



LEGALITY OF RETAINING TRAVELLERS' PASSPORTS UPON ARRIVAL IN NIGERIA AMIDST COVID-19 PANDEMIC

¹ See paragraph G of the Directive

Introduction

The Federal Government of Nigeria has continued to introduce and enforce regulations across the board with a view to limiting the continuous outspread of the Covid-19 pandemic in the country. The most recent set of guidelines was issued by the Federal Airports Authority of Nigeria ("FAAN") (the "Guidelines") on July 3, 2020. Earlier, the Presidential Taskforce "PTF" on Covid-19 had issued a set of regulations or directives ("Presidential Taskforce on Covid-19 Revised Quarantine Protocol") (the "Directives") Both the Guidelines and Directives are geared towards curtailing further spread of the Covid-19, as well as protecting all airport users.

These Directives and Guidelines are layouts of the expectations from all travelers predeparture, on board the flight and upon arrival in Nigeria. However, one major detail that stands out in the Directives is that, upon arrival in Nigeria, passengers cleared through the Nigeria Immigration System's Migrants Identification Data Analysis System ("MIDAS") shall have their passports taken and retained until after successful completion of the fourteen (14) days self-quarantine.¹

Our discussion in this briefing relates to the safeguarding of these passports, the FAAN guidelines, the legality of the Directive vis a vis, the requirement for all travellers to submit their passport until after fourteen (14) days self-quarantine under the Directive and the violation of the 'passengers' constitutional rights by retaining their passports. We have also examined the essence of the MIDAS biometrics exercise carried out at the port of entry into Nigeria, which collects, processes, stores and analyses migrant information in real-time across the border network, and provides a strong statistical base for security, migration policy and planning.

According to the Guidelines, the new normal entails that departing passengers must comply with the following:

- a) All passengers MUST arrive the airport properly kitted with their FACE MASKS ON.
- b) They MUST also ensure a minimum of one point five meters (1.5m) PHYSICAL DISTANCING, Aviation Medical/Port Health personnel would screen each passenger and ensure the use of FACE MASKS, those travelling with pets MUST get necessary clearance from Nigerian Agricultural Quarantine Services.
- c) All passengers' luggage WOULD be DISINFECTED before entry into the departure halls.
- d) Passengers are required to WASH their HANDS as often as possible; HAND SANITIZER would be provided for passengers before entrance, at the waiting halls/lounges and pre boarding gates.
- e) All footwears would be DISINFECTED/SANITIZED by FOOT MATS placed at all entrances to the terminal building, amongst others.

However, for arriving passengers, the new normal will entail that:

- a) On disembarkation from the aircraft, passengers would observe PHYSICAL DISTANCING as they board the Co-Buses (Hand Sanitizer would be provided in the buses).
- b) PHYSICAL DISTANCING protocols MUST be observed at the BAGGAGE claim area, where HAND SANITIZER is also provided,



2 Please refer to the Passport (Miscellaneous Provisions) Act, Chapter 343 Laws of the Federation of Nigeria ("LFN") 2004 (the "Passport Act")

3 Please refer to Section 6 of the Passport Act

4 Kenneth Diplock, "Passports and Protection in International Law" *Transactions of the Grotius Society Vol. 32, Problems of Public and Private International Law, Transactions for the Year 1946 (1946), pp. 42-59 (18 pages)* Published by: Cambridge University Press on behalf of the British Institute of International and Comparative Law.

5 *ibid*

6 See section 44 of the Constitution

7 See Article 13 of the Universal Declaration of Human Rights ("UDHR"), Article 12 of International Covenant on Civil and Political Rights ("ICCPR"), Article 12 of African Charter on Human and Peoples' Rights ("ACHPR") which was incorporated into Nigeria Law by the ACHPR's (Ratification and Enforcement) Act, Cap 10 LFN, 1990.

DISINFECTED trolleys would be made available for passengers.

