

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)

MISCELLANEOUS CAUSE NO. 0086 OF 2022

1. INITIATIVE FOR SOCIAL AND ECONOMIC RIGHTS (ISER) LIMITED. :..... APPLICANTS
 2. THE UNWANTED WITNESS (UW) LIMITED
 3. HEALTH EQUITY AND POLICY INITIATIVE LIMITED
- VERSUS
1. THE ATTORNEY GENERAL
 2. NATIONAL IDENTIFICATION & REGISTRATION AUTHORITY (NIRA) :.....RESPONDENTS

Before Justice Boniface Wamala

APPLICANTS' WRITTEN SUBMISSIONS IN REJOINER

Your Lordship,

A. INTRODUCTION:

1. The Applicants make these brief submissions in rejoinder to the Respondents' dated 30th August 2023. The Applicants reiterate their main written submissions on the four issues of the application, filed on the 20th June 2023. The Applicants in rejoinder reiterate that: -
 - (a) The instant application is properly before court for enforcement of the *right to social security and the right to health*, along auxiliary rights and freedoms *to equality and non-discrimination, nationality and freedom from statelessness, and privacy*, guaranteed under Articles 8A, 20, 21, 22, 27, 33(1), 35 & 45 of the Constitution, and Objectives 14 & 20 of the National Objectives.
 - (b) The Applicants reiterate that the adoption of the National ID System as the mandatory means of identification of SAGE beneficiaries with its inherent errors, systemic access barriers and weaknesses, is exclusionary and discriminatory, violating the rights of eligible older persons to social security protection.
 - (c) The Applicants further reiterate that the use of the National ID System as the *primary* and *mandatory* identification data source to access public health services, as set out under Sections 65 & 66 of the ROPA,



is exclusionary and violates the right to health and related human rights and freedoms.

B. BRIEF ON REJOINDER SUBMISSIONS

2. In their submissions in response, the Respondents have introduced novel legal interpretations of the underlying legislation and have alleged that the integration of the national digital ID system with healthcare and social protection has a number of purposes.
3. However, the Applicants submit that this an application for human rights enforcement, the primary question before the Court is whether there has been an actual and continuing violation of the rights of individual older persons and women, due to their exclusion from social protection and healthcare and the failure of the government to provide an adequate remedy.
4. The Applicants submitted affidavits demonstrating the violations of rights guaranteed by the Constitution and binding international human rights instruments. These violations are caused by both *de jure* and *de facto* barriers to accessing the national digital ID system, the mandatory application of the ID system in social protection and healthcare services, and the continued failure to provide adequate mitigations, remedies, and redress.
5. Paragraph 1 Page 10 of the Respondents' submissions shows that about 38% of Ugandans had not been assigned NINs. Since these barriers significantly impact specially protected groups, including women and older persons, they constitute discriminatory treatment.
6. As a result of the policy and practice of the Respondents, this discriminatory system has been applied to social protection and healthcare to devastating effect, as outlined extensively in the Applicants' submissions and affidavit evidence. Until all people in Uganda have free and easy access to ID, demanding a national ID card or number in order to access such critical services is in violation of the human rights obligations of the Government of Uganda.
7. The Respondents offer several arguments as to why the national digital ID system may serve a legitimate purpose in both social protection and healthcare. However, the Court must determine whether the use of the national digital ID system is both necessary and proportionate to achieve such purposes. Given the severity of the ongoing violations and the

importance of the rights implicated, there should be a high evidentiary burden placed on the Government when conducting such a determination. The Applicants submit that the Respondents have failed to discharge their burden of proof to demonstrate that the system serves a legitimate purpose, is suitable to achieve such purpose, is necessary to achieve such purpose, and is balanced against the severity of the rights violations in question.¹

8. Finally, the Applicants reiterate the nature of the remedies sought in this case, which include, *inter alia*, the allowance of alternative forms of ID, a structural interdict to ensure compliance with the judicial decision, and the creation of a functioning grievance redress and accountability mechanism, as required in ROPA. The Applicants submit that the requested remedies are necessary components to a well-functioning national digital ID system, which deals with sensitive personal information and has the potential to affect broader areas of both public and private services. Not only will these remedies provide immediate relief to those who have been excluded, they will safeguard against further violations of rights.

C. ISSUE REJOINDER RESPONSES

9. In response to issue one, the Respondents assert in their written submissions that there is no mandatory requirement for the use of the National Identification Card (NIC), Number (NIN), and Register (the Register) as the primary data source and only means of identification under Sections 65 & 66 of the Registration of Persons Act, 2015 (ROPA).
10. In rejoinder, the Applicants submit that Sections 65 & 66 of ROPA make the NIC, NIN, and the Register, a *de jure* mandatory requirement. Section 65(1) uses the word “shall”; according to Black’s Law Dictionary 9th Edition at p. 1499, “shall” connotes the mandatory sense that drafters typically intend and that courts typically uphold. The word “shall” can only be inferred to mean may when a negative word such as not or no precedes it,² which is not the case in the above sections.
11. Furthermore, Section 66 ROPA’s headnote reads ‘Mandatory use of national identification cards’ and uses the language “shall require” in subsections 1 and 2. The literal, plain text meaning of this is that the NIC, NIN,

¹ See the amicus intervention of Professor Philip Alston, at pp. 21-25.

