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GETTING IT WRONG: APPLYING PUBLIC SECURITY LIMITATION TO THE EAST AFRICAN COMMUNITY'S RIGHT OF ESTABLISHMENT IN KENYA

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> '*If Kenya treats us badly by deporting us in a generalised manner, they will be treated the same way in our countries. If they stop us from doing business in Kenya, we will also stop them from doing theirs in our country.*'[1]

Abstract

The Right of Establishment (ROE) is one of the rights and freedoms provided for under the East African Community's Common Market Protocol. Under this right, citizens of East African Community Partner States, namely, Kenya, Uganda, Tanzania, Rwanda, Burundi, South Sudan, and the Democratic Republic of Congo are entitled to move to any other Partner State and pursue economic activities, as self-employed persons. Their spouses and children are also entitled to this right or to be employed. They are also entitled to join the security schemes of the host PS. However, the right is not absolute. A PS can limit the enjoyment of the right on the ground of public security. The "how" of applying the limitation was left to the Partner States to deal with under their national laws. This article analyses how Kenya handles this limitation regarding East African Community citizens, who are ROE holders. It examines the scope of the limitation focusing on its theoretical underpinning, and its scope under the Common Market Protocol. It then identifies and explains areas where Kenya is getting it 'wrong'. The article contends that Kenya has not balanced the interests of ROE holders and its national interests. It suggests steps towards getting it right during the application of the limitation.

I. INTRODUCTION

The Right of Establishment (ROE) is one of the rights and freedoms provided for under the East African Community Treaty (EAC Treaty).[2] The right, which is available to nationals of East African

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[1] These are views of a Burundian national who is doing business in Kenya, interviewed on 23 August,2022. Burundi is a Partner State in the EAC. The views depict the bigger picture in the management of public security limitations in the context of EAC integration.

[2] See art 76 of the *Treaty for the Establishment of East African Community* (7 July 2000); 2155 UNTS 255 (EAC Treaty).

Community (EAC), is for the benefit of natural persons, their family members, and legal persons.[3] It entitles them to move to any Partner State (PS), take up residence and pursue any economic activities.[4]

Under the EAC Treaty, the Partner States (PSs) "agreed" to take necessary measures to ensure this right is enjoyed in their national jurisdictions.[5] One of those measures was to conclude a protocol to facilitate implementation and, therefore, the "enjoyment" of this right. This protocol is the Common Market Protocol (CMP). Article 13 provides for the entitlements to the right holders and obligations of the PSs in that regard. The main objective of this right is to contribute to faster economic growth and development of the PSs.[6] Consequently, migration of ROE holders should be viewed as a socio-economic development issue, rather than a security threat.

Generally speaking, citizens have the right to enter, reside, and exit their country.[7] However, this is not the case for non-citizens. They can be stopped from entering the country or removed from it if their presence is taken to be a threat to public security.[8] ROE holders have rights under the treaties that PSs have ratified. However, this right is not absolute. It can be limited on national security grounds. Enjoyment of this right entails balancing public security concerns with the interests of right holders. Certainly, national law must strike this balance. This is particularly important and relevant in the context of ROE.

We need to bear in mind that ROE holders are not "foreigners" to a host PS as per the EAC Treaty[9] and the CMP.[10] This is the position even where security is concerned. "Foreigners" are defined under this corpus of laws as nationals of third countries, not EAC PSs. Therefore, treating ROE holders as foreigners is the beginning of getting it wrong. On paper, EAC nationals have a ROE and are guaranteed to enjoy it in a PS of their choice. PSs can, however, impose limitations based on public security. Despite its importance, the application of the security limitations to the ROE has not received due attention in academic discourse. It is important to have this aspect discussed at this point when the

[3] See art 13 of the *Protocol on the Establishment of East African Community Common Market*, (1 July 2010), Kenya Treaties Online.
[4] *Ibid*.
[5] EAC Treaty, *supra* note 2, art 104(1) (providing that The Partner States agree to adopt measures to achieve the free movement of persons, labour and services and to ensure the enjoyment of the right of establishment and residence of their citizens within the Community).
[6] CMP, *supra* note 3, Article 4(2).
[7]See, for instance, art 39(3) of the *Constitution of Kenya*, art 29(2) of *Constitution of Uganda*, art 27 of the *South Sudan Constitution*, and art 26 of the *Constitution of Rwanda*. See also, s 22(1) of the *Kenya Citizenship and Immigration* (Act No. 12 of 2011), s 4 of Law N°57/2018 of 13/08/2018 on *Immigration and Emigration in Rwanda*, s 28 of *The Immigration Act*, Chapter 54 Laws of Tanzania, and s 53 of *The Uganda Citizenship and Immigration Act*, Chapter 66 Laws of Uganda.
[8] *MHS & another v MGA & 2 others; Italian Embassy (Interested Party)* [2020] eKLR, paragraph 58. See also, International Covenant on Civil and Political Rights; UNTS, vol. 999, p. 171, art 13.
[9] EAC Treaty, *supra* note 2, para 1.
[10] CMP, *supra* note 3, para 1.

EAC is at the stage of implementing the Common Market. Moreover, the CMP, which provides for these limitations, does not provide guidance on how they are to be implemented. With these gaps, there is a likelihood of abuse and imbalanced/inconsistent application driven by the self-interests of the PSs. How PSs are handling the limitations is, therefore, a key factor in the realisation and enjoyment of the ROE.

This article is divided into seven parts. Fieldwork was conducted to gain a practical understanding of the subject under review. Part I is the introduction. Part II outlines the applied research method. Part III unpacks the ROE from a theoretical and practical perspective. Part IV deals with the theoretical underpinning of the limitation of rights. This part seeks to provide an understanding of the basis of the limitation of rights provided under international instruments in national jurisdictions. Part V deals with the public security limitation under the CMP. It examines its scope as per the CMP, and as interpreted by the East African Court of Justice (EACJ). It also reviews the obligations that Kenya owes to the ROE holders in the process of applying the limitation. Part VI analyses the areas where Kenya is getting it wrong in the application of this limitation. It draws on the parameters that domestic and international courts have used when balancing the limitation with the individual's right of movement. In Part VII, the article reviews the steps that can be taken by stakeholders, including the legislature and the Department of Immigration Service, to make the application of the limitation right. In conclusion, the article argues that the application of the limitation in Kenya has been problematic. There are practical steps that can be taken to correct the problematic approach which Kenya can adopt to remedy the gaps.

II. RESEARCH METHOD

The central question that this article addresses is; how Kenya invokes and applies the public security limitation to restrict the enjoyment of rights by ROE holders. The information used to answer the question was drawn from content analysis of the law, reports, and literature. The information was complemented by face-to-face interviews with key informants (N=46). They were selected because of their key positions in the handling of non-citizens facing deportation on suspicion of being threats to national security. They were identified through random sampling[11] and chain referral techniques. The respondents would refer the researchers to other respondents. The latter would then be interviewed. The interviews were conducted either online through the google meet platform, or face to face

[11] See R.B. Jain, "Sampling Method in Legal Research" (1982) 24 Journal of the Indian Law Institute 678–691 for a deeper analysis of this.

meetings, or by telephone depending on the location and preference of the respondent. Each interview lasted about ten minutes. The respondents were male (60%) and female adults (40%). Children were not interviewed.

The key informants had first-hand information on how non-citizens suspected of being a threat to national security are handled, leading to deportation. They were drawn from public officers serving in the Department of Immigration Services (n=10) as immigration officers and prosecutors (n=3). Judicial officers (n=5) serving in subordinate courts in Migori and Kajiado Counties were also interviewed. These two courts serve at land border entry points into Kenya. Immigration law experts in private practice (n=8) were also interviewed. Due to the sensitivity of this topic, most respondents disclosed as much information as they could within their mandates. But what they said still assisted in answering the question.

Semi-structured interview questions[12] were used to allow the respondents to express their views as much as possible. The idea was to get their views on the treatment of non-citizens, especially those from other EAC PSs in light of their rights under the CMP. They were encouraged to share their experiences and their challenges, and what could be done to address these challenges. The areas of focus were:

a) The status of EAC citizens in Kenya; are they foreigners?
b) Adherence to the requirements of due process.
c) Whether deportation was the only means of handling the public security challenge in the circumstances of the cases they have come across.

Whenever an informant raised an important point that needed further explanation, more information was sought. Due to the sensitivity of the information sought and given, individual names of the public officers are not disclosed. Rather, pseudo names have been used in this article.

The information received was coded and arranged thematically to bring out the areas where Kenya is not getting it right. Thematic analysis is a method of analysing qualitative data. It entails searching across the data set to identify, analyse and report repeated themes.[13]

The study is not exhaustive as it focused on the ROE. There are other rights and freedoms under the CMP which deserve a study in their respective contexts. We hope, however, that the findings

[12] See Anne Galletta, *Mastering the Semi-Structured Interview and Beyond: From Research Design to Analysis and Publication* Vol. 18 (New York University Press, London, 2013) for a detailed analysis of this.
[13] For a detailed review of thematic analysis, see Virginia Braun and Victoria Clarke, "Using Thematic Analysis in Psychology" (2006) 3:2 Qual. Res. Psychol 77. See also, Oscar Labra et al, "Thematic Analysis in Social Work: A Case Study" in Bala Niku ed, *Global Social Work: Cutting Edge Issues and Critical Reflections* (Intech Open, London, 2020) 183-198.

of this study may provide a foundation for further studies. Note, the data collected from the interviews comprised of opinions of the respondents informed by practice in their respective areas.

III. UNPACKING THE ROE: THEORETICAL AND PRACTICAL PERSPECTIVES

The ROE is wide. The right holders are entitled to move to any PS and engage in economic activities as self-employed persons or through commercial entities (undertakings).[14] Accordingly, the ROE falls under socio-economic rights. Gorga[15] defines 'economic rights' as "rights of access to resources—such **as** land, labor, physical, and financial capital—that are essential for the creation, legal appropriation, and market exchange of goods and services."[16]

Economic rights, therefore, refer to the right to access to resources that are required for purposes of production of goods and services. Access to the resources depends on their availability and distribution. Of course, countries with limited resources must protest and take a protectionist approach when dealing with non-nationals. Competition for the scarce resources is one of the causes of conflicts between locals and immigrants.[17] The conflicts then turn into national or public security issues.[18] However, limited resources must not be made an excuse for failing to protect and fulfil economic rights. It cannot be used to reduce the economic rights to mere wishes. As stated by Brown,[19] the rights must be fulfilled within the available resources.

