Rashidi v Tanzania (merits and reparations) (2019) 3 AfCLR 13

Application 009/2015, *Lucien Ikili Rashidi v United Republic of Tanzania*

Judgment, 28 March 2019, done in English and French, the English text being authoritative.

Judges: ORE, KIOKO, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, TCHIKAYA, and ANUKAM

Recused under Article 22: ABOUD

The Applicant, his wife and children were arrested and detained as illegal immigrants. The Applicant alleged that he had lost his passport, which contained a valid visa, but that he was in possession of a certificate of loss of passport from the police of the Respondent State. He further claimed that an anal search was conducted on him in violation of his right to dignity. The Court held that the Respondent State should have taken measures to ascertain the legal status of the Applicant before arresting him and his family. The Court also held that the Applicant's arrest violated his right to residence and that the anal search violated his right to dignity and physical integrity. The Court further held that the process to determine the Applicant's immigration status had been inordinately long.

Admissibility (exhaustion of remedies, 45; submission within reasonable time, 55, 56)

Residence (arbitrary arrest in violation of right to residence and freedom of movement, 77-81)

Dignity (anal search, 94-96)

Physical integrity (anal search, 97)

Fair trial (time to determine immigration status, 108-109)

Reparations (compensation, evidence of material loss, 129; non-material loss, 131, 138)

I. The Parties

1. Mr Lucien Ikili Rashidi (hereinafter referred to as the "Applicant") is a national of the Democratic Republic of Congo (DRC) who lived in Dar es Salaam, United Republic of Tanzania. He currently lives in Bujumbura, Republic of Burundi.

2. The Application is filed against the United Republic of Tanzania (hereinafter referred to as the "Respondent State"), which became a party to the African Charter on Human and Peoples' Rights (hereinafter referred to as the "Charter") on 21 October 1986 and the Protocol on 10 February 2006. It also deposited, on 29 March 2010, the declaration under Article 34(6) of the Protocol through

which it accepts the jurisdiction of the Court to receive cases from individuals and Non-Governmental Organisations.

II. Subject of the Application

3. This Application arose from the arrest, detention and deportation of the Applicant, his wife and children for allegedly residing illegally in the territory of the Respondent State. The Applicant alleges that the Respondent State violated his rights to residence and movement by arresting him while he was in possession of a certificate issued by the Tanzanian police attesting to the loss of his passport. The Applicant also alleges that anal search performed on him at the time of his detention violated his dignity.

A. Facts of the matter

4. The Applicant alleges that he entered the Respondent State's territory in 1993 on a temporary visa. Thereafter, in 1999, his wife and children entered the country as refugees but did not go to the designated refugee camps. They rather lived with him in Dar es Salaam.

5. In 2005, following a dispute with a retail trader, a certain Mussa Ruganda Leki, who owed him money, the Applicant filed Civil Case 263 of 2005 at the Resident Magistrate's Court of Kisutu, Dar es Salaam.

6. On 1 June 2006, the Applicant submitted a request to the DRC Embassy in Dar es Salaam for replacement of his passport, which he had lost. On 2 June 2006, the Embassy confirmed the ongoing process in writing and issued a related notice addressed to the Respondent State's Police. On 5 June 2006, the Tanzanian Police in Dar es Salaam issued the Applicant with a certificate of loss of his passport, which was still valid and contained a visa to stay in the Respondent State up to September 2006.

7. On 9 June 2006, the Tanzanian Immigration authorities arrested the Applicant for residing illegally in the country while he attended proceedings in Civil Case No. 263 of 2005 referred to above in which a debt judgment had been rendered in his favour.

8. The Applicant's wife and children were also arrested and they were all detained for five (5) days until they were taken to court on 15 June 2006 and charged with illegal stay, in Criminal Case 765 of 2006. The DRC Embassy became aware of the matter and obtained an authorisation from the Tanzanian authorities that the Applicant be released and allowed to stay to pursue his cases but on the understanding that his family would exit Tanzania within

seven (7) days and the illegal stay case be dropped. On 16 June 2006, the Applicant's family left and the Applicant remained as agreed, to pursue Civil Case 263 of 2005 referred to earlier. The Applicant was then granted several extensions of visa to stay in Tanzania up to 28 March 2007.

9. In September 2007, the Applicant filed Civil Case 118 of 2007 at the High Court of Tanzania against Mussa Ruganda Leki and Jerome Msemwa (immigration officer) for illegal arrest and degrading treatment. In August 2010, the Applicant joined more parties to Civil Case 118 of 2007, that is, the Permanent Secretary of the Ministry of Home Affairs and the Attorney General of Tanzania.

10. In September 2010, the High Court of Tanzania heard Civil Case 118 on the Applicant's arrest for illegal stay arising from the events in June 2006. On 2 January 2014, the High Court delivered its judgment and found that the Applicant's arrest in 2006 was lawful since he was then residing illegally in Tanzania for lack of a valid passport and visa. On 3 January 2014, the Applicant was issued with a Notice of Prohibited Immigrant and ordered to leave Tanzania within seven (7) days, which he duly complied with.

11. On 6 January 2014, having left Tanzania, the Applicant filed a request with the High Court to be availed a copy of the judgment of 2 January 2014 authorising his deportation in order to be informed of the basis of the decision and to facilitate his appeal, if he so wished. On 8 January 2014, the Applicant also requested the Minister of Home Affairs to waive the Notice of Prohibited Immigrant to allow him return and proceed with his cases, including the appeal against the judgment that resulted in his deportation. None of these authorities responded until an Application was filed before this Court, on 19 February 2015.

B. Alleged violations

12. The Applicant alleges that:

i. His arrest and detention in 2006 at the time he stayed legally in Tanzania were in violation of his rights to residence and free movement guaranteed under Article 12(1) of the Charter and Article 13 of the Universal Declaration of Human Rights.

ii. The anal search performed on him in the presence of his two (2) sons at the time of detention constituted a violation of his right to dignity protected under Article 5 of the Charter.

iii. The seven (7) year wait before the High Court delivered its judgment in Civil Case No. 118 of 2007 involving his illegal stay in Tanzania

violated his right to be tried within a reasonable time guaranteed under Article 7(1)(d) of the Charter.

III. Summary of procedure before the Court

13. The Registry received the Application on 19 February 2015.

14. On 9 June 2015, the Application was transmitted to the Respondent State and the Legal and Human Rights Centre was requested to provide the Applicant with representation on a *pro bono* basis. On the same date, the Application was also notified to the Chairperson of the African Union Commission and to other State Parties to the Protocol, in accordance with Rule 35(3) of the Rules.

15. On 6 July 2015, the Respondent State filed the list of its representatives. On 9 September 2015, the Respondent State filed its Response to the Application.

16. On 24 September 2015, the Applicant requested for judgment in default on the grounds that the deadline for the Respondent State to respond to the Application had lapsed. On 25 September 2015, the Applicant was informed that the Respondent State's Response was being translated into French and would be served on him once the translation was completed. On 29 September 2015, the Applicant requested to be served with the English version of the Response pending translation and this was done on the same day. On 14 October 2015, the Applicant reiterated his request for a default judgment. On 26 November 2015, the Registry served the Applicant with the French version of the Respondent State's Response.

17. On 24 November 2015, the Pan African Lawyers Union (PALU) was requested to represent the Applicant as the Legal and Human Rights Centre did not respond to the Court's request to that effect. On 14 December 2015, PALU agreed to represent the Applicant and was availed a copy of the file accordingly.

18. Due to difficulties faced by PALU in communicating with the Applicant who lived in Burundi, the Court granted several extensions of time for the filing of the Applicant's Reply to the Respondent State's Response. The Reply was filed on 28 July 2016 and on the same day it was served on the Respondent State for information.

19. On 9 August 2016, the Respondent State's attention was drawn to the Applicant's additional arguments. After several extensions of time granted by the Court *suo motu*, the latter filed its Rejoinder on 27 April 2017 and it was transmitted to the Applicant on 28 April 2017 for Reply within fifteen (15) days. The Applicant

subsequently filed several additional documents in support of the Application, which were served on the Respondent State.

