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*What law/decision influenced the Bangladesh project and is now often used by paralegals?*

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The Bangladesh project was informed by the 2008 High Court ruling in the case:

***Md. Sadaqat Khan (Fakku) and 10 others...Petitioners  
-Versus-  
The Chief Election Commissioner, Bangladesh Election***

Below is an extract of the 10-page decision:

“.....In view of above provisions of the Act and President Order No. 149 of 1972, every person who or whose father or grandfather was born in the territories now comprised in Bangladesh and who was a permanent resident of such territories on the 25 day of March, 1971 and continues to be so resident unless disqualified under Article 2 B of PO No. 149 of 1972 shall be citizen of Bangladesh. In the acquisition of such citizenship, the laws have made no discrimination in any way on the ground of ethnicity, language, sex etc. Members of the Urdu-speaking people wherever they live in Bangladesh if they answer the above qualifications shall become citizen of Bangladesh and in view of the above provisions have already acquired the citizenship of Bangladesh by operation of law and no intervention of the Government is necessary. Such people have accordingly become eligible with the attainment of majority for enlistment as voters under Article 122(2) of the Constitution and the Election Commission is under constitutional obligation to enroll them in the electoral rolls as voters. No functionary of the Republic can deny such rights of the Urdu-speaking people who want to be enrolled as voters.

On the disqualification under Article 2 B of PO No. 149 of 1972, this division had an occasion to deliberate in the case of Mukhtar Ahmed v Bangladesh. By a memorandum dated 05-10-97 the Ministry of Home Affairs informed the petitioner that he was not qualified to be a citizen of Bangladesh because he had registered his name from ICRC form for going over to Pakistan. Considering the above laws, this Division made the Rule absolute declaring the Notification issued without any lawful authority and was of no legal effect on the view inter alia that, “Be that as it may, there is nothing on record to show that the petitioner who is a citizen of Bangladesh has incurred any disqualification to be penalized by deprivation of his citizenship. We are, therefore, of the opinion that after emergence of Bangladesh the petitioner became a citizen of Bangladesh by the operation of law and continues to be a citizen of this country.”

Those who are termed and still call them to be “Stranded Pakistanis” by owing affirming and acknowledging, expressly or by conduct allegiance to a foreign state, say, Pakistan, they may belong to a class and cease to be citizens of Bangladesh. Those who have renounced their citizenship and / or waiting to leave for Pakistan may be left to their fate. The Election Commission is under no obligation to enlist them as voters. Question of citizenship of Urdu-speaking has got another aspect, which is very important from the constitutional perspective. Miseries and sufferings of such people due to statelessness were time to time reported in the national media, electronic and print. Besides, the reasons mentioned in the letter of the Election Commission, they are constantly denied the constitutional rights to job, education, accommodation, health and a decent life like other citizens of the country. By keeping the question of citizenship unresolved on wrong assumption over the decades, this nation has not gained anything rather was deprived of the contribution they could have made in the nation building. The sooner the Urdu-speaking people are brought to the mainstream of the nation is the better.

Now, with regard to the issue of maintainability of the writ petition without exhausting statutory provisions of enrollment, it would be sufficient to say when the question of citizenship of Urdu-speaking people is left unattended for decades on the constitutional ground that could not be got resolved by individual application. The Chief Election Commissioner having found difficulties in the enrollment of such people wrote to the Chief Advisor for policy direction and till date the Chief Advisor could not find time to give any policy guidance. This question of citizenship could never be decided in statutory forum/. it is well settled that constitutional question can only be decided in properly constituted writ petition under Article 102 of the Constitution. Mr. Rafiqul Islam Miah also prayed for direction upon the Election Commission for registration of the Urdu-speaking people en block. The petitioners do not appear to represent all such people. Secondly, in the absence of any law, no citizen can be forced to register as a voter and the Election Commission also can not register every citizen against his / her will. Till now, option lies under the law with a citizen to enroll as a voter.

