IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA

FIRST INSTANCE DIVISION

(Coram: Monica K. Mugenyi, PJ; Faustin Ntezilyayo, J and Fakihi A. Jundu, J)

REFERENCE NO.6 of 2014

HUMAN RIGHTS AWARENESS&
PROMOTION FORUM (HRAPF) ..... APPLICANT

VERSUS

THE ATTORNEY GENERAL OF UGANDA .....RESPONDENT

AND

THE SECRETARIAT OF THE JOINT UNITED NATIONS
PROGRAMME ON HIV/AIDS ..... AMICUS CURIAE

27th SEPTEMBER 2016

JUDGMENT OF THE COURT

A. INTRODUCTION

1. This Reference was brought under Articles 6(d), 7(2), 8(1) and 30(1) of the Treaty for the Establishment of the East African Community (hereinafter referred to as '**the Treaty**') and Rules 24(1) - (4) of the East African Court of Justice Rules of Procedure, 2013 (hereinafter referred to as **'the Rules'**).

2. The Applicant, Human Rights Awareness and Promotion Forum (HRAPF) is a human rights organization that promotes non-discrimination and equal access to justice for marginalized groups in Uganda.

3. The Respondent is the Attorney General of the Republic of Uganda, and is sued as the legal representative of the Government of the Republic of Uganda.

4. Pursuant to Article 40 of the Treaty and Rule 36 of the Court's Rules, the Secretariat of the Joint United Nations Programme on HIV/AIDS did successfully apply to be joined as *amicus curiae* in this Reference.

5. At the trial the Applicant was represented by Mr. Ladislaus Rwakafuuzi and Ms. Frida Mutesi; the Respondent was represented by Ms. Patricia Mutesi, and Mr. Donald Deya represented the *Amicus Curiae*.

B. BACKGROUND

6. An Anti-Homosexuality Act (hereinafter referred to as 'the Act') was enacted by the Parliament of the Republic of Uganda on 10th

March 2014, the essence of which was to 'prohibit any form of sexual relations between persons of the same sex; prohibit the promotion of such relations and to provide for other related matters.' (*See long title to the said law*).

7. Aggrieved by the Act for allegedly abrogating the rights of sexual minorities, persons living with HIV/ AIDS and persons with disabilities, on 23rd April 2013 the Applicant instituted the present Reference in this Court challenging various provisions of the Act that it considered a violation to Articles 6(d), 7(2) and 8(1)(c) of the Treaty.

8. On 1st August, 2014,the Constitutional Court of Uganda struck down the Act for being unconstitutional, having been passed without the requisite quorum in Parliament. Consequently, the Applicant amended the Reference and, in effect, restricted its challenge of the Act to selected provisions thereof.

C. THE APPLICANT'S CASE

9. The Applicant contends that certain provisions of the Act were, between its enactment on 10th March 2014 and its repeal on 1st August, 2014, in violation of Articles 6(d), 7(2) and 8(1)(c) of the Treaty. In this regard, the Applicant postulates case that, the nullification of the Act notwithstanding, the 'act' of enacting a law with sections 5(1), 7 and 13(1) and (2); which provisions allegedly promoted impunity, homophobia and stigma, was contrary to the dictates of rule of law, social justice and universally accepted standards of human rights as postulated in Articles 6(d) and 7(2) of the Treaty.

10. The Applicant specifically took issue with section 5(1) of the Act for exonerating purported victims of homosexuality from criminal prosecution for actions taken in self defence. It did also challenge sections 7 and 13(1) and (2) for 'criminalising' the aiding, abetting, counseling, procuring and promotion of homosexuality, as well as creating offences that were overly broad, penalizing legitimate debate, hampering professional counsel, and impeding access to HIV-related and other health services.

11. It was the Applicant's contention that the foregoing provisions contravened the following rights of sexual minorities, persons living with HIV/ AIDS and persons with disabilities: the right to equality before the law; the right to privacy; the right to fair trial; the right to dignity and freedom from cruel, inhuman and degrading punishment or treatment; the right to freedoms of expression, thought and conscience, assembly, association and civic participation; and the right of access to health care.