20. Having been seized afresh of the Applicant's request dated 18 August 2017 to engage with the Respondent State towards an amicable resolution of the matter, the Court, on 22 September 2017, requested the Applicant to indicate whether such engagement should lead to halting the proceedings before the Court. On 2 November 2017, the Applicant informed the Court that he wishes to pursue the case. Pleadings were then closed with effect from 15 November 2017 and the Parties were informed accordingly.

21. On 5 April 2018, the Parties were informed that, in accordance with Rule 27(1) of the Rules, the Court would determine the matter on the basis of the written pleadings without holding a public hearing.

22. On 25 June 2018, the the Parties were informed that the Court had decided during its 49th Ordinary Session (16 April to 11 May 2018) to combine and deal with reparations at the same time as the merits of the Application. The Applicant was therefore requested to file his submissions on reparations within thirty (30) days.

23. On 13 July 2018, the PALU was requested to assist the Applicant prepare his submissions on reparations. On 23 August 2018, PALU filed written submissions on reparations on behalf of the Applicant. On 29 August 2018, the Registry served these submissions on the Respondent State for Response within thirty (30) days. On 16 October 2018, the Registry informed the Respondent State that it had been granted an extension of thirty (30) days to file its Response on reparations. On 21 November 2018, the Parties were informed that the Court would proceed and deliver judgment in the matter.

IV. Prayers of the Parties

24. In the Application, the Applicant prays the Court to:

"i. Grant him free legal aid;

ii. Rule that his claim is founded and declare it admissible;

iii. Find that the acts inflicted on him violate his rights as spelt out above;

iv. Order the Respondent State to compensate him to the amount of TZS 800 million;

v. Order the Respondent State to ship to the Court File No. 118/07 Civil Case and File No. 57/09 Civil Case, Baraza Kata/Segelea, Dar es salaam, for attachment to this Application."

25. In a correspondence dated 5 May 2016, the Applicant further prays the Court to:

"i. Quash the conviction and sentence imposed and/or release him from custody;

ii. Grant an order for reparations as follows:

- Tsh Twenty Million (20,000,000) being the value of his artefacts and damage;
- Tsh Fourty Five Million (45,000,000) being the value of his personal effects that were confiscated by agents of the Respondent State; and
- FBU Eighty Million (80,000,000) being a compensation for damage suffered by his family following arbitrary and unjust prosecution, especially in Case No. 765/2006."

26. Finally, as part of his additional submissions, the Applicant prays the Court to grant him the following:

i. The amount of US Dollars Twenty Thousand Dollars ($20,000) for moral prejudice suffered as a direct victim;

ii. The amount of US Dollars Fifteen Thousand Dollars ($15,000) for moral prejudice suffered by his family members as indirect victims;

iii. The amount of US Dollars Twenty-Two Thousand Dollars (USD 20,000) for legal fees incurred in the proceedings before this Court;

iv. The amount of US Dollars Five Hundred Dollars (USD 500) for other expenses;

v. An order that the Respondent State guarantees non-repetition of the violations and reports back to the Court every six months; and

vi. An order that the Respondent State publishes the judgment in the national Gazette within one month of its delivery as a measure of satisfaction.

27. In response, the Respondent State prays the Court to find that:

"i. The Application has not evoked the jurisdiction of the Court;

ii. The Application is not admissible as it has not met the admissibility requirement under Rule 40(5) of the Rules of the Court, that is, exhaustion of local remedies;

iii. The Application is not admissible as it has not met the admissibility requirement under Rule 40(6) of the Rules of the Court, that is, being filed within a reasonable time after exhausting local remedies;

iv. The Respondent has not violated any of the provisions of the Charter and other instruments as alleged by the Applicant;

v. The Applicant's request for reparations is denied."

28. The Respondent State did not respond to the Applicant's additional submissions on reparations.

V. Jurisdiction

29. Pursuant to Article 3 of the Protocol, "the jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instruments ratified by the States concerned."

30. In accordance with Rule 39(1) of the Rules, "the Court shall conduct preliminary examination of its jurisdiction … ".

31. The Respondent State contends that the Application has not invoked the jurisdiction of the Court but does not specify which aspect of jurisdiction is referred to.

32. The Applicant on his part avers that the Court has jurisdiction without substantiating his contention.

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33. Having conducted a preliminary examination of its jurisdiction and noting futher that there is no indication on file that it does not have jurisdiction, the Court holds that:

i. It has material jurisdiction given that the Application raises alleged violations of the Charter to which the Respondent State is a party.

ii. It has personal jurisdiction given that the Respondent State is a Party to the Protocol and has made the declaration prescribed under Article 34(6) of the Protocol, which enabled the Applicant to bring this Application directly before this Court, pursuant to Article 5(3) of the Protocol.

iii. It has temporal jurisdiction as the alleged violations which gave rise to this Application occurred before the Respondent State became a party to the Protocol and deposited the declaration but continued thereafter.

iv. It has territorial jurisdiction given that the facts of the matter and alleged violations occurred within the territory of the Respondent State.

34. In light of the foregoing, the Court holds that it has jurisdiction to hear the instant case and therefore finds that the Respondent State's objection is unfounded.

VI. Admissibility

35. Pursuant to Article 6(2) of the Protocol, "the Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter".

36. In accordance with Rule 39(1) of the Rules, "the Court shall conduct preliminary examination of … the admissibility of the Application in accordance with article … 56 of the Charter and Rule 40 of [the] Rules".

37. Rule 40 of the Rules, which in substance restates the provisions of Article 56 of the Charter, provides that:

"Pursuant to the provisions of Article 56 of the Charter to which Article 6(2) of the Protocol refers, applications to the Court shall comply with the following conditions:

1. Disclose the identity of the Applicant notwithstanding the latter's request for anonymity;
2. Comply with the Constitutive Act of the Union and the Charter;
3. Not contain any disparaging or insulting language;
4. Not based exclusively on news disseminated through the mass media;
5. Be filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
6. Be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the Matter;
7. Not raise any matter or issues previously settled by the parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union".

38. While some of the aforementioned conditions are not in contention between the Parties, the Respondent State raises objections regarding the exhaustion of local remedies and the filing of the Application within a reasonable time.

A. Conditions of admissibility in contention between the Parties

i. Objection based on failure to exhaust local remedies

39. The Respondent State avers that the Applicant did not attempt to exhaust local remedies that were available to challenge his

Prohibited Immigrant status.

40. With respect to the Applicant's claim that, due to his Prohibited Immigrant status, he was prevented from returning to Tanzania to appeal against the decision rendered in Civil Case No. 118 of 2007, the Respondent State contends that the Applicant had the available remedy of submitting an Application to the Minister of Home Affairs to waive or annul the Notice of Prohibited Immigrant and permit him to re-enter the country for his intended purpose. It is the Respondent State's submission that the Minister would have then considered the waiver application together with the reasons therein and rendered a decision.

41. The Applicant on his part alleges that the existing remedies, which the Respondent State refers to, were not made available to him. He states that after leaving the country in compliance with the Notice of Prohibited Immigrant, the High Court did not respond to his request to be availed a copy of the proceedings and judgment in Civil Case No. 118 of 2007, to determine whether and on what grounds he should appeal. He further avers that, similarly, the Minister of Home Affairs did not respond to his request for a waiver of the Notice of Prohibited Immigrant and to allow him return to Dar es Salaam to pursue his case. It is the Applicant's contention that by not responding to those two requests, authorities of the Respondent State prevented him from exhausting local remedies.

42. The Applicant also avers that, in any event, applying to the Minister of Home Affairs should be considered an extraordinary remedy, which he had attempted to exhaust nonetheless.

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43. The Court considers that, as it has held in the matter of *Lohé Issa Konaté v Burkina Faso*, the requirement set out in Article 56(5) of the Charter is to exhaust remedies that exist but also are available.[1] In the same case, this Court further held that "a remedy can be considered to be available or accessible when it may be used by the Applicant without impediment".[2] As such,

1 See Application 004/2013. Judgment of 5 December 2014 (Merits), *Lohé Issa Konaté v Burkina Faso* (hereinafter referred to as "*Lohé Issa Konaté v Burkina Faso* (Merits)"), para 77.