For the reasons aforesaid, we find the petitioners are citizen of Bangladesh and accordingly, eligible and entitled to be enrolled as a voter in the electoral roll. In the result, the Rule is made absolute without however any order as to cost. The Election Commission is directed to enroll the petitioners and other Urdu-speaking people who want to be enrolled in the electoral rolls and accordingly, give them National Identity Card without any further delay. Let a copy of this order be sent to the Election Commission at once for guidance and necessary action.”

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## *What key regional decision informed the Kenya project?*

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One goal of the Kenya Citizenship Project was to follow-up and monitor implementation of the 2011 *Nubian Minors'* decision by the African Committee of Experts on the Rights and Welfare of the Child and below is an extract of the 16-page decision.

The Committee found Kenya's actions violated the Charter's provisions protecting children's right to nationality, observing that statelessness is the antithesis of the best interests of the child. The Committee also found Kenya's vetting system unlawfully discriminates against Nubian children in violation of Article 3, leaving them stateless or at risk of statelessness with no legitimate hope of gaining recognition of their citizenship. As a result, Nubian children lack access to adequate healthcare and education, in violation of Kenya's obligations to provide the highest attainable standard of health and education to all children (Articles 14(2)(a)-(c), (g) and Article 11(3), respectively).

The Committee issued five detailed recommendations including legislative and administrative reforms, an obligation to consult with affected communities in developing implementation strategies and the requirement that Kenya implement a non-discriminatory birth registration system. It also established implementation monitoring mechanisms, including an obligation that Kenya report back on implementation within six months and a dedicated Committee member to monitor implementation.

Extract from the Nubian minors' ruling:

*“69. For the reasons given above, the African Committee finds multiple violations of Articles 6(2), (3) and (4); Article 3; Article 14(2) (b), (c) and (g); and Article 11(3) of the African Children's Charter by the Government of Kenya, and:*

*1. Recommends that the Government of Kenya should take all necessary legislative, administrative, and other measures in order to ensure that children of Nubian descent in Kenya, that are otherwise stateless, can acquire a Kenyan nationality and the proof of such a nationality at birth.*

*2. Recommends that the Government of Kenya should take measures to ensure that existing children of Nubian descent whose Kenyan nationality is not recognised are systematically afforded the benefit of these new measures as a matter of priority.*

*3. Recommends that the Government of Kenya should implement its birth registration system in a non-discriminatory manner, and take all necessary legislative, administrative, and other measures to ensure that children of Nubian*

*descent are registered immediately after birth.*

*4. Recommends that the Government of Kenya to adopt a short term, medium term and long term plan, including legislative, administrative, and other measures to ensure the fulfilment of the right to the highest attainable standard of health and of the right to education, preferably in consultation with the affected beneficiary communities.*

*5. Recommends to the Government of Kenya to report on the implementation of these recommendations within six months from the date of notification of this decision. In accordance with its Rules of Procedure, the Committee will appoint one of its members to follow up on the implementation of this decision.*

*Done in Addis Ababa, Ethiopia,*

*22 March 2011”*

The decision came at a time that Kenya had just enacted the 2010 constitution and it was a very promising time since the constitution was seen as a progressive law that would solve all discrimination in the country.

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## *How is the data used?*

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In 2014 Namati, NRF and OSJI submitted the following briefing to the ACERWC on the Kenyan government's progress in implementing the Nubian minors' decision.

# Briefing Paper: Implementation of *Nubian Minors v. Kenya*

FEBRUARY 2014

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The Open Society Justice Initiative, the Open Society Initiative for East Africa, Namati, and the Nubian Rights Forum submit this briefing paper to assist the African Committee of Experts on the Rights and Welfare of the Child in its efforts to ensure the implementation of the case of *Nubian Minors v. Kenya*. In that March 22, 2011 decision, the Committee found Kenya in violation of the African Children's Rights Charter in the discriminatory rules and practices applied to Nubian children in the recognition of Kenyan nationality. Three years later, Nubians continue to suffer this discrimination. Nubian children still must provide excessive documentation in support of birth certificate and identity card applications, and Nubians continue to undergo vetting in order to obtain identity cards. This briefing draws on data generated from a community-based paralegal assistance program, which identifies precisely how the government of Kenya continues to fall short in recognizing Kenyan nationality for Nubian children on a non-discriminatory basis.