D. THE RESPONDENT'S CASE

12. The Respondent countered the justiciability of the Amended Reference on three (3) grounds. First, it is the Respondent's contention that the Reference is not justiciable before this Court given that it would require the Court to consider human rights issues, and interpret international treaties, as well as the Constitution of Uganda, a jurisdiction that the Court is not clothed with.

13. Related to the foregoing position, the Respondent contends that the impugned provisions of the Act do not violate the Treaty,

African Charter on Human and Peoples Rights or any human rights; but rather, were valid under the Constitution of Uganda.

14. Finally, the Respondent maintains that the Reference was overtaken by events and rendered moot following the repeal of the impugned Act by a competent court.

E. AMICUS CURIAE

15. In a nutshell, the *Amicus* Brief can be summed up as follows:

    a. **The Partner States of the Community have committed themselves to international human rights and international public health standards in their joint and respective responses to the HIV epidemic.**

    b. **Laws criminalising homosexual relations, as well as the activities of persons purportedly aiding, abetting and working with individuals and organizations in relation to homosexuality, violate international human rights standards. Such laws ignore the principles of good governance, social justice and human rights stated in the Treaty.**

    c. **Laws criminalizing homosexual relations, as well as the activities of persons purportedly aiding, abetting and working with individuals and organizations in relation to homosexuality, ignore the commitment of the Partner States to advance effective responses to the HIV epidemic that are grounded in public health and the protection of human rights for all. Evidence shows that such criminal laws hinder an effective public health**

response to the HIV epidemic by increasing vulnerability to HIV and compromising access to HIV services for a key section of the population.

d. Homosexual men and transgender people represent a significant proportion of people living with or at risk of HIV. These populations are disproportionately vulnerable to HIV infection, in part, because of the legal and social environments in which they live. Homophobia, transphobia, discrimination, violence and laws criminalising homosexual relations, as well as other forms of overly broad legislation targeting individuals and organizations in relation to homosexuality, continue to constitute serious barriers preventing the persons affected from accessing HIV services and participating in national and regional responses to the epidemic.

e. Effective, evidence-based HIV programs targeting homosexual males and transgender people are based on three strategic objectives:

    i. to improve their health and human rights;

    ii. to strengthen and promote the evidence base for responding effectively to HIV vulnerability and impact; and

    iii. to strengthen capacity and promote partnerships to ensure more far-reaching and effective HIV interventions.

f. **UNAIDS and others have consistently stated that the realization of these strategic objectives requires the creation of enabling social, legal and policy environments where high risk populations can participate in the design and implementation of effective HIV prevention and treatment programs. This entails:**

   i. **the decriminalisation of homosexual relations between consenting adults,**

   ii. **the elimination of other punitive laws and practices against people who have homosexual relations and transgender people, and**

   iii. **the enforcement of laws protecting these sections of the population from discrimination and violence, and guaranteeing their right to access health and other services.**

F. ISSUES FOR DETERMINATION

16. The parties framed the following issues for determination:

   a. ***Whether this matter is justiciable in light of the fact that Act No. 4 of 2014 was declared to be void by a competent court of a Partner State.***

   b. ***Whether the Reference is justiciable in as far it requires the Court to adjudicate and determine a human rights dispute, to interpret Uganda's obligations under international treaties, and to interpret Uganda's Constitution, which jurisdiction it is not vested with.***

c. ***Whether Sections 5(1), 7 and 13(1)& (2) of Act No. 4 of 2014 were in violation of Articles 6(d) and 7(2) of the Treaty.***

d. ***What reliefs are available to the parties, if any.***

G. COURT'S DETERMINATION

17. Before we proceed to a determination of the issues framed herein, we propose to dispose of the question of the irregular amendment of the Reference, as raised by the Respondent in Submissions.