Besides pursuing an economic activity, a self-employed person is entitled to be accompanied by his family members (spouse, children, and dependents).[20] The spouse and children are entitled to work either as self-employed persons under the ROE or be employed.[21] This means that the self-employed person has interests in his or her investment and in the family members they live within the host PS. Accordingly, these interests must also be considered and taken into account when applying public security limitation before making an adverse decision against an individual. Indeed, protection

[14]CMP, *supra* note 3, art 13(3) (a).
[15] Carmine Gorga, 'Toward the Definition of Economic Rights' (1999) 2 *Journal of Markets and Morality* 88-101.
[16] *Ibid* 89.
[17] See general discussions on how foreigners are viewed with regard to national security in Whitaker BE, "Refugees, Foreign Nationals, and Wageni: Comparing African Responses to Somali Migration" (2020) 63 African Studies Review 18; Loren Landau, "Immigration and the State of Exception: Security and Sovereignty in East and Southern Africa" (2006) 34:2 Millennium 325-348.
[18] Otilla Anna Maunganidze & Julian Formica, "Freedom of movement in Southern Africa: A SADC (pipe) Dream?" (2018) 17 ISS South African Report 1 at 17.
[19] Gordon Brown, *The Universal Declaration of Human Rights in the 21st Century: A Living Document in a Changing World* (Open Book Publishers, Cambridge United Kingdom, 2016) 64.
[20]*Ibid* art 13(4).
[21] *Ibid* read with art 10(5).

of investments made under the ROE is an obligation of the PSs. [22]Therefore, application of the limitation must take this obligation into account.

The ability of the ROE holders to contribute to the socio-economic development of the PS and the region at large means the limitation should be viewed through economic lenses. The benefits outweigh possible risks.[23] Permitting free movement also helps in curbing illegal immigration by making the criminal networks obsolete.[24] This means that properly managed economic immigration promotes national security. ROE holders should be viewed as supporters and promoters of national security and economic development, not as threats.

The duty bearers are the PSs. The CMP outlines their legal obligations. First, they need to "guarantee" under the CMP, that this right is enjoyed in their respective national territories.[25] Second, they must "ensure" that there would be no discrimination against these right holders on the ground of nationality.[26] Thirdly, they are required to ensure that all restrictions to the enjoyment of the right, especially those posed by national law, are removed and new ones not introduced.[27] A list of those restrictions was to be forwarded by PSs to the Council of Ministers within one year, after the coming into force of the CMP, for further directions.[28] As of August 2022, this list was yet to be forwarded. John, a senior official at Kenya's Department of Regional Integration, explained that "Kenya has been focusing on trade and the removal of restrictions to trade like non-tariff barriers. We have not reached the point of implementing the Right of Establishment."[29]

Trade and restrictions to it are addressed under the Customs Union Protocol.[30] John's explanation is not reasonable for a number of reasons. First, the CMP is in force and is being implemented. Second, the removal of restrictions is an obligation on the part of PSs. Failure to discharge the obligation is a violation of the CMP. Lastly, it shows a lack of political goodwill to implement the CMP.

However, the PSs reserved an important power to themselves as hosts under the CMP. This is

[22] CMP, *supra* note 3, art 29.
[23] J Crush, B Dodson, V Williams and D Tevera, "Harnessing Migration for Inclusive Growth and Development in Southern Africa: Special Report" (2017) Southern African Migration Programme.
[24] Mauganidze and Formica, *supra* note 18, 3; see also, Fiona B. Adamson,'Crossing Borders: International Migration and National Security' (2006) 31:1 International Security 165–199.
[25]CMP, art 13(1)
[26]CMP, art 13(2).
[27]CMP, art 13(5).
[28] *East African Community Common Market (Right of Establishment) Regulations (Annex III);* Kenya Treaties Online, online: <http://treaties.mfa.go.ke/treaties> (accessed 12 May,2022), reg 10.
[29] Interview with an official at Kenya's Department of Regional Integration (22 August,2022).
[30] East African Community Protocol on the Establishment of Customs Union; Kenya Treaties Online, online: <http://treaties.mfa.go.ke/treaties> (accessed 2 September,2022), art 22.

the power to impose limitations on the right on grounds of public security, public health, and public policy.[31] The focus of this article is the public security limitation. Under the CMP, "public security" is defined as:

> [T]he functions of governments which ensure the protection of citizens and other nationals, organizations, and institutions against threats to their well-being and the prosperity of their communities.[32]

Granted, the power of States to provide national security is a key obligation. However, it must be exercised within the confines of the law, not arbitrarily.

In practice, right holders are viewed by host states as security concerns in the first instance. According to Milej, migration policies of African states view non-nationals as risks to national security.[33] This view was echoed by Kenya's President, Mr Uhuru Kenyatta, in his annual report to Parliament on the state of national security, in 2020.[34] Mr Kenyatta told the House that foreigners are associated with unlawful activities.[35] In other words, foreigners are a threat to national security.

> These foreign immigrants are associated with other organized criminal activities like drug trafficking, smuggling of small arms, money laundering, human trafficking, smuggling, and terrorism among others.[36]

ROE holders, or EAC citizens generally, were not excluded from this statement. This means that they are viewed as security threats. Furthermore, the sentiments show that the resultant policies may not view the right holders as potential contributors to socio-economic development in the first instance.

IV. THEORETICAL UNDERPINNING FOR LIMITATION OF LEGAL RIGHTS

Several critics have addressed the issue of the limitation of rights. Rawls,[37] and Goldsmith and Posner[38] theorised on the question of liberty and interests. Their main argument is that liberty is not absolute. Rather, this right is subject to limitations, such as public order and security. Rawls argues that, while every individual has a right to basic liberties, the right is not absolute. It is subject to public order,

[31] CMP, *supra* note 3, art 13(8).
[32] *Ibid* art 1.
[33] Tomasz Milej, "Legal Framework for Free Movement of People Within Africa – A View from the East African Community (EAC)" (2019) 79 *ZaöRV* 935 at 936.
[34] Executive Office of the President, *Annual Report to Parliament on the State of National* Security (March 2020) 17.
[35] *Ibid*.
[36] *Ibid*.
[37] John Rawls, *A Theory of Justice* (Revised edition) (Cambridge MA, Harvard University Press, 1999) 212.
[38] J. L. Goldsmith & E. A. Posner, *The Limits of International Law* (New York: Oxford University Press, 2005) 105.

security, and other considerations based on public good.[39] According to Rautenbach, [40] rights are limited for the protection of others and the well-being of all. But he cautions that the limitations should not be applied as if the rights do not exist.[41] This means there should be some balance that considers the right and the limitation. There is nothing wrong with limitation of rights. States are expected to enact laws that regulate the exercise of rights, while taking care of the broader national interests.

However, the exercise of unchecked public power by governments can lead to unjustified and unreasonable limitations. Limitations can be applied to achieve other objectives under the disguise of public security. Blanket invocation of public security may also lead to unjustified elimination of rights. In keeping with due process considerations, right holders should be entitled to challenge, and get a remedy for abusive application of the limitation. This is in accordance with the CMP and other international treaties, to which the PSs are signatories. For example, the CMP provides that anyone whose rights have been infringed shall have a right of redress by a competent authority.[42] This competent authority must be one that can adjudicate those rights.[43] The African Charter on Human and Peoples' Rights provides for a right to be heard by a competent national organ.[44] The International Covenant on Civil and Political Rights(ICCPR) provides that every person has a right to an effective remedy determined by a competent authority.[45] There should be a level below which the limitation of the rights cannot fall. These are questions that Rawls, and Goldsmith Posner, and Rautenbach did not attempt to address. In practice, the issues come to the fore when a PS invokes the limitation clause. The process of limiting the right is as important as the substance of the limitation. Leaving these issues to the unfettered, unguided, and unchecked discretion of state officials, especially in the context of regional integration, is risky. There is a high probability of rendering the rights ineffective through abuse of power and protectionism acts. As a result, the power to impose limitations must also be limited. Simply put, the imposition of limitations is not immune from judicial scrutiny.[46]

On the limits of international law, Goldsmith and Posner argue that a state's interests affect

[39] Rawls, *supra* note 29, 213.
[40] I. M. Rautenbach, "The Limitation of Rights in Terms of Provisions of the Bill of Rights Other Than the General Limitation Clause: A Few Examples" (2001) SALJ 617 at 618.
[41] *Ibid* 622.
[42] CMP, *supra* note 3, art 54 (2).
[43] *Ibid*.
[44] CAB/LEG/67/3; rev. 5, 21 I.L.M. 58 (1982); art 7(1).
[45] ICCPR, *supra* note 8, art 2(3).
[46] *Randu Nzai Ruwa & 2 others v Internal Security Minister & another* (2016) eKLR, para 39. See also, *Republic v. Minister of State for Immigration of Persons exparte C. O.* (2013) eKLR para 33.

compliance with its international commitments.[47] Scholars like Barnard,[48] Cooney,[49] and Gastorn[50] agree that all freedoms and rights under treaties are limited on grounds of public policy, public security, or public health. As a proponent of ideal theory, Caren argues that states have no right to restrict immigration.[51] He then argues that though limitations to immigration can be justified on the ground of public security, that happens in a non-ideal situation.[52] His main concern is the context within which the limitation is applied. The PSs reserve their sovereign power through these limitations. These limitations are the only avenues that PSs can use to close borders to nationals of other PSs under the ROE.

Pound, a proponent of the theory of interests asserts that the task of the law is to protect a wide range of interests with the least resistance.[53] This means a balance must be struck between applying the limitations and exercise of rights. Theorists, such as Durojaye[54] as well as Saretau and Obutte,[55] advocate for this approach in favour of a right. Therefore, for purposes of striking the balance, limitations must be justified. Critics of the balancing approach, such as, Niels[56] and Woolman,[57] raise critical concerns. One of them is whether a court will not be making political decisions under the guise of balancing competing interests and values.[58] They conclude that the balancing depends on the political and social background of the judge hearing a particular case.[59]

The criticism is not unfounded. In the context of ROE, a judge would be looking at a "foreigner" on the one hand, and his/her security as a citizen and that of other Kenyans, on the other. The balance could depend on the side s/he inclines to. Furthermore, outsiders looking at the decision will make their conclusion also depending on their political, economic, cultural and social background.

