I certify that whatever is stated herein above is true and correct to the best of my knowledge and belief save that which is based on information the source of which is therein disclosed".

The Applicant filed a supplementary affidavit in support, deponing;

"1.That on 9th March 2004 the Refugee Law Project made an application for Mandate Status to the UNHCR in Kampala on my behalf.

2. That the application was granted and a mandate status was given on the basis of High possibility of political persecution in Ethiopia. A copy of the mandate status is attached hereto marked "MAN".

3. That this is recognition by the UNHCR representation in Uganda that I am a genuine refugee in Uganda.

4. That I swear this supplementary affidavit in support of my application for orders certiorari and prohibition.

5. That I certify that whatever is stated hereinabove is true and correct to the best of my knowledge and belief. "

Through Douglas Asiimwe the Attorney General of Uganda filed an affidavit in reply. It reads as follows;

1. That I am a male adult of sound mind.

2. That I am a Senior Protection Officer in the office of the Prime Minister and therefore competent to swear this affidavit.

3.That I have read the affidavit of Tesfaye Shiferaw Awala dated 21st November 2003 and reply as hereunder.

4.That the Applicant was sent to me on the 2nd July 2002 by Mr. Kofi Dwomo an Associate Protection Officer UNHCR for determination of refugee status.

5. That when I received the letter I sent the Applicant back to Mr. Kofi Dwomo on the grounds that the UNHCR had already dealt with his case and asylum in Kenya had been refused.

6. That on 30th July 2002 the Applicant was sent back to me with another referral for determination of refugee status.
7. That it is true that the Directorate of Refugees sent the Applicant to the Special Branch Police for interviews which is a normal procedural process.

8. That in October 2002 the Refugee Eligibility Committee deferred the Applicant's case to enable the UNHCR Nairobi to provide Information regarding the demonstration of Ethiopian asylum seekers. A copy of the Minutes from REC is attached and marked "A".

9. That the REC Committee sat and considered the application and decided that it be rejected among others because the application lacked grounds of persecution.

10.That a review of the case with additional information was lodged on behalf of the Applicant by Refugee Law Project of the Faculty of Law, Makerere University.

11. That the Refugee Eligibility Committee sat and discussed the appeal and rejected it for lack of grounds.

12.That this appeal/review was rejected because the application or appeal did not show wellfounded fear of being persecuted for reasons of race, religion, nationality or any other reason as required by the law.

13. That the Refugee Eligibility Committee rejected the Applicant's asylum for good reason and considered all the circumstances surrounding the application for asylum.

14. That the Refugee Eligibility Committee at all times acted fairly while dealing with the Applicant's application and appeal/review for grant of asylum.

15. That I swear this affidavit in reply to the affidavit of Tesfaye Shiferaw Awala and in opposition to his application.

16. That what is stated herein is true to the best of my knowledge.

In his written submissions Counsel for the Applicant contended as follows: That the Refugees Eligibility Committee's (hereafter the "REC") decision denying the Applicant refugee status for lack of grounds and also directing him to leave the country within ninety days was unconstitutional, ultra vires, illegal and invalid. That Article 42 of the Constitution provided for a right to just and fair treatment. That the Applicant was only interviewed twice by two Police Officers at Central Police Station Special Branch and it was on the basis of these interviews that his application was considered. That the Applicant was never accorded a hearing before the REC which procedure violated Article 42 aforesaid. Further that the rejection violated the rules of natural justice of the right to be heard when the REC made its own investigations from the UNHCR, Kenya, which had also rejected his application. Counsel cited ***R. -VS- SECRETARY OF STATE FOR HOME DEPT. ex. p. FAYED (199B)1 WRR 763.***

That this reference to the UNHCR of Kenya showed that the REC acted illegally because the consideration was irrelevant and in any case procedures in Kenya may be different. That whereas section 5 of the Aliens Act sets out the grounds to be taken into account, the REC ignored the section. That section speaks of the ground to be

> ***i). (the Applicant) "will be tried or punished for an offence of a political character"***
> ***ii).(the Applicant) "may be subjected to a physical attack."***

In reply to this ground Counsel for the Respondent submitted as follows. The Applicant filed the application under Article 50(1) of the Constitution which provides;