² Black’s Law Dictionary 9th Edition, at p. 1499.

and Register must be used for administration of and access to public services and other services such as opening bank account. The use of the words “**Shall require**” within legislation establishing a national digital identity system has been subject to adjudication and courts have held this to be a mandatory requirement. *See Robinson v AG of Jamaica*.³

12. It is established law that statutes are construed according to their object and intent.⁴ To discern the object and intent of Parliament it is imperative to use internal aids, such as the Title of the Act, Preamble, punctuation, headings, schedules, and interpretation clauses. Based on the above, if ROPA is read as a whole, its object and intent is the establishment of a national Register which shall be used as a single source of information, whereby any person whose information is not on the register is to be excluded from access to public services such as health, education, and social services.
13. Notwithstanding the *de jure* requirement, both Sections 65 & 66 have been interpreted and applied by the relevant authorities as a mandatory provision. For example, the Social Protection guidelines dictate that to be eligible for SAGE one must be registered with NIRA.⁵ This is further evidenced by Hon. Gidudu Mafwaabi Dominic’s statement that “The ministry of Gender, Labour & Social Development took a policy decision to use the national ID as source data for enrolment to the SAGE programme,”⁶ and by numerous other statements by Parliamentarians and policymakers. The Respondents in their submissions, irrespective of the legal interpretation offered, further admit that the National ID is the single data source and mode of verification for the beneficiaries of the SAGE project.
14. The Applicants reiterate their earlier submissions that the system has inherent errors, systemic access barriers, and weaknesses which have an exclusionary effect on older persons and women. Specifically, systemic access barriers and weaknesses have included difficulties relating to the

³ The case of *Robinson, Julian v The Attorney General of Jamaica* [2019] JMFC Full 04 deals with legislation that states that a public body “shall require” that individuals submit the National Identification Number or Card to facilitate the delivery of goods or services, and finds that this signals usage in the mandatory sense rather than directory sense. At [247] A (15) the Court stated that “The section says the public body ‘shall require’ and the registered individual ‘shall comply.’ These words do not admit of any exception.” At [252], the Court finds this to be a “mandatory legal obligation.”

⁴ *Kasampa Kalifani vs Uganda Revenue Authority High Court Civil Suit No.579/2007*, Justice Yorukamu Bamwine (as he then was), in echoing the words of Lord Denning, stated that Acts of Parliament are construed according to their object and intent.

⁵ Social Protection Guidelines, at page 8.

⁶ Annexure OA-7 to Odur Anthony’s Affidavit, Vol. 2, page 252, page 245, para 3.

production of adequate documentation, and difficulties surrounding the collection of biometric data.⁷ Errors within the system have been widely documented. When the national ID system—despite its significant and well-documented coverage gaps—is applied to social protection programs such as SAGE, this has a cascade effect in excluding many older persons who have been unable to access the national ID system from accessing life-saving social protection benefits to which they are entitled.⁸ Exclusion from social security and other public services does not only affect the victims who do not have other forms of social security, but also forces them into relationships of dependency upon families, friends and the community with whom they have contact, thereby causing a burden on the entire community.⁹

15. As the Respondents rightly note, the Constitution guarantees rights and opportunities and access to health services as well as pension and retirement benefits. It also requires the government to take affirmative action in favor of marginalized groups. Yet while the government has taken some steps to improve access to the national ID system, the Respondents admit at page 10 of their submissions in response that the system continues to exclude 38% of the population. Uganda's ID system has interfered with human rights, particularly the essential element of access to both healthcare and social protection.¹⁰
16. The fact that there is no fee associated with registering for the ID is certainly welcome. But it does not follow that there are therefore no barriers to registration. The imposition of fees is one possible barrier, but there are many other ways in which the design of the system has led to this not being an inclusive means of identification.¹¹ This includes both direct and indirect costs of obtaining identification—including fees for supporting documents, travel costs, lost income from time spent on registration, translation and assistance, and fees for legal affidavits to remedy any errors.

⁷ See affidavit of Kiira Brian Alex, at paras. 14 and 35, and affidavit of Diana Gichengo, at para. 22.

⁸ The country examples cited in paras. 66-71 of the affidavit of Dr. Fisher draw comparisons with national ID systems that similarly require ID as a mandatory condition to accessing public services and the human rights implications of this.

⁹ *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development*, 81, 115 (CCT 13/03, CCT 12/03) [2004] ZACC II; 2004 (6) SA 505 (CC); 20M (6) BCLR 569 (CC) (4 March 2004).

¹⁰ See amicus of Prof. Alston at para. 25 (de jure & de facto limitation).

