Denton

v.

The Director-General, National Intelligence Agency and Others

Ajaratou Mariam Denton v The Director-General National Intelligence Agency, Inspector-General of Police, The Chief of Defence Staff Gambia Armed Forces, The Director-General of Prisons and the Attorney-General

High Court of the Gambia

HC241/06/MF/087/F1

24 July 2006

Judge: Monageng

[**1.**] The applicant, Mrs Ajaratou Mariam Denton, filed an originating summons dated 10 July 2006, seeking the following reliefs:

> 1. A declaration that her arrest by the 1st, 2nd, 3rd and 5th respondents or by their subordinates and/or agents on Thursday 6 April 2006 at the applicant's residence at Churchill's Town in Kombo Saint Mary Division of the Gambia is unlawful, in that it is inconsistent and/or in contravention of section 19 of the Constitution of the Gambia 1997.
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> 2. A declaration that her detention by the respondents, their subordinates and/or agents since Thursday 6 April 2006 is unlawful and unconstitutional, in that the said detention is inconsistent with, and/or in contravention of section 19 of the 1997 Constitution of the Republic of the Gambia, and article 6 of the African Charter on Human and Peoples' Rights (ACHPR) and article 9 of the International [Covenant] on Civil and Political Rights (ICCPR).
>
> 3. An order for the unconditional release of the applicant or her release on such terms as the Court may deem fit.

[**2.**] The application is brought pursuant to sections 5, 19 and 37 of the 1997 Constitution of the Gambia, article 6 of the African Charter on Human and Peoples' Rights (ACHPR) and article 9 of the International [Covenant] on Civil and Political Rights (ICCPR).

[**3.**] In support of the summons, the applicant filed a 24 paragraph affidavit sworn to by her brother of full blood, one Demba Alieu Jack.

[**4.**] The state filed a notice of preliminary objection dated 17 July 2006, which was heard by this Court, and I ruled against the state and maintained the *status quo*. In that hearing, the question of interpretation of sections 6 and 17 of the Gambian Constitution 1997 *vis a vis*section 19 of the said Constitution was raised, and I ruled that interpretation, and consequently referral of this matter to the Supreme Court does not arise. Having disposed of the preliminary objection, the proceedings matured to the main application.

[**5.**] The facts as presented by the applicant appear in the affidavit in support of the originating summons, and I will deal with these in detail later on in my judgment, since some of the averments raise very fundamental issues. At paragraph 16 of the affidavit in support, the applicant's brother deposes that he does not believe that the applicant has committed any criminal offence. The applicant avers that this has not been refuted by the state, hence she submits that her arrest and detention are unlawful and unconstitutional. She relies further on section 19(3) of the Constitution and avers that had she committed a criminal offence under the laws of the Gambia, she would have been brought before a Court, without undue delay, in any event, within seventy two hours from the time of arrest.

[**6.**] There was a submission that these words of the Constitution are absolutely clear and that a detention of 103 days, as of the date of the hearing, cannot be justified under section 19(3) of the Constitution. Further, my attention was drawn to the fact that, on the facts as presented by the state, there is no reasonable suspicion of her having committed an offence or about to, and that even if there had been, her continuous detention runs foul of the Constitution.

[**7.**] My attention was brought to exhibit MD 2, where on 28 April 2006, this Court was informed that investigations in the matter of the attempted *coup* had not been concluded. The applicant informs this Court that a group of people has since been charged in relation to those investigations, and that there can never be any justification for her continued detention, which, contrary to what the state submits, does not comply with the relevant provisions of the Constitution. She further submits that the onus lies on the state to justify her continued detention.

[**8.**] In this regard, she relies on the case of *Ajayi v Attorney-General of the Federation* 1998 *Human Rights Law Reports of Africa*, 373 at 377 where the Court held, 'once an applicant proves facts which *prima facie* show that his constitutional right has been infringed, the onus then devolves on the respondent to justify the infringement. It is not the duty of the appellant to exclude all circumstances of justification'.The applicant's counsel contends that the state has failed to bring itself within any law that will justify the applicant's continued detention. The applicant also drew my attention to the case of *Abiola v Abacha* 1998 (1) *Human Rights Law Reports of Africa*, where this position was restated when the Court held that: 'The burden of proving the legality or constitutionality of the arrest and/or detention of a person is on the arresting authority. Therefore it is the respondents' duty to justify the arrest of the applicant. The respondents having admitted the arrest and detention of the applicant, the onus is on them to prove that such arrest or detention was lawful'. Counsel for the applicant further submits that 'the Court is always prepared and will be quick to give relief against any improper use of power or any abuse of power by a member of the executive, the police or any person, which results in an unlawful detention of a citizen' *Abiola v Abacha* 453.