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[47] Goldsmith & Posner, *supra* note 38, 105.
[48] C. Banard, *The Substantive Law of the EU: The Four Freedoms*, 4th ed (Oxford: Oxford University Press, 2013) 496.
[49] T A M Cooney, *Restrictions on Freedom of Movement*, (1966) 10:2 Irish Jurist 314 at 315.
[50] Kennedy Gastorn, "Freedom of Establishment and the Freedom to Provide Services in the EAC" in Emmanuel Ugirashebuja, John Eudes Ruhangisa, Tom Ottervanger and Armin Cuyvers (eds), *East African Community Law: Institutional, Substantive and Comparative EU Aspects* (Brill Nijhof, Leiden, 2016) 365 at 370.
[51] Joseph Carens, "Aliens and Citizens: The Case for Open Borders", (1987) 49:2 The Review of Politics 251 at 254.
[52] *Ibid* 260.
[53] R. Pound, *Contemporary Juristic Theory*, (Littleton: F.B Rotham, 1981) 75.
[54] E. Durojaye, "Between a Rock and a Hard Place: (Un)balancing the Public Health Interventions and Human Rights Protection in the COVID 19 era in South Africa" (2022) 26:2 The International Journal of Human Rights 332 at 342.
[55] D.P Saredau & P.C Obutte, "Inclusivity and trans–border security under ECOWAS free movement and transhumance protocols*"* (2019) 1:3 International Review of Law and Jurisprudence 99.
[56] P Niels P, "Proportionality and the Incommensurability Challenge in the Jurisprudence of the South African Constitutional Court" (2014) 30:3 SAJHR 405 at 428;
[57] S Woolman, "Out of Order? Out of Balance? The Limitation Clause of the Final Constitution" (1997) 13 SAJHR 102 at 114.
[58] Niels, *supra* note 56, 407.
[59] *Ibid*. See also, Woolman, *supra* note 57, 111.

If the decision upholds public security and suppresses the ROE, some will contend that there is a balance. If the ROE is upheld some would contend there was no balance. Arguably, the approach that meets due process standards sets principles to be followed and considered during the balancing process. These criteria should take into account the nature and context of the right. The burden is on the moving party to demonstrate that their right has been unjustifiably or unreasonably limited.[60] Once it has discharged this, the burden shifts to the responding party to prove that the limitation is reasonable and justified.[61]

This is the approach taken by Kenya's Constitution under art 24(3). It provides that the burden of proving a limitation is justified is on the State or person seeking to impose it.[62] This is the correct approach because placing the burden to demonstrate that the limitation was unreasonable or not unjustified on the right holder makes it almost impossible for them to challenge the imposition of limitations. This is particularly important in the case of Kenya where ROE holders do not have a right to access information held by the state, or any other person even if the information is required for the protection of rights.[63] The justification for this refusal is for protection of national security. However, the absence of information makes it hard for one to enforce their rights.

Justification and reasonableness are now common standards applied by courts for evaluating state actions and decisions made pursuant to the application of these limitations. Justification entails a PS giving good reasons for an omission, action, or belief.[64] Courts in the EAC and elsewhere have addressed this theme. Within the EAC, the EACJ addressed this question in *Samuel Mukira Mohochi v Attorney General of the Republic of Uganda*.[65] The applicant, a Kenyan, was deported by Uganda on the ground that he was a threat to its national security.[66] The Respondent claimed that it had 'unchecked and overarching discretionary power to declare people, including East African citizens, prohibited immigrants' under section 52 of Uganda's Citizenship and Immigration Control Act.[67] In response, the Petitioner contended that it was wrong for Uganda to declare him a prohibited immigrant without giving him a hearing or subjecting him to due process.[68] In arriving at its decision, the Court

[60] *Evidence Act*, Chapter 80 Laws of Kenya, s 107.
[61] E O Abuya, "Promoting transparency: Courts and the operationalization of the Right to Access Information in Kenya" (2017) 46:2 Common Law World Review 112 at 125.
[62] *Constitution of Kenya*, art 24(3).
[63] *Ibid* art 35(1).
[64] G Gehan, "Justifying Limitations on the Freedom of Expression," (2021) 22 Human Rights Law Review 91 at 94.
[65] EACJ Reference No. 5 of 2011.
[66] *Ibid* para 15.
[67] *Ibid*.
[68] *Ibid* para 9.

took a broader view. The judges held that no justification was provided to show the petitioner was a threat to national security and to impose the limitation.[69] In other words, the State, which bore the burden, had failed to discharge it. According to the court, it failed to balance the petitioner's rights against the need to protect national security. The judges held the burden of proving justification was on the state imposing the limitation.[70]

The point the EACJ and authors such as, Durojaye, Saretau and Obutte, and Woolman, were making is that there must be a balance of the competing interests. This is by ensuring that the limitation is justified, reasonable and that due process is adhered to. The power and discretion to apply limitations to the ROE must be exercised and justified within, the confines of the law. The application must be regulated by law. The checks and balances must be by and within the law. In the circumstances, it can be argued that the exercise of 'unchecked and overarching discretionary power' on the part of PSs is no more in so far as rights under the CMP are concerned.

V. PUBLIC SECURITY LIMITATIONS UNDER THE COMMON MARKET PROTOCOL

Several authors, such as, Hamadou,[71] Alabi,[72] and Ladau,[73] contend that public security limitations are one of the most invoked to limit the movement of immigrants. They argue that security concerns by member states have hampered the implementation of regional treaties. For instance, Hamadou contends that in the Economic Community of West African States the limitation has been used for political interests and short-term policies of economic protectionism.[74]

As noted earlier, the PSs are entitled to impose a limitation on the ROE on the ground of public security.[75] However, as correctly stated by Lenaghan and Amadi,[76] having a limiting attitude that focuses on security alone does very little to achieve the integration agenda. PSs must start viewing the ROE as an important economic issue, rather than focusing extensively on security. Focus should be placed on the right and protection of its holders. This is because, as stated by Nshimbi and others, over-

[69] *Mohochi*, *supra* note 65, para 115.
[70] *Ibid*.
[71] A Hamadou, "Free Movement of Persons in West Africa Under the Strain of COVID-19" (2020) 114 AJIL Unbound 337.
[72] A Alabi, "ECOWAS Protocol Implementation on Free Movement of Persons and Trade between Nigeria and Benin Republic: An Overview" (2020) 9:2 JMSS 947 at 963.
[73] B Ladau et al, "Free and Safe Movement in East Africa: Report on Promoting the Safe and Unencumbered Movement of People across East Africa's International Borders" (2018) Open Society Foundations 14.
[74] Hamadou, *supra* note 63, 338.
[75] CMP, *supra* note 3, art 13(8).
[76] P Lenaghan & V Amadi, "Advancing Regional Integration through the Free Movement of Persons in the Southern African Development Community (SADC)" (2020) 10 Speculum Juris 52 at 64.

focusing on security leads to policies of restriction and exclusion. [77] Furthermore, States can miss out on the contributions of ROE holders, if they are viewed only as security threats. This calls for a shift of the mindset on the part of the officials of the PSs to widen their view.

The CMP definition of "public security" entails the protection of the well-being and prosperity of all persons in the territory of a PS against threats to their well-being and prosperity.[78] A limitation on the ground of public security is invoked where there is a need to "protect" against "threats" to people's well-being and prosperity. According to Black's Law Dictionary, a "threat" is defined as "a communicated intent to inflict harm or loss on another or another's property."[79] A "communicated intent" means that a PS cannot act on mere suspicion. It must have received sufficient information that there is an intent to inflict harm. This means that a decision to declare an ROE holder a "threat" must be based on an individual's conduct. For example, Kenya cannot claim that Tanzanians or Ugandans are a threat to public security. To meet legal requirements, this assertion must be targeted at an individual or a specific group. Broad-based statements cannot work. It can only be person A is, or persons by the names B, C, & D are, a threat to public security. Therefore, a "threat" must be identifiable, genuine, and one that compromises or has the potential to compromise people's well-being and prosperity, based on an individual's conduct. The suspect/group must be known by their name.

The CMP does not define the scope of a public security limitation, and the principles guiding its application. As a result, there could be varied interpretations leading to complete "elimination" of the ROE. This gap could lead to complexities in interpretation and implementation. As drafted, the limitation is subject to various interpretations, including subjective ones. Leaving the interpretation to the discretion of public officials merely because they know they are bound by the law, may lead to lack of certainty and predictability. Elimination of the right by the host State is not allowed in law. Any statute that seeks to limit a right must not derogate from the core content of the right.[80] Black's Law Dictionary defines a "limitation" as a "restriction."[81] In turn, a "restriction" is defined as a "confinement within bounds."[82]

Domestic courts have addressed the question of the limitation of rights. In *Wilson Olal & 5*

[77] C Nshimbi, I Moyo, & Gumbo T, "Between Neoliberal Orthodoxy and Securitisation: Prospects and Challenges for a Borderless Southern African Community" in Magidimisha et al (eds) *Crisis, Identity and Migration in Post-Colonial Southern Africa* (London: Springer, 2017) 167 at 176.
[78] CMP, *supra* note 3, art 1.
[79] B Garner, *Black's Law Dictionary*, 11th ed (St Paul, MA: West Publishing Company, 2019) *sub verbo* "threat" at 1783.
[80] *Constitution of Kenya*, art 24(2) (c).
[81] *Black's Law Dictionary, supra* note 71, *sub verbo* "limitation" at 1114.
[82] *Ibid sub verbo* "restriction" at 1572.

Others v Attorney General & 2 Others, the High Court of Kenya held that a "limitation" does not "hollow out such rights so that they no longer have any meaningful content."[83] Therefore, the "limitation" envisaged by the CMP does not entail "elimination" of the right or freedom. Notably, the power of PSs to limit the ROE does not go beyond restricting it. The power does not include negation of the right. This means there is a standard below which limiting the ROE cannot fall.

The PSs have an obligation to notify other PSs of any limitation they have imposed.[84] Curiously, Kenya has not issued a notification in connection with public policy limitations in the history of the CMP.[85] Failing to notify other PSs is a violation of the obligation. An ROE holder cannot know what to expect in this regard. Neither can the other PSs. According to *Muhochi*, the burden of proving that a notification was issued is on the PS imposing the limitation.[86] There need not be litigation for the notification to issue.[87] The notification should be published as a matter of course as soon as a limitation is imposed. The essence of the notification is to promote transparency, accountability, and predictability.