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## I. Background

In *Nubian Minors v. Kenya*, the African Committee of Experts on the Rights and Welfare of the Child concluded that Kenya had violated the rights of Kenyan Nubian children by denying them access to a nationality at the time of birth and subjecting them, upon reaching majority, to a complicated, racially discriminatory vetting process that overshadows their childhood in the form of social and material exclusion.

The Committee recommended, in pertinent part, that Kenya should:

*Take all necessary legislative, administrative, and other measures in order to ensure that children of Nubian descent in Kenya, that are otherwise stateless, can acquire a Kenyan nationality and the proof of such a nationality at birth;*

*Take measures to ensure that existing children of Nubian descent whose Kenyan nationality is not recognized are systematically afforded the benefit of these new measures as a matter of priority; and*

*Implement its birth registration system in a non-discriminatory manner, and take all necessary legislative, administrative, and other measures to ensure that children of Nubian descent are registered immediately after birth (para. 69).*

In February 2013, the Kenyan Nubian Rights Forum (NRF), with support from Open Society Justice Initiative, Open Society Institute for East Africa, and Namati, began operating a paralegal assistance program designed to work with clients in Kibera – both Nubians and members of other ethnic groups – in applying for critical documentation of their existence and legal identity: birth certificates, national identity cards, death certificates and passports. The paralegals' case records track the application process for each form of documentation and are therefore a vital source of information on implementation of the *Nubian Minors* decision and access to proof of nationality in Kenya, for all Kenyans.

After one year of operation, over 900 clients have come to the NRF office for assistance. The information gathered from these case records is the basis for the analysis and recommendations provided in this briefing. The records objectively illustrate that Nubians continue to suffer discrimination in access to proof of their Kenyan nationality.

## II. Recommendations

The Committee should:

- Urge the Kenyan government to push for adoption of a National Registration and Identification Act that reflects the letter and spirit of the *Nubian Minors* decision.

- Press the Kenyan government to provide for only limited and guided discretion in the issuance of identity documentation, and to clearly establish a mechanism by which children’s nationality is determined at birth.

The Government should:

- Make independent efforts to revise and adopt a National Registration and Identification Bill that will address the Committee’s recommendations.
- Ensure that all relevant stakeholders are meaningfully consulted in the process of developing the legislation and any implementing regulations.
- Regularly submit and publicize comprehensive reports to the Committee on its efforts to implement the *Nubian Minors* decision.

### III. Birth Registration: Nubians Still Face Discrimination and the Risk of Statelessness

The Committee’s decision emphasized the “strong and direct link” between birth registration and children’s right to nationality, as reflected by the fact that both important rights are contained in Article 6 of the Charter (para. 42). The decision clarified that under Article 6, children should have a nationality when they are born, and that the combination of inadequate birth registration and discriminatory vetting of Nubians in Kenya “is neither in line with the spirit and purpose of Article 6, nor promotes the children’s best interests, and therefore constitutes a violation of the African Children’s Charter” (*ibid.*).

Three years after the Committee’s decision, the data gathered in Kibera shows that Nubians still face overtly discriminatory hurdles in obtaining birth certificates. Registration officers retain blanket discretion to request documentary proof before issuing identity documents including birth certificates, and Nubians are disproportionately required to provide additional documentation in support of applications. Requests for additional documents trigger multiple trips to different government buildings, additional travel costs and fees, and a prolonged and intimidating process. As the Committee’s decision powerfully stated in finding consequential violations arising from the discriminatory denial of nationality (para. 58), these discriminatory requirements impede or restrict Nubians’ access to social and economic opportunities, especially, in the case of NRF clients, in access to education.

#### A. Burdensome document requests for Nubians

Community demand for assistance in obtaining birth certificates in Kibera is high among the project’s client base. Over one-half of the 934 cases handled by NRF paralegals between February 2013 and February 2014 were birth certificate applicants.

In Kenya, all birth certificate applications made after the child is three months old are classified as late applications. The great majority (91%) of all cases, Nubian and non-Nubian, were late applications.