> ***"(1).Fundamental rights and freedoms of the individual are inherent and not granted by the State."***

That for anyone to proceed under this Article there must be a fundamental or other right which is guaranteed by the Constitution and that right must have been infringed or threatened. That the Applicant had in fact not pleaded any such right under the Constitution. That the Applicant seemed to be under the misguided belief that refugee status was a right but that it was not, let alone that right being guaranteed under the above Article and entitling the Applicant to bring the application under the said Article. Learned Counsel further submitted that refugee status was a status conferred on any person by the Minister through a Statutory Instrument and was by a discretionary exercise. Learned Counsel cited ***S. 2(d) of the CONTROL OF ALIEN REFUGEES ACT. CAP 62. LAWS OF UGANDA***. Counsel contended that for the above reasons the Applicant had no locus standi to bring this application under Article 50(1).

On whether the decision of the REC was a nullity/illegality, Counsel for the Respondent argued that according to ***"Osborne's CONCISE LAW DICTIONARY" (9th Ed.) 1J 198*** ***"illegality"*** is defined as ***"an act which the law forbids"*** and "void" ***is defined as that which is "of no legal effect***." That the general laws governing the status of refugees are found in the ***1951 UNITED NATIONS CONVENTION REGARDING THE STATUS OF REFUGEES*** as amended by the ***PROTOCOL OF 1969***. That domestically the duty of determining whether or not one should be accorded refugee status lies with the REC. That the REC is recognised by the UNHCR which had representation on it and that at page 2 of the Applicant's Counsel's submission the Applicant agreed with this role of the REC.

Learned Counsel for the Respondent then proceeded to submit as hereunder. The prayer for the order of ***CERTIORARI*** was canvassed in: inter alia, ***R. -VS- ELECTRICITY COMMISSIONERS ex.p. LONDON ELECTRICITY JOINT COMMITTEE CO. (1920) LTD [192411KB Aat 204 CA.***

Therein Atkin, L.J said –

"The matter comes before us upon rules of writ of prohibition and certiorari which have been discharged by the divisional courts. Both writs are of great antiquity, forming part of the process by which the Kings Courts restrained the Courts of inferior jurisdiction from exceeding their powers. Prohibition restrains the tribunal form proceeding further in excess of jurisdiction; certiorari requires the record or the order of the Court to be sent up to the Kings Bench Division to have its legality inquired into, and, if necessary to have it quashed. It is to be noted that both writs deal with questions of excessive jurisdiction."
***[Emphasis added.*]**

That the Applicant had not shown any evidence that the REC exceeded its jurisdiction when it rejected his application both at first instance and on appeal. That this standard was strict. Counsel referred to ***AL MEHAANI-VS- SEC. OF STATE FOR HOME DEPT. 1907 1AC 876***. Counsel argued that refugee status was not just a question of compassion but one as much of security and public policy for which reasons it was not a guarantee but had to be applied for and a decision reached entirely on discretion. That the Applicant having failed to adduce evidence of excess jurisdiction or illperformance of duty by the REC, the remedy of certiorari would fail.

Learned Counsel further submitted that the Applicant's conduct did not merit the remedy of certiorari because of the reasons given in ***Ex.P. FRY (1954) 2 ALL E. R 118.*** That the Applicant's journey to Uganda had been fraught with many illegalities e.g. escaping from prison through bribery, failure to register himself with the Immigration Department as required by ***S. 2 of the ALLENS (REGISTRATION AND CONTROL) ACT, CAP. 61 and in violation of ARTICLE 31 OF the UN CONVENTION REGARDING THE STATUS OF REFUGEES, 1951*** which provides:

> ***"…..Present themselves without delay to the authorities and show good cause for their illegal entry or presence."***

Learned Counsel for the Respondent further submitted that contrary to the Applicant's claim that he was not accorded an opportunity to be heard, the provisions of Article 42 of the Constitution were adhered and a just and fair treatment was given to the Applicant because he was interviewed by two police officers of the Special Branch and the REC relied on the recorded interview to arrive at its decision. That because of the nature of the asylum sought for reasons set out in paragraphs 11, 18, 19 and 21 of the affidavit in reply the REC found it necessary to use security organs to interview the Applicant. Counsel reproduced the composition of the REC which considered the Applicant's application as –