- d) If you MUST speak to anyone around, please speak to a properly tagged Aviation Security (AVSEC) officer, PHYSICAL DISTANCING would be maintained while waiting to be screened by personnel of PORT HEALTH SERVICES, amongst others.
- e) All passengers are required to observe SOCIAL DISTANCING and make use of the FLOOR MARKINGS at the security screening area.
- f) All passengers must also comply with all other security guidelines as laid down by officials of the Aviation Security (AVSEC) department.

It is without doubt, that these guidelines are put in place to protect all passengers and other airport users. On the other hand, the Directives issued by PTF are divided into two parts which are specific directives related to Pre-departure/On board and another set related to, On Arrival in Nigeria. The Directive provides as follows;

For Pre-Departure/On board:

- a) Passengers arriving /returning to Nigeria must have tested NEGATIVE for COVID- 19 (pre-boarding PCR test in country of departure). PCR test MUST be within 2 weeks before departure and preferably no less than five (5) days pre-boarding.
- b) Tests done more than two weeks before departure are not valid and persons will not be allowed to board; but for the five (5) days minimum, this is advisory and will not preclude boarding.
- c) On board, passengers are required to fill in the Health Declaration/ Self- Reporting Form & the Sample Collection Time Allocation Form.
- d) Passengers should ensure that the information/contact details provided on the form are correct and are verifiable and they can be reached on the phone number and at the address provided.

On Arrival in Nigeria:

- a) The passengers shall queue in an orderly manner and disembarkation will be done systematically and in batches to avoid overcrowding.
- b) Passengers will proceed for health screening at the Point of Entry.
- c) The Health Declaration Form will be assessed and collected along with the Sample Collection Form.
- d) Passengers are required to:
 - i Keep their face masks on.
 - ii Perform hand hygiene.
 - iii Ensure respiratory / cough etiquette; cough into tissue, sleeve/ bent elbow and discard used tissue safely into a bin.
 - iv Always observe and maintain physical distancing measures.
- e) Persons who have arrived in Nigeria are advised to self-isolate for fourteen (14) days and to remain in the City/ State where the Point of Entry is located (i.e. Lagos or Abuja) throughout the duration of self-quarantine.

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- f) If not resident in Lagos or Abuja, passengers shall make arrangements for accommodation at their own cost (Federal Government will not be responsible for providing accommodation nor transportation to the place of abode).

- g) Passengers will be cleared through the Nigeria Immigration System's Migrants Identification Data Analysis System (MIDAS) and their passports retained until after successful completion of the fourteen (14) days self-quarantine.

- h) They will be given an appointment time and date to present at the Sample Collection Centre located in Lagos or Abuja for a repeat COVID-19 PCR test within 72 hours of arrival.

- i) Passengers must provide their full and correct addresses and phone numbers, before exiting the airport. They must comply with self-isolation/quarantine guidelines and ensure that they can be reached/can be located during the period.

- j) Persons who are unable to remain in Lagos or Abuja throughout the period of self-quarantine may return to their States of residence ONLY after:

- i they have had their samples collected and are NEGATIVE for COVID-19.
- ii provide Public Health Officials with their full and correct address and phone number where they can be reached.

- k) Persons who have completed the fourteen (14) days of self-isolation/quarantine will undergo an exit interview. Their details will be forwarded to the Nigeria Immigration Service for release of their passports. Alternative arrangements can be made to collect passports via Special delivery e.g. DHL.

Legal Analysis of Retaining a Traveller's Passport under the Nigerian Law

A Passport is a document of protection and authority to travel issued by the competent Nigerian officials to Nigerians wishing to travel outside Nigeria and includes, by virtue of subsections (3) and (4) of section 1 of the Act;² the following:

- a) a standard Nigerian passport;
- b) a Nigerian diplomatic or official passport;
- c) a Nigerian pilgrim's passport; and
- d) a seaman's passport or seaman's card of identification.³

A passport, in a modern sense is a document of identity with which a State may, but not necessary does, require of an alien traveler within its territories to be furnished. It is a requirement of the state which the traveler is visiting not a requirement of the state which he is a national.⁴ A passport is a thing which is proof of nationality. It is issued after the payment of a fee. The payment gives the owner a proprietary right over the passport.