The CMP does not provide parameters for the application of the limitations to the rights and freedoms it provides for. It only identifies those limitations as public policy, public health, and public security. However, courts and Kenya's Constitution have stepped in to bridge the gap. The ROE is part of Kenya's national law.[88] Consistent with art 19(3)(b) of the Constitution, this right forms part of Kenya's Bill of Rights.[89] As a result, the general limitation of rights clause under art 24 of the Constitution applies to the ROE. Article 24 of the Constitution provides:

> (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom, taking into account all relevant factors, including—
>
> (a) the nature of the right or fundamental freedom;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
> (e) the relation between the limitation and its purpose and whether there are less

[83] [2017] eKLR, 8.
[84] CMP, *supra* note 2, art 13(9).
[85] Interview with a Senior Legal Officer at EAC Secretariat (22 March, 2022).
[86] *Mohochi*, *supra* note 57, para 114.
[87] *Ibid*.
[88] *Constitution*, art 2(6).
[89] *Ibid* art 19(3)(b).

restrictive means to achieve the purpose.

(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom—
(a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;
(b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and
(c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

The application of public security limitations in Kenya must, therefore, comply with these constitutional requirements.[90]

VI. WHERE KENYA GETS APPLICATION OF PUBLIC SECURITY LIMITATION WRONG

The limitation of rights provided under treaties and other international instruments on grounds of national security is not a new phenomenon in Kenya. States need to ensure they do not treat ROE holders in a manner that violates the substantive guarantees under the EAC Treaty and CMP. It is a rule under customary international law that a State is responsible for injury caused by the violation of rights of ROE holder arising from an official act or omission.[91] As a result, care must be exercised to ensure no violation of rights occurs in the process of applying the limitation.

Nationals of the EAC are not foreigners in the PSs. The EACJ clarified this position in *British American Tobacco (U) Limited vs Attorney General of Uganda*.[92] In this case, Uganda had defined cigarettes manufactured by a branch of the applicant established in Kenya as "imported" from a "foreign country."[93] and imposed excise duty.[94] The petitioner challenged imposition of this tax. After hearing the parties, the Court held that the "misconstruction" of the terms was a violation of the EAC Treaty and the Protocol.[95] This is because 'the intention of the framers of the treaty…was to establish a community with a single economic area characterized by free movement of goods and in which

[90]See, *Kenya Human Rights Commission v Communications Authority of Kenya & 4 others* [2018] eKLR, para 67.
[91] Restatement (Third) of Foreign Relations Law of the United States (American Law Institute Publishers, St Pauls, MN, 1987) para 711.
[92] EACJ Reference No. 7 of 2017.
[93] *Ibid* para 7.
[94] *Ibid* para 7.
[95] *Ibid* para 45.

goods from any of the partner states were not treated as imports.'[96]

In a region whose theme is "One People, One Destiny", viewing nationals of other PSs as foreigners is simply against the spirit of integration.[97] This is so because the PSs are already looking at the ultimate goal of EAC integration-political confederation. Preparation of its constitution is underway.[98] The political confederation will succeed if the rights under the Common Market are realisable in national jurisdictions.

Public officers applying the limitation to ROE holders must understand the legal status of the right holders, and the context within which the limitation is applicable. The focus should be the parameters set by the EAC Treaty, CMP, Constitution of Kenya, and case law from EACJ and Kenyan courts as well as Kenya Citizenship & Immigration Act (KCIA).[99] KCIA is the statute that regulates the immigration of nationals, including those from other PSs into Kenya, their stay, and their ejection from the territory.[100] Its provisions are juxtaposed against the parameters for the application of the limitation.

Several agencies have reported that rights are violated in the process of application of this limitation. The Kenya National Commission on Human Rights, in its 2020 report,[101] found non-citizens are detained primarily on security concerns, and their rights are violated in the process.[102] In its 2018 study on migration in the EAC, the International Organization for Migration found that the majority of immigrants in Kenya are from the PSs.[103] Based on these findings, one would argue that EAC citizens form the majority of detainees. Studies have shown that the rights of these nationals are violated by PSs.[104] But this should not be the case because EAC nationals are not foreigners in Kenya.

The Limburg Principles on the Implementation of the International Covenant on Economic, Social, and Cultural Rights emphasise that the systematic violation of economic rights undermines true national security.[105] One would argue that EAC nationals deserve higher protection than nationals of

[96] *Ibid* para 41.
[97] See this theme on East Africa Community official website, online: <https://www.eac.int/> (accessed on 25 September, 2022).
[98] 21st Ordinary Summit of Heads of State of the East African Community Joint Communiqué (27 February,2021), para 4, online: <https://www.eac.int/communique/1942-communiqu%C3%A9-of-the-21st-ordinary-summit-of-the-east-african-community-heads-of-state> (accessed on 20 August, 2022).
[99] Act No. 12 of 2011.
[100] *Ibid* Preamble.
[101] Kenya National Commission on Human Rights, *A Survey Report on Status of Migrants in Places of Detention in Kenya* (October 2020).
[102] *Ibid* 6.
[103] International Organization of Migration, *Migration in Kenya Profile: A Country Profile*, (2018) xvii.
[104] See for example, KNCHR, supra note 101.
[105] United Nations doc. E/CN.4/1987/17, 122.

third states without a ROE. The outcome of not offering this protection and continued violation of rights may not only be a threat to national security, but also spill over to the region. This is through similar retaliatory measures by other PSs against Kenyans. The application of this limitation cannot be taken lightly.

However, case law demonstrates that the application has thus far, not been guided by any reasonable justification or known lawful procedures. Although most of the cases relate to other foreigners generally, it can be argued that the issues placed before the Courts and the principles coming out of their determination also apply to ROE holders. This is because there is no data demonstrating how ROE holders have been treated differently from foreigners. Furthermore, the interviewed respondents drawn from the Department of Immigration Services and judicial officers were unanimous that when it comes to the application of public security limitations, anyone who is not a Kenyan is a foreigner. Reins stated:

> So long as they are not Kenyans, they are foreigners. There is no special treatment for those from the EAC Partner States. [106]

To justify a limitation, the information which it is based upon must be availed to the Court. The purpose is to enable the Court to weigh the limitation against the constitutional requirement. Accordingly, without full disclosure of the information upon which a limitation is based, the State cannot discharge its burden of proving a justification. However, some security sector statutes prohibit 'unauthorised' disclosure of 'classified' information on the ground of national security. Kenyan statutes have defined 'classified' information. Under the National Police Service Act ('NPSA')[107] 'classified' information is that whose unauthorized disclosure would cause 'exceptionally grave damage' or 'serious injury' or 'is prejudicial' or 'undesirable' in the 'interests of the state.'[108] The Kenya Defence Forces Act,[109] and the National Intelligence Service Act [110] have similar (word for word) descriptions of 'classified' information as the NPSA.[111] It can be argued that any information that has something to do with national security is 'classified.' Unfortunately, none of the statutes defines some key terms, including 'exceptionally grave damage,' 'serious injury,' 'is prejudicial,' and 'interests of the state' in the context of their respective mandates and national security. Hence, the provisions are ambiguous, vague, and

[106] Interview with an immigration official (20 August, 2022).
[107] Act No. 11A of 2011.
[108] *Ibid* s 128(3).
[109] Act No. 25 of 2012.
[110] Act No. 28 of 2012.
[111] *See* KDF Act, s 49(5). *See also*, NIS Act, s 37(4).

open-ended. One would have to find the meaning elsewhere and contextualise it. This exposes the interpretation of the provisions to abuse and subjectivity.

The purpose of the limitation regarding disclosure of the 'classified' information is discernible from a plain reading of the provisions. It is to protect the institutions under those statutes from disclosing the information they hold. For example, the National Intelligence Service Act ('NISA') prohibits the Service from complying with a request to furnish a person with classified information.'[112] The KDFA contains a similar prohibition. As the NISA, it protects its members from 'demands to furnish persons with classified information.'[113] These statutes could be interpreted to imply that even orders from a court for information to be disclosed cannot be enforced. One wonders why such 'protection' is needed when those institutions are bound by the principles of transparency, accountability, rule of law, and utmost respect for human rights.[114]

Even if 'authorised' disclosure of classified information was granted, the statutes do not have procedures which an applicant can follow to access the information. The failure to provide for these procedures is by design. However, with or without procedures for disclosure, the burden of the State to prove that the limitation is justified and aimed at protecting a genuine national security concern stands. This is a burden that is provided for under the Constitution. Thus, it must be discharged. It was so provided because national/public security was not exempted from the application of art 24. It is a limitation like any other.

A request for an explanation as to the state of the content and practice of the three statutes was declined by the officers contacted for an interview. Zuri answered that the statutes are 'clear' that the information they hold as security officers cannot be disclosed to any person.[115] From a human rights perspective, the officers' view, though based on the statutes that guide their operations, is mistaken and ill-advised.

Domestic courts have addressed the issue of non-disclosure of information based on national security grounds. Where the information was not disclosed to the Court, the decision by the public officers was quashed. In *Bashir Mohammed Jama Abdi vs The Minister of Immigration and Registration of Persons and 2 Others*[116] the High Court observed that the respondents "seem to treat information about national security threats in a very casual manner."[117] The petitioner filed suit

[112] NIS Act, s 37(2).
[113] KDF Act, s 49(2)(a).
[114] *See*, *EAC Treaty*, *supra* note 2, art 6(d). *See also*, Annex III, *supra* note 28, reg 2.
[115] Interviewed on 20 August 2022.
[116] [2014] eKLR.
[117] *Ibid* para 36.

challenging the respondent's decision denying his son entry into Kenya. The son was a British national. The respondent argued the petitioner's son was "suspected to be abetting terrorist activities while in Kenya" and "in order to deter his activities kindly declare him a prohibited immigrant."[118] The petitioner argued there was no evidence linking him to terrorism activities. In its finding, the High Court held the respondent had failed to show that their decision was justified. Further, 'even if a certain material is considered classified, it is the view of this Court that when a challenge is made in Court, the Respondents can and should have applied for the Court to view the "closed" material for it to understand the enormity of the threat posed by Abdi. By keeping mum, its actions, however noble, may not pass the test of legal scrutiny.'[119]

A similar approach was taken in *Republic vs Minister For Home Affairs & 2 Others Exparte Leonard Sitamze.*[120] This case involved a Cameroonian national. An objection to view a classified document was raised by the ex parte applicant.[121] The judge held that in the interests of doing justice, a Court must view such a document[122] because 'classified information, where relevant to the issue at hand, cannot be kept away from the court.'[123]

The individuals involved in these two cases were not ROE holders, but nationals of third countries. However, the result would be the same even if they were ROE holders. The rule that the Courts established is they cannot balance the security concerns with the interests of right holders without full disclosure of the evidence. One implication of non-disclosure of evidence is the exposure of the public to further security threats if the threat is genuine. These cases capture the mindset of security agencies in Kenya. They demonstrate that these officials act as if the limitation of rights principle is unregulated. Further, it is apparent they believe that merely stating a decision was based on national security considerations is enough. In other words, their word cannot be questioned. Alternatively, they fall outside the confines of the Bill of Rights of the Constitution. One would also contend these officials do not believe they must balance the national interests with the protection, recognition, and fulfilment of rights and freedoms in accordance with the obligations they owe to right holders. Granted, the balancing is delicate and sensitive. Even so, this process must be undertaken by any State which is governed by the rule of law.