No publicly available guidelines exist as to when an officer may request additional documentation and what specific information they may require applicants to furnish. A close look at the document requests that the Kenyan government made to applicants in cases of late birth registration reveals the disparity in treatment experienced by Nubians – as well as the discretion that registration officers routinely exercise in making such requests.

The table below displays categories of document requests disaggregated for ethnic background (Nubian or non-Nubian).

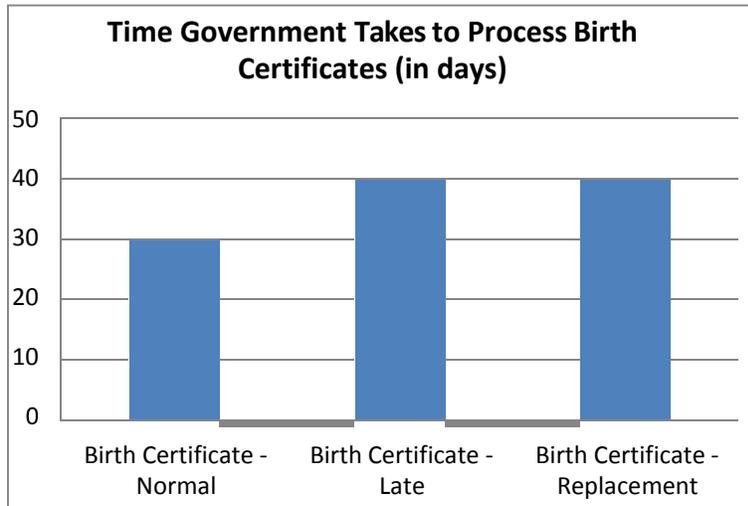
| Documents Requested for Late Birth Certificate | Nubian Clients (119) | Documents Requested for Late Birth Certificate | Non-Nubian Clients (30) |
|--|----------------------|--|-------------------------|
| Mother's ID Card                               | 83%                  | Mother's ID Card                               | 90%                     |
| Father's ID Card                               | 79%                  | Father's ID Card                               | 90%                     |
| Mother's ID Card (Photocopy)                   | 63%                  | Birth Notification from Hospital               | 73%                     |
| Father's ID Card (Photocopy)                   | 61%                  | Mother's ID Card (Photocopy)                   | 60%                     |
| Birth Notification from Hospital               | 55%                  | Father's ID Card (Photocopy)                   | 60%                     |
| ID Card (Client)                               | 25%                  | Child's Clinic Card                            | 20%                     |
| <i>Print-out of Own/Parent ID Card</i>         | 23%                  | Antenatal Clinic Card                          | 20%                     |
| School Leaving Certificate                     | 22%                  | Birth Notification from Chief                  | 13%                     |
| Other Document                                 | 20%                  | Other Document                                 | 13%                     |
| Child's Clinic Card                            | 18%                  | ID Card (Client)                               | 7%                      |
| Antenatal Clinic Card                          | 14%                  | School Leaving Certificate                     | 7%                      |
| Photocopy of ID Card (Client)                  | 13%                  | <i>Print-out of Own/Parent ID Card</i>         | 3%                      |
| Birth Notification from Chief                  | 10%                  | Parent Death Certificate                       | 3%                      |
| Parent Birth Certificate                       | 6%                   |  |                         |
| Parent Death Certificate                       | 4%                   |  |                         |
| Letter From Chief/Assistant Chief              | 3%                   |  |                         |
| Religious Certificate                          | 3%                   |  |                         |
| School Result Slips                            | 2%                   |  |                         |
| Letter From Head Teacher                       | 1%                   |  |                         |

The table illustrates the volume of additional documentation that may be required of Nubians, as well as the scope of discretion that civil registration officers have in the processing of birth certificate applications in general.<sup>1</sup> The data also suggest that discretion is leading to differential treatment based on the ethnicity of applicants. None of the non-Nubian clients was required to provide religious certificates, a parent's birth certificate, or letters from a teacher or their district chief, simply in order to obtain a birth certificate. Nubians were also required to provide an official print-out of their own or a parent's identity card over seven times as often as non-Nubian applicants (italicized text). This step entails an additional cost of approximately 300 KES, or around \$ 3.50, an additional trip to the relevant government office to obtain the printout, and further delays in processing the applicant's document. The additional cost in terms of time and money may be prohibitive for an individual already living in extreme poverty, as many Nubians in Kibera do.