2 *Lohé Issa Konaté v Burkina Faso* (Merits), para 96.

remedies to be exhausted within the meaning of Article 56(5) of the Charter and Rule 40(5) of the Rules must be available not only in law but also be made available to the applicant.[3] Where a remedy exists but is not accessible to the applicant, the said remedy will be considered as exhausted.[4]

44. In the instant matter, the Parties concur that the appropriate remedy was to file a request with the Minister of Home Affairs for a waiver of the Notice of Prohibited Immigrant. However, as this Court has held in the case of *Alex Thomas v United Republic of Tanzania*, an applicant is only required to exhaust ordinary and judicial remedies within the meaning of Article 56(5) of the Charter.[5] The request to the Minister of Home Affairs does not qualify as such a remedy.

45. The Court considers that, in the circumstances of this case, the actual remedy was to appeal against the judgment rendered by the High Court on 2 January 2014 in Civil Case 118 of 2007, in implementation of which the relevant authorities issued the Notice of Prohibited Immigrant and proceeded to deport the Applicant as recounted above. The Court notes that the fact that neither the Minister of Home Affairs nor the High Court responded to the Applicant's requests made it impossible for him to access the appeal remedy. The Court thus finds that though the remedy of the appeal existed, the Applicant was unable to utilise it. This situation was compounded by the fact that the Applicant was no longer in the territory of the Respondent State. The Court therefore deems it that local remedies have been exhausted.

46. As a consequence, the Court dismisses the Respondent State's objection to the admissibility of the Application for lack of

3 See Application 002/2013. Judgment of 3 June 2016, ***African Commission on Human and Peoples' Rights (Saïf Al-Islam Gaddafi) v Libya*** (Merits), para 69.

4 See Application 006/2016. Judgment of 7 December 2018 (Merits), ***Mgosi Mwita Makungu v United Republic of Tanzania***, para 41. See also ***Geneviève Mbiankeu v Cameroon*** (hereinafter referred to as "***Genevieve Mbiankeu v Cameroon***") Communication 389/10 (ACHPR 2015), paras 48, 72, 82; Article 19 v Eritrea Communication 275/03 (2007) AHRLR 73 (ACHPR 2007), para 48; ***Anuak Justice Council v Ethiopia*** Communication 299/05 (2006) AHRLR 97 (ACHPR 2006); and ***Dawda Jawara v Gambia*** Communication 147/95-149/96 (2000) RADH 107 (2000), para 31.

5 See Application 005/2013. Judgment of 20 November 2015 (Merits), ***Alex Thomas v United Republic of Tanzania*** (hereinafter referred to as "***Alex Thomas v Tanzania*** (Merits)"), para 64. See also, Application 007/2013. Judgment of 3 June 2016 (Merits), ***Mohamed Abubakari v United Republic of Tanzania*** (hereinafter referred to as "***Mohamed Abubakari v Tanzania*** (Merits)"), para 64.

exhaustion of local remedies.

ii. Objection based on failure to file the Application within a reasonable time

47. In computing the time within which the Applicant filed his Application after exhausting local remedies, the Respondent State considers the period between the date of the High Court judgment, which is 2 January 2014, and the filing of the present Application on 28 January 2015. The Respondent State avers that the said period, which is more than one (1) year, cannot be considered a reasonable time against the standard of six (6) months set out by the African Commission in the case of *Michael Majuru v Republic of Zimbabwe*.[6]

48. While agreeing with the Respondent State on the dates to be taken into account and the period of time within which the Application was filed, as reflected above, the Applicant challenges the inference made by the Respondent State as to what constitutes a reasonable time as per Article 56(6) of the Charter. It is the Applicant's contention that, in line with the jurisprudence of this Court, what constitutes a reasonable time should be assessed on a case-by-case basis.

49. The Applicant argues that, after filing the two aforementioned requests to the Minister of Home Affairs and the High Court, he was obviously waiting to receive responses before considering his next step. He avers that, considering the extreme delays he had already experienced while awaiting the delivery of the judgment in Civil Case 118 of 2007, waiting a year before filing this Application should be found to be reasonable.

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50. The Court notes that the High Court judgment in Civil Case 118 of 2007 that led to the issuance of the Notice of Prohibited Immigrant and deportation of the Applicant was delivered on 2 January 2014, while the present Application was filed on 19 February 2015. The relevant question is whether the period of one (1) year and

6 See Communication 308/2005 (2008) *AHRLR* 146 (ACHPR 2008).

twenty-six (26) days that elapsed between the two events can be considered as reasonable within the meaning of Article 56(6) of the Charter and within the context of the instant case.

51. The Respondent State's consistent contention is that, based on the African Commission's view in the *Majuru* case, a period of more than six (6) months should be considered as unreasonable.

52. The Court considers that such contention is not well-grounded. First, the Respondent State's reliance on the decision in the *Majuru* Communication is partial as it is limited to paragraph 108 of the Commission's reasoning, which was merely demonstrative but not conclusive. As a matter of fact, the relevant portion of the decision, which is also the conclusive one, is paragraph 109 where the Commission took the view that:

"Going by the practice of similar regional human rights instruments, such as the inter-American Commission and Court and the European Court, six months seem to be the usual standard. *This notwithstanding, each case must be treated on its own merit. Where there is good and compelling reason why a Complainant could not submit his/her complaint for consideration on time, the Commission may examine the complaint to ensure fairness and justice*."

53. In light of the above, this Court notes that, in the *Majuru* Communication, the Commission applied a case-by-case approach and not the six-month standard as averred by the Respondent State in the present Application.

54. Second, this Court has consistently held that the six-month time limit expressly provided for in other international human rights law regimes is not set out in Article 56(6) of the Charter, which rather refers to a *reasonable time*. As a matter of course, the Court has thus adopted a case-by-case approach in assessing what constitutes a reasonable time within the meaning of Article 56(6) of the Charter.[7]

55. The Court recalls that by its consistent case-law, in circumstances where there is uncertainty as to whether the time is reasonable, determining factors may include the Applicant's situation.[8] In the present case, the Applicant was deported within a week of the High Court's Judgment and issuance of the Notice of Prohibited Immigrant. He therefore lacked the proximity that was necessary

7 Application 013/2011. Judgment of 21 June 2013 (Preliminary Objections), ***Norbert Zongo and others v Burkina Faso*** (hereinafter referred to as "***Norbert Zongo and others v Burkina Faso*** (Preliminary Objections)"), para 121; ***Alex Thomas v Tanzania*** (Merits), paras 73-74.

8 See for instance, ***Alex Thomas v Tanzania*** (Merits), para 74.

to follow up on his requests to the domestic authorities.[9]

56. In light of the foregoing, the Court finds that the period of one (1) year and twenty-six (26) days in which the Applicant filed this Application is reasonable within the meaning of Article 56(6) of the Charter and Rule 40(6) of the Rules. As a consequence, the Court dismisses the Respondent State's objection in respect of the filing of the Application within a reasonable time.

B. Conditions of admissibility not in contention between the Parties

57. The Court notes that whether the Application meets the conditions set out in Article 56 subsections (1),(2),(3),(4), and (7) of the Charter and Rule 40 sub-rules (1),(2), (3), (4) and (7) of the Rules regarding the identity of the Applicant, compatibility of the Application with the Constitutive Act of the African Union, the language used in the Application, the nature of evidence adduced, and the previous settlement of the case, respectively, is not in contention.

58. Noting further that the pleadings do not indicate otherwise, the Court holds that the Application meets the requirements set out under those provisions.

59. As a consequence of the foregoing, the Court finds that the Application fulfils all the admissibility requirements set out under Article 56 of the Charter as restated in Rule 40 of the Rules and accordingly declares it admissible.

VII. Merits

60. The Applicant alleges that the Respondent State violated his rights to residence, freedom of movement, dignity and to be tried within a reasonable time.

A. Alleged violation of the rights to residence and freedom of movement

61. The Applicant avers that his right to freedom of movement was violated because he was arrested and detained while legally staying on the territory of the Respondent State. In support of this submission, the Applicant first contends that the Respondent

9 See Application 012/2015. Judgment of 22 April 2018 (Merits), *Anudo Ochieng Anudo v United Republic of Tanzania*, para 58.