Let us now look at four key instances where Kenya gets it wrong in applying the public security

[118] *Ibid* para 9.
[119] *Ibid* para 41.
[120] [2008] eKLR.
[121] *Ibid* 1.
[122] *Ibid* 2.
[123] *Ibid* 3.

limitation.

A. FAILURE TO PRESCRIBE THE LIMITATION IN LAW IN A CLEAR AND SPECIFIC MANNER

Article 24 of the Constitution provides that a limitation to a right or freedom under the Bill of Rights must be by law.[124] In other words, the pursuit of national security must be in full compliance with the law. [125] The process must comply with basic rule of law principles as well as human rights standards and well-known fundamental rights and freedoms.[126]

Limitations to a right must be provided in and by law. Ristea[127] contends the substantive and procedural law that a State applies in that regard must be considered.[128] Judges in Kenya and the EACJ have also held that the requirement for a limitation to be prescribed by the law is aimed at promoting the community principles of rule of law, accountability, and transparency provided for under the treaty[129] and Annex III of the CMP.[130] In *Media Council of Tanzania & 2 Others vs the Attorney General of the United Republic of Tanzania*[131] the EACJ held that a limitation imposed by national law must be prescribed by law.[132] The Court cited, with approval, a decision by the Kenya High Court in *Coalition for Reform and Democracy & 2 others v Republic of Kenya &10 Others(CORD)*.[133] Here, the High Court held a limitation to a right or fundamental freedom "must be part of a statute, and must be clear and accessible to citizens so that they are clear on what is prohibited."[134] The specific ground relied upon must be one that is provided by the law. In *Republic v Cabinet Secretary in Charge of Internal Security & 2 others Ex-parte Nadeem Iqbal Mohammad*,[135] the ex-parte applicant was deported on the ground that his presence in Kenya was contrary to "national interest."[136] While setting aside the deportation order, the High Court held there was no such ground under section 33(1) of the KCIA.[137] Hence, the Government had no legal status to declare the *ex-parte* applicant a prohibited

[124] *Constitution*, art 24(1).
[125] *Ibid* art 238(2)(b).
[126] *Ibid*.
[127] O E Ristea, "Free movement of EU Citizens: Limitations on grounds of Public Policy, Public Security and Public Health" (2011) 1:1 Chall Knowl Soc 724-736.
[128] *Ibid* 727.
[129] *EAC Treaty*, *supra* note 2, arts 6(d), 7(2) and 8 (1) (c).
[130]Annex III, *supra* note 28, reg 2.
[131] Reference No. 2 of 2017.
[132] *Ibid* para 60.
[133] [2015] eKLR.
[134] *Ibid* para 210.
[135] [2015] eKLR.
[136] *Ibid* 9.
[137] *Ibid*.

immigrant and to remove him from the country on a ground not provided in law.[138] The 'prohibited immigrant' declaration was consequently quashed as it was an illegality.[139]

Those policy justifications that are intended to limit a right must be prescribed in law. There is no room for justifications outside the law however well-meaning, noble, or justified they may be. We should not be understood to imply that information about public security should be treated casually.[140] By contrast, governments should take these data seriously. The point is that a PS cannot hide under "national security" and purport to invoke grounds that are not provided under the law. The High Court in Kenya affirmed this rule in *Republic vs Minister of State for Immigration and Registration of Persons Ex-Parte C.O*.[141] Put in another way, 'public security' is not a ticket to create any other ground. Likewise, there is no room to extend the enumerated grounds.[142] Extra-legal considerations, like those contained in intelligence reports, are excluded.[143]

Courts in Kenya have held that there is no more presumption of constitutionality of statutes, which seek to limit rights.[144] Those statutes must meet the criterion under art 24 of the Constitution. The criterion is the statute must "clearly and specifically express the intention to limit" the right.[145] It must also express the "nature and extent of the limitation."[146] The consequence of failure to adhere to these requirements is that the statute shall not be construed as limiting the right.

It is not enough to state, like the CMP does, that a right is limited on the ground of public security. The meaning of "public security" must be unpacked by the statute seeking to limit rights based on it. Further, the act or omission that is prohibited must be clear. In addition, the conduct that constitutes a "threat" to public security must be identifiable. The words used in the provision must also be easily understood by the right holder regardless of whether or not they are trained in law. Moreover, a right holder must understand which actions and omissions constitute threats to public security and are, therefore, prohibited. This understanding enables the individuals to conform their conduct to the dictates of the limitation. They get to know where the powers of a public officer start and where they

[138] *Nadeem, supra* note 135, 10.
[139] *Ibid* 11.
[140] *Bashir Mohammed Jama Abdi vs The minister of Immigration and Registration of Persons and 2 Others* [2014] eKLR.
[141] [2013] eKLR, para 22.
[142] Ibid.
[143] Marjoleine Zieck, "Refugees and the Right to Freedom of Movement: From Flight to Return," (2018) 39 Mich. J. Int. Law 19 at 21.
[144] See for instance, *Peter Solomon Gichira vs Independent Electoral and Boundaries Commission & Another* (2017) eKLR.
[145] *Constitution*, Article 24(2).
[146] *Ibid.*

end. Similarly, this information can enable a public officer to know the contours of his/her powers.

Section 33 of the KCIA only goes to the extent of providing that one can be a prohibited or inadmissible immigrant on the ground of national security. The section does not indicate a "clear and specific intention" to limit any right. This is despite the Act having come into force in 2011 after a new Constitution was promulgated in the country. Therefore, the section is inconsistent with the Constitution in so far as limiting the ROE is concerned.[147] It cannot be used to limit the ROE on the ground of national security.

The provisions fail to identify the nature and extent of the limitation. There cannot be a limitation based on national security without describing what it is about in that regard. This is because one cannot understand what is meant by "national security," without more, in the context of a limitation. Several questions come to mind. First, is the limitation about promoting national security? Second, is it about undermining? Further, is it about threatening? The description of what constitutes a ground for limitation must be clearly given by law. In the context of disclosure of information, a comprehensive statute must provide for, among others, the definition of terms and outlines the exempt documents.[148] Simply put, a statute that fails to describe the grounds for public security limitation is not comprehensive. It cannot pass the constitutional test.

Courts have held that terms, such as "threatening," that are not defined in a statute are too broad and result in subjective interpretation or abuse. In *CORD*,[149] the petitioners argued that a new Section 66A of the Penal Code was void for vagueness. The provision stated as follows:

> 66A. (1) A person who publishes, broadcasts, or causes to be published or distributed, through print, digital or electronic means, insulting, threatening, or inciting material or images of dead or injured persons which are likely to cause fear and alarm to the general public or disturb public peace commits an offence and is liable, upon conviction, to a fine not exceeding five million shillings or imprisonment for a term not exceeding three years or both.
>
> (2) A person who publishes or broadcasts any information which undermines investigations or security operations by the National Police Service or the Kenya Defence Forces commits an offence and is liable, upon conviction, to a fine not exceeding five million shillings or imprisonment for a term not exceeding three years, or both.

The petitioners argued the section "deploys broad and imprecise terminologies without defining the

[147] See Article 24(2)(a) of the *Constitution*.
[148] Abuya, *supra* note 61, 113.
[149] *CORD*, *supra* note 133.

target and the conduct sought to be prohibited."[150] The respondents sought to justify the section. They claimed it was going to help in curbing the use of mass media as a tool for propagating terrorist or other criminal agendas.[151] In declaring the impugned section unconstitutional for violating freedom of expression and of the media, the High Court held there was no connection between the publication of the information and national security. According to the Court, the section used very broad terms, such as "insulting, threatening, inciting material, images of the dead or injured persons," which are not defined in the section and are, therefore, left to subjective interpretation, misinterpretation, and abuse.[152] The provision was declared unconstitutional for being "too vague and imprecise, and for not having any rational nexus with the intended purpose."[153] The same principle applies to a statute that seeks to limit the ROE on the ground of public security. What constitutes the limitations on the ground of public security must be defined. The limitation must be connected to the intended purpose. This is what promotes transparency and accountability in the application of the limitation.

An example of a prescription by law that expresses an intention to limit a right and the nature and extent of it is the Kenya's Access to Information Act.[154] Section 6 of the Act provides that "the right to access information" is "limited", thereby expressing the intention to limit.[155] This is in respect of information whose disclosure is likely to "undermine national security,"[156] which shows the nature and extent of the limitation. There is more clarity in this provision in that it identifies the right to be limited. Secondly, the intention to limit the right to access information has been stated. The provision states that pursuant to art 24 of the Constitution, the right of access to information under art 35 of the Constitution shall be limited.[157] Thirdly, the extent of the limitation is stated, namely, where the disclosure is likely to "undermine" national security.[158] The KCIA should take on board these valuable lessons. Failure to do so is tragic for officials seeking to invoke section 33 of this legislation.

B. FAILURE TO THE APPLY LIMITATION IN A REASONABLE AND JUSTIFIABLE MANNER

The PSs have an uncontested obligation to ensure the protection and maintenance of public security.

[150] *Ibid* para 63.
[151] *CORD, supra* note 133, para 230.
[152] *CORD, supra* note 133, para 257.
[153] CORD, *supra* note 133, para 254.
[154] Act No. 31 of 2016.
[155] *Ibid* s 6.
[156] *Ibid*.
[157] *Ibid*.
[158] *Ibid*.

However, it has been noted the limitation has been applied without regard to the rights of the concerned persons.[159] The application of the limitation is not contextualised, taking the nature of the right being limited into account. According to Gehan, a good reason is one given in the specific context of justifying a limitation.[160] Carens gave an example of a reason that cannot justify the invocation of public security. He argued that to address "antagonistic reactions" by citizens aimed at preventing others from exercising their rights is unjust. [161]For example, deporting EAC nationals on account of riots by Kenyans based on fears that business will be taken over is unjust. The term "reasonableness" is subjective. It depends on the circumstances of each case.[162] This confirms that the context of a limitation must be considered in light of the nature and purpose of the right. "Justifiable manner" means that the action taken or decision made is prescribed by law, necessary to achieve a legitimate aim, and proportionate to the aim pursued.[163]

If the application of this limitation is not well handled, then the objective of the EAC Common Market cannot be achieved. As Ladau and others,[164] and Mauganidze and Otilla[165]caution, "securitisation" of immigration has adversely affected the integration in Africa because the agenda is not taken into account. This means that the state cannot have unlimited discretion to apply limitations, without justifiable objectives.[166] The limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom.[167] This is a unanimous position even in academic discourse,[168] with which we agree.