"(i).Office of the Prime Minister
(ii).An official from United Nations High Commission for Refugees (UNHCR)
(iii).An official from Special Branch
(iv).An official from Immigration Department
(v).An official from President's Office
(vi).An official from Ministry of Foreign Affairs
(vii).An official from Ministry of Local Government
(viii).An official from Ministry of Justice and Constitutional affairs

The REC also relied on annex ETH 268/02 to the affidavit in reply. It is reproduced extenso:

TESFAYE SHIFERAW AWALA (Ethiopian)
Tesfaye was born in 1978 in Alitena, Ethiopia. Hails from the Irob tribe, single. He was Vice President of the students' council and student's representative to the BAHIR University senate. By the time he fled, 14-08-01, he was in fourth year at the University pursuing mathematics.

He alleges because of his positions, the Ethiopian Government suspected he was one of the brains behind series of students' demonstrations that rocked Addis Ababa in April 2001.

He claims he was arrested on 19-04-02, from Bashir campus during a demonstration that students had organised to protest against the manner and excessive force that the security agents used to quash the Addis Ababa strikes. IC alleges several students were killed by security operatives during the riots.

He was taken to MOKOD military camp, 2 km outside Dahir where he was detained and tortured. Relatives and friends were denied access to him while he was in detention.

He was taken three weeks late, on 14-05-01 to the Regional Government Radio Studio where he was forced to denounce the students' demonstrations on the Amhara programme.

Two weeks later, on 29-05-01, he was taken to the university when final year students rejected to sit their exams unless IC and other student leaders were released.

Under duress, he was made to sign in front of the other students as prepared text denouncing the students' actions and accepting to take personal responsibility of the consequences of the strike. It was then that the authorities allowed him to sit his exams under guard and surveillance.

IC however escaped and fled the campus on 05-06-01 before completing his papers. He states he had received reliable reports that he was to be returned to the military camp after the exams for detention.

He trekked on foot for several days before he reached Borena where his brother worked and lived. He stayed in Borena for approximately one month but left when he received reports that he was still being looked for.

IC states he therefore decided to leave his country knowing that the long arm of the Government would catch him as long as he remained within Ethiopia.

Tesfaye therefore continued towards the Kenya border. He crossed into Kenya on 14-08-01 through Moyale and then continued to Nairobi where he applied for asylum. His application, together with whose of other 29 Ethiopian students was rejected by UNHCR. Applicant alleges the Ethiopia Government had a hand in influencing the decision.

He later influenced and organised the other students; together they went on hunger strike on 21-11-2001 after the officials concerned promised to revisit their case.

IC states the group waited in vain to be summoned for another interview. He alleges he approached the UNHCR authorities several times but would always be told 'come tomorrow. '

Applicant was arrested on the streets of Pangani on 03-02-2002 by the Kenya police for illegal entry. IC claims his arrest was engineered by some UNHCR officials who wanted to silence him. He appeared in Court on 06-02-02 and was convicted and sentenced to six months imprisonment. He was however released on 13-04-02 after his colleagues and some Kenyan students bribed some officers at Pangani police.

Tesfaye states he realised his stay in Kenya was no longer secure. He therefore decided to continue to Uganda where he has now lodged his case. He crossed to Uganda on 23-04-2002 through Malaba.

Counsel submitted that the composition of the REC and the contents of ETH 268/02 manifested that the REC acted fairly and justly. That contrary to the Applicant's claim that the REC contracted away its discretion to the UNHCR, Kenya, the REC on both occasions relied on information that had been obtained from a body with similar functions in addition to their own interviews and meetings.

Counsel for the Respondent invited Court when assessing the fairness of treatment to appreciated that the law governing refugee status does not lay down clear procedures for determining the status.