18. The gist of the Respondent's objection is that, whereas it did consent to an amendment to restrict the Reference to sub-paragraphs 3(f) and (g) of the original Reference, the Applicant did not secure its consent or the leave of Court as required by Rules 48 and 50 of the Court's Rules of Procedure to introduce a cause of action premised on the ignominies allegedly suffered by homosexuals during the duration of the impugned Act. In that regard, the Applicant contests the purported amendment of the Reference to cater for the effect of the Act during its short life span, as well as the facts alleged in paragraph 1.1(e)(iv) of the Applicant's Submissions.

19. The issue of the ambit of the Applicant's amendment to the Reference was first raised by learned Counsel for the Respondent, Ms. Patricia Mutesi, on 6th November 2014. In response, Mr. Rwakafuuzi did confirm that the nature of the amendment sought was to strike out most of the Reference and restrict it to only two or three challenges to the Act. It appears to have been on that basis that Ms. Mutesi conceded to the amendment sought.

20. On 7th January 2015, the Applicant filed an amended Reference in which he did delete most of paragraph 3 of the original Reference, only saving sub-paragraphs 3(f), (g), (h) and (i) thereof. However, the Applicant did also did introduce to those provisions a challenge specifically premised on the effect of Act '***between its enactment on 20th December 2013 and its repeal on 1st August 2014 by the Constitutional Court of Uganda***'.

21. Be that as it may, on 22nd April 2015, when the issue was brought to its attention, with the guidance of the Court, Mr. Kosia Kasibayo (then appearing for the Respondent) did seem to suggest that the amended Reference did not affect this client's Defence. We now perceive Ms. Mutesi's objection to be that, although the Amended Reference did not affect the Respondent's Defence as stated by Mr. Kasibayo, the specific introduction of the above statement without either the leave of Court or opposite Party's consent was irregular and in contravention of Rules 48 and 50 of the Court's Rules.

22. We have carefully scrutinized the original and Amended References in this matter. We find that there was no reference whatsoever in the original Reference to the disputed averment within the context prevailing at the time. Had the Applicant sought to merely adapt the Reference to the ensuing repeal of the law, as has been argued herein, there should have been a basis for such adaptation in the first place. There would have been an averment making reference to the effect of the Act 'since its enactment', that would have been contextualized to factor in the nullification of the Act. This is not the case herein. Although the affidavits in support of the original Reference did allude to the incidence of the

ignominies mentioned by the Applicant in Submissions, the said Reference had merely challenged stated provisions of the Act to the extent that they allegedly violated the Treaty.

23. We do, therefore, strike out the statement '***between its enactment on 20th December 2013 and its repeal on 1st August 2014 by the Constitutional Court of Uganda***' in paragraphs 3(f), (g), (h) and (i) of the amended Reference, as well as in the Declarations sought in respect thereof. However, we do uphold the necessary adaptations highlighted in the Amended Reference with regard to 'past' rather than 'present' tense. We so hold.

24. It would appear from the Respondent's Submissions that the second issue hereinabove was abandoned following the consensual amendment of the Reference to delete other pleadings in paragraph 3 of the original Reference, save for sub-paragraphs 3(f) and (g). We do, therefore, propose to determine the Reference on that basis and shall, therefore, consider the points of law raised in the first issue above prior to a consideration of the substantive legal questions presented in the third and fourth issues.

Issue No. 1: Whether or not the Reference is justiciable in light of the fact that *Act No. 4 of 2014* was declared to be void by a competent court of a Partner State

25. It was a well conceded fact in the Scheduling Conference Notes dated 22nd April 2015 that the Anti-Homosexuality Act was struck down by the Constitutional Court of Uganda on 1stAugust 2014. Nonetheless, we understood it to be the contention of the Applicant that, the said nullification notwithstanding, the 'act' of

enacting the Act with provisions that purportedly violate the rights of stated sections of the Ugandan Community contravened Articles 6(d), 7(2) and 8(1)(c) of the Treaty and thus presented justiciable matters before this Court. Stated differently, the Applicant postulates that the nullification of the Act did not negate its cause of action under the Treaty.