Under the English law, no person, whether subject or alien is entitled as of right to demand a passport. Although, the crown reserves the discretion to refuse passport to even a British subject, such discretion is nowadays, seldom exercised.⁵



8 *ibid*

9 Section 35(1) 1999 Constitution of Federal Republic of Nigeria (as amended)

10 For instance Article 3 and 9 of the UDHR, Article 9 ICCPR, Article 6 ACHPR

11 Section 44 of the constitution

12 4 L. Ed. 97

13 R.A.C. Alton, J.R., Struble "The Nature of a Passport at the Intersection of Customary International Law and American Judicial Practice" Annual Survey of International & Comparative Law. Volume 16, issue 1, 2010.

14 R. v. Teplin 1950(2) S.A.L.R. 250, 254). Mahtab v. Canada Employment and Immigration Commission and R.C.M.P., [1986] 3 F.C. 101 (Fed. Ct.)

15 969 F.2d 1392 (2d Cir 1992)

16 This is provided for in second schedule (Regulation 24(1)(a) of the Immigration regulation 2017)

The right to a passport is also derivable from the right of every person to personal liberty under the Nigerian constitution⁶ and the international legal regime. Under Nigerian law, a passport cannot be lawfully denied to any Nigerian citizen except in the most exceptional circumstances. Everyone has the right to leave any country, including his own, and to return to his country.⁷

A passport is treated by both the Consular officers of the issuing state and the officials of the state which the holder is visiting as a prima facie evidence that the holder is entitled to the national status where the holder is stated therein to be.⁸ Where an expatriate enters into Nigeria and his passport is taken from him, he is restricted in movement and the right of personal liberty entrenched into the constitution,⁹ is put in jeopardy. This right is also available in various international treaties to which Nigeria is signatory to.¹⁰ The constitution guarantees the right of everyone to own immovable property.¹¹ Hence, no one shall be deprived of his property except as provided by a law.

Hence, it can be said that the right of a person to his personal liberty, right to enter and leave a country, and the right to own property are the parents right to own and retain a passport in Nigeria. Thus, the collection of passports from migrants and returnees could be a breach of their constitutional right. It is not arguable that the constitution and international conventions guarantee the right of every lawful resident in the country, be it a Nigerian or a foreigner.

However, it is pertinent to note 45(1) of the constitution, which provides that nothing in sections 37, 38, 39, 40 and 41 of the Constitution shall invalidate **any law that is reasonably justifiable in a democratic society** in the interest of defence, public safety, public order, public morality or public health or for the purpose of protecting the rights and freedom of other persons.

We admit that it is possible in limited cases to seize passport of a person for the interest of others. Thus, it is arguable that collecting and retaining passport from foreign nationals and its temporary seizure could fall under the exceptions specified in Section 45(1) of the Constitution relating to the safeguard public safety and public health. However, to activate this section of the constitution, the National Assembly or State House of Assembly ought to pass a law. Only on that premise will one justify the legality of collecting and seizing a passport from foreign nationals on arriving Nigeria. The argument in some quarters that the inscription on the face of the passport showing that the passport remains the property of the federal government only goes to show the reversionary right of the Federal Government at its expiration and not ownership.

Indeed, in *Martin v Hunter*¹² the court held that it would be an affront to all known human rights norms were the right to freedom of exit specifically guaranteed by the constitution is drained by arrogating to the government a discretionary and arbitrary power to withdraw or revoke a passport. Hence, the statement on the Nigeria passport that the document may be withdrawn at any time is unconstitutional and contrary to section 5(1) of the Passport (Miscellaneous Provisions) Act which clearly provides that the Minister may, at any time, cancel or withdraw any passport issued to any person if:

- a) the passport is obtained by fraud;
- b) the passport has expired;
- c) a person unlawfully holds more than one passport at the same time;
- d) it is in the public interest so to do.