Fear of breach of public security alone cannot justify a limitation. Whims, protectionism, and trivial issues cannot be justifiable considerations. There must be reasonable grounds to fear that a

[159] See, for instance, KNCHR report, *supra* note 101; see also, O Onyango, "Kenya Entangled in Proscribed Crimes of Terrorism and Violations of Human Rights Law," (2015) 3:1 Sociology and Anthropology 1 at 3;
[160] Gehan, *supra* note 64, 94.
[161] Carens, *supra* note 51, 262.
[162] E Abuya & J Githinji, "Access to University Education by Learners with Physical Disabilities: Combating the Barriers" (2021) 27 BHRLR 1 at 50.
[163] See, *Jacqueline Okuta & another v Attorney General & 2 others* [2017] eKLR 10; See also, *Kenya Human Rights Commission v Communications Authority of Kenya & 4 others* [2018] eKLR para 52; G Huscroft, *et al* (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge: Cambridge University Press, 2014); and *R vs Oakes* [1986] 1 SCR 10, para 69 for a detailed analysis.
[164] Ladau *et al*, *supra* note 73, 20.
[165] A O Maunganidze, "Freedom of Movement: Unlocking Africa's Development Potential" (Policy Brief 111, December 2017).
[166] F Viljoen, *International Human Rights Law in Africa*, 2nd edn (Oxford: Oxford University Press, 2012) 349.
[167] *Constitution*, Article 24(1).
[168] See for example, NW Orago, "Limitation of Socio-Economic Rights in the 2010 Kenyan Constitution: A Proposal for the Adoption of a Proportionality Approach in the Judicial Adjudication of Socio-Economic Rights Disputes" (2013) 16:5 PER/PELJ 170; C Emeka, "Right to Freedom of Movement in Nigeria," (2020) 1 Auxano LJ 80; M van Staden "Constitutional rights and their limitations: A critical appraisal of the COVID-19 lockdown in South Africa" (2020) 20 AHRLJ 484.

breach will occur if the rights are exercised. In the *Wilson Olal*, the judge described "reasonableness" as being devoid of arbitrariness and excessive interference with enjoyment of a right. [169] A limitation by way of declaring someone as a prohibited immigrant must be reasonably connected to a threat to public security and the need to protect it. In *Nadeem*, the judge held that there must be evidence of what national security is threatened.[170]

Several practitioners of immigration law in Kenya, interviewed for purposes of this article, stated that most deportation cases are withdrawn by the prosecutors when evidence of the exact threat to national security or breach of it is asked for. They said the evidence is never availed and the explanation they get is that the prosecutors rely on intelligence reports from the National Security Intelligence Service. Mary, an immigration law practitioner in private practice, summarised it as follows:

> We write to immigration officials demanding information and grounds for declaring them as prohibited immigrants. The immigration officials do not give the information required, but they withdraw the order. If the matter goes to court and we apply to be supplied with the information, the cases are withdrawn.[171]

Comparatively and persuasively, the European Court of Justice (Grand Chamber) has held that there must be a genuine, present, and sufficiently serious threat to public security, for it to be invoked to limit freedom of movement. This was in *K. v Staatssecretaris van Veiligheid en Justitie (C-331/16)* and *H.F. v Belgische Staat (C-366/16)*(*K&HF*). [172] The applicants had previously applied for asylum but their applications were rejected because they had participated in war crimes in Bosnia.[173] They made a second application for asylum, but it was declined because they had been banned from entering The Netherlands as they were undesirable immigrants.[174] The applicants challenged that decision arguing that they would not be denied asylum based on conduct they had been convicted of two decades earlier.[175] The referring Court was of the view that the applicants presented a threat to the security and fundamental interests of the society.[176] The judges held that the mere fact that the applicants had been excluded from refugee status in the past did not mean that their presence in the host country constituted a 'present genuine, present and sufficiently serious threat to the interests of

[169] *Wilson Olal*, *supra* note 83, 8.
[170] *Nadeem*, *supra* note 135, 10.
[171] Interview held on 12 August, 2022.
[172] ECLI:EU:C: 2018:296.
[173] *Ibid* para 18.
[174] *Ibid* para 17.
[175] *Ibid* para 19.
[176] *Ibid* para 21.

the community.'[177] Suspicions, without more, cannot pass the test of being genuine. Previous convictions, without more, cannot also pass the test unless they can be connected to a "present and sufficiently serious" threat.

Several cases demonstrate examples of what cannot constitute a reasonable and justifiable limitation on the ground of public security. In *Mohochi*, the judges rejected Uganda's invitation to "consider circumstances during the wind of terrorism" as a justification to limit the petitioner's freedom of movement.[178] That there was a "wind of terrorism" did not constitute a "real" threat to security. In the *Ex parte C.O*,[179] the state argued that the ex-parte applicant had two different passport numbers with different names.[180] As a result, he was declared a prohibited immigrant on the ground of "national security."[181] The judge held that "having two different passport numbers with different names cannot be said to be a threat to national security."[182] The threshold is much higher is the rule the court was laying.

Evidence of wrong doing or commission of a crime known to the law must also be adduced. The burden is on the alleging party, the State, to bring on board this evidence. In *Mulki Amina Issa & Another v Attorney General & 2 others*; *Director of Immigration & Another*,[183] the 2nd petitioner was deported. He, and other foreigners, were suspected of being in a syndicate that was perpetuating fake gold nuggets and US dollars.[184] The police claimed this suspicion gave rise to a "reasonable belief that they were involved in actions that were detrimental to public security."[185] The judge held that particulars of the criminal activities that the 2nd petitioner was involved in had to be supported by solid evidence.[186] The judge further found that associating with others who were involved in criminal activities alone is not a criminal offence. There must be evidence of "conspiracy."[187] The declaration of the 2nd petitioner as a prohibited immigrant and the resultant deportation order were quashed.

The *Mulki* and *Ex-parte C.O* cases also demonstrate the need to put the offences, and threat to/breach of public security into context if reasonableness and justification are to be achieved. Section 33 does not allow such contextualisation. Sue, a prosecutor at the Department of Immigration stated

[177] *Ibid* para 51.
[178] *Mohochi*, *supra* note 57, para 90.
[179] *Ex parte C.O*, *supra* note 141, para 23.
[180] *Ibid*.
[181] *Ibid*.
[182] *Ibid*.
[183] [2021] eKLR.
[184] *Ibid* 1.
[185] *Ibid* 2.
[186] *Ibid* 3.
[187] *Ibid*.

that so long as a foreigner is suspected of committing any offence, they are deported under section 33 of the KCIA.[188] However, section 33 does not contextualise or categorise the offences in any manner. It provides that any person who has been convicted of an offence for which the sentence of imprisonment is a minimum term of three years is a prohibited immigrant.[189] Some offences cannot be a reasonable and justifiable connection to a threat to public security. For example, bigamy which attracts imprisonment for five years under the Penal Code is among the offences under section 33.

C. USE OF DISPROPORTIONATE MEANS OF ACHIEVING PROTECTION OF PUBLIC SECURITY

The means of achieving the objective must not go beyond the purpose it seeks to achieve. The judges in *CORD*[190] explained that "proportionality" has two elements. First, the means of achieving the objective must have a rational connection to it, devoid of unfairness, arbitrariness, and irrational considerations.[191] Second, the means must limit the right as little as possible.[192] Proportionality calls for balancing the extent to which a right is restricted and the interest sought to be protected. Selective enforcement methods have serious negative impacts on community relations.[193] This means the choice of methods can be counter-productive. In the context of ROE, feelings of isolation and alienation may develop amongst the right holders and their home PS. As a result, those PSs may treat ROE holders who are Kenyans the same way. The result is a loss of benefits that would be derived from the exercise of ROE and the failure of the integration agenda. A key informant, Mary, who is a national of a Burundian and doing business in Kenya, said:

> If Kenya treats us badly by deporting us in a generalised manner, they will be treated the same way in our countries. If they stop us from doing business in Kenya, we will also stop them from doing theirs in our country.[194]

Deporting a right holder is not always a proportionate means of achieving protection of national and regional security. In *Mohochi*, the EACJ judges wondered how a person suspected of being a threat to

[188] Interview held on 14 August, 2022.
[189] KCIA, section 33(1).
[190] *CORD*, *supra* note 125.
[191] *Ibid* para 211.
[192] *Ibid. See also*, I M Rautenbach, "Proportionality and the Limitation Clauses of the South African Bill of Rights" (2014) 17:6 PER/PELJ 2229 at 2247.
[193]Daniel Moeckli, "Immigration Law Enforcement after 9/11 and Human Rights" in Alice Edwards and Carla Ferstman eds, *Human Security and Non-Citizens: Law, Policy, and International Affairs (*Cambridge University Press, New Work, 2010) 459 at 490.
[194] Interview held on 23 August, 2022.

regional security could be deported from one PS to another.[195] In other words, there was no sense in deporting him to go and cause harm to other populations if, indeed, he was a threat to public security. Likewise, in *Mulki*, Kenya's High Court wondered why the respondents opted to deport the 2nd petitioner instead of prosecuting him.[196] One would understand the judge's reasoning to mean that deporting a person suspected of committing a crime is not proportional to the protection of public security, especially in the context of regional integration. It is an excessive means. Charging them in court is a less restrictive means and would have still secured public security. In *Randu Nzai Ruwa & 2 Others v Internal Security Minister & Another*,[197] the Government banned a group called Mombasa Republican Council (MRC). The Government alleged that the group was a threat to national security as it was agitating for secession and training militia.[198] It proscribed MRC under the Prevention of Organised Crimes Act.[199] Kenya's Court of Appeal held that it was the duty of the respondents to satisfy the court that "less restrictive means would not have been efficacious to deal with the perceived challenges posed by MRC."[200] The Court held that to discharge its burden of proof, the State ought to have answered certain questions.[201] First, was it open to the State to invoke the criminal justice system against errant members of the group instead of slapping a total ban on the whole group? Second, did the State first issue warnings to the group to abide by the law? Third, if the State was concerned that the group was opaque and amorphous, did it require the group to apply for formal registration as a society or political party before imposing the harshest possible measure? According to the Court, MRC ought to have been allowed to register itself under the law before the "imposition of a total ban."[202] As a result, proscribing MRC was not proportionate to the protection of national security.[203]