[**9.**] A further submission was made to the effect that the applicant has consented to giving evidence on behalf of the state, in the ongoing criminal case against *Captain Bunja Darboe and others*, Criminal Case number HC/208/06/Cr/37/A, hence she is listed as witness number 13.

[**10.**] In response to the above submissions, learned counsel representing the state raised the following as issues for determination:

1. Whether the arrest of the applicant is indeed unlawful or unconstitutional.

2. Whether the detention of the applicant is indeed unlawful or unconstitutional.

3. Whether this Court can, in law, grant the declarations sought, and if this Court can, whether it can do so at this stage of the proceedings.

[**11.**] The state introduced sections 6(1) (a) and (b) of the Constitution and said that they are in agreement with paragraphs 2, 3, and 4 of the affidavit in opposition. I was also referred to sections 23, 26, 35 (1) (a) and section 36 of the Criminal Code Cap 10 Laws of the Gambia, which sections deal with parties to an offence. I was referred to section 4 of the Police Act and to this extent, learned state counsel said that the police had a duty to investigate, arrest and where necessary, detain. The National Intelligence Agency Decree of 1995 and the Armed Forces Act were also invoked in terms of the powers of the agency and the force to investigate, arrest and where necessary to detain.

[**12.**] These were referred to in an effort to justify the arrest and detention of the accused. The state further submitted that the knowledge contained in the annexure to the originating summons, brings the applicant under the provisions of section 6 of the Constitution and sections 23, 26, 35, (1) (a) and 36 of the Criminal Code, and therefore that the arrest of the applicant cannot be said to be unlawful or unconstitutional. It was further submitted that these authorities have the power to grant conditional or unconditional bail, and that the law of the Gambia gives discretion to these authorities in this regard.

[**13.**] The state further revisited the issue of interpretation and referral of this matter to the Supreme Court, for that Court to make a comprehensive interpretation of sections 6 and 17 of the Constitution of the Gambia *vis a vis* sections 19(3), (4) and 5 of the Constitution.

[**14.**] It was further submitted that it would be premature for this Court to make a determination of this matter before the Supreme Court makes its comprehensive views known. Learned counsel also submitted that the case of *Ajayi v Attorney-General supra* is not relevant to these proceedings. The state also submitted that reference to the African Charter on Human and Peoples' Rights is misplaced, since the Gambia has not domesticated the Charter, unlike the Republic of Nigeria, where the Charter has been domesticated and is therefore applicable. There was a further submission by the state that the Charter does not provide for unlimited liberties or derogations from constitutions of sovereign states. In reaction to reliance by the applicant on article 19 of the International Covenant on Civil and Political Rights (ICCPR), learned counsel said that the laws and procedures of the Gambia adequately cover arrest and detention of the applicant, and therefore that the ICCPR is irrelevant. The state referred me to the case of *Hon Halifa Sallah and 3 others v Clerk of the National Assembly & others* case 1/2005 – 7 July 2005, where the Court referred the case to the Supreme Court for interpretation, even though the subject matter was whether or not the seat of the applicant had not become vacant. On the issue that certain paragraphs of the affidavit in support of the originating summons had not been disputed by the state, learned counsel said these were mitigatory in nature and the Court should not take them into consideration. The fact that the applicant is listed as a witness, the state submits, is the discretion of the 1st, 2nd, and 5th respondents, in view of paragraphs 2, 3, 4, and 6 of the affidavit in opposition. It was the state's further submission that the fact that the applicant has been listed as a witness is not proof that investigations are complete or otherwise.