State's admission that his visa was severally extended confirms his lawful stay.

62. The Applicant further alleges that the Respondent State's arguments are contradictory in the sense that, on the one hand, it qualifies him as an illegal immigrant but, on the other hand, it withdrew Criminal Case No. 795 of 2006 against him and his family, and allowed him to stay on humanitarian grounds for the purpose of pursuing his case. It is the Applicant's contention that the absence of evidence on file to support the hypothesis of a discretionary authorisation by the Minister of Home Affairs to reside for almost seven (7) years without proper documentation should only lead to the conclusion that he was residing legally in the country at the time of his arrest.

63. The Applicant consequently submits that the absence of proper documents was the result of their loss, which he diligently reported to the Tanzanian Police and was issued a certificate of loss in that regard.

64. In his Application and subsequent submissions, the Applicant contends that the Immigration Services "in complicity with lawyers from the Office of the Attorney General and the presiding Judge in Civil Case 118 of 2007," decided to deport him so that he would not be able to continue with the judicial proceedings he had initiated. However, in his Reply, he states that he no longer wishes to argue violations based on this claim and his initial claim that his documents were torn by agents of the Respondent State.

65. On its part, the Respondent State submits that the right to freedom of movement is subject to limitations provided by law, which it has duly observed in the instant case. The argument of the Respondent State in this respect is two-fold.

66. First, the Respondent State avers that it acted "in accordance with the law" as prescribed under Article 12(1) of the Charter by following the relevant provisions of its Constitution and Immigration Act, which prescribe respectively that:

i. "No person shall be arrested, imprisoned, confirmed, detained, deported or otherwise be deprived of his freedom save only a) under circumstances and in accordance with procedures prescribed by law; or b) in the execution of a judgment, …" (Article 15(2) of the Constitution);

ii. "Any immigration officer may, without warrant, arrest a person whom he reasonably suspects to be a prohibited immigrant or to have

contravened … any of the provisions of this Act". (Section 8(1) of the Immigration Act);

iii. "The expression 'prohibited immigrant' means a person whose presence … into Tanzania is unlawful under any law for the time being in force". (Section 10(1)(h) of the Immigration Act);

iv. "… any immigration officer or any police officer may … without warrant, arrest any prohibited immigrant …" (Section 12(1) of the Immigration Act);

v. "Subject to subsections 2 and 3, no person to whom this section applies shall enter Tanzania … or remain in Tanzania unless a) he is in possession of a valid passport; and b) he is the holder of … a residence permit issued under the provisions of this Act; or c) he is the holder of … a pass issued under the provisions of this Act." (Section 15(1) of the Immigration Act).

67. Second, the Respondent State alleges that it did not curtail the Applicant's freedom of movement arbitrarily as it acted to implement the High Court judgment in Civil Case 118 of 2007 *Lucien Ikili Rashid v Musa Rubanda, Jerome Msewa, Permanent Secretary, Ministry of Home Affairs, and Attorney General*, where that Court held that "… at the time of his arrest, even during hearing of this case, the plaintiff had no valid passport, a resident permit or pass" and that he "therefore, was and still is a prohibited immigrant within the meaning of Section 10(1)(h) of the Immigration Act".

68. Finally, the Respondent State challenges two more claims by the Applicant. The first claim relates to the destruction of the Applicant's documents by agents of the Respondent State, which the latter submits must be dismissed as the Applicant failed to discharge the onus of proof. Concerning the second claim by the Applicant that he was deported to prevent him from pursuing his case, the Respondent State contends that it is baseless and should be dismissed since the Applicant admitted in Civil Case 118 of 2007 that he does not have the required documents.

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69. The issue for determination is whether the Applicant's arrest at the time and in the circumstances recounted earlier constitutes a violation of his right to freedom of movement protected by Article 12(1) of the Charter, which provides that "Every individual shall have the right to freedom of movement and residence within the

borders of a State provided he abides by the law".

70. Prior to examining that issue, the Court notes that the Applicant no longer wishes to pursue his two allegations that agents of the Respondent State destroyed his documents and deported him to prevent him from pursuing his cases in domestic courts. The Court will therefore not dwell into issues that the Applicant himself has dropped.

71. Turning to the issue being determined, the Court observes that although the submissions by both Parties on whether the Applicant was wrongly arrested are framed as alleging the violation of his right to "freedom of movement", the preliminary question which arises is that of the Applicant's right to residence. This is due to the fact that, in the instant case, the issue of freedom of movement will only arise after and if it is established that the Respondent State breached the Applicant's right to reside in the country.

72. Furthermore, the Court considers that this determination must be made as at the time of the Applicant's arrest, which was on 9 June 2006, since he has complained of the arrest as being the act that allegedly violated his rights.

73. Regarding the right to residence, the Applicant avers that he was legally residing in the Respondent State as the loss of his valid documents was duly reported to the police who issued him with a certificate of loss. On its part, the Respondent State submits that at the time of his arrest, the Applicant was illegally in its territory, as confirmed by the 2 January 2014 High Court's judgment in Civil Case 118 of 2007, because he had no valid passport, residence permit or a pass as required under the Immigration Act. In the Respondent State's view, a mere certificate of loss, be it delivered by the Tanzanian police, cannot make his stay legal.

74. The Court notes that pursuant to the provisions of the Tanzania Immigration Act, to reside legally in the country, a foreigner must hold a passport together with an express authorisation to stay in the form of a permit or a pass. The Applicant does not deny that, at the time of his arrest, he had neither of the above.

75. However, the Court considers that, the fact that the Applicant did not hold the documents expressly required in the Act, did not automatically render his stay illegal. A contrary position would amount to a narrow interpretation of the law, which would not be appropriate for a human rights based determination. A purposive interpretation of the law is further called for where there is a risk of a subsequent action by the Respondent State that is likely to have a critical impact on the life of the person involved.

76. The Court is of the view that, in such circumstances, the determinant should be the reasonable expectation of a certain

course of action which is required when an authority or the law has induced in a person, who may be affected by subsequent decisions, a reasonable expectation that he or she will retain the said benefit or will be seen as having obtained the same by law.[10]

77. In the instant matter, the Court notes that, at the time of his arrest on 9 June 2006, the Applicant held two documents of probative value, that is, a cerficate of loss of his passport issued by the Tanzanian Police and an official correspondence from the Embassy of his country to the Respondent State confirming that he was in the process of obtaining a new passport. While in possession of these documents, the Applicant could legitimately expect that the Respondent State would not issue a Notice of Prohibited Immigrant against him because the certificate of loss was meant to replace the documents expressly provided for in the law and was valid, having been issued by the competent authorities.

78. In the Court's view, reasonable expectation required that when presented with the aforementioned documents, the Respondent State's agents should have conferred with the issuing authorities to ascertain their validity.

79. The position of the Court is premised on the fact that the documents referred to were issued on 2 June and 5 June 2006 respectively, four (4) days prior to the Applicant's arrest by the Respondent State's immigration officers, that is, on 9 June 2006. The obvious conclusion is that the Applicant did not obtain these documents to preempt his arrest.

80. On this specific point, the Court's position is reinforced by the decision of the concerned authorities made on 16 June 2006 to withdraw the illegal residence case filed against the Applicant, to release him and his family members, and to allow him to stay in Tanzania to pursue his cases before domestic courts. This demonstrates that the Respondent State had alternatives to the issuance of a Notice of Prohibited Immigrant followed by arrest and deportation.

81. In light of the above, the Court holds that the Applicant's arrest in the circumstances of this case constitutes a violation of his right to

10 See *Stretch v United Kingdom* (Merits and Just Satisfaction), 44277/98, paras 32-35, ECHR, 24 June 2003.

residence and, consequently, of his freedom of movement.

82. As a consequence of the foregoing, the Court finds the Respondent State in violation of Article 12(1) of the Charter.

B. Alleged violation of the right to dignity

83. The Applicant alleges that the fact that the Respondent State's prison officers undressed him before his children and made him bend over to search into his anus for marijuana and money constitutes cruel, inhuman and degrading treatment and violated his right to dignity guaranteed under Article 5 of the Charter.

