AFRICA FREEDOM OF INFORMATION CENTRE

ANALYSIS OF THE COURT RULING IN CHARLES MWANGUHYA MPAGI AND ANGELO IZAMA VS. ATTORNEY GENERAL (MISCELLANEOUS CAUSE NO. 751 OF 2009) AGAINST THE FRAMEWORK OF THE UGANDA ACCESS TO INFORMATION ACT, 2005 AND INTERNATIONAL ACCESS TO INFORMATION STANDARDS.

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Analysis of the Ruling of the Court in and Charles Mwanguhya Mpagi and Angelo Izama Vs. Attorney General (Miscellaneous Cause No. 751 of 2009) against the framework of the Uganda Access to Information Act, 2005 and international access to information standards.

1. INTRODUCTION

Africa Freedom for Information Centre is a pan African non-governmental Organisation and resource centre promoting the right of access to information (ATI) on the African Continent. ATI is otherwise called a right to know (RTK) or freedom of information (FOI). AFIC was established as part of the implementation of the 2006 Lagos Declaration on Freedom of Information which was adopted by participants representing 20 civil society organizations from East, West, Central and Southern Africa.

AFIC Goal seeks to promote democratic rule and socio-economic justice for African citizens through fostering a culture of increased transparency, integrity and accountability among governments, regional and international bodies.

This paper analyses the ruling of the Court in *Charles Mwanguhya Mpagi and Angelo Izama vs. Attorney General* (Miscellaneous Cause No. 751of 2009) against the framework of the Uganda Access to Information Act, 2005 and international access to information standards.

2. THE RIGHT TO ACCESS INFORMATION IN UGANDA

The 1995 Constitution

Article 41 of the 1995 Constitution of Uganda guarantees the right to access information. Article 41 (1) states that:

> "Every citizen has a right of access to information in the possession of the State or any other organ or agency of the State except where the release of the information is likely to prejudice the security or sovereignty of the State or interfere with the right to the privacy of any other person."

Clause (2) provides that:

> "Parliament shall make laws prescribing the classes of information referred to in clause (1) of this article and the procedure for obtaining access to that information."

In 2005, Parliament enacted the Access to Information Act to give effect to this provision. The Act also sought to promote an efficient, effective, transparent and accountable government; protect persons disclosing evidence of contravention of the law, maladministration or corruption

in Government bodies,; promote transparency and accountability in all organs of the state by providing the public with timely, accessible and accurate information, and empower the public to effectively scrutinise and participate in Government decisions that affect them.

The Act makes general provisions on access to information and, in accordance with article 41(2), specifies the kind of information that may be accessed and outlines the procedure of accessing the information.

Section 11 of the Act requires a request to be made in writing to the Chief Executive who has twenty-one days to respond or extend the time to another twenty-one days. *Note*: For purposes of the Access to Information Act, 2005, the Chief Executive Officer of a department is referred to as the information officer.

Section 18 provides that when a CEO does not respond within the requisite timeframe, he or she will be understood to have refused the request.

According to section 37, a person may make a complaint to a Chief Magistrate against the decision of the information officer.

The *Charles Mwanguhya Mpagi and Angelo Izama vs. Attorney General* case has to be understood in the context of these provisions.

The Facts

Through their lawyer, journalists Angelo Izama and Charles Mwanguyha Mpagi wrote to the Permanent Secretary, Ministry of Energy and the Attorney General requesting copies of agreements made between the government of Uganda and various companies involved in the prospecting and exploitation of oil in Uganda.

The Permanent Secretary did not directly reject the request but said that he needed more time to consult with other government bodies before he could properly respond. Meanwhile, the Solicitor General argued that the agreements could not be accessed due to a confidentiality clause within the agreements prohibiting their disclosure.

In accordance with section 18, the persons making the request construed the non committal response by the Permanent Secretary for the Ministry of Energy as a refusal. This refusal, along with the response from the Solicitor General, allowed the journalists to invoke section 37 of the Act; they filed a complaint in the Chief Magistrates Court at Nakawa under Miscellaneous Case No. 751 of 2009.

The International Standard

The right of access to information is recognized in international law and regional frameworks. Article 19 of the *Universal Declaration of Human Rights* guarantees that: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers"

The *International Covenant on Civil and Political Rights* (ICCPR),5 which Uganda ratified in 1995, guarantees the right to information in similar terms, providing: "Everyone shall have the right to freedom of expression: this right shall include freedom to *seek, receive* and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print..."