The report by KNHCR shows that in 2020, thirty two percent of non-citizens were detained for being in the country without proper documentation.[204] Sixty seven percent were detained due to other criminal charges.[205] All of them were deported to their countries.[206] There was no chance for compliance by the thirty two percent who did not have proper documentation. Judicial officers serving

[195] *Mohochi* case, *supra* note 57, para 100.
[196] *Mulki*, *supra* note 183, p 2.
[197] *Randu*, *supra* note 46.
[198] *Ibid* para 9.
[199] Act No. 6 of 2010.
[200] *Randu*, *supra* note 46, para 75.
[201] *Ibid*.
[202] *Ibid* para 76.
[203] *Ibid* para 77.
[204] KNCHR report, *supra* note 77, 26.
[205] *Ibid*.
[206] *Ibid*.

in two border courts (Kehancha and Kajiado) and an immigration department prosecutor confirmed that citizens from EAC PSs are always deported for lack of documentation or upon conviction for any crime. Frank, a judicial officer, stated:

> They are deported all the time if they do not have documentation allowing them to be in the country or if they are convicted of any offence. There is no room for leniency or for time to comply because there are no mechanisms for finding them if they mingle with Kenyans.[207]

To meet due process standards, the State officers must ask themselves whether deportation, which is the harshest measure one can get, is the only means of protecting public security. They must be ready to explain why they opted for the most restrictive means. For example, it would be disproportionate to the protection of public security to deport a right holder on the grounds that they could have been convicted of bigamy. Jerome, an immigration official, explained that there is no time to consider contexts.

> We have no time for that. Once we receive reports and recommendations by security agencies, the Cabinet Secretary just makes the order. We execute the order by issuing and serving the deportation notice.[208]

The principle developed by the courts about proportionality is there must be several options available to the executing officer in addition to deportation. Deportation should be a last resort and only used in suitable cases where the rest of the options cannot be applied.[209] Availability of other options is critical in the interests of promoting regional integration and achievement of the overall agenda. Indeed, the PSs undertook to cooperate on matters of security in their territories and the region.[210] Hence, it is a violation of this obligation for Kenya to deport a Rwandese back to his country to roam freely and pose more threats there, without trying, for example, rehabilitating him or her through Kenya's criminal justice system. Where one does not have proper documentation, facilitating them to acquire the documentation is more proportionate than deporting them. The former approach can foster integration more than the latter.

D. FAILURE TO FOLLOW DUE PROCESS WHEN APPLYING THE LIMITATION

[207] Interview held on 18 August 2022.
[208] Interview held on 13 August, 2022.
[209] A Ellermann, "The Limits of Unilateral Migration Control: Deportation and Inter-State Cooperation" (2008) 43:2 Government and Opposition 168 at 169.
[210] *EAC Treaty*, art 124.

Due process requires the fulfilment of procedures, and factors to be considered in deciding to impose the limitation. In *Mohochi*, the judges held that competent national authorities must assess the situation on a case-by-case basis.[211] This presupposes that there are procedures for carrying out the assessment. In the *K&HF*, the ECJ underscored the importance of procedures for evaluation. The ECJ said a limitation must be based "exclusively on the conduct of the individual involved."[212] This means the conduct must be evaluated to confirm that it constitutes a genuine, present, and real threat to public security. A "future" threat cannot be considered as this would be speculative. There must be evidence of wrongdoing. This is extremely important in the context of ROE, especially where a right holder is deeply attached to the economy of the host PS. A decision to remove them from the territory must be based on serious, verifiable, and genuine reasons.

Fair administrative action is a right for every person in Kenya, regardless of their nationality.[213] Every person has a right to an administrative action that is lawful, reasonable, and procedurally fair.[214] Further, if a right or freedom of the person is going to be affected by the decision, they must be given written reasons for the decision.[215] Unwritten outcomes have negative effects on the individuals involved.[216] In practice, however, ROE holders are not given any reasons for their deportation. According to Faith, an immigration law practitioner:

> In practice, no reasons are given to them. They are simply served with a deportation order.[217]

Upon the Cabinet Secretary declaring the person as such, an immigration officer simply issues a notice to that effect.[218] There are no procedures under KCI Act or Regulations, to be followed before making this declaration. There are no procedural safeguards to guarantee adherence to due process. The effect of this gap is to empower the Cabinet Secretary to issue the order based on rumours or personal views, and non-legal considerations. Further, there are no safeguards for the protection of investments and family members. The impact of this provision is to derogate from the core content of ROE.

The "power" to remove persons declared as unlawfully present in Kenya is provided under section 43 of the KCI Act. The Cabinet Secretary is empowered to issue an order in writing for the

[211] *K&HF* case, *supra* note 172, para 52.
[212] *Ibid.*
[213] *Constitution*, art 47(1). See also, *Fair Administrative Action* (Act No. 4 of 2015), s 4(1).
[214] *Ibid*.
[215] *Ibid*.
[216] Abuya, *supra* note 53, 128.
[217] Interview held on 13 August, 2022.
[218] *Kenya Citizenship & Immigration Regulations* (2012) reg 37.

removal of that person.[219] The source of the information upon which an order is made is a recommendation made under section 33 of the Act or section 26A of the Penal Code.[220] The Penal Code mandates a court that has convicted a non-citizen of an offence punishable by imprisonment to recommend their deportation.[221] The deportation can be after serving the sentence if imprisoned for less than one year or immediately upon conviction if the term exceeds one year.[222] The order for removal should be carried out in accordance with the Constitution and related laws.[223] There is no requirement that the recommendation is made pursuant to verification that the offence is a genuine threat to national security.

Missing from section 43 of the KCI Act is the procedure to be followed by the Cabinet Secretary before making the decision. The requirement for compliance with the Constitution and related laws is during the execution of the order, not before. Mohamed, a prosecutor at the Department of Immigration, stated as follows:

> On matters of security, there is no time for formalities. All that is needed is the order from the Cabinet Secretary. If one wants to challenge it, they can do that from their country. The courts do not always agree with us, but we must maintain security.[224]

When asked to explain why the law is not followed to the letter, the official stated there is a way the department does its work following intelligence reports. This "way" of doing things outside the law was not explained. This shows a lack of transparency and predictability in the process. Without transparency, it is difficult to hold the officers concerned accountable. It exposes the process to abuse.

Legal experts who have defended foreigners, including ROE holders, facing deportation confirmed that the procedure is opaque right from declaring the person as a prohibited immigrant to making an order for deportation.[225]

> The process is completely opaque. Getting information on the grounds for the declaration is very difficult. The officials would rather terminate the process than give out the information.[226]

This explains the high number of court decisions quashing deportation orders on account of non-compliance with due process.

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[219] KCIA, s 43.
[220] *Ibid*.
[221] *Penal Code, Chapter 63 Laws of Kenya*, s 29.
[222] *Ibid*.
[223] KCIA, s 43.
[224] Interview held on 15 August 2022.
[225] Interview with Faith, Cate, Samantha, and Yona (13 August, 2022).
[226] Interview with Faith held on 13 August, 2022.

Kenyan courts have always nullified the decisions of public officers purportedly made on the ground of public security without following due process of the law. One wonders why the officers, especially those responsible for immigration affairs, keep repeating the mistake. They are so quick to declare people as "prohibited immigrants" and to deport them. They don't have regard for the impact of their decisions on those individuals' rights and those of their family members. They blatantly disregard their legal responsibility to ensure that their decisions are based on law and are fully compliant with constitutional demands.

A few examples of such cases will suffice to demonstrate the impunity of public officers in applying the limitation to non-nationals. The cumulative effect of the decisions is there cannot be deportation without following due process. In *Egal Mohamed Osman v Cabinet Secretary, Ministry of Interior and Co-ordination of National Government & 2 others,*[227] the petitioner was "subjected to routine checks to verify his entry documents, as is routinely done for persons who have a history of having been declared prohibited immigrants with enhanced scrutiny."[228] The High Court held the action was a violation of the petitioner's freedom of movement. The Court held that there cannot be deportation without due process.[229] The court described the respondent's conduct as "shameful of a democracy, callous to the extreme and insensitive."[230]

The social –economic situation of an individual declared as a prohibited immigrant must be considered before a decision to deport them is reached. This is with regard to their investments and family. In *Oumarou Moumouni Ali vs Director General Kenya Citizens and Foreign Nationals Management Services & 3 others,*[231] the petitioner had lived in Kenya for 10 years, was married with two children, and had a business in which he employed 100 people.[232] He was deported without being given a hearing.[233] The High Court held that deportation, without any formal process, written allegations, reasons, and failure to accord him a hearing and giving him time to appeal against the deportation order or challenge the same, was wrong.[234] The Court considered the petitioner had a family and investment and quashed the decision.[235]

Although the two decisions did not concern the ROE holders, they laid down important

[227] [2015] eKLR.
[228] *Ibid* para 13.
[229] *Ibid* para 42.
[230] *Ibid* para 43.
[231] [2020] eKLR.
[232] *Ibid* para 8.
[233] *Ibid* para 27.
[234] *Ibid* para 34.
[235] *Ibid*.

principles. First, routine security checks, without more, are a hindrance to freedom of movement. Second, family ties and investments, which are core elements of the ROE, must be considered before deporting a person. The point is that the greater the attachment to the economy the person and their family members are, the higher the protection.[236] Arguably, higher protection promotes the integration agenda. Also, with higher protection, PSs would benefit more by having higher numbers of investors coming in under the ROE.

In the instances where the due process has not been followed, the deportation ends up defeating the objective of due process and access to justice. For example, in *ex –parte C.O*,[237] the petitioner was deported during the pendency of court proceedings. Despite the court finding that holding two passports was not a threat to public security, it still dismissed the case. The judge argued that in light of the deportation, allowing the petition would not serve any useful purpose.[238] In the end, there was no justice for the petitioner.

There are instances where a person is charged in court for being in Kenya illegally and an application for their deportation is made to the Cabinet Secretary simultaneously. If the court is informed of such an application, it may remand that person for fourteen days or admit them to bail, pending the Cabinet Secretary's decision. It is the decision of the Cabinet Secretary on deportation that is given priority. There is no provision to the effect that a pending appeal serves as an automatic stay of a deportation order. One would have to make an application before the Court. This gap is what gives public officers the confidence to deport where the stay is not granted, negating the whole purpose of due process.