84. In reply to the Respondent State's submission that "cavity searches" are a current practice in its prisons, the Applicant avers that such is not an acceptable justification and cannot in any case apply indiscriminately to all persons, without first determining the penalties faced in specific circumstances. He further submits that he should not have been treated like any other criminal even if he was presumed to be an illegal immigrant.

85. In its Response to the Application, the Respondent State does not deny the facts as recounted by the Applicant but justified the same by stating that "… cavity searches are a security measure performed upon entry and exit of most prisons in the Respondent State". In its Rejoinder, the Respondent State restates its position, putting the Applicant to strict proof to show that he was subject to any such treatment.

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86. Article 5 of the Charter, which the Applicant alleges has been violated, provides as follows:

"Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited".

87. The issue for determination is whether the anal search performed on the Applicant by agents of the Respondent State in the presence of his children constitutes a violation of his right to dignity.

88. The Court observes that, in assessing generally whether the right to dignity protected by Article 5 of the Charter was violated, the African Commission considered three main factors. First, Article

5 has no llimitation clause. The prohibition of indignity manifested in cruel, inhuman and degrading treatment is thus absolute.[11] Second, the prohibition must be interpreted to extend to the widest possible protection against abuse, whether physical or mental.[12] Finally, personal suffering and indignity can take various forms and assessment will depend on the circumstances of each case.[13]

89. With respect to body search that bears on the intimacy of the person as arose in the instant matter, the European Court of Human Rights (ECHR) has held that the fact of prison guards forcing a person to bend over and squat while they undertake a visual inspection of his anus constitutes an encroachment on dignity, which exceeds reasonable procedures and amounts to degrading treatment.[14]

90. The Inter-American Commission of Human Rights (IACHR) has taken the view that while restrictive measures might be necessary where threat to security is obvious, "… a vaginal search is more than a restrictive measure as it involves the invasion of a woman's body". The IACHR proceeded to set out that "… lawfulness of a vaginal search or inspection, in a particular case, must meet a four-part test: 1) it must be absolutely necessary to achieve the security objective in the particular case; 2) there must not exist an alternative option; 3) it should be determined by judicial order; and 4) it must be carried out by an appropriate health professional".[15]

91. The Court considers that, of these criteria, those of necessity and availability of alternative options apply in the instant matter.

92. With respect to necessity, the Respondent State does not contend that the Applicant posed any security threat. The Court notes that he was only accused of not being in possession of his passport and a visa to stay in Tanzania.

93. In the Court's view, the Respondent State's submission that "cavity search" is the standard practice upon entry and exit

11 See *Huri-Laws v Nigeria* Communication 225/98 (2000) AHRLR 273 (ACHPR 2000), para 41.

12 See *Media Rights Agenda v Nigeria* Communication 224/98 (2000) AHRLR 262 (ACHPR 2000), para 71.

13 See *John Modise v Botswana* Communication 97/93 (2000) AHRLR 30 (ACHPR 2000), para 91.

14 See *El Shennawy v France* (Merits), 51246/08, paras 45-47, ECHR, 20 January 2011. See also, *Frerot v France (Merits),* 70204/01, paras 35-48, ECHR, 12 June 2007.

15 *Ms X v Argentina (Merits)* Case 10.506, Judgment of 15 October 1996, Report No. 38/96, IACHR, paras 71-74.

from its prisons can only be read as an admission of degrading treatment in the instant matter. In the light of the wording of relevant provisions of the Charter and case law in reference, the systematic nature of that practice, especially anal search, cannot justify its performance.

94. Regarding the availability of alternatives to the anal search, which was conducted on the Applicant in this case, this Court notes that the objective of preventing the introduction of items such as drugs, money or weapons into prisons is legitimate, as it ensures safety of those in custody. Searching accused persons for such items in that context might thus be acceptable only within strict checks but should never be to the extent of breaching dignity. There surely exists a wide range of alternative means of effectively achieving the same result such as purge, scanning and others.

95. In the case at hand, even assuming there was need for anal search, conducting it on a father in the presence of his children certainly added to the Applicant's anguish and humiliation. Such instance inevitably impacted on the Applicant's authority and tarnished his reputation in the eyes of his family.

96. In light of the above, the Court holds that the anal search conducted on the Applicant constituted a violation of his right to dignity and not to be subjected to degrading treatment. The Court consequently finds the Respondent State in violation of Article 5 of the Charter.

97. The Court further considers that the search performed on the Applicant constitutes an interference with his physical integrity. As stipulated under Article 4 of the Charter, "Human beings are inviolable. Every human being shall be entitled to respect for … the integrity of his person".

98. The Court notes that full body search has come under thorough scrutiny in human rights case law. This is exemplified among others in the case of *Frérot v France* where the ECHR held that systematic search, especially anal search that is not justified and duly authorised by a judicial authority, constitutes a breach of Article 3 of the European Convention on Human Rights.[16] This Court is of the view that the same principle underlines the prohibition in Article 4 of the Charter. The breach of physical integrity is also prohibited in international human rights instruments as is the case in Article 5 of the Universal Declaration of Human Rights

16 *Frérot v France*, *op cit*. Article 3 of the European Convention reads: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment".

(UDHR),[17] Article 7 of the International Convenant on Civil and Political Rights (ICCPR)[18] and Article 1 of the United Nations Convention against Torture.[19]

99. In light of the circumstances of this case and based on the determination made earlier with respect to the violation of the Applicant's right to dignity, the Court is of the view that the anal search that he was subjected to constitutes a violation of his right to the integrity of his person. The Court, therefore, finds the Respondent State in violation of Article 4 of the Charter.

C. Alleged violation of the right to be tried within a reasonable time

100. The Applicant alleges that for him to have waited almost seven (7) years before the High Court delivered its judgment in Civil Case No. 118 of 2007, violated his right to be tried within a reasonable time. It is the Applicant's contention that, "this undue prolongation of the trial further increased the prejudice he was originally seeking redress for", which is a "lowered reputation with devastating effects on his personal and professional life".

101. The Respondent State challenges the Applicant's claim and avers that the delay in completing the case was caused by him. It submits that after filing the case in September 2007, in August 2010, the Applicant amended the plaint to join the Ministry of Home Affairs and Attorney General, and this resulted in the case commencing again in September 2010. The Respondent State further submits that after completion of the filing of the pleadings thereafter, the matter went through mediation as required by the Civil Procedure Code before the hearing began.

102. The Respondent State also avers that the Applicant severally requested for the recusal of the judges handling the matter, which led to the case being referred to the judge in charge for re-assignment and consequently resulted in further delays. By the Respondent State's calculation, the completion of the case actually lasted only three (3) years and three (3) months and the Applicant's actions account for the delay amounting to the

17 Article 5 of the UDHR provides that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment".

18 Article 7 of the ICCPR provides that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation".

19 See also the position of the Inter American Commission of Human Rights in the case of *Miguel Castro-Castro Prison v Peru*, 25 November 2006, para 312.

remaining part of the period of seven (7) years.

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103. Article 7(1)(d) of the Charter provides that "Everyone shall have the right to have his cause heard. This comprises: … d) The right to be tried within a reasonable time by an impartial court or tribunal".

104. The Court notes that, while Civil Case No. 118 of 2007 was filed in September 2007, it was heard only in September 2010 and judgment was delivered on 2 January 2014. Therefore, it took the High Court a period of six (6) years and four (4) months to complete the Applicant's case relating to the legality of his stay in Tanzania. The issue for determination is whether that time is reasonable within the meaning of Article 7(1)(d) of the Charter.

105. Before making that determination, the Court must consider the Respondent State's contention that the Applicant caused part of the delay by amending his initial application in August 2010 and severally requested the recusal of the Judges handling the matter. In that respect, the Court first considers that the Applicant cannot be sanctioned for merely exercising his rights by amending the applications and calling for the Judges' recusals. Second, the Respondent State does not provide justification for why the case was not completed between the date of its filing in September 2007 and when the Applicant caused the proceedings to start afresh in September 2010, a period of about three (3) years.

