

Kampala, 29th September 2016

EAST AFRICAN COURT OF JUSTICE DECIDES CASE CHALLENGING THE ENACTMENT OF UGANDA'S ANTI-HOMOSEXUALITY ACT 2014

The First Instance Division of the East African Court of Justice (EACJ) sitting in Arusha, Tanzania, on Tuesday 27th September 2016 delivered its judgment in the case concerning Uganda's Anti-Homosexuality Act, 2014 (AHA). The case, *Human Rights Awareness and Promotion Forum (HRAPF) (Applicant) v Attorney General of Uganda (Respondent) and the Secretariat of the Joint United Nations Programme on HIV/AIDS (UNAIDS)* (amicus curiae), Reference No.6 of 2014 – was filed in April 2014 by Human Rights Awareness and Promotion Forum (HRAPF), a Ugandan human rights advocacy and legal aid service provision organisation, under the auspices of the Civil Society Coalition on Human Rights and Constitutional Law (CSCHRCL).

The case originally challenged the AHA as being contrary to the rule of law and good governance principles enshrined in the Treaty for the Establishment of the East African Community. The AHA during the period of its existence, dramatically expanded criminal liability for consensual same-sex sexual activity between adults and created new offences such as 'touching with the intent' to commit homosexuality, and 'promotion of homosexuality,' which threatened not only the rights of individuals, but also civic space and press freedom. It also provided for immunity from prosecution for 'victims of homosexuality' who committed any crime 'as a direct result of [their] involvement in homosexuality.' The passing of the Act triggered a marked increase in the violations of the human rights of Gay, Lesbian, Bisexual, Transgender (LGBT) people, a pattern that has continued even after the Act was nullified in August 2014.

The case was amended in January 2015 with the consent of both parties following the nullification of the AHA by the Constitutional Court of Uganda on 1 August 2014. The amendment limited the case to challenging the enactment of the Act with particular provisions, which led to violations against LGBTI persons. When the case came up for hearing, the respondents raised a preliminary objection that the amendment could not stand as the AHA had been nullified by the Constitutional Court of Uganda - in essence that the case was moot. HRAPF argued that they were not challenging the Act but the passing of the Act with the three particular

provisions that led to the violation of the rights of LGBTI persons during the period when the law was in force, and that without prejudice to that argument, this was a matter of public interest that the Court could hear as an exception to the mootness rule.

During the course of the case, four organisations made applications to join the case as amicus curiae. These were: UHAI - The East African Sexual Health and Rights Initiative (EASHRI) (Kenya), Health and Development Initiative (HDI) (Rwanda), The Centre for Human Rights, University of Pretoria (South Africa) and UNAIDS. The first three applications were rejected and only that of UNAIDS accepted. UNAIDS made its submissions which in essence focused on the negative implications of the Anti-Homosexuality Act 2014 on the HIV/AIDS response, especially among LGBTI persons.

Judgment in the case was delivered by a panel of three justices: Hon. Justice Monica Mugenyi (Principal Judge) from Uganda; Hon. Justice Faustin Nteziyayo, judge (from Burundi) and Hon. Justice Fakihi Jundu (from Tanzania). The Court observed that the amendment of the Reference was done irregularly as the Attorney General did not specifically consent to the introduction of new facts concerning the violations committed during the period when the Anti-Homosexuality Act was in force.

HRAPF is disappointed with the court's subsequent rejection of the amendment, since the decision to amend was agreed upon by both parties, and communicated to the court as required by the provisions of the Court's Rules of Procedure. *'The amendment was solely intended to address the change in circumstances occasioned by the nullification of the Anti-Homosexuality Act and this is what was agreed upon and done. The case was limited to the violations during the period when the Act was in force, so stating that the amendment was not in line with what was agreed is factually and legally incorrect,'* said Ladislaus Rwakafuuzi, HRAPF's lead lawyer in this matter.

The Court then decided that the case was moot since the reference

challenged a law that had been nullified by the Court. The Court considered the public interest exception to the general rule and stated that it did not find the evidence adduced sufficient to *'...establish the degree of public importance attached to the practice of homosexuality in Uganda...'* since the public interest requires that the matter should concern a sufficient number of people. *'Subjecting a case concerning the enactment of a law that criminalises the very existence of sexual minorities to majoritarian opinions on sexual practices trivialises the violations that sexual minorities have to suffer every single day because of laws like these.'* Adrian Jjuuko, Executive Director of HRAPF.

This is the first time that an international tribunal in Africa has heard a case concerning laws primarily affecting LGBTI persons. The case also set precedent in the field of amicus curiae which precedent was relied on by the Supreme Court of Uganda in the presidential election case. The case also galvanised Ugandan, East African and African activists to take their destiny in their hands and challenge the passing of laws that threaten the rights of LGBTI persons. *'The Applicant has shown that African citizens – through their civil society formations – have the knowledge, skills, experience and courage to challenge in international courts any legislation or policy that they feel may infringe upon the human or peoples' rights of LGBTI and PLHIV. The States have been put to sufficient notice, and we believe that they will be much more circumspect when formulating law or policy in future.'* said the lawyer for the amicus curiae and the Chief Executive Officer of the Pan African Lawyers Union (PALU), Mr. Donald Deya.

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