26. The Applicant's premise for this position was tri-fold. First, it was submitted therefor that in so far as the Interpretation Section of the Treaty did in Article 1(2) define a law or protocol to include one that had been repealed, suggested that a repealed law could be challenged before this Court under Article 30(1) of the Treaty. Learned Counsel for the Applicant argued that the consequences of actions that ensued while a repealed law was still in force, as well as the continued effects of such actions after its repeal would be in contention, hence the need for the Court to inquire into a repealed law. Mr. Rwakafuzi did also make the curious argument that a domestic law of a Partner State that violates the Treaty had the effect of amending the Treaty contrary to Article 150 thereof that provides for the procedure of amendment, and such law should be struck down.

27. The second premise for the Applicant's endorsement of the justiciability of the Amended Reference was rooted in section 13(2) of Uganda's Interpretation Act, which provides as follows:

> "**Where any Act repeals any other enactment, then unless the contrary intention appears, the repeal shall not:-**
>
> **a. .....**

b. affect the previous operations of any enactment so repealed or anything duly done or suffered under any enactment so repealed,

c. ....., or

d. **Affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed**."

28. Mr. Rwakafuuzi argued that the subsequent repeal of the Act could not negate the actions undertaken thereunder during its duration and, therefore, whereas the victims of the said actions could not claim damages, this Court should not shun the Amended Reference and the Declarations sought thereunder in so far as the grievances suffered under the Act had not been extinguished. On that premise, learned Counsel maintained that the Amended Reference was a live dispute.

29. Citing the definition of a 'moot case' advanced in Black's Law Dictionary and distinguishing the Amended Reference from the decisions in **Justice Okumu Wengi vs Attorney General of Uganda (2007) 600 KaLR** and **Joseph Borowski vs. Attorney General of Canada (1989) 1 SCR 342**, we understood Mr. Rwakafuzi to reiterate his earlier argument that the grievances suffered during the duration of the Act presented a live dispute for determination and, therefore, the Reference was not moot. He opined that the issue before this Court was whether or not a law that permitted indignities such as harassment, arrest and eviction on account of their homosexuality was in consonance with Article 6(d) and 7(2) of the Treaty.

30. For ease of reference, we reproduce the legal authorities cited by learned Counsel above. **Black's Law Dictionary, 9th Edition, p.1099** defines a 'moot case' as '**a matter in which a controversy no longer exists; a case that presents only an abstract question that does not arise from existing facts or rights.**'

31. In **Justice Okumu Wengi vs Attorney General** (supra), a judge who had been recommended for investigation by the Judicial Service Commission successfully requested the appointing authority to be allowed to retire in lieu thereof. He subsequently challenged the recommendation for his investigation in court. It was held:-

> ***"Courts of law do not decide cases where no live dispute exists between the parties. Courts do not decide cases or issue orders for academic purposes only. Courts cannot issue orders where the issues in dispute have been removed or merely no longer exist. It is now a mere moot case."***

32. The court in the **Justice Okumu Wengi** case relied on the reasoning in the **Joseph Borowski** case, in which a constitutional provision that had been challenged by a litigant in a lower court had been struck down by the Supreme Court before the matter went on Appeal. On Appeal, the Supreme Court dismissed the constitutional challenge for being 'moot'.

33. Finally, the Applicant did postulate that the causes of action envisaged under Articles 27 and 30 of the Treaty were rooted in public rights; such rights, often exercised in the public interest, include the right of a Partner State's resident to access the Court

to enforce the provisions of the Treaty; and the Amended Reference sought to resolve the legality of a municipal law that permitted the ignominies of arbitrary arrests and evictions.