With regard to the grant of a mandate status to the Applicant on the basis of high possibility of political persecution by the UNHCR Respondent's Counsel submitted that the process was clothed with illegality because-

"a). The supplementary affidavit was filed on May 20, 2004 was never served on the Respondent until 13th September 2004, after Court had asked for the original of annexture "A" which even then could not be readily availed.

b).UNHCR Officials sit on the REC Committee and are bound by the decisions that this Committee makes and therefore the purported issue of illegality to say the least does not arise.

c).UNHCR Uganda is not an appellate body and cannot change the decision of the REC, if it has those powers why then does the Applicant submit to the jurisdiction of this Court?

d).Both the 1951 Convention and the 1967 Protocol provide for co-operation between the contracting states and the Office of United Nations High Commissioner for Refugees. "This cooperation extends to the determination of refugee status, according to arrangements made in various contracting states."

That in rejecting the Applicant's application the REC considered the fact that the Applicant was a fugitive under ***Article 1 F (b) of the 1951 CONVENTION*** which reads:

"The provisions of this convention shall not apply to any person with respect to whom there are serious reasons for considering that he has committed a serious non-political crime outside the country of refugee prior to his admission to that country as a refugee."

That there was no bias, ill will or injustice occasioned by the REC. Reference to him as a trouble causer did not show bias. In any case the Applicant's affidavit admitted this character. Learned Counsel wound up this ground with a quote from ***RE BUKOBA GYMKHANA CLUB: f196JJ EA 478 at 487*** where it was stated –

"When inferior tribunal has Jurisdiction to decide a matter it cannot (merely because it incidentally misconstrues a statute or admits illegal evidence, or rejects legal evidence, or misdirects itself as to the weight of the evidence, or convicts without evidence) be deemed to exceed or abuse its jurisdiction. If however, an administrative body comes to a decision which no reasonable body could ever have come to, it will be deemed to have exceeded its jurisdiction, and My Lord, I therefore pray that the Court declines to grant the prayer of Certiorari. 11

With regard to the remedy of ***PROHIBITION*** Respondent's Counsel submitted that, like in Certiorari, the Applicant has to prove that the decision of a tribunal was arrived at in excess of jurisdiction. He cited ***R -VS- ELECTRICITY COMMISSIONERS ex. P. LONDON E. JOINT COMMITTEE CO. (1920) L TD: f19241 IKB 171 at 204.***
That prohibition is intended to prevent the tribunal from proceeding to make a decision in excess of its jurisdiction. That an application has thus to be made ***"prior to the action or decision in question being taken."*** That in the present application the Applicant sought an order of prohibition stopping the REC from deporting him to Kenya or Ethiopia. Counsel argued that no such order had been made by the REC. That all that the REC did was to advise the Applicant, upon rejecting his application to either leave Uganda in 90 days or otherwise regularise his stay. Secondly, the REC has no authority to deport the Applicant. The REG sole purpose was to determine the eligibility of persons for refugee status, decide and advise the Minister of Internal Affairs accordingly. Furthermore the Applicant had not shown any evidence of the REC's intention to deport him. This prayer was thus misconceived in as far as it sought a remedy that by its nature was not available to the Applicant on the facts of the case.

Counsel for the Respondent proceeded to submit on the prayer for a declaration that the Applicant's application for refugee status was wrongly/illegally rejected. He argued that this discretionary remedy is available where there is a justifiable issue of law. That a dispute concerned merely with professional ethics or technical flaws does not warrant the order. He cited ***COX -VS- GREEN: [196611 ALL ER 268.*** He reiterated that the REC acted within its powers; there was no illegality or irregularity in the handling of the Applicant's application. When the Applicant appealed he was ably represented by the Refugee Law Project of MUK. This prayer ought to fail.

After looking at the documents presented, the submissions and perusing the law, I have the following to say:
I will start with the prayer for an order of certiorari to quash the REC's decisions rejecting the Applicant's application for refugee status both at first instance and on appeal. The law regarding this prerogative order is briefly that -

a) It is discretionary and is granted:

(i).where there has been a failure in natural justice.

[See: GLYNN -VS- KEELE UNIVERSITY: (197111 WLR 487 at 4961; or

> ***(ii).Where the decision in question is liable to be upset as a matter of law because on the face of it, it is clearly without jurisdiction or in consequence of an error of law.***

[See: R -VS- HILLINGDON LONDON BOROUGH COUNCIL ex. P. (19741 QB7201.