¹¹ See Affidavit of Reetika Khera, para 64, 75

17. The Government has been forthcoming about the problems with the national ID system. For example, in his 'Statement to the Media on the Joint Remedial Registration of Older Persons with NIRA' (2022), the Minister of State for Elderly Affairs admitted that over 54,559 older persons have been excluded from receiving the SAGE benefit as a result of the fact that they were not successfully registered for the National ID or because their ID has the wrong details. The Report of the National Population Council on '*The State of Uganda Population Report 2019*' also confirmed that some older persons who were too frail or sick to register for the National ID are now being left out of social protection programmes.
18. In rejoinder to issue two, the Applicants reiterate their submissions and the factual evidence contained in the supporting affidavits, which demonstrate a significant number older persons, and women are being turned away from health centers for lack of a National ID. The arguments above, and in the Applicants' submissions, regarding exclusion and discrimination apply in equal measure here.
19. In rejoinder to issue three, the Respondents deny the fact that the national ID system is discriminatory because it is, *inter alia*, all inclusive, free of charge and accessible to all groups of persons, including vulnerable and marginalized groups. These are indeed important factors in making a system inclusive and accessible, but in and of themselves they are not sufficient. Under human rights law, accessibility has four overlapping dimensions: non-discrimination, physical accessibility, economic accessibility, and informational accessibility.¹²
20. Moreover, the Applicants' argument is oriented not only towards the purpose of the system, but also to the impacts it has on specific government programs. Even if one were to accept that the aim is to provide an all-inclusive means of ID—and that this is true in both law and in fact—it is abundantly clear from the evidence that the system is currently unable to meet this goal in practice, and is instead excluding people living in poverty, older persons, women, and girls. The fact that the system is "accessible to all groups" does not mean it is actually being accessed by all groups.¹³

¹² See U.N. CESCR, General Comment No. 14: the right to the highest attainable standard of health (article 12), ¶ 12(b) U.N. Doc. E/C.12/2000/4 (11 August 2000).

¹³ See especially, Prof. Alston's amicus, at paras. 64-84; See also affidavit of Dr. Fisher, at paras. 31-43 on indirect exclusion and why certain individuals and communities are more at risk of being excluded.

21. The Applicants' evidence shows widespread exclusions that have fallen especially on marginalized groups, who are disproportionately affected by barriers to registration due to factors such as their physical distance, economic circumstances, and informational barriers. This constitutes a form of indirect discrimination, wherein a seemingly neutral policy is having a disproportionately negative effect on protected groups.¹⁴
22. In rejoinder to the issue of privacy, the Respondents argue that the system is a physical ID card-based system and therefore does not pose the risks associated with digital ID systems. However, while the national digital ID system does entail a physical NIC, this is not a solely physical card-based system; biometric data is collected as the Respondents note in their submissions at page 11. The collection and storage of biometric data poses serious risks to the right to privacy, as is demonstrated in the Applicants' main submissions and supported by the affidavit evidence.¹⁵
23. The Applicants reiterate their arguments that the collection of personal identifying information through the national digital ID system can lead to mass surveillance and targeted profiling, and that the presence of these risks should heighten the level of scrutiny applicable to the integration of the national ID system with social security and healthcare, as individuals may be coerced into sacrificing privacy to gain access. In such cases, informed consent is not always a sufficient remedy, and further mitigations may be required.
24. The Respondents note that the right to privacy is not absolute and must be balanced against "competing values." The Applicants submit that the proper framework for measuring these "competing values" is a proportionality assessment. Such an assessment requires appraisal of whether the acquisition of the data is necessary.¹⁶
25. In conclusion, the Applicants submit that the instant application has merit and if the Respondents continue to implement mandatory requirement of a NIC or NIN for access to SAGE, healthcare, and other public services, there will be continuous, grave violations of human rights. This can only be only

¹⁴ See amicus brief of Prof. Alston, at paras. 25, 66. See also affidavit of Dr. Fisher, *Id.*

¹⁵ See esp. Amicus brief from CIPESA, Access Now, and Article 19, esp. paras 6-31. See also Affidavit of Dr. Fisher, esp. paras. 44-57.

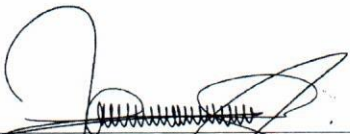
¹⁶ See amicus brief of Prof. Alston, at paras. 49-63

averted by this Honourable Court, by granting the remedies sought in the instant application.

The Applicants reiterate all their prayers in the application.

We so pray!

Dated at Kampala this 13th day of October 2023



FOR ALP ADVOCATES
COUNSEL FOR THE APPLICANTS

Drawn & Filed By: -
M/s ALP Advocates,
Lotis Towers, 5th Floor,
Plot 16 Mackinnon Road, Nakasero,
P.O. Box 28611, Kampala,
info@alp-ea.com / Lgulume@alp-ea.com