At continent level, the right of access to information is recognized through different instruments. The African Charter on Human and Peoples Rights under Article 9 recognises the right to information by providing that, "Every individual shall have the right to receive information". Part IV(1) of the Declaration of Principles on Freedom of Expression in Africa provides that "Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law."

Article 9 of the African Union Convention on Preventing and Combating Corruption, adopted on 11 July 2003, also recognized the right to information by stating that that "Each State Party shall adopt such legislative and other measures to give effect to the right of access to any information that is required to assist in the fight against corruption and related offences" and Article 12 requires nations to engage with civil society and the media to promote transparency and provide information to the media relating to corruption while the African Charter on Democracy, Elections and Governance whose objective, according to Article 2(10), includes to: "Promote the establishment of the necessary conditions to foster citizen participation, transparency, access to information, freedom of the press and accountability in the management of public affairs";

Most recently the African Union adopted the African Charter on Values and Principles of Public Service and Administration which in Article 6 states that public service and administration shall establish effective communication systems and processes to inform the public about service delivery, to enhance access to information by users, as well as to receive their feedback and inputs;

International law also recognizes the legitimate need for protection of information in respect to protection of private security and national security. These should however, be clearly and

narrowly defined to avoid being abused to defeat the very purpose of the right. As such the following principles should be adhered to while legislating or interpreting legislation.

Maximum disclosure: Freedom of information legislation should be guided by maximum disclosure;

a. **Obligation to publish**: public bodies should be under an obligation to publish key information;
b. **Promotion of open Government**: public bodies should actively promote open Government;
c. **Limited exceptions**: Exceptions should be clearly and narrowly drawn and subject to strict "harm and public interest" tests;
d. **Processes to facilitate access**: requests for information should be processed rapidly and fairly and an adequate review of any refusals should be available;
e. **Costs**: individuals should not be deterred from making requests for information by excessive costs;
f. **Open meetings**: Meetings of public bodies should be open to the public.
g. **Disclosure takes precedence**: Laws which are inconsistent with the principle of maximum disclosure should be amended or repealed; and
h. **Protection of whistleblowers**: Individuals who release information on wrongdoing-whistleblowers should be protected;

Accordingly, a public authority or official should not refuse to disclose information unless it can show that the information meets the following strict three-part test:

1. the information must relate to a legitimate aim listed in the law;
2. disclosure must threaten to cause substantial harm to that aim; and
3. the harm to the aim must be greater than the public interest in having the information.

The first part of this test requires that a complete list of the legitimate aims that may justify non-disclosure be provided in the access to information law; no other aims may be relied on to deny access.

Secondly, *the public authority* (and not the person requesting information) *must* demonstrate (prove) that disclosure would cause substantial harm to the legitimate aim. It is not enough for the information simply to fall within the scope of the legitimate aim, for example, by being related to national security. Instead, the public authority must *also* show that disclosure of the information would harm that aim. Otherwise, there is no reason not to disclose it.

The third part of the test calls for the use of a balancing exercise to assess whether the risk of harm to the legitimate aim from disclosure is greater than the public interest in accessing the information. This is often referred to as the public interest override. If, taking into account all of the circumstances of a particular request, the risk of harm from disclosure is greater than the

public interest in accessing the information, then the government may legitimately withhold the information. This might not, however, be the case, where the information, for example, leads to an invasion of privacy but also reveals serious corruption or a contravention of the law.

Commentary

In the case of *Charles Mwanguhya Mpagi and Angelo Izama vs. Attorney General*, the court correctly dismissed the government's argument that the information could not be released for fear of breaching a confidentiality clause contained in the agreements. Issues of confidentiality between the parties are not part of the three-part test and, therefore, should not affect the application of the public interest override test. This is especially so when the matter is before a court or tribunal. Allowing confidentiality clauses to defeat disclosure under article 41 of the Constitution would allow the State to restrict all information arising out of agreements by simply inserting the requisite language.

In Uganda, the public interest override principle is now found in section 34 of the Access to information Act, 2005 which provides for mandatory disclosure in the public interest. Section 34 requires the information officer to grant access to information where the disclosure would reveal evidence of contravention of the law or serious public safety, health or environmental risk and the public interest in the disclosure is greater than the harm contemplated.