<sup>1</sup> More common forms of identification, such as parents' identity cards or photocopies of them, are routinely requested of all applicants. Where such documentation was not listed as requested, it is most likely because the individual clients lacked it at the time of application. The non-Nubian sample size is too small to draw firm conclusions about the frequency of specific document requests where the percentages are high in both columns.

## B. Prolonged process

Kenyan civil registration authorities are also failing to meet even their own targets for issuing birth certificates, irrespective of the applicant's ethnic background.<sup>2</sup> The civil registration office



responsible for the Kangema district in Nairobi, for example, sets timelines for the processing of civil documentation including birth certificates. Birth certificates should be processed within a single day according to this document. In reality, the average time for processing late birth applications among NRF clients was 41 days, which is also the overall average processing period (including cases of late applications, timely applications and replacement applications). Even timely applications averaged 30 days between the initial submission and receipt of the birth certificate. The length of the process in general does not only affect Nubians, but may compound the impact of other barriers to access that do apply to them on a discriminatory basis.

## C. Interference with the right to education (Article 11(3))

Thirty-five of the late birth certificate cases in the NRF database that have been handled and closed by the paralegals were Nubian primary school pupils wishing to enroll for the Kenya Certificate of Primary Education (KCPE) exams, all of whom were sent away by their schools for lack of birth certificates.

Some students reported that the schools were assisting non-Nubian pupils who needed birth certificates and allowed them to attend classes in the meantime. These allegations are not based on data systematically captured by the paralegals as part of the assistance they provide, but they are nevertheless alarming and provide further anecdotal evidence of differential treatment of Nubian and non-Nubian children. Kenyan authorities should ensure that schools are not engaging in practices that compound and reinforce the exclusion of Nubian children from access to education.

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<sup>2</sup> Late applications from Nubians took an average of approximately 10 days longer to process than those of non-Nubians (there were no timely applications from non-Nubians). However, the paralegals have only handled and closed 13 late applicants from non-Nubians, meaning that the comparison data is too limited at present for the difference to be considered significant.

## IV. Vetting Based on Ethnicity Continues

The Committee called “vetting” – the practice of requiring Nubians and other specific ethnic and religious minorities to appear before specially constituted committees which determine their eligibility for citizenship – a “seemingly routine practice” in Kenya (para. 42). The data gathered by NRF over the course of the year reveals that the practice of vetting Nubians *is* routine. Vetting of Nubians is systematic in Kibera and has continued in spite of the Committee’s finding that the practice violates Nubian children’s right to nationality and “is an affront to their dignity and best interests” (para. 57).

### A. All timely Nubian applicants subjected to vetting

All Kenyans must apply for national identity cards by the age of 18 years, nine months. Kenyans who apply outside this timeframe are considered late and will have to go through some form of additional scrutiny. Isolating only those cases that were submitted on time, however, the data show that 100% of the Nubian applicants were forced to appear before a vetting committee prior to submitting their application to the local registrar. This means that even where a Nubian applicant is within the required timeframe, he or she is certain to be subjected to additional scrutiny.<sup>3</sup>

Over half of the cases handled by NRF paralegals this year – 58% – were late applications. This may be partially explained by the fact that until the vetting committee signs off on a Nubian’s application, it cannot be officially “submitted” for the purposes of consideration by the Registrar of Persons. The entire vetting system operates outside of the ordinary application process – it is a creature of discretion, just as it was at the time of the *Nubian Minors* decision three years ago.