We contend that collecting passports of foreign nationals during PCR could be in public interest. However, as things stand, same remains unconstitutional, unless a legislation is passed in that regard.

Indeed, the United States ("US") government has long declared that the impounding of U.S. passports by foreign nations is a violation of customary international law.¹³ The available cases previously showed that seizure of passports of US citizens is a breach of violation of customary international.¹⁴ However, this position seems to have changed. The US now holds the position that foreign passport confiscations is a matter of domestic policy to be evaluated. Even at that, it must be done in compliance with the constitutional due process principles.

The case of *Onwubiko v U.S.*,¹⁵ *Mahtab and R. v. Teplin*, shows that domestic courts will apply municipal law whenever possible rather than customary international law to cases where a foreign passport has been confiscated and impounded or seize either permanent or temporary. One thing runs through, the due process outlined by the constitution must be followed for such either temporary or permanent deprivation of property.

Essence of Biometrics for Foreign Expatriates

In June 2019, the Federal Government of Nigeria ("FGN") introduced the method of electronic registration of migrants or foreign nationals including their biometric capturing ("Nigeria Immigration Service: Migrant E-Registration Guidelines"). With this, foreign nationals are now subject to a mandatory personal appearance requirement to submit their biometrics. Any employer that is found to have an unregistered foreign national is subject to pay a fine. With this requirement, those entering after December 31, 2019 and seeking to remain in Nigeria for over ninety (90) days will also be required to register under the system, even though no deadline has been issued for such entrants whereas those who were already in Nigeria before that time are required to submit themselves to the Migrant Registration Centre for registration. To be eligible for Biometric e-registration, the person must:

- a) have attained the age of eighteen years and,
- b) is not a citizen of Nigeria or,
- c) is not otherwise exempted from compliance with registration, and
- d) intends to reside in Nigeria for any period exceeding ninety (90) days.¹⁶

However, persons under the age of eighteen (18) years, persons enjoying diplomatic immunity, and immigrants staying in Nigeria for less than ninety (90) days are not required to undergo this exercise. A migrant may opt to pre-register on the portal and later proceed to Registration Office for only biometrics capturing and document verification.

Indeed, the essence of this biometric capturing is to ensure that all foreign nationals' identity are properly captured and thus, make it easy to trace such migrants, improve border security, streamline the immigration process and identify illegal immigrants.

Conclusion

Although, the purpose for retaining passports of travellers into Nigeria during the compulsory fourteen (14) days quarantine would be to ensure that foreign nationals are easily traceable, it is important to state that Nigeria can only withhold the passports of her citizens through the immigration guidelines,



but will require the permission of the issuing country for any foreigner's passport to be retained and relevant legislation, passed in that regard. In the unlikely event that these travellers test positive to COVID-19 and are not at the designated isolation centres, the information obtained through MIDAS should be explored.

However, there is also the issue of safeguarding these passports. Logically, any foreigner will be hesitant to let go of their passport for two weeks bearing in mind that the passport can be tampered with or result in a case of identity theft for the traveller. The Directives do not provide any further information on the measures that will be taken to keep the passports safe, other than retaining the passport at the port of arrival in Nigeria.

A possible argument is that it will be in the public interest of Nigeria to ensure the safety and public health of her citizens that it is of necessity as stated in the constitution. However, we maintain the position that, a mere Directive does not elevate to the status of a law properly so called as provided by the constitution, having come from PTF on COVID-19. Besides, the intendment of the taskforce has been achieved by biometric capturing of all foreign nationals coming into Nigeria. Thus, it is illegal to collect the passport of a returnee, be it a Nigerian or foreign national until after the PCR test and a relevant legislation, passed, in that regard.

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