



10th Annual Child Law Moot Court Competition

October 2019

Facts of Hypothetical Case

1.

Adam is 42 years of age and was born in Wakanda to migrant Equatorial Kundu parents. Adam has lived in the Southern African state of Wakanda all his life and has never been to Equatorial Kundu. Adam's father, Tome T'Challa, left Equatorial Kundu in 1975, due to political tension which was attributed to the fact that political parties were banned in the country at the time. Tome was one of those at the forefront calling for the unbanning of political parties. To this day, political parties remain banned, as they have been since 1973. Independence of the judiciary has been severely compromised and repressive laws continue to be used to target critics of the government and the monarch, despite basic human rights guarantees in Equatorial Kundu's 2005 Constitution.

Security legislation severely curtailing basic rights remains in force despite calls for its amendment or repeal. The Suppression of Terrorism Act of 1971 placed severe restrictions on civil society organizations, individuals and the media. Under the legislation, a "terrorist act" includes a wide range of legitimate conduct such as criticism of the government. The legislation was used by state officials to target perceived opponents through abusive surveillance, and unlawful searches of homes and offices as well as detention. Tome and other members from the banned political party, the Democratic Movement (DEMO) were detained in 1973 and remained in custody pending the finalization of their trial on charges under the Suppression of Terrorism Act for allegedly criticizing the monarch by singing a pro-democracy song and shouting "viva DEMO" during a rally. After more than a year in custody, Tome and a few others escaped and left for Wakanda.

2.

As a way of punishing political detractors, Equatorial Kundu's government enacted a law that declares any citizen of Equatorial Kundu a "permanent emigrant" if they have been out of the country for 11 consecutive months. This status implies that such person is no longer recognised as a citizen of the country. When he was still alive, Tome and his wife were unable to travel back to Equatorial Kundu due to his political background and as such Tome and his wife died as "permanent emigrants" of Equatorial Kundu and with no official recognition in Wakanda as well. Consequently, Adam is not recognised as a citizen of Equatorial Kundu and cannot claim Equatorial Kundu citizenship or transfer it to his own children.

3.



Adam and Nakia both do not have identity documents Furthermore, the couple are irregular migrants in Wakanda without the required permits legalising their stay as their parents never legalised their stay in Wakanda.. The couple share a home with their two children in Wakanda. Okoye T’Challa (born 10 November 2005) - aged 14 and Shuri T’Challa (born 15 May 2014) - aged 4.

Adam and Nakia are both unemployed and rely on odd jobs from people in their community and thus do not have steady sources of income. When their first child, Okoye, was born the nurse at the hospital gave Nakia a hand written notice of birth that she could use in applying for a birth certificate for Okoye in Equatorial Kundu. The nurse further pointed out that Wakanda does not issue children of foreign nationals birth certificates, this was also confirmed by a Ministry of Home Affairs and Immigration official working in the hospital assisting with birth registrations. As a result Adam and Nakia have not registered the births of any of their two children because they have never been to Equatorial Kundu themselves.

4.

Wakanda is a committed member of the international community as evidenced by its membership to both the United Nations (UN) and African Union (AU). To this end, Wakanda has ratified the following international legal instruments: the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) (in 2015); the *United Nations Convention on the Rights of the Child* (UNCRC) (in 1995); the *African Charter on the Rights and Welfare of the Child* (ACRWC) (in 2000) and the *African Charter on Human and Peoples’ Rights* (African Charter) (in 1996). Furthermore, Wakanda ratified the Protocol to the African Charter on the *Establishment of the African Court on Human and Peoples’ Rights* in 2015, and it also approved and deposited the *Article 34(6) Declaration* of the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights. Wakanda is also party to the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness.

5.

Wakanda has constitutionally guaranteed children’s rights to a name and nationality from birth as well as children’s best interests.

The Constitution also provides that “everyone has the right to basic education” and that the “State may not unfairly discriminate directly or indirectly against anyone on grounds of ethnic or social origin”.

The Wakanda Education Act (Education Act) regulates admissions to public schools. Though the Education Act does not require learners to produce any specific documents in order to be admitted to a public school, the Admission Policy for Ordinary Public Schools (Admission Policy) provides:

- In terms of section 15 that a birth certificate is required in order for a child to be admitted to a public school.
- In terms of section 21, that learners who are classified as “illegal foreigners” in terms of the Migration Control Act (Migration Act) must, when they apply for admission to school, show evidence that they have applied to legalise their stay in the country.



- In addition to the documentation requirements set out in the Admission Policy, sections 9(1) and 26 of the Migration Act prohibit schools from providing basic education to children who are considered “illegal foreigners”.

6.