The table below shows the average processing time for each step in the identity card application process for Nubians who have received their cards, a total of 35 cases.<sup>4</sup>

|  | Normal Applications (at 18) | Late Applications (over 18) | Overall Average Time (Combined Case Types) |
|--|-----------------------------|-----------------------------|--|
| Time between 1 <sup>st</sup> visit to a government office and vetting                        | 8 days                      | 6 days                      | 6 days                                     |
| Time between vetting and application submission  | 13 days                     | 11 days                     | 11 days                                    |
| Time between application submission and issuance of identity card                            | 64 days                     | 79 days                     | 77 days                                    |
| Time between issuance and receipt by client  | 20 days                     | 11 days                     | 12 days                                    |
| <b>Totals: Vetting adds at least 17 days even with the assistance of a trained paralegal</b> |                             |                             |  |
| Total time between 1 <sup>st</sup> visit to a government office and application              | 21 days                     | 17 days                     | 17 days                                    |
| Total time between application and receipt of identity card                                  | 84 days                     | 90 days                     | 89 days                                    |

<sup>3</sup> The NRF paralegals have handled only three timely identity card applications on behalf of non-Nubian clients, none of whom appeared before a vetting committee, although the comparative figure may not be statistically significant.

<sup>4</sup> These are cases for which the applicant both received an identity card and the paralegals have recorded a date for each step in the application process. Cases for which certain dates could not be verified were excluded from the analysis.

The information gathered through NRF’s paralegal assistance program demonstrates that – even with specialized assistance – Nubian applicants experience significant delays in obtaining identity cards to which they are entitled as citizens of Kenya. For a normal application, the average delay is three additional weeks (between the date of first visit and the time of application).

## B. Additional document requests

When Nubians appear before vetting committees, they are also asked to present documentary proof in support of their application. There are no statutory or regulatory limitations on the volume or type of documentation that may be requested, nor are there any guidelines on the kinds of questions that the committee members may ask during the vetting appointment. Vetting committee proceedings are closed to the public, and paralegals are unable to accompany their clients when they appear before the committee.

The two charts below display how often Nubian clients have been asked to provide certain kinds of documentary proof in support of their applications for identity cards. The first chart contains data for late applications; the second contains data for timely applications. Regardless of the timeliness of the application, the documents requested are similar, in terms of both type and frequency of the documents requested.

| Documents Requested for Late ID Card Application | Nubian Clients (Total: 54) |
|--|----------------------------|
| Mother’s ID Card                                 | 70%                        |
| Mother’s ID Card (Photocopy)                     | 67%                        |
| School Leaving Certificate                       | 63%                        |
| Father’s ID Card                                 | 57%                        |
| Birth Certificate (Client)                       | 52%                        |
| Father’s ID Card (Photocopy)                     | 52%                        |
| School Result Slips                              | 31%                        |
| Religious Certificate                            | 24%                        |
| Grandparent ID Card                              | 22%                        |
| Sworn Affidavit                                  | 11%                        |
| Other Document                                   | 11%                        |
| Grandparent Death Certificate                    | 4%                         |
| Father’s Birth Certificate                       | 2%                         |
| Mother’s Birth Certificate                       | 2%                         |

| Documents Requested for On-time ID Card Application | Nubian Clients (Total: 11) |
|---|----------------------------|
| Birth Certificate (Client)                          | 82%                        |
| Father’s ID Card                                    | 82%                        |
| Mother’s ID Card                                    | 82%                        |
| Father’s ID Card (Photocopy)                        | 64%                        |
| Mother’s ID Card (Photocopy)                        | 64%                        |
| School Leaving Certificate                          | 55%                        |
| School Result Slips                                 | 45%                        |
| Grandparent ID Card                                 | 18%                        |
| Other Document                                      | 18%                        |
| Religious Certificate                               | 18%                        |
| Sworn Affidavit                                     | 18%                        |
| Father’s Birth Certificate                          | 9%                         |
| Mother’s Birth Certificate                          | 9%                         |
| Grandparent Death Certificate                       | 9%                         |

## V. Conclusion

As the Committee emphasized in the *Nubian Minors* decision, the vetting process itself is an affront to dignity and a violation of the African Children's Rights Charter. The burden is placed overwhelmingly on Nubian applicants to prove they are as entitled as their fellow citizens to documentary proof of their existence.

In implementing the Committee's decision, Kenya must confront the total incompatibility of vetting based on race with the Charter. Any measures taken must address the unbridled discretion currently exercised by registration authorities in processing vital identity documents.