[**15.**] Section 99 of the Criminal Procedure Code as amended was referred to in the context of section 19(4) and (5) of the Constitution, and that this Court will be guided by section 99 of the Criminal Procedure Code, should the discretion of the respondents be affected.

[**16.**] Section 17(2) of the Constitution was raised with relevance to public interest and the fact that the Constitution embodies what the Gambian public needs, and that there is therefore no need to go outside the Constitution. Similarly, section 17(1) of the State Proceedings Act, the Laws of the Gambia was referred to, and in this context, I was reminded that the Court shall not grant injunctions and orders capable of being specifically enforced, but can only make orders regarding the rights of the parties in proceedings for declarations. Finally, the state moved for a referral of this matter to the Supreme Court for interpretation.

[**17.**] By way of reply to the state, the applicant's counsel submitted that the Armed Forces Act has no relevance to the present case, regard being had to section 34 of the Act, which stipulates persons to whom the Act is applicable. Further that the National Intelligence Agency Decree 1995 bears no justification for the circumstances of this case, and that in fact the Decree is subject to the Constitution, and that these Acts, together with the Police Act, cannot be used to whittle down entrenched provisions of the Constitution ie section 19. Further, that section 99 of the Criminal Procedure Code has no application since the applicant has not been charged and brought before any Court. Learned counsel further submitted that the relevance of the *Sabally* case *supra*, reinforces the fact that principles laid down by the African Commission are pertinent and relevant to cases at national level. She also referred the Court to its powers under the Constitution to grant the reliefs sought.

[**18.**] From the onset, I wish to refer to the case of *Caso Loayza Tamago* v *Peru*, 3 June 1999, Inter America Court series (c) 53 (1999). In this case, Peru had refused to implement the decision of the Inter-American Court, and the Court observed that article 27 of the Vienna Convention on the Law of Treaties of 1969, prohibits parties from invoking internal law to justify non-compliance with treaty obligations.

[**19.**] I am bringing this up to address the respondent's contention that since the Gambia has not domesticated the African Charter, as was the case in Nigeria in the case of *Abiola v Abacha* 1998 1 HRLRA, then the applicant cannot rely on the Charter. It is a fact that once a country signs a treaty, it should, strictly speaking, put into effect measures to domesticate it immediately on ratification. But there is no time limit to this; some countries do it faster than others. Others ultimately ratify the instrument before putting the domestication measures into effect. But the fact that a country has not domesticated an international instrument, but has ratified it only, does not exonerate it from its obligations under that instrument.

[**20.**] This has been demonstrated fully with particular reference to the African Charter on Human and Peoples' Rights, and in particular by the government of the Gambia, which has rightly subjected itself to the jurisdiction of the African Commission on Human and Peoples' Rights in many instances, where the Commission has ruled, for and against the Gambia, for instance in communications 131/94 *Manjang v The Gambia* [(2000) AHRLR 101 (ACHPR 1994)] and 86/93 *Ceesay v The Gambia* [(2000) AHRLR 101 (ACHPR 1995)], when government representatives acquitted themselves very ably in defence of the government, in matters brought to the Commission against the Gambia. This position is also amplified in the case of *Sabally v IGP* 1997-2001 878. If I am to agree that non domestication of the treaties by the Gambia exonerates the government from its responsibilities under the Charter and the ICCPR, then I would seek to defeat the whole purpose of ratification, and what it means to the Gambian government and her people. I should observe that the Commission is the

implementing institution of the Charter, and that the Commission is charged with protection of human and peoples' rights in Africa.

[**21.**] I would now wish to address the issue of referral under section 127 of the Constitution of the Gambia 1997. A spirited submission was made on behalf of the state, to the effect that this Court presently has no jurisdiction to hear this application, since there are issues that need interpretation, which is the preserve of the Supreme Court of the Gambia. This, the state argues, results from the state's counter argument, which has introduced sections 6 and 17 of the Constitution, which the state says have an impact on section 19 of the Constitution, under which the applicant has brought her application to this Court.