Okoye is considered an “*illegal foreigner*” for purposes of the Migration Act. While he does not have a study permit under the Migration Act, which would allow him to lawfully reside in Wakanda, he nonetheless lives there with his parents and is enrolled in school. While in grade 3, Okoye and 23 other children were forcibly removed from class before the school year had concluded. Most removals from school occurred between 2014 and 2017, when Okoye was 9 years old. The children were told that they were being removed because they do not have birth certificates or study permits. Eight children (excluding Okoye) were allowed to come back to complete the 2015 school year while ‘sorting out their documents’ as they were in the final year of their primary schooling. Those who still did not have the said documents were refused readmission to school in 2016. Eleven of the children (including Okoye) attempted to apply at various different public primary schools (five different primary schools in total) but were refused admission because they did not have birth certificates or study permits. The attempted applications and subsequent refusals occurred from 2016 with the last refusals having occurred in 2019. Some of the children did not apply at any school at all on account of the knowledge that so many other children were being removed from school or refused admission.

7.

In 2015, Okoye’s parents instructed the Community Law Centre to institute legal proceedings against the Wakanda Government. On 17th March 2015 an action was commenced in the High Court of Wakanda by way of an urgent application that led to a leave to file a class action suit on behalf of the undocumented children asking for their births to be registered and for access to education. Okoye and other undocumented children won in the High Court and the Ministry of Home Affairs and Immigration (the Ministry) appealed to the Supreme Court of Appeal (which is the highest Court in Wakanda). Nevertheless, in the Supreme Court, the Ministry agreed to an out of court settlement, which was made an order of court. The order stipulated as follows:

1. The Ministry would allow Okoye (and similarly placed children) readmission to school for the next two years.
2. In those two years the Ministry will consider whether these children have legitimate claims to permanent residence status or citizenship in Wakanda.
3. The Ministry would issue birth certificates to stateless children if statelessness is proven

However, the Ministry did not honour this agreement, applying instead to the High Court in 2016 to rescind the order. The High Court refused to hear the rescission on grounds that it did not have jurisdiction. Frustrated with the process, especially with the fact that the matter has stalled and there seems to be no way of getting any legal resolution from courts in Wakanda, Okoye has decided to seek legal assistance.



8.

Okoye is determined that he has a right to a birth certificate and the right to education and that he did nothing unlawful because he had no hand in his situation. Furthermore, Okoye wants to argue that he had no control over the circumstances that led to his I status in Wakanda . Okoye seeks advice from an attorney (Ms. Ramonda) working in a Non-Governmental Organization (Kids Are Right) with observer status before the African Commission on Human and Peoples' Rights. Ms Ramonda suggests that the only solution is to approach the African Committee of Experts on the Rights and Welfare of the Child (African Committee) and lay a complaint detailing how Okoye and similarly situated children suffer violations of several rights under the African Charter on the Rights and Welfare of the Child (African Children's Rights Charter) including the right to birth registration and to acquire nationality at birth; non-discrimination and equal access to education. Ms Ramonda, proposes approaching the African Committee for a range of reasons, chief among them being the fact that the African Children's Rights Charter contains explicit rights to birth registration and a nationality; education as well as non-discrimination which are the main violations Okoye wants to challenge. In addition, Ms. Ramonda proposes that they also challenge the denial of access to economic, social and cultural rights, particularly Okoye's right to education. Furthermore, due to the fact that Okoye's parents were declared permanent emigrants, Okoye is at risk of becoming stateless if Wakanda does not give him status.

9.

Okoye will make the following arguments :

1. Okoye is of the view that the pursuit of domestic remedies has stalled and the case has been pending for four years. The impasse has left him in legal limbo for such a long time and as time goes by he continues to miss out on school.
2. Okoye also argues that Wakanda violated his right to have his birth registered immediately after birth and his right to acquire a nationality as provided for by the United Nations Convention on the Rights of the Child; the African Charter on the Rights and Welfare of the Child as well as the Wakanda Constitution. The fact that his birth is not registered also means that Okoye is stateless.
3. Okoye also argues that Wakanda violated his rights to education and non-discrimination protected by the Constitution of Wakanda, the African Children's Rights Charter and the United Nations Convention on the Rights of the Child (UNCRC) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).
4. Okoye requests that Wakanda adopts legislative and policy positions that grants him, and similarly placed children, access to education in line with the Constitution of Wakanda as well as international and regional law.

10.



The Government of Wakanda's Ministry of Home Affairs and Immigration will make the following arguments:

1. Okoye did not give domestic courts ample opportunity to decide on this matter before he brought it to an international forum. Okoye should have exhausted extra-judicial remedies by lodging an official claim at the Wakanda Human Rights Commission.
2. Okoye is entitled to the nationality of Equatorial Kundu where his parents originate from and Wakanda has no obligation to provide him with a birth certificate. Wakanda has the sovereign right to set the rules for acquisition of nationality as part of its sovereign power. In exercising this right, it is argued that Wakanda does not issue birth certificates to foreign nationals that are in the country illegally for fear of opening the floodgates and allowing all foreigners to come to its territory.
3. The regulations requiring birth certificates for school enrolment are not discriminatory since they serve a legitimate government purpose such as protecting children from being trafficked as well as curbing the issue of schools registering more learners than they actually have which impacts spending 'ghost learners'.
4. Wakanda does not have an infinite supply of resources to provide free education to all illegal foreign children in its territory.