106. Consequently, if the case started afresh in September 2010 as the Respondent State submits, and judgment was delivered on 2 January 2014, it took the High Court six (6) years and four (4) months in total to complete the matter. This Court will therefore make its determination on the basis of that timeframe.

107. When it comes to assessing reasonable time in the administration of justice, this Court has adopted a case-by-case approach, based on several factors, including the Respondent State's behavior, especially the operation of its courts.[20]

108. In the instant matter, this Court observes that the Respondent State had already arrested and detained the Applicant for illegal

20 See *Alex Thomas v Tanzania* (Merits), paras 100-110. See also, *Buchholz v Germany* (Merits), no. 7759/77, para 49, ECHR, 6 May 1981; *Abubakar v Ghana*

residence in 2006, which is seven (7) years prior to the 2014 High Court judgment that led to his eventual deportation. The Respondent State thus had ample knowledge of the Applicant's status. Furthermore, as reflected in the proceedings, during the June 2006 actions, it took the Respondent State only a few days to establish the Applicant's alleged illegal status and deport his family. In such circusmtances, this Court is of the view that a period of six (6) years and four (4) months to determine whether a person is an illegal immigrant in light of the Respondent State's Immigration Act is inordinately long.

109. In light of the above, this Court holds that the time of six (6) years and four (4) months that it took the High Court to complete the case cannot be considered a reasonable period to deliver justice.

110. The Court consequently finds the Respondent State in violation of Article 7(1)(d) of the Charter.

VIII. Reparations

111. Article 27(1) of the Protocol provides that "If the Court finds that there has been violation of a human or peoples' rights it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation".

112. In his Application, the Applicant prays the Court to order the Respondent State to compensate him to the amount of Tanzania Shillings Eight Hundred Million (TZS 800,000,000).

113. In a subsequent pleading filed on 5 May 2016, the Applicant further requests the Court to: Quash the conviction and sentence imposed and/or release him from custody; and grant an order for reparations as follows:

i. Tanzania Shillings Twenty Million (TZS 20,000,000) being the value of his artefacts and damage suffered as a result of their loss;

ii. Tanzania Shillings Fourty Five Million (TZS 45,000,000) being the value of his personal effects that were confiscated by agents of the Respondent State; and

iii. Burundian Franc Eighty Million (FBU 80,000,000) being a compensation for damage suffered by his family following arbitrary and unjust prosecution especially in Criminal Case No. 765/2006.

114. The Applicant, in subsequent submissions on reparations, prays

Communication 103/93 (2000) AHRLR 124 (ACHPR 1996), paras 10-12. See also *Beaumartin v France*, 24 November 1994, where the European Court of Human Rights found in violation of the Convention long delays in proceedings before the the French *Conseil d'Etat*.

the Court to grant him the following:

i. The amount of US Dollars Twenty Thousand ($20,000) for moral prejudice suffered as a direct victim;

ii. The amount of US Dollars Fifteen Thousand ($15,000) for moral prejudice suffered by his family members as indirect victims;

iii. The amount of US Dollars Twenty-Two Thousand ($ 20,000) [sic] for legal fees incurred in the proceedings before this Court;

iv. The amount of US Dollars Five Hundred ($ 500) for other expenses;

v. An order that the Respondent State guarantees non-repetition of the violations and reports back to the Court every six months; and

vi. An order that the Respondent State publishes the judgment in the national Gazette within one month of its delivery as a measure of satisfaction.

115. The Respondent State, in its Response to the Application, prays the Court to dismiss the Application and rule that the Applicant is not entitled to reparations. The Respondent State did not respond to the the Applicant's additional submissions on reparations.

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116. In line with its case-law, the Court considers that for reparations to be awarded, the Respondent State should be internationally responsible, there should be a nexus between the wrongful act and the harm, and where it is granted, reparation should cover the full damage suffered. Furthermore, the Applicant bears the onus to justify the claims made.[21]

117. As this Court has earlier found, the Respondent State violated the Applicant's rights to residence and freedom of movement, to integrity, to dignity and to be tried within a reasonable time protected under Articles 12(1), 4, 5 and 7(1)(d) of the Charter, respectively. Responsibility and causation have therefore been

21 See Application 001/2015. Judgment of 7 December 2018 (Merits and Reparations), ***Armand Guehi v United Republic of Tanzania (Republic of Côte d'Ivoire Intervening)*** (hereinafter referred to as "***Armand Guehi v Tanzania (Merits and Reparations***)"), paras 157. See also, Application 013/2011. Judgment 5 June 2015 (Reparations), ***Norbert Zongo and others v Burkina Faso*** (hereinafter referred to as "***Norbert Zongo and others v Burkina Faso*** (Reparations)"), paras 20-31; Application 004/2013. Judgment of 3 June 2016 (Reparations), ***Lohé Issa Konaté v Burkina Faso*** (hereinafter referred to as "***Lohé Issa Konaté v Burkina Faso*** (Reparations)"), paras 52-59; and ***Reverend Christopher R Mtikila v Tanzania*** (Reparations), paras 27-29.

established. The prayers for reparation are being considered against these findings.

118. The Court notes that the Applicant requests for reparations with respect to both material and non-material damages. The Applicant's claims for material damage must be supported by evidence. The Court has also previously held that the purpose of reparations is *restituo in integrum*, which is to place the victim, as much as possible, in the situation prior to the violation, not richer or poorer.[22]

119. With respect to non-material damage, as this Court has previously held, prejudice is assumed in cases of human rights violations[23] and evaluating the quantum of non-pecuniary damage must be made in fairness and taking into account the circumstances of the case.[24] The Court has adopted the practice of affording lump sums in such circumstances.[25]

120. The Court notes that the Applicant's claims for reparations are made in different currencies. In this respect, the Court is of the view that, taking into account the principle of fairness and considering that the Applicant should not be made to bear the fluctuations that are inherent in financial activities, the choice of currency will be made on a case-by-case basis. As a general principle, damages should be awarded, where possible, in the currency in which loss was incurred.[26] Given that, in the present case, the Respondent State does not object to the fact that the Applicant's claims are in different currencies, the currency of award will be determined taking into account the above mentioned factors.

A. Pecuniary reparations

121. In the Application, the Applicant requests to be compensated in the amount of Tanzania Shillings Eight Hundred Million (TZS 800,000,000) for suffering cruel, inhuman and degrading treatment, illegal arrest and undue delay in the trial of the case involving his stay in Tanzania. The Applicant submits that as a result of these violations, he suffered humiliation and monetary loss due to the suspension of his trading activities, lost time in

22 See *Norbert Zongo and others v Burkina Faso* (Reparations), paras 57-62.

23 *Idem*, para 55; and *Lohé Issa Konaté v Burkina Faso* (Reparations), para 58.

24 See N*orbert Zongo and others v Burkina Faso* (Reparations), para 61.

25 *Idem*, para 62.

26 See Application 003/2014. Judgment of 7 December 2018 (Reparations), *Ingabire Victoire Umuhoza v Republic of Rwanda*, para 45.

the lengthy proceedings before domestic courts and his family suffered separation.

122. The Applicant, in his subsequent submissions on reparations, prays to be awarded Tanzania Shillings Twenty Million (TZS 20,000,000) being the value of his lost artefacts and damages related thereto, Tanzania Shillings Forty Five Million (TZS 45,000,000) being the value of his personal effects confiscated by agents of the Respondent State, and US Dollars Twenty Thousand ($ 20,000) for the pain and anguish, disruption of his life plan, lack of contact with his family, chronic illness and poor health suffered.

123. The Court decides that although some of the amounts claimed are for both material and moral prejudice, the related claims will be dealt with separately.

i. Material loss

124. The Court notes that the Applicant's claims for material prejudice are with respect to the loss incurred due to the suspension of his activites, time lost in proceedings before domestic courts, loss of his artefacts and damage that ensued therefrom, loss of his personal belongings, disruption of his life plan, chronical illness and poor health.

125. Regarding the prayer for compensation due to the loss that allegedly occurred due to the suspension of his trading activities, the Applicant claims that he has suffered material damage owing to the loss of his business as an exporter and importer of products, which included exporting artwork to Europe and importing *vitenge* (cotton fabrics) to the DRC. However, the Applicant does not support the claim with evidence or prove the existence of the said business, such as a business licence, payment receipts or business contracts. This prayer is consequently dismissed.