[**22.**] At this stage, I wish to turn to the applicant's affidavit in support and the state's affidavit in opposition to establish if this argument can be sustained. In particular I wish to refer to paragraphs 16, 17, 18, 19, and 20 of the applicant's affidavit in support, which I reproduce below:

> 16. That I verily believe that the applicant has not committed any crime.
>
> 17. That I am advised by counsel for the Applicant and I verily believe the same to be true that if the applicant is arrested in connection with any offence, she must be brought before a court of competent jurisdiction not later than 72 hours after her arrest.
>
> 18. That I know as a fact that the applicant has not been charged with any offence nor brought before any court for any offence she might be suspected to have committed.
>
> 19. That I verily believe that the arrest and detention of the applicant is an unconstitutional act by the respondents and not justified by law.
>
> 20. That up to the time of settling this affidavit, the applicant was and is still in the unlawful custody of the respondents and their subordinates/agents.

I believe in answer to the averments that are contained therein, the state relies on paragraph 4 of the affidavit in opposition, which states: 'The applicant was arrested and being investigated in connection with her knowledge and or participation in the aborted coup of March 2006'.

[**23.**] In her submission, and in what was generally viewed in Court as a hilarious point to raise, the learned counsel for the applicant had this to say, and I quote:

> I want to draw the Court's attention to the affidavit in opposition. The affidavit does not contain any proper justification for the continued detention of the applicant. At paragraph 4, some words are missing and these are either 'is' or 'was'. If it is 'is' this means that the investigations are continuing now, and if it is 'was' this means that they are completed. The concerned word was omitted conveniently.

[**24.**] In response to this submission, learned counsel for the state had this to say and I quote:

> In paragraph 4 he (Demba Sowe) gave the reason for the arrest of the applicant, and the reason why the applicant is being investigated. In view of paragraph 3 of the affidavit in opposition, that the investigation is still on going, there is no omission, whether of the word "is" or "was" and nothing can be added to the paragraph by way of any submission from the Bar. The paragraph is very clear and speaks for itself.

[**25.**] I must say that there is no explanation of this very serious aspect from the state. I am aware that I should not trivialise issues that are placed before me, neither should I dramatise such issues nor read things I should not read into them. I should not use fanciful technicalities to defeat the ends of justice. But with the greatest respect to the state, paragraph 4 of the affidavit in opposition, as it stands, is so ambiguous that reliance cannot be placed on it. This glaring ambiguity was highlighted by the applicant as above, the state was given a chance to address this serious concern and the state chose not to. In my considered view, there is a yawning *lacuna* in the state's case, and a doubt has been created in my mind, and this doubt to me hits the very foundation of section 6 of the Constitution, on which the state requires me to refer this matter to the Supreme Court. The section, in my view, is dealt a death blow, since it is trite learning that, when a doubt exists, it inures to the benefit of the accused or in this case, of the applicant.

[**26.**] The result of this is that the state cannot tell me with certainty whether investigation is ongoing or concluded. In fact, the result is nought. In the circumstances, I am left with only the applicant's affidavit in support of her originating summons at paragraphs 16,17,18,19, and 20 to consider, where she seeks to demonstrate exactly what has resulted in paragraph 4.

[**27.**] The state contends that paragraph 3 of the affidavit in opposition is clear and I agree with that. But paragraph 3 does not say that the applicant is being investigated, it is a general statement. Instead, the state tried to show what the applicant's situation is at paragraph 4, but I have just said that it is speculative and does not assist the Court in any way. In the case of *Omar Manjang and Lamin Fatty v The State and Kinteh, Nyang & Fatty v The State Criminal Appeals* 2, 3, and 4 - 1992, the Gambia Court of Appeal, quoting the case of *Okokm v The State*(1984) I All NLR 423 at 427 said the following 'The duty of the jury to give the benefit of the doubt is a duty which they should discharge having regard to the materials before them, for it is on the evidence and the evidence alone, that the accused is being tried.' The Court further went on to say 'the same thing applies *mutatis mutandis* where the judge is sitting as judge of facts and law. Courts cannot speculate outside the evidence'. This position applies fully to this application.