In arriving at its decision, the court in *Charles Mwanguhya Mpagi and Angelo Izama vs. Attorney General* assessed both the public interest and the harm contemplated and it was not satisfied that the public interest in the disclosure was greater than the harm contemplated.

The court held that the two journalists, as members of the public in Uganda, did not show how they would use the information for the benefit of the public. The court determined that demonstrating such a benefit was necessary to prove a public interest in disclosure.

With respect, the court mixed two issues:

1. The duty is on the public authority to prove that the disclosure will be more harmful than the public interest and not the other way around.
2. It is not necessary for the person requesting for the information to justify how they are going to use the information.

Section 6 of the Access to Information Act, 2005 makes clear that the reason for requesting for the disclosure is not important; the court, therefore, never should have taken this into account. Further, the principle of “harm” or public override requires that the person in authority should be the one to prove that the disclosure is harmful, *not the other way around*.

The court also observed that, “Government business is not in its entirety, supposed to be in the

public domain." This observation no doubt weighed on the court in reaching its decision; yet if the court has taken note of section 3 of the Act, it would have found that such an observation was uncalled for since section 3 gives that purpose of the Access to Information Act as to:

a. To promote an efficient, effective, transparent and accountable Government;
b. To give effect to article 41 of the Constitution;
c. To promote transparency and accountability in all organs of the State;
d. To empower the public to effectively scrutinize and participate in Government decisions; and
e. To protect persons disclosing evidence of corruption or contravention of the law in public bodies.

Therefore, it can be said that the principles stated in section 3 of the Act are adhered to if the government business is not in the public domain.

Related Court Decisions

Whereas the court was quick to refer to a text book- International Petroleum Transactions, 2nd Edition, Rock Mountain Mineral Law Foundation, Denver, Colorado 2000—which strangely, is the only authority that the court relied upon—it failed to refer to decisions of superior courts in Uganda. These decisions, however, are binding on lower courts by virtue of article 132(4) of the Constitution, which provides that:

> "The Supreme Court may, while treating its own previous decisions as normally binding depart from a previous decision when it appears to it right to do so; *and all other Courts shall be bound to follow the decisions of the Supreme Court on questions of law."*

The Supreme Court and the Constitutional Court have rendered binding judgments on article 41 of the Constitution in the following cases:

In *Attorney General vs. Major General David Tinyefuza***,** the Court was concerned with, inter alia, section 121 of the Evidence Act and article 41 (1) of the Constitution. Section 121 provides that:

> "No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of state, except with the permission of the officer at the head of the department concerned who shall give or withhold such permission as he thinks fit."

The Court held that:

> "The Constitution has determined that a citizen shall have a right of access to information in the hands of the state. It has determined the exceptions in a manner that is inconsistent

with the application of section 121 of the Evidence Act, it is no longer for the head of department to decide as he thinks fit. The unfettered discretion has been overturned by article 41 of the Constitution and now it is for the Constitutional Court to determine whether a matter falls in the exceptions in article 41 or not. And to this, the state must produce evidence upon which the Court can act. It has not done so in this instance."

Paul Ssemogerere and Zachary Olum vs. Attorney General.

Section 15 of the Act provides:

> "Save as provided in this Act no member or officer of the Assembly and no person employed to take minutes of evidence before the Assembly or any committee shall give evidence elsewhere in respect of the contents of such minutes of evidence or contents of any document laid before the Assembly or any such committee as the case may be, or in respect of any proceedings or examination held before the Assembly or such committee as the case may be without the special leave of the Assembly first had and obtained.
>
> (2) The special leave referred to in subjection (1) of this section may be given during a recess or adjournment by the Speaker or, in his absence or other incapacity or during any dissolution of the Assembly, by the clerk."