126. As to the time lost in proceedings before the High Court, this Court notes that time lost may be proved by adducing evidence as to the financial income that would have been made.[27] In the instant case, loss caused by lengthy court proceedings could also have been evidenced by the payment of legal fees, costs in proceedings and other related costs.[28] The Applicant does not provide any such evidence to support his claims. The prayer is

27 See *Lohé Issa Konaté v Burkina Faso* (Reparations), paras 38-43.

28 *Idem*, para 46.

therefore dismissed.

127. The Applicant also prays this Court to award him Tanzania Shillings Twenty Million (TZS 20,000,000) being the value of the artefacts that were allegedly sold to a certain Mussa Ruganda Leki as mentioned in the proceedings of Civil Case No. 263 of 2005 referred earlier in this judgment. Regarding this prayer, the Court notes that the Appliant did not link his claim with any of the human rights violations found in this judgment. Furthermore, the claim is not in relation to an alleged violation of his right to property protected under Article 14 of the Charter. Finally, the Applicant did not establish the Respondent State's responsibility for the loss of the value of those items as a result of the private dispute settled in Civil Case No. 263 of 2005. The prayer is consequently dismissed.

128. With respect to the claim for payment of Tanzania Shillings Fourty Five Million (TZS 45,000,000) as compensation for the confiscation of his personal belongings by agents of the Respondent State, the Court notes that the issue was not raised as an alleged violation in the Application. Furthermore, the Applicant did not substantiate his claim. This prayer is equally dismissed.

129. Regarding the Applicant's prayer for compensation due to the disruption of his life plan, as well as chronic illness and poor health that he suffered, the Court notes that the claim is not supported with evidence. The prayer is consequently dismissed.

ii. Non-material loss

a. Loss incurred by the Applicant

130. The Court notes that the Applicant requests for compensation in the tune of Tanzania Shillings Eight Hundred Million (TZS 800,000,000) for inhuman and degrading treatment, and US Dollars Twenty Thousand ($ 20,000) for the pain and anguish he suffered.

131. The Court recalls that violation of the right to dignity is a grave breach that diminishes humanity. In the instant matter, the conditions in which the Applicant was arrested and the consequences that ensued, especially with respect to his family, were detrimental to his well-being, reputation and honor. However, the amounts claimed by the Applicant are excessive. The Court deems it fair to grant the amount of Tanzania Shillings Ten Million

(TZS 10,000,000).

b. Loss incurred by the Applicant's family

132. The Applicant requests for compensation in the tune of Burundian Franc Eighty Million (FBU 80,000,000) for the arbitrary prosecution of his family in Criminal Case No. 765 of 2006 in respect of their residence.

133. The Court observes that upon the intervention of the DRC Embassy in Dar es Salaam, the Respondent State withdrew the case and allowed the Applicant to stay for seven (7) years while he agreed to his family leaving the country. The Court is of the view that it runs contrary to that agreement and good faith to find against the Respondent State while it brought the said prosecution to an end to the satisfaction of the Applicant. Furthermore, that claim was not substantiated as a consequential violation. The Court therefore declines the request for compensation.

134. The Applicant also prays the Court to award US Dollars Fifteen Thousand ($ 15,000) to the identified indirect victims namely: Ms. Adele Mulobe (wife), and Seraphin Mutuza Ikili, Papy Ikili, Berthe Ikili, Frederic Ikili, Azama Ikili, Carine Ikili, Lucien Ikili, Marie Ikili, Peter Ikili, Faustin Ikili, Asha Ikili, Kisubi Ikili and Julienne Ikili (children), for the loss suffered, including the emotional pain and anguish as a result of the Applicant's arrest, detention, torture and deportation, considering he was the breadwinner of the family.

135. The Court considers, regarding this prayer, that as it has held in the *Zongo* case, indirect victims must prove their relation to the Applicant to be entitled to damages. Spouses should produce their marriage certificate and life certificate or any other equivalent proof, and children should produce their birth certificate or any other equivalent evidence to show proof of their filiation.[29]

136. The Court notes that, in support of this claim, the Applicant provides a list, which includes the names of his wife and children as earlier reproduced without adducing any of the aforementioned pieces of evidence of relation to the alleged indirect victims.

137. The Court considers however that in the instant case, the fact that the Applicant had a wife and children at the time of the violations is established. This fact is expressly and consistently acknowleged by the Respondent State in its submissions. The same fact is confirmed in the judgment delivered by the High Court of Tanzania in Civil Case No. 118 of 2007, although this decision referred to

29 *Idem*, para 54.

only "seven children"[30] and expressly identified the wife as "Adela Lucien", and two of the children as "Rashid Kazimoto" and "Vicent Rashid".[31] As a consequence, there is a *prima facie* relation of the Applicant to these alleged victims, and the latter are therefore entitled to reparation if any is granted by this Court.

138. The Court considers that, as earlier found, the violations established have certainly affected the Applicant's wife and children, more particularly as he was their breadwinner and the degrading treatment suffered was in the presence of some of his children. However, the amount claimed is excessive. In the circumstances and based on equity, the Court grants Tanzania Shillings One Million (TZS 1,000,000) to each of the indirect victims.

B. Non-pecuniary reparations

i. Restitution

139. The Applicant prays the Court to quash his conviction and sentence, and/or order that he should be released.

140. The Applicant also prays the Court to make an order for restitution. He avers that compensation should be paid in place of restitution given that he cannot be returned to the situation before his deportation.

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141. The Court notes, with respect to the prayer for the conviction and sentence to be quashed, and/or the Applicant be released, that the Applicant was arrested on 9 June 2006, charged in court on 15 June 2006 and released on 16 June 2006 without being convicted. The related claims have consequently become moot.

142. Regarding the prayer for compensation in place of restitution, the Court considers that the generally accepted purpose of restitution

30 See *Lucien Ikili Rashid v Musa Rubanda, Jerome Msewa, Permanent Secretary, Ministry of Home Affairs, and Attorney General*, High Court of Tanzania, Dar es Salaam, Civil Case 118 of 2007, Judgment of 2 January 2014, page 8.

31 *Idem*, page 7.

is to bring ongoing violations to an end and restore the Applicant in the state prior to the violations. This remedy is therefore applicable where other measures such as compensation are not relevant or sufficient. Measures ordered to that effect include, for instance, the return of property or nullification of judgments.[32]

143. This Court has also held, in the judgment it rendered in the *Konaté* case, that "… reparation shall include all the damages suffered by the victim and in particular, includes restitution, compensation, rehabilitation of the victim as well as measures deemed appropriate to ensure the non-repetition of the violations, taking into account the circumstance of each case". In the same case**,** the Court ordered the Respondent State to, *inter alia*, "expunge from the Applicant's judicial records, all criminal convictions pronounced against him".[33]

144. The Court notes that, in the instant case, the Applicant requests for compensation and other forms of reparations for the concerned violations. Given that the prayers for compensation and other forms of reparations have been duly considered earlier and remedies granted where it was deemed proper, this Court considers that they are sufficient and an order for the Applicant to be placed in the situation before his deportation is not warranted. The prayer is therefore dismissed.

ii. Non-repetition

145. The Applicant prays the Court to order that the Respondent State guarantees non-repetition of the violations against him and reports back to the Court every six (6) months until the orders are implemented.

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146. The Court considers that, as it has held in the matter of *Armand*

32 *Loayza-Tamayo v Peru*, Inter-American Court of Human Rights, Judgment on Reparations and Costs (27 November 1998); *Papamichalopoulos v Greece*, 14556/89, European Court of Human Rights, Judgment (Article 50) (31 October 1995); *Mohammed El Tayyib Bah v Sierra Leone*, Suit ECW/CCJ/APP/20/13, ECOWAS Community Court of Justice, Judgment (4 May 2015); and *Genevieve Mbiankeu v Cameroon*.

33 *Lohé Issa Konaté v Burkina Faso* (Reparations), para 58.