[**28.**] I reiterate my earlier position that there is no need for the Supreme Court to interpret section 6, because there are no facts before the Court to justify that. As demonstrated above, my view is that the state has failed to show that, and the benefit has to go to the applicant. The state went further and brought section 17 of the Constitution into play and again said that it calls for interpretation, and specifically relied on the notion of public interest. I will deal with this later on in my judgment. Suffice it to say that I find no basis to refer this matter to the Supreme Court, for there are no facts to support that. I want to say very strongly that it is trite law that referrals should not be used to stall the disposal and finalisation of constitutional matters, but should be done in good faith and lawfully. Having said that, this particular case is distinguishable from the case of the *United Democratic Party (UDP) and others and the Attorney-General, The Gambia (SCCS*) case 3/2000,, a Supreme

Court decision, where Honorable Hassan B Jallow, in establishing the jurisdiction of the Supreme Court, said at page 12 of the ruling:

> Unlike the case of Isatou Combeh Njie, in this case there is a specific issue of interpretation of the Constitution: Are Messrs Johnson and Fatty still respectively Chairman and member of the Independent Electoral Commission in view of the alleged non-compliance with the procedure set out in section 42(6) of the Constitution, in their removal, dismissal or termination.

[**29.**] The Honorable Judge actually distinguished that case with the case of *Isatou Combeh Njie v Attorney-General and the Judicial Service Commission (SCCS)* 1/2000, where the applicant approached the Supreme Court for a declaration that her dismissal was in contravention of the Constitution and of the rules of natural justice. The Court held that there was no request before the Court in *Njie*'s case for the interpretation of any specific provision of the Constitution, and therefore, the applicant was given leave to withdraw the action, with liberty to institute proceedings in another court. In my view, this settles the issue of referral to the Supreme Court.

[**30.**] The state has referred to a pending appeal against my decision in suit HC/130/06/MF/404/F. This is a decision I made in a case that was argued before me by the applicant, Mrs Denton, in which I ruled in her favour. It appears to me that I am being asked, by the state, not to make any pronouncements regarding the present matter, because of the pending appeal. As rightly submitted, it is trite law that an appeal does not operate as a stay, and I think this position of the law deals sufficiently with this aspect and needs no further elaboration. In any case, in the present matter, the applicant seeks completely different reliefs from those in the decision that is being appealed against.

[**31.**] I now wish to touch on some paragraphs of the affidavit in support of the originating summons. At paragraph 2, the applicant avers that she is a legal practitioner, a widow and the mother of two children. These averments fall squarely under paragraph 1 of African Charter on Human and Peoples' Rights. Article 15 of the Charter provides that every individual shall have the right among others, to work. Article 18(1) of the Charter recognises the family as the natural unit and basis of society, which shall be protected by the state, and enjoins the state to take care of its physical health and morals. Article 29 requires the individual to preserve the harmonious development of the family and to work for the cohesion and respect of the family.

[**32.**] Article 18(2) enjoins the state to assist the family, which is the custodian of morals and traditional values recognised by the community. To me, these provisions go a long way in restating and reinforcing the applicant's expectation for this Court to positively consider her [relatives], and are not mere fanciful restatements of her social life, which does not concern the Court, and I daresay should be taken seriously by the state, in the context of the state's responsibilities and obligations under the Charter.

[**33.**] The applicant avers at paragraphs 15 and 21 of her affidavit in support that she has fallen ill and was not taken to hospital, that she fears she might relapse and develop further illnesses. In response to this, the state at paragraph 5 of its affidavit in opposition merely states that, the Central Prison Mile 2 has medical and feeding arrangements for all its inmates, without controverting these paragraphs, especially paragraph 15. I take a very dim

view of the state's attitude and again wish to draw the state to its obligations under article 22(1) of the Charter, which provides that all people shall have the right to their economic, social and cultural rights, and of course this is the provision that addresses the right to health. I find it unacceptable for the state to cursorily dismiss these averments with such contempt.

[**34.**] With reference to exhibit MD 2, I adopt the same reasoning as the one I used in relation to paragraph 4 of the affidavit in opposition, whose effect is to render the state's averments in April 2006 of no force or effect, due to the fact that the present position regarding the applicant is unknown and the state has failed to make it known. Furthermore, whether investigations were ongoing in April 2006 or not should not preoccupy this Court.

[**35.**] The state, as observed above, by operation of paragraph 4 of the affidavit in opposition has failed to discharge its onus of demonstrating the present status of the applicant.