VII. SOME STEPS TOWARDS GETTING IT RIGHT

There is a need to start viewing the ROE and other rights and freedoms under the CMP as possible solutions to some economic needs, rather than as a security problem.[239] The mindset of Kenya's public officials must change from "over-securitisation" of immigration to a rights-based approach. ROE holders should not be treated as foreigners. To assist in changing the mind-set, capacity-building training for the public officers serving in the executing agencies, like the Department of Immigration, National Assembly, and security agencies, is necessary. This is in line with a proposal by the African

[236] Ristea, *supra* note 127, 730.
[237] *Ex –parte C.O*, *supra* note 141, para 38.
[238] *Ibid*.
[239] Maunganidze and Formica, *supra* note 18.

Development Bank (ADB) in the Eastern African Regional Integration Strategy Paper (2018-2022).[240] ADB recommended that there must be regular capacity-building training of officers serving in the executing agencies, in order to transform the region economically.[241] Enhancing the capacities and competencies of officers at the national level through training will help in navigating challenges affecting regional integration. [242] One of those challenges is incoherent national structures that lack supra-national scope, brought about by the concept of sovereignty of States.[243] KNCHR also recommended capacity enhancement training for duty bearers to use a human rights-based approach in handling immigrants who are subjected to the criminal justice system.[244] The area of focus should be on how to apply the limitation in the context of regional integration and the rights and freedoms under the CMP. Specific areas to train on include the scope of the ROE, its purpose, its limitations, and access to effective justice for the individuals involved.

To resolve the challenges posed by the failure to prescribe public security limitations in law, the KCI Act requires amendments to align the limitations with art 24 of the Constitution. It needs to "clearly" and "specifically" express the intention to limit the rights and freedoms under the CMP, which are the subject of public security limitation. The extent of the limitations must also be provided for, especially; the ROE, right of residence, and freedom of movement of persons. The extent of the limitations must take into account the context of the rights. Lessons can be taken from the Access to Information Act.[245] This will go a long way towards promoting transparency, accountability, predictability, and adherence to the rule of law.

Further, to assist the State in discharging its burden of proof in cases concerning national security, disclosure of information to the courts must be allowed without conditions. To this end, the security statutes must provide procedures for such disclosure. These statutes include NPSA, KDFA, and NISA.

To meet the requirements of reasonableness, justification, proportionality, and due process, some lessons from the European Union (EU) are relevant. The EU has developed principles that guide the application of the limitation to immigrants under the freedom of movement, residence, and

[240]Available at <file:///C:/Users/pc/Downloads/east_africa_regional_strategy_2018-2022.pdf> (accessed on 19 August, 2022).
[241] *Ibid* 39.
[242] W Masinde & C O Omolo "Key Factors for Capacity Development for Regional Integration in Africa" (2011) Center for European Integration Studies 1-10.
[243] *Ibid* 9.
[244] KNCHR, *supra* note 94, 37.
[245] See for example, s 6.

establishment. The principles are contained in Directive 2004/38/EC,[246] which is binding on member states. The Directive provides conditions and procedural guarantees for self-employed persons and their family members. [247] The Directive has provided clarity to the scope of the limitations, and removed divergent interpretations since the Treaty did not unpack the limitation.[248] The CMP, too, did not unpack the limitation. There is need to have legislation or directive doing that. The ECJ applies the principles set out in the Directive when testing the limitations, including their justification and reasonableness. This means it is possible to legislate the principles under the laws of the EAC or its PSs. The principles should address at least four basic issues.

First, public security should not be invoked to achieve economic ends in favour of PSs.[249] Economic considerations cannot justify limiting immigration on account that it reduces the well-being of nationals.[250] This is a particularly important principle that can be applied to the ROE, which is all about engaging in economic activities. The aim of public security limitation should not be to drive the right holder out of business, take over their business, or shield similar local businesses from competition.

Second, the limitation must comply with the principle of proportionality and should be based exclusively on the personal conduct of the individual concerned.[251] This eliminates blanket condemnation of ROE holders. It also protects the family members of the individual concerned because they also have a ROE or other rights like employment. They should not lose their right simply because the self-employed person under whom they benefit is a threat to public security. Further, the personal conduct of the individual concerned must represent a genuine, present, and sufficiently serious threat to public security.[252] Extrinsic matters that are not related to the case should not be considered. The assessment has to be on a case-by-case basis. The date of the action or omission is considered to determine whether the threat is present. Past conduct may also be considered in the context of repeat conduct constituting a threat. Without being speculative, it is not possible to predict whether one's conduct will be a threat in the future.

Third, there should be protection against expulsion where a case so merits. Experience from

[246] Directive 2004/38/EC of The European Parliament and of The Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (19 April 2004).
[247] *Ibid* art 15.
[248] Ristea, *supra* note 119, 725. See also, C Banard, *The Substantive Law of the EU. The Four Freedoms*, 6th edn (Oxford University Press, Oxford, 2007) 461.
[249] Directive 2004/38/EC, art 27(1).
[250] Carens, *supra* note 51, 262.
[251] Directive 2004/38/EC, art 27(2).
[252] *Ibid*.

other regional bodies can offer tips for the EAC. In the EU, for instance, there are factors to be considered before expulsion on the ground of public security. They include the length of stay in the territory, age, state of health, family, economic situation, and social and cultural integration.[253] The greater the degree of connection with the host PS, the greater the protection. Further, an individual who has resided in the territory for over ten years and minors, save when it is in their best interests,[254] can only be expelled on "imperative grounds of public security", as defined by national law. [255]

In the event of the expulsion of a right holder who has invested in the economy, their property and interests must be safeguarded by the state. This is a principle in the Common Market of Eastern and Southern Africa.[256] This principle safeguards against arbitrary expulsions hiding behind public security but resulting in the destruction of businesses.

Fourth, there should be no deportation before the determination of appeals against an order to that effect. A provision to stay deportation order pending determination of an appeal should be introduced under the KCIA. The courts should grant a stay immediately after a case is filed. A persuasive authority to this effect is by the Supreme Court of England in *R (on the application of Kiarie) & Another v Secretary of State for the Home Department*.[257] Kiarie, a Kenyan, was living in the United Kingdom since 1997 with his parents and siblings.[258] In 2014, he was convicted of drug-related offences, and an order for his deportation was made. The question was whether he could be deported before his appeal against the deportation was heard.[259] The judges unanimously held that deportation, before his appeal was heard, was a violation of the applicant's right to family and would render the appeal process ineffective.

The EAC Council of Ministers can also adopt these principles and issue a directive to PSs to harmonise their national laws accordingly. This will promote predictability and uniformity in the application of public security limitation.

VIII. CONCLUSION

Limiting a right on the ground of public security is acceptable so long as it is done within the confines

[253] *Ibid* art 28.
[254] See art 3 of the *Convention on the Rights of the Child* UNTS vol. 1577, p. 3.
[255] *Ibid*.
[256] *COMESA Protocol on the Free Movement of Persons, Labour, Services, Right of Establishment and Residence*, Article 6(3).
[257] (2017) UKSC 42.
[258] *Ibid* para 2.
[259] *Ibid* para 43.

of the law. Although the CMP does not unpack the public security limitation, the EACJ and Kenyan courts have done well in providing guiding principles that should be followed. The EACJ has affirmed the EAC treaty and CMP's definition of EAC nationals. They are not foreigners and PSs must respect this legal position during their interactions at whatever level.

The High Court of Kenya has made great strides in providing jurisprudence on the application of the limitation clause under Article 24 of the Constitution. The jurisprudence shows the public security limitation is being applied, but mostly in the wrong way. It also shows that despite the jurisprudence, the executing agencies, like the Department of Immigration, security agencies, and some courts are still not getting it right. They keep on failing to adhere to the courts' guidance in the execution of their duties. They fail to follow constitutional requirements regarding due process and fair administrative action.[260] They claim to have their "own" way of handling individuals suspected to be a threat to public security without regard to the law. This means that more needs to be done if the pitfalls are to be avoided. Training, sensitization, and legislation are some of the interventions that can be applied. It is the responsibility of the EAC Council of Ministers, the Summit, the PSs, the courts, and EAC nationals to ensure the work is done. They can draw from comparative law and practice from other regional economic communities.

Kenya's domestic security statutes have a common approach that is protectionist in nature in so far as the handling of information touching on national security is concerned. The statutes provide that information touching on national security is 'classified.' They prohibit unauthorised disclosure of classified information. But they do not provide procedures for 'authorised' disclosure. This means that getting any information from them is not easy. The difficulty only favours the holders of the information. That explains why cases are withdrawn when information is demanded because there is no willingness to disclose the same. The statutes are used as excuses. However, the burden of proof never shifts despite the excuses.

Further, the focus of these statutes is on national security, rather than public security. This is a narrow conception in the context of regional integration. The narrow conceptualisation results in the treatment of ROE holders as foreigners. This is where getting it wrong began. The conceptualisation of public security is much broader under the CMP. It looks beyond the national arenas of the PSs and their nationals. It goes further to take into account the regional and collective interests of PSs and their nationals. As a result, more options for handling individuals suspected of being threats to public

[260] *Constitution of Kenya*, art 47. See also, *Fair Administrative Action* (Act No. 4 of 2015).

security need to be explored. Some of them could be facilitating compliance with national law requirements about documentation, watch-listing, and rehabilitation and deterrence through national criminal justice systems. This is in addition to deportation, which should be a measure of last resort.

Kenya's National Assembly needs to amend the KCIA, KDFA, NISA, and NPSA to align them with art 24 of the Constitution and provide for substantive and procedural safeguards to ensure the protection of ROE holders that are the subject of the limitation. Ultimately, there will be need for specific legislation that covers public security limitations in the context of rights under the CMP. This will guide the executing agencies in ensuring that they balance the rights with the need to protect security. If it is not done, then chances of getting it right are drastically reduced. The integration agenda will also be at risk.

It is important to consider ROE holders as key contributors to the socio-economic development of the country. Over securitisation of their presence in the country hinders their ability to contribute effectively. Furthermore, the consequences may spill over to the region resulting in retaliation, frictions, and diplomatic tensions. The result is the failure of the integration agenda. Therefore, getting it right is mandatory if Kenya still intends to benefit from ROE holders in terms of socio-economic development. Failure to accord EAC nationals their ROE entitlements can have serious consequences on the lives and livelihoods of these individuals as well as on the integration agenda.