Guehi v United Republic of Tanzania, guarantees of non-repetition seek to address systemic and structural violations rather than to remedy individual harm.[34] The Court has however further held that non-repetition would be relevant in individual cases where the violation will not cease or is likely to occur again.[35]

147. In the instant case, the Court is of the view that non-repetition is not warranted in the circumstances given that the Applicant and his family are no longer living in the territory of the Respondent State and the orders sought do not include their return. As such, the likelihood of a fresh deportation and repetition of the violations found in this judgment is non-existent.

148. Having said that, the Court notes that, in its Response to the Application, the Respondent State submits that "… cavity searches are security measures performed upon entry and exit of most prisons in the Respondent State".[36] In light of that submission, the Court considers that the violation found with respect to the Applicant has the potential for wider or structural violations, and therefore holds that an order for non-repetition is warranted in this respect.

149. As a consequence, the Court orders the Respondent State to take all necessary measures to ensure that anal search as in the instant case and its kind, are conducted in strict compliance with its international obligations and principles earlier set out in the findings of the Court on the violation of the right to dignity.

iii. Publication of the Judgment

150. The Applicant prays the Court to order that the Respondent State should publish in the national Gazette the decision on the merit of the main application within one (1) month of the delivery of judgment as a measure of satisfaction. He further prays the Court

34 *Armand Guehi v Tanzania* (Merits and Reparations), para 191. See also *Norbert Zongo and others v Burkina Faso* (Reparations), paras 103-106; African Commission on Human and Peoples' Rights, General Comment No. 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5), para 10 (2017). See also Case of the "Street Children" *Villagran-Morales et al v Guatemala*, Inter-American Court of Human Rights, Judgment on Reparations and Costs (26 May 2001).

35 *Armand Guehi v Tanzania* (Merits and Reparations), para 191; and *Reverend Christopher R. Mtikila v Tanzania* (Reparations), para 43.

36 'Reply to the Application by the Respondent' dated 3 September 2015 and received at the Registry of the Court on 9 September 2015, para 60.

to order that:

i. The official English summary developed by the Registry of the Court, of this judgment, which must be translated to Kiswahili at the expense of the Respondent State and published in both languages, once in the official gazette and once in a national newspaper with widespread circulation; and

ii. This judgment, in its entirety in English, on the official website of the Respondent State, and remain available for a period of one (1) year.

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151. The Court considers that even though a judgment in favor of the Applicant, *per se*, can constitute a sufficient form of reparation for moral damages, such measure can also be ordered where the circumstances of the case so require.[37]

152. In the present case, the Court notes that, as it has earlier found, the violation of the right to dignity was established beyond the individual case of the Applicant and is illustrative of a systemic practice. The Court further notes that its findings in this judgment bear on several rights protected in the Charter, which are those to the integrity of the person, dignity, residence and movement as well as to be tried within a reasonable time.

153. As a consequence of the foregoing, the Court finds that the prayer for the judgment to be published is warranted, however with a variation from the Applicant's request in order to enhance public awareness. The Court therefore grants the prayer that this Judgment be published on the websites of the Judiciary and the Ministry for Constitutional and Legal Affairs, and remains accessible for at least one (1) year after the date of publication.

IX. Costs

154. In terms of Rule 30 of the Rules "unless otherwise decided by the Court, each party shall bear its own costs".

155. The Court considers that, in line with its previous judgments, reparation may include payment of legal fees and other expenses

37 *Armand Guehi v Tanzania* (Merits and Reparations), para 194; See *Reverend Christopher R. Mtikila v Tanzania* (reparations), paras 45 and 46(5); and *Norbert Zongo and others v Burkina Faso* (reparations), para 98.

incurred in the course of international proceedings.[38] The Applicant must provide justification for the amounts claimed.[39]

A. Legal fees for Counsel

156. The Applicant prays the Court to award him US Dollars Twenty Thousand ($ 20,000) in legal fees, which is for the 300 hours of legal work, of which 200 hours for Assistant Counsel and 100 hours for Lead Counsel, charged at US Dollars Fifty ($50) per hour for Assistant Counsel and US Dollars One Hundred ($100) per hour for Lead Counsel; which amounts to US Dollars Ten Thousand ($ 10,000) for the Assistant counsel and US Dollars Ten Thousand ($ 10,000) for the Lead Counsel.

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157. The Court notes that the Applicant was represented by PALU throughout the proceedings under the Court's legal aid scheme. Given that the legal aid arrangement is *pro bono* in nature, the Court declines to grant this prayer.

A. Other expenses

158. The Applicant also seeks compensation for other costs incurred pertaining to the case, including the payment of: US Dollars Two Hundred ($ 200) for postage, US Dollars Two Hundred ($ 200) for printing and photocopying, and US Dollars One Hundred ($ 100) for communication costs.

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159. The Court notes that these claims are not backed with supporting

38 See *Norbert Zongo and others v Burkina Faso* (Reparations), paras 79-93; and *Reverend Christopher R Mtikila v Tanzania* (Reparations), para 39.

39 *Norbert Zongo and others v Burkina Faso* (Reparations), para 81; and *Reverend R Mtikila v Tanzania* (Reparations), para 40.

documents. The related prayer is therefore dismissed.

X. Operative part

160. For these reasons:
The Court,
Unanimously:
On jurisdiction
i. *Dismisses* the objection on jurisdiction;
ii. *Declares* that it has jurisdiction.

On admissibility
iii. *Dismisses* the objections on the admissibility of the Application;
iv. *Declares* that the Application is admissible.
On the merits
v. *Finds* that the Respondent State violated the Applicant's right to the integrity of his person protected under Article 4 of the Charter;
vi. *Finds* that the Respondent State violated the Applicant's right to dignity protected under Article 5 of the Charter;
vii. *Finds* that the Respondent State violated the Applicant's right to be tried within a reasonable time protected under Article 7(1)(d) of the Charter;
viii. *Finds* that the Respondent State violated the Applicant's rights to residence and freedom of movement protected under Article 12(1) of the Charter.

On reparations
Pecuniary reparations
ix. *Does* not grant the Applicant's prayers for compensation due to the damage caused by the alleged suspension of his trading activities, the time lost in proceedings before domestic courts, the loss of his artefacts, the confiscation of his belongings, the disruption of his life plan, lack of contact with his family, chronic illness, poor health and arbitrary prosecution of his family for lack of evidence;
x. *Grants* the Applicant the sum of Tanzania Shillings Ten Million (TZS 10,000,000), free from taxes, for the moral damage that ensued from the anal search conducted on him, particularly in the presence of his family members, and which resulted in the violation of his rights to the integrity of his person and dignity as well as damage to his reputation and honour;
xi. *Grants* the Applicant's wife and children the sum of Tanzania Shillings One Million (TZS 1,000,000) each, free from taxes, for the moral damage suffered;
xii. *Orders* the Respondent State to pay the amounts under

sub-paragraphs (x) and (xi) within six (6) months, effective from the date of notification of this Judgment, failing which it will pay interest on arrears calculated on the basis of the applicable rate of the Central Bank of Tanzania throughout the period of delayed payment and until the accrued amount is fully paid.

Non-pecuniary reparations

xiii. *Finds* that the Applicant's prayer for the Court to quash his conviction and sentence, and/or order his release has become moot;

xiv. *Does not grant* the Applicant's prayer for restitution as it not warranted;

xv. *Does not grant* the prayer for non-repetition of the violations found with respect to the Applicant as it not warranted;

xvi. *Orders* the Respondent State to take all necessary measures to ensure that anal search as in the instant case and its kind are conducted, if at all, in strict compliance with its international obligations and principles earlier set out in the present Judgment;

xvii. *Orders* the Respondent State to publish this Judgment, within a period of three (3) months from the date of notification, on the websites of the Judiciary and the Ministry for Constitutional and Legal Affairs, and ensure that the text of the Judgment is accessible for at least one (1) year after the date of publication.

xviii. *Orders* the Respondent State to submit to it within six (6) months from the date of notification of this Judgment, a report on the status of implementation of the decision set forth herein.

On costs

xix. *Does not grant* the Applicant's prayers related to payment of legal fees and other expenses incurred in the proceedings before this Court;

xx. *Decides* that each Party shall bear its own costs.