[**36.**] One portion of this case that needs serious consideration is the fact that the applicant has consented to giving evidence on behalf of the state, and the question is what does this mean? In fact, a summary of her evidence has been made a public document. I must say that I have never known of a situation where a witness is kept in detention for the sole purpose of ensuring that she appears in Court and to give evidence favourable to the state. This would be very strange indeed. Consequent to paragraph 4 of the affidavit in opposition, and the decision I have reached on that paragraph, I can only surmise that this is the only reason why she continues to be detained. I do not believe that the government of the Gambia would want to give its subject with one hand and take away with the other immediately. Unfortunately, the state only found it fit to give the answer that consenting to give evidence does not mean that investigations are complete or ongoing, which I again find very disturbing and very negatory of issues before this Court. Surely, on the face of it, any reader of exhibit MD 2 would reach no other conclusion than that the applicant continues to be detained so that she is present to give evidence when called upon to do so.

[**37.**] But is this justifiable, especially in view of paragraph 4 of the affidavit in opposition? I find this unfortunate because we all know what action the state can take if the applicant turns on her word and does not present herself to give evidence as and when she is required to. I find that in view of exhibit MD 2 and what I have said above, some measure of good faith needs to be exercised in this case by the state.

[**38.**] The applicant's counsel appropriately responded to the issue of the provisions of the Criminal Code, Armed Forces Act, National Intelligence Agency Decree and the State Proceedings Act. These pieces of legislation to me are irrelevant to these proceedings, and I have failed to appreciate their purport. The applicant is not one of those people who fall under the Armed Forces Act; the National Intelligence Agency Decree gives way to the Constitution, the State's Proceedings Act is not the answer and it is trite that the Police Act cannot be used to whittle down individual rights. This is especially so in view of paragraph 4 of the affidavit in opposition.

[**39.**] I should mention that international human rights instruments protect the right to personal liberty, in that no one shall be arbitrarily deprived of his liberty. There may accordingly be legitimate deprivations of liberty, such as of convicted persons or of those accused of serious offences. There may further be other forms of deprivation of liberty attributable to administrative authorities, as in the case of mentally disturbed persons. In addition, the right to personal liberty may suffer limitations during states of emergency, in

accordance with article 4 of the International Covenant on Civil and Political Rights and other internationally recognised standards.

[**40.**] International human rights instruments do not definitively answer the question of when detention is or becomes arbitrary. The Universal Declaration of Human Rights, for instance, merely provides in article 9 that 'no one shall be subjected to arbitrary arrest, detention or exile'. Article 9(1) of the International Covenant on Civil and Political Rights is scarcely any clearer: 'Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law'. Article 6 of the African Charter provides that 'Every individual shall have the right to liberty and to the security of his person. No one may be deprived of this freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested'.

[**41.**] Happily, the Constitution of the Republic of the Gambia for its part, provides in its article 19(1) that 'every person shall have the right to liberty and security of the person. No one shall be subject to arbitrary arrest or detention. No one shall be deprived of his or her liberty except on such grounds and in accordance with such procedures as established by law'. Sub-paragraphs 2 and 3 are even more instructive for our purposes, and state that 'any person who is arrested or detained shall be informed as soon as is reasonably practicable and in any case within three hours, in a language he or she understands, of the reasons for his or her arrest or detention and of his or her right to consult a legal practitioner' and 'any person who is arrested or detained: -(a) for the purposes of bringing him or her before a Court in execution of the order of a Court ; or (b) upon reasonable suspicion of his or her having committed, or being about to commit a criminal offence under the laws of The Gambia, and who is not released, shall be brought without undue delay before a Court and, in any event, within seventy two hours'.

[**42.**] In the present case, the Applicant has been held without charge for over three months and has thus approached this Court to invoke her rights. The state on its part claims that her continuous detention is necessary for public interest, and I will now address the issue of public interest.

[**43.**] The respondents in a very intensive submission urged me to find that individual rights in the circumstances of this case should give way to public interest, and invoked section 17 of the Gambian Constitution in support of this contention.

[**44.**] It has been observed in many fora that public interest refers to the common well-being or general welfare. The public is central to policy debates, politics, and democracy and the nature of government itself. While nearly everyone claims that aiding the common well-being or general welfare is positive, there is little if any consensus of what exactly constitutes the public interest. There are different views on how many members of the public must benefit from an action before it can be declared to be in the public interest.