The Applicant sought this remedy alleging that the REC's decision was ***"null and void unconstitutional ultra vires and illegal."*** That grounds of these allegations are in paragraphs 1 0, 11, 12 and 13 of the notice of motion. He supported the allegations and grounds by his affidavit evidence. I perused this affidavit especially paragraphs 4, 6, 7, 9 to 17, 23 to 27, 28, 31, 32, 34 and 35. I also perused the affidavit in reply, especially paragraphs 7, 8 to 12.

From the Applicant's affidavit in support, I find and hold that nowhere does the Applicant show clear direct or circumstantial evidence that he will be tried for an offence of a political character or that he will be subjected to physical attack. ***Section 5(2) of the CONTROL of ALIENS REFUGEES ACT, CAP. 62*** provides-

> ***"(2). An authorised officer may in or her discretion without signifying any reason refuse to issue a permit; except that a permit shall not be refused to a refugee if the authorised officer has reason to believe that the refugee on returning to the territory from which he or she came will be tried or punished for an offence of a political character or be subject to a physical attack."***

If these matters are not apparent from the documents presented by the Applicant especially his affidavit I cannot see how otherwise the REC could be accused of having arrived at its decision due

to failure in natural justice or their decision could be faulted because on the face of it was arrived at in consequence of an error of law.

Furthermore however the REC approached the issue before it, its decision would not be upset on appeal as a matter of law because, in my considered view, the Applicant did not present the required evidence to support his claim.

The above finding and holding notwithstanding I will proceed further.

Counsel for the Applicant contended that the REC did not afford the Applicant an opportunity to be heard, especially to inform him of the evidence or facts the REC had gathered from its own investigations. First of all I repeat the affidavit evidence by the Applicant did not on its own disclose a case deserving of a decision in the Applicant's favor. Look at paragraph 4 of the Applicant's affidavit. What were the students ***"demands?"*** Look at paragraph 17: What were the ***Strong statements*** against the current Ethiopian regime?" Where was the evidence of the broadcast? Paragraph 34: What are the ***"circumstances"*** that the Applicant presented but the REC failed to consider?

Paragraph 35 mentions ***"threats to my life."*** What form did they assume? Second, Counsel cannot complain that the REC made "'its own" investigation from the UNHCR, Kenya because it was the Applicant himself who gave out this information. See: paragraphs 8 to 31 of his affidavit. Counsel's argument therefore is not convincing.

Third, the maximum ***audi alteran partem*** does not mean that the Applicant must be heard orally. [See: ***BOARD OF EDUCATION VS- RICE: (19111 AC 179; BRIGHTON CORPORATION - VSPARRY: (19721 70LGR 5761.*** In the application before the REC the Applicant filed an application with grounds and in fact on appeal he was represented by the Refugee Law Project of Makarere University.

Counsel for the Applicant further argued that the REC did not exercise the discretion vested in it. That instead the REC contracted this discretion to the UNHCR, Kenya. He referred to annex "H" to the affidavit in support and paragraph 5 of the affidavit in reply. I will here reproduce annexture "H" extenso.

"27 February 2003

TO WHOM IT MAY CONCERN

TESFAYE SHIFERAW AWALA (ETHIOPIAN)

This is to inform you that the Refugee Eligibility Committee (REC) discussed your application for asylum on 19 February 2003. The application was rejected because of lack of grounds of persecution in the case. As you may recall, your case was also rejected by UNHCR - Nairobi.

You should therefore, prepare to leave this country within ninety days (90), from the date of issue of this letter.

In event that you want to stay in the country, you are advised to regularize your stay with the Immigration Department after the expiry of ninety days.

Carlos Twesigomwe
FOR: PERMANENT SECRTARYIDIRECTOR FOR REFUGEES

Cc: The Representative
UNHCR
KAMPALA

Cc: The Commissioner Immigration Department Ministry of Internal Affairs KAMPALA

Cc: The Director Special Branch KAMPALA"

A sober reading of this document does not, in my considered view, show that the REC did not exercise its discretion. Nor does the document show that the REC contracted its discretion to the UNHCR, Kenya. The document shows that on ***19-02-2003 the REC discussed*** the Applicant's application. It ***rejected*** the application for ***lack of grounds of persecution.*** Reference to the earlier rejection by the UNHCR, Kenya is not stated to have been one of the grounds considered or influencing the REC to arrive at its decision. It was a mere reminder to the Applicant, in case he had forgotten, that the UNHCR, Kenya, had also earlier rejected his application. The document does not state what grounds were used by the UNHCR, Kenya I cap this finding by referring to paragraphs 6 to 13 of the affidavit in reply and hold that the Applicant's application was considered, evaluated, and a decision made on the merits of the application, whatever those merits were.