34. Mr. Rwakafuuzi urged the Court to find that a question of considerable importance was raised by the Amended Reference that necessitated recourse to the merits thereof, even if the dispute was indeed found to be moot. In that regard, he referred us to the 'public interest exception' to determination of moot cases as encapsulated in **Black's Law Dictionary, Ibid., p.1350**. It reads:

> *"**Public interest exception is the principle that an appellate court may consider and decide a moot case – although such decisions are generally prohibited – if (1) the case involves a question of considerable public importance, (2) the question is likely to arise in future, (3) the question has evaded appellate review.**"*

35. Learned Counsel cited the following parameters as stated in **The Queen on the Application of Crompton vs. Wiltshire Primary Care Trust (2008) ECWA Civ. 749** to explain what a question of general public importance would entail:

> *"**(i) that the matter involves the elucidation of public law by higher courts; in addition to the interest of the parties.***
>
> ***(ii) that the matter is of general importance to a general class...**"*

36. Mr. Rwakafuuzi further argued that in so far as the Constitutional Court of Uganda did not address the merits of the matter that was

before it, but rather struck down the impugned Act on account of a procedural anomaly in its enactment, the merits of that matter were likely to arise in future. He did also allude to the fact that a Notice of Appeal having been filed by the Respondent in that matter as an indication that the merits thereof had not been conclusively resolved. Furthermore, learned Counsel submitted that the matter had not been subjected to appellate review. Consequently, Mr. Rwakafuuzi argued that the Amended Reference presented matters of public interest, which should be subjected to judicial determination, even if the said Reference was found to be moot.

37. Conversely, it was argued for the Respondent that the Amended Reference was moot and academic in so far as the challenge to the legality of the Anti-Homosexuality Act had been rendered redundant following the nullification of the Act. Adopting the approach of this Court's Appellate Division in **Alcon International Ltd vs Standard Chartered Bank & 2 Others EACJ Appeal No. 3 of 2013** and **Legal Brains Trust Ltd vs Attorney General of Uganda EACJ Appeal No. 4 of 2012**, Ms. Mutesi argued that following the nullification of the Anti-Homosexuality Act in 2014, the substratum of the present Reference had been removed and there was no live controversy between the Parties.

38. For ease of reference, we reproduce the pertinent decision in the **Legal Brains Trust** case (supra):

> ***"In this regard, it is a cardinal doctrine of our jurisprudence that a court of law will not adjudicate hypothetical questions – namely, those concerning which no real dispute exists. A court will not hear a***

case in the abstract, or one which is purely academic or speculative in nature – about which there exists no underlying facts in contention. .... Absent from such a dispute, the resulting exercise would be an abuse of the court's process."

39. Ms. Mutesi also sought to rebut the Applicant's Submissions on this issue with the following counter-arguments. On the Applicant's interpretation of Article 1(2) viz Article 30(1), we understood Ms. Mutesi to argue that Article 1(2) had to be construed in good faith and in accordance with the ordinary meaning of terms, therefore the ordinary meaning of Article 30(1) of the Treaty was that only a validly existing Act could be challenged before this Court.

40. On the question of acts allegedly done under the authority and during the duration of the impugned Act, it was Ms. Mutesi's contention that no such grievances were averred in the pleadings, and neither the original nor Amended Reference challenged the legality of any acts meted out under the Act as a cause of action. On the contrary, the Reference was restricted to challenging the validity of specific provisions of the impugned Act for violating the Treaty. Ms. Mutesi maintained that, whereas Article 30(1) recognized challenges to Acts or laws, as well as challenges to actions undertaken thereunder; those were to separate causes of action and should have both been pleaded by the Applicant.

41. Finally, Ms. Mutesi did address the public interest exceptions to the general rule that courts should not entertain moot disputes as advanced in **Black's Law Dictionary**. Learned Counsel relied

upon extracts of the decision in **Joseph Borowski** (supra) to fortify her argument that this Court's determination of a nullified law would not be in the public interest. On the contrary, it would impede upon Partner States' legislative prerogative, yet the Court would have the opportunity to inquire into the validity of any laws enacted by them. We reproduce the pertinent extract for ease of reference:

> ***"The mere presence of an issue of national importance in an appeal which is otherwise moot is insufficient. .... Moreover, while it raises a question of great public importance, this is not a case in which it is in the public interest to address the merits in order to settle the state of the law. .... To accede to this request would intrude on the right of the executive to order a reference and pre-empt a possible decision of Parliament by dictating the form of legislation it should enact. To do so would be a marked departure from the traditional role of the Court."***