[**45.**] At one extreme, an action has to benefit every single member of society in order to be truly in the public interest, at the other extreme, any action can be in the public interest as long as it benefits some of the population and harms none. The public interest is often contrasted with individual rights under the assumption that, what is good for society may not be good for a given individual and *vice versa*. This definition allows us to 'hold constant' private interests in order to determine those interests that are unique to the public.

[**46.**] However, society is composed of individuals, and public interest must be calculated with regard to the interests of its members. There is wide ranging debate about whether the public interest requires or destroys the idea of human rights, about the degree to which the ends of society are the end of its individual members, and the degree to which people should be able to fulfil their own ambitions even against the public interest. It should be noted that it is also possible that in some cases, advancing the public interest will hurt certain individual rights. This risks 'the tyranny of the majority' in any democracy, since minorities' rights may be overridden.

[**47.**] Black's Law Dictionary (6th ed 1990) page 1229 defines public interest as 'something that the public, the community at large, has some pecuniary interest, or some interest by which their legal right or liabilities are affected'. It further says that 'public interest does not mean anything so narrow as mere curiosity, or as the interest of the particular localities, which may be affected by the matters in question'. It further defines it as 'interest shared by citizens generally, in affairs of local state or national government'. This seems to me to be the case in the present matter.

[**48.**] I recall here that part of the requirement for this Court to refer this matter for interpretation is section 17(2), that has been raised by the state, with particular reference to the issue of public interest. It has been submitted by learned counsel for the applicant that it should not simply be said that it is in the public interest to continue detaining the applicant, and to arrest her, simply to do away with chapter 4 of the Constitution. Further that there must be sufficient material (facts) provided to the Court, for it to determine whether or not public interest has arisen. In view of my earlier observations regarding paragraph 4 of the affidavit in opposition, section 6 of the Constitution and all other facts placed before me, I find that using public interest as a reason for referral to the Supreme Court is indeed a red herring and cannot be sustained, in the absence of any facts placed before this Court.

[**49.**] I should observe that my understanding of this case is two-fold: this Court must first determine the nature of the applicant's rights, and if any rights have been infringed upon by her continuous detention, then resolve the further question as to whether the continuous detention is justified.

[**50.**] In the case of *Irwin Ravin, Petitioner v State of Alaska* 537 P 2d 494, 27 May 1975, the Supreme Court of Alaska, quoting *Breese v Smith* (Alaska 1972), stated that 'Once a fundamental right under the constitution … has been shown to be involved, and it has been further shown that this constitutionally protected right has been impaired by governmental action, then the government must come forward and meet its substantial burden of establishing that the abridgement in question was justified by a compelling governmental and/or public interest'.

[**51.**] The United States Supreme Court in *Griswold v Connecticut*, 381 US 479, 496: 29-30 March 1965, has also stated that 'where there is a significant encroachment upon personal liberty, the state may prevail only upon showing a subordinating interest which is compelling. The law must be shown necessary, and not merely rationally related, to the accomplishment of a permissible state policy'.

[**52.**] From these cases, it can be said that the general proposition that the authority of the state to exert control over the individual, extends only to activities of the individual, which affect others or the public at large, as it relates to matters of public health, morality, security or safety, or to provide for the general welfare. This tenet is basic to any free society. The

state cannot impose its own notions of morality, security or safety on individuals, when the public has no legitimate interest in the affairs of those individuals. The right of the individual to do as he pleases is not absolute, of course: it can be made to yield when it begins to infringe on the rights and welfare of others.

[**53.**] In the present case, it is my view that the state has not demonstrated the public harm that would be caused by the release – conditional or otherwise of the petitioner, nor has it availed this Court with any proof to show that the applicant's continuous detention is justified. I find that no public interest has been, it being or is likely to be served by the continuous detention of the applicant. I find no basis for agreeing to refer the matter to the Supreme Court for interpretation as this will be unlawful.