In further submission Applicant's Counsel contends that at its session of 28th to 31st May 2003 the REC took into consideration irrelevant matters, to wit, that the Applicant ***"appears to be a trouble causer."*** That this violated, inter alia, the provisions of section 5(2)of the Act (ante). The statement as it stands does not appear to have been at the centre of the deliberations of the REC I will cite the paragraph where it is found.

> ***"In addition My Lord, bias by predetermination may occur where it can be shown that a person has committed himself to one out come before hearing part or all the case. In our present case there is a clear indication that the Refugee Eligibility Committee was to an extent biased against the Applicant and this is reflected in their minutes where the Applicant is referred to as a "trouble causer."***

Further I agree with the decision in ***RE BUKOBA GYMKHANA CLUB (ante)*** and hold that even if this matter crept up it does necessarily shows that the REC exceeded its jurisdiction.

The Applicant's Counsel submitted that the standard of proof in this case was a reasonable possibility but not a balance of probability. On the part of the Respondent, Counsel argued that the standard is very strict. He cited the case of ***AL MEDANI - VS- SEC. OF STATE FOR HOME DEPT: [1990J 1 A.C 876.*** He gave reasons for this standard. I agree with Respondent's Counsel's submissions and hold that the Applicant failed to live up to this standard.

In view of the above discourse I decline to grant the order of certiorari.

The Applicant sought an order of prohibition directed to the REC stopping it from deporting him to Kenya or Ethiopia. In paragraph 33 of his affidavit, he annexed "I". It reads:

"Our Ref: 14/03/Eth
Your Ref: OPM/R/41/1

28th March 2003

Mr. Douglas Asiimwe
Office of the Prime Minister
The Refugee Eligibility Committee (REC)
Sir Apollo Kaggwa Road
Old Kampala, Kampala

Dear Mr.Asiimwe,

Re: Review of Rejection - Mr. Tesfaye Shiferaw Awala

We submit herewith a request for your kind reconsideration of Mr. Tesfaye Shiferaw Awala's claim for asylum. Enclosed are legal arguments and appendices in support of his claim.

The REC rejected Mr. Awala on 27th February 2003 on the grounds of "no well-founded fear of persecution" and with a referral to the fact that the UNHCR in Nairobi has already rejected his claim. However, as further argued in the enclosed documents, Mr. Awala did have and still has a well-founded fear of persecution in Ethiopia. The UNHCR in Nairobi gave him an unfair consideration of his application for refugee status and he experienced further interrogation in Kenya as to his activities in Ethiopia. Mr. Awala has continued his political activity outside Ethiopia and his subjective fear of persecution has increased and is now also extended to include Kenya. Objective evidence in support thereof shows that his fears are well-founded.

A deportation to Kenya would be contrary to the principle of non-refoulement of the 1951 Convention, partly due to his problems in Kenya and because a deportation to Kenya effectively is the same as deportation to Ethiopia, where there is a strong likelihood that he will be detained, tortured and potentially killed.

Surely this is not a deportation order. In any case as the Respondent's Counsel pointed out in his submission the power to deport lies with the Minister of Internal Affairs. I decline to grant this remedy.

Finally the Applicant asked for a declaration that his application for refugee status was illegally and unconstitutionally rejected. I repeat my reasons for declining to grant the remedy of certiorari and apply them to my refusal to grant the declaratory order.

This application stands dismissed with costs to the Respondent.

GIDEON TINYINONDI
JUDGE
08-02-2005

Ms. Nabakooza Margaret for the Respondent present
Miss Bakkidde Hannan and Ssekaana Advocates for the Applicant

Parties are absent.

COURT:
Ruling read by the Deputy Registrar.

PAUL WOLIMBWA GADENYA
DEPUTY REGISTRAR
08/02/2005