42. On the question of the likelihood of the subject matter of the Amended Reference arising in future, it was Ms. Mutesi's submission that this was a question of fact that had not been sufficiently proved by the Applicant. She further argued that it would be speculative for this court to assume that an Appeal lodged by the Respondent in the Supreme court of Uganda would be successful or a Private Members' Bill on the same subject would be enacted by the Parliament of Uganda. Ms. Mutesi invited the Court to adopt the following reasoning in the **Joseph Borowski** case:

"The mere fact, however, that a case raising the same point is likely to recur even frequently should not by itself be a reason for hearing an appeal which is moot. It is preferable to wait and determine the point in a genuine adversarial context unless the circumstances suggest that the dispute will have always disappeared before it is ultimately resolved."

43. We have carefully considered the arguments of both Parties. We are constrained to state from the onset that the attempt by the Applicant to introduce a cause of action premised on the 'act' of enacting the impugned Act, without having pleaded the same in the Reference is clearly misconceived. We would, therefore, disregard his Submissions on that issue.

44. With regard to the issue under review, it seems to us that the justiciability of the Amended Reference hinges firmly on the mootness question and, whether if found to indeed be moot, the circumstances of the Reference are such as would warrant the Court to exercise its discretion and entertain it on its merits. Stated differently, would the circumstances of this Reference fall within the ambit of the exception to the general rule on mootness of suits.

45. The general rule on the question of mootness is most succinctly stated in **Joseph Borowski vs. Attorney General of Canada (1989) 1 SCR 342 at 353**as follows:

"The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract

question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no live controversy exists which affects the rights of the parties, the case is said to be moot."

46. Our construction of the foregoing holding is that an essential ingredient in the determination as to whether or not a matter before a court is moot, is the existence of a live controversy that affects the rights of parties. In the absence of such a live dispute, a court decision would have no practical effect on the purported rights of any party and would, accordingly, be hypothetical and academic.

47. In the **Legal Brains Trust** case, the Appellate Division explicitly declared to be an abuse of court process the adjudication by this Court of hypothetical questions in respect of which no real dispute exists, or such as are academic or speculative, with regard to which there exist no facts in contention. The Court provided the following rationale for its position:

"The reason for this is to avoid the hollow and futile scenario of a court engaging its efforts in applying a

***specific law to a set of mere speculative facts. There must be pre-existing facts arising from a real live situation that gives rise to, for instance, a breach of contract, a tortuous wrong, or other such* grievance on the part of one party against another."**

48. Turning to the Amended Reference before us, it is manifestly clear to us that the cause of action therein is limited to the compliance (or lack of it) of sections 5, 7 and 13 of the impugned Act with Articles 6(d) and 7(2) of the Treaty. Indeed, that is the substantive issue for determination by the Court. The question is, following the nullification of the said Act, did any live controversy remain that affects the rights of the Parties and would, therefore necessitate adjudication? We think not for the reasons that we shall expound forthwith.

49. It seems quite clear to us that the substratum of the original Reference was the Anti-homosexuality Act. That Act, having been struck down in its entirety by the Constitutional Court of Uganda, the *raison d'etre* of the Reference disappeared. Given that the Amended Reference is grounded in the legality of selected sections of the nullified Act, we do not think it resurrects any live controversy or concrete dispute either. Indeed the reliefs sought from this Court buttress this position further. We reproduce them below for ease of reference:

"WHEREFORE the Applicant brings this Reference as an aggrieved person and in public interest and humbly prays that this Court may be pleased to grant the following Declarations and Orders:-

f. ***Section 5(1) of the Anti-Homosexuality Act 2014, in decriminalizing any criminal act done by a victim of homosexuality in his or her purported defence against acts of homosexuality created impunity ... and was counter to the dictates of the principle of rule of law enunciated in Articles 6(d) and 7(2) of the Treaty;***

g. ***THAT sections 7 and 13(1) and (2) of the Anti-Homosexuality Act 2014... in criminalizing aiding, abetting, counseling, procuring and promotion of homosexuality, created offences that were overly broad, penalized legitimate debate, hampered professional counsel and impeded HIV related service provision and access to health service, were in violation of Articles 6(d) and 7(2) of the Treaty that enjoin Partner States to abide by the principles of rule of law, social justice and the maintenance of universally accepted standards of human rights.***

h. ***The spirit of the Anti-Homosexuality Act 2014, by promoting and encouraging homophobia ... amounted to the institutionalized promotion of a culture of hatred and was inconsistent with Article 7(2) of the Treaty that enjoins Partner States to abide by the principles of good governance, rule of law, social justice and the maintenance of universally accepted standards of human rights.***

i. ***THAT the Anti-Homosexuality Act 2014, by encouraging homophobia and stigmatization... was in contravention of the duty of the government to respect, protect and promote the rights and freedoms of persons likely to be affected by the Act since Uganda is a Partner State to the Treaty which requires in Article 7(2) that every Partner State abides by the principles of good governance, rule of law, social justice and the maintenance of universally accepted standards of human rights."***

50. Everyone of the reliefs sought above entails Declarations by the Court that cited provisions of the nullified Act, as well as the spirit and content of the Act, contravened Articles 6(d) and 7(2) of the Treaty. Each of them has been overtaken by events and is no longer relevant. We are, therefore, satisfied that the Amended Reference is moot.

51. Having so found, we would ordinarily have gone ahead to decline to entertain it further as opined by the Appellate Division in the **Legal Brains Trust** case. However, learned Counsel for the Applicant did raise the issue of exceptions to the general rule in the event of a court finding a matter to be moot. Common law does acknowledge the discretion of courts to depart from the general rule on moot cases. *See* ***Borowski vs Attorney General of Canada*** *(supra) and the definition of 'Public Interest Exception' in* ***Black's Law Dictionary****, Ibid, p.1350.*

52. In **Joseph Borowski** (supra), the following exceptional circumstances were advanced as a guide to the judicious exercise of courts' discretion in moot cases:

   i. ***If a court's decision will have some practical effect on the rights of the parties, notwithstanding that it will not have the effect of determining the controversy which gave rise to the action.***

   ii. ***In order to ensure that an important recurring question which might independently evade judicial review is heard by the court.***

   iii. ***Matters that raise an issue of public importance, the resolution of which would be in the public interest.***

53. The Applicant herein sought to rely upon the public interest exception above and as expounded upon in **Black's Law Dictionary** (supra). We did reproduce that exposition earlier in this judgment. He did also seek to rely upon the afore-cited classification of what would amount to 'public importance' as proposed in **The Queen on the Application of Crompton** (supra).

54. We are constrained to observe that whereas that case did indeed make reference to the elucidation of public law and the general importance of a matter to a general class as guiding parameters, the majority position in that case was that whether a matter was deduced to be of general public importance was ultimately a question of degree to be determined by judges on a case by case basis. In that regard, it was held (Waller LJ at p. 989):

"I would accept that a local group may be so small that issues in which they alone might be interested would not be issues of 'general public importance'. It is a question of degree and a question which Corner House would expect judges to resolve."

55. In the earlier case in reference above, **R (on the application of Corner House Research) vs. Secretary of State for Trade and Industry (2005) 4 All ER 1 at 36**, it had been held:-

"It does not necessarily follow, simply because an issue is raised which is of 'general public importance', that 'the public interest requires' that that issue should be resolved. Whilst I have agreed that the issues are of importance to a sufficiently large section of the public to be of general public importance, I consider it much more marginal whether 'the public interest requires' that they should be resolved."

56. It would appear from the foregoing legal precedents that a matter would only take on the stance of 'general public importance' where it is important to a sufficiently large section of the public. Further, even where such matter is adjudged to be of general public importance that would not necessarily enjoin courts to resolve it 'in the public interest'.