[**54.**] The African Commission, in its case law, has established a few criteria, which are applicable in considering whether or not an arrest and detention can be considered as arbitrary. For example, the detention of individuals for the reason that they protested against being tortured has been found to be a violation of the right to freedom of liberty and a violation of article 6 of the African Charter – seecommunications 25/98, 47/90, 56/91 and 100/93 joined. In the specific case of *Jawara v The Gambia*, communications 147/95 and 149/96, the complainant alleged *inter alia*, that 'several members of the armed forces had been detained, some for up to six months, without charge or trial, following the introduction of Decree No 3 of July 1994. This Decree gave the Minister of Interior the power to detain and to extend the period of detention and infinitum. The Decree further prohibited the proceedings of *habeas corpus* on any detention issued under it.

[**55.**] In its argument before the Commission, the Republic of the Gambia, commenting on the allegation of violation of the right to liberty, said it was acting in conformity with laws previously laid down by domestic legislation. The government said that the decrees do not prohibit the enjoyment of freedoms, but were merely there to secure peace and stability, and that only those who wanted to disrupt the peace would be arrested and detained.

[**56.**] I have had the opportunity to read the *Jawara* case, and it would be recalled that the detention of the applicant in the present case is under similar circumstances as the detention of those described in the *Jawara* communication before the African Commission. The arguments of the government before this Court for the continuous detention of the applicant are almost similar to the arguments before the African Commission in the *Jawara* communication.

[**57.**] In that case before the African Commission, the Commission held that 'the argument that the action of the government is in conformity with regulations previously laid down by law is unfounded'. The Commission restated its decision in communication 101/93, with respect to freedom of association, that 'competent authorities should not enact provisions which limit the exercise of this freedom. The competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international human rights standards'. And more importantly, the Commission in its Resolution on the Rights to Freedom of Association has also reiterated that: 'The regulation of the exercise of the right to freedom of association should be consistent with states' obligations under the African Charter on Human and Peoples' Rights'. It follows that any law which is pleaded for curtailing the enjoyment of any of the rights provided for in the Charter must meet this requirement.

[**58.**] Given the above analysis, I find that the arrest and continuous detention of the petitioner, can therefore be termed arbitrary, and be regarded as a violation of her right to freedom of liberty as contained in article 19(3) of the Gambian Constitution, article 6 of the African Charter on Human and Peoples' Rights and article 9 of the International Covenant on Civil and Political Rights.

[**59.**] I should mention that in my view, the initial arrest of the applicant by the respondents, cannot be said to be unlawful, given the powers that vest on them to arrest anybody who is reasonably suspected of having committed or being about to commit a crime, as provided for by section 19(3)(b) of the Constitution. This is part of democracy and good governance in any civilized society. However, the same section, to safeguard excesses and abuses by state agents, provides that the same detainee shall be brought before a court of competent jurisdiction, without undue delay, in any event within 72 hours of such arrest.

[**60.**] If within the 72 hours, the person is not brought before a court of competent jurisdiction, this then renders both the arrest and detention unlawful and unconstitutional. In this particular case, by reason of the above violations, and for all the reasons I have given in my judgment, I find that the arrest and detention of the applicant on 6 April 2006 are unlawful and unconstitutional.

[**61.**] In the result, I find that I have to agree with the applicant and to grant the reliefs that she seeks. To that extent, I make the following declarations:

1. The applicant's arrest by the 1st, 2nd, 3rd and 5th respondents or by their subordinates and/or agents on Thursday 6 April 2006 at the applicant's residence at Churchill's Town in Kombo Saint Mary Division of the Gambia is unlawful, in that it is inconsistent with and/or in contravention of section 19 of the Constitution of the Gambia.

2. The applicant's detention by the respondents, their subordinates and/or agents since Thursday 6 April 2006 is unlawful and unconstitutional in that the said detention is inconsistent with and/or in contravention of section 19 of the Constitution of the Republic of the Gambia and article 6 of the African Charter on Human and Peoples' Rights and article 9 of the International Covenant on Civil and Political Rights.

[**62.**] I make the following order:

1. The applicant be and is hereby released from detention with immediate effect.

2. The applicant shall make herself available for questioning as and when requested to do so by the police.

3. The applicant shall not travel out of the country, the Republic of the Gambia, without authorisation from this Court.