Rule 171 of the rules of procedure of Parliament, 1996 were worded in identical terms as section 15 (1) of the Act. Kanyeihamba, Supreme Court Judge said:

> "It is my view that in the light of the provisions of article 41 (1), the argument that a citizen needs permission of parliament to use Hansard or allow members of Parliament to give evidence in Court proceedings is unsustainable. In this case, the Speaker gave what is known in administrative law as a speaking order. He disclosed that he had consulted the registers of members and used the numbers registered therein to ascertain the quorum. A speaking order is impeachable in courts of law, especially if there is evidence that it was based on a wrong principle. Consequently, since under article 41(1), information in possession of the state is freely available to a citizen except where its release would be "prejudicial to the security or sovereignty of the state or interference with the right of privacy of any person" I can find no constitutional or legal grounds to prevent the release and use of Hansard or stop members of parliament from giving evidence in courts of law...
>
> In any event it would be incumbent upon the Attorney General to show that the information to be excluded as evidence in Constitutional petition No. 3 of 1999, came within the purview of the exceptions listed in clause (1) of the same article. In my opinion, while it is still a practical necessity for a litigant to write to the state or organ or

agency in possession of information, once that information is obtained, with or without the co-operation of the state, or organ or agency concerned, the information is freely usable and admissible in courts of law unless it falls within the exceptions under article 41(1). Moreover, where the state refuses to release such information, the citizen entitled to receive it may take the necessary legal steps to compel its release."

Canadian Experience

In the Canadian case of *The Criminal Lawyers' Association vs. The Ministry of Public Safety and Security*, the Court of Appeal of Ontario considered the right to freedom of expression under section 2(b) of the Canadian Charter of Rights and Freedoms in the context of the public interest override provision in section 23 of the Freedom of Information and Protection of Privacy Act 1990 (Ont).

A judge had stayed a murder trial on grounds of material non-disclosure by the prosecution, making very critical remarks about the police, including abusive conduct, deliberate editing of useful information and negligently failing to maintain original evidence. The provincial police investigated and issued a press release saying there was no evidence of a deliberate attempt to obstruct justice. The claimant was an NGO which monitored the criminal justice system. It was concerned about the discrepancy between the judge's findings and the outcome of the investigation by the provincial police. The government denied the NGO's request to access documents concerning the investigations, relying on solicitor-client privilege as the reason for non-disclosure. The exemption claims were upheld, but the Information Commissioner applied the public interest override to order release of the documents to which it applied. The commissioner could not do so with respect to the documents to which solicitor-client privilege applied because this was excluded from the operation of the override by the terms of section 23.
The Court held that section 23 unjustifiably limited the applicant's right of freedom of expression as guaranteed in section 2(b) of the Charter because section 23 did not allow solicitor-client privilege to be overridden when the public interest compellingly required it. It held that the public interest override provision infringed the association's right to freedom of expression because the scheme of the freedom of information legislation was to assist expression. It ordered words to be read into the statute to permit a public interest override in solicitor client privilege cases.

Conclusion

The right of access to information is one of the fundamental human rights recognised by national, regional and international law that is necessary for functioning democratic governance and for promoting an efficient, effective, transparent and accountable government. Unfortunately, the case under review failed to sufficiently draw lessons from previous court decisions as well as regional and international law. Informed court decisions can play an

important role in enabling people participate in government decision making from an informed view point. Pro-activeness of courts in expanding the frontiers of freedom of information through decisions and its operations strengthens the public's desire to access and use courts in building a democratic society.

Recommendations

The coalition of freedom of information and its members should strengthen awareness raising of the right to information among the population and key segments of stakeholders including the judiciary, law society and general public. Specific attention should also be given to raising of awareness about the Access to Information Act and its provisions.

To ensure that the public benefits from the outcome of this ruling, COFI should without prejudice endevour to inform the public and key decision makers of previous decisions relevant to the right of access to information as outlined above.

Civil society organizations collectively through the coalition of freedom of information and individually engage with the judiciary on strengthening the right to information through its decisions as well as the need for the judiciary to implement measures that advance the right of access to information by citizens.

The absence of access to information regulations had been a major stumbling block to the implementation of the Access to Information Act. Government should build on the issuance of regulations by sensitising its official and the public, training public information officers, build systems for re-active and pro-active disclosure and strengthening compliance by submitting to Parliament annual reports.

The judiciary should incorporate the right of access to information in its training programmes for judicial officers. In addition it should as a matter of urgency implement awareness programmes for its officials through such means as practice directives as well as posters, information sheets and handbooks for judicial officers.

Beyond these, the judiciary should itself put in place mechanisms for the promotion of access to information within the sector. These should include messages informing the public about their rights, records accessible by the public as well as open days to create accessibility of courts, its processes and records in its possession.

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