57. In Teraya Koji, **Emerging hierarchy in International Human Rights and Beyond: From the perspective of Non-derogable Rights'**, EJIL (2001), Vol.12, No.5, 917 at 921, due regard was given to the normative values that inform communities' interests in the following terms:

"***Because law is not merely a means of dealing with issues, but concerns the purposive self-ordering of society, each articulation of law carries social and value-related implications***."

58. Drawing from that analogy, it would appear that due cognizance should be made of matters of public interest in Nation States that derive from their socio-cultural diversities. Thus the normative values intrinsic to different practices and 'rights' cannot be said to be identical in different global communities.

59. The question then is would the Amended Reference be categorised as a matter of general public importance in Uganda, so as to warrant a departure from the mootness rule in the public interest? We deem it necessary to evaluate this question against the underlying rationale behind the mootness doctrine.

60. We have carefully scrutinised the material on record. We have seen Affidavits on record that do highlight the ignominies that were allegedly suffered by some members of the Uganda population during the period the Act was in force. However, we would not go so far as to find that the said Affidavits sufficiently establish the degree of public importance attached to the practice of homosexuality in Uganda as would warrant the Court to adjudicate the merits of the Amended Reference.

61. The Amicus Brief was not very helpful in that regard either in so far as it primarily dwelt on the correlation between homosexuality and HIV/ AIDS infections in males, and the vitality of interventions and programs that would engender access to health services by affected persons.

62. On the other hand, the mootness doctrine is rooted in an adversarial legal system that is synonymous with the Common Law and necessitates a live controversy in adjudicated matters, as well as the judicial economy principle that obviates the squandering of scarce judicial resources on moot and hypothetical questions. These 2 parameters have already been canvassed in this judgment.

63. A third premise for the mootness doctrine is to be found in the traditional adjudication function of judiciaries viz their legislative and executive counterparts' functions. This aspect of the mootness doctrine is aptly addressed in the **Joseph Borowski** case as follows:-

> ***"The third underlying rationale for the mootness doctrine is the need for the court to display a level of awareness of its proper law-making function. The court must be sensitive to its role as the adjudicative branch in our political framework. Pronouncing judgments in the absence of a dispute affecting the rights of the parties may be viewed as intruding into the role of the legislative branch."***

64. We respectfully agree with the principle advanced in that case and find it most applicable to the circumstances of the Amended Reference before us. It seems to us that this Court is being invited to adjudicate legal provisions that allegedly violated the rights of homosexuals in Uganda in the abstract; in the absence of the law that purportedly usurped those rights. The Applicant's case is apparently premised on the possibility of another Anti-

Homosexuality Act being enacted by a private member's Bill of the Parliament of Uganda. These set of circumstances would lend credence to Ms. Mutesi's assertion in Submissions that the Amended Reference is speculative and intended to pre-empt the legislature's legislative function by dictating the form of legislation it should enact. As was held in the Borowski case, we too find this to be a marked departure from the traditional role of courts.

65. Consequently, we do respectfully decline the most generous invitation extended to the Court to usurp the legislative function of the Parliament of Uganda. We are fortified in this position by the provisions of Article 27(1), which do enjoin the Court to take due cognisance of the mandate of organs of EAC Partner States. The Parliament of Uganda is one such organ.

66. In the result, faced with a Reference that is devoid of sufficient proof of the public importance of its subject matter and in due recognition of the legislative function of the legislature viz the traditional adjudication role of courts, we are unable to exercise our judicial discretion to adjudicate a matter that is moot and hypothetical. We so hold.

Issue No. 3: Whether sections 5(1), 7 and 13(1) & (2) of *Act No. 4 of 2014* were in violation of Articles 6(d) and 7(2) of the Treaty.

Issue No. 4: What reliefs if are available to the Parties, if any.

67. Having held as we have in Issue No. 1 above, we find no reason to delve into the merits of this Amended Reference. We hereby dismiss this Reference with no Order as to costs.

September 2016.

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MONICA MUGENYI
PRINCIPAL JUDGE

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FAUSTIN NTEZILYAYO
JUDGE

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FAKIHI A. JUNDU
JUDGE