PATON v ATTORNEY-GENERAL AND CHONA IN HIS CAPACITY OF MINISTER OF HOME AFFAIRS AND CHANGUFU IN HIS CAPACITY OF MINISTER OF HOME AFFAIRS (1968) ZR 185 (CA)

COURT OF APPEAL
DOYLE JA, PICKETT AND EVANS JJ
22nd October 1968

Flynote and Headnote

[1] Jurisprudence- Precedent - Court of Appeal not absolutely bound by own decisions.

The Court of Appeal for Zambia is not absolutely bound by its previous decisions. A previous decision will not be followed only for very compelling reasons and only where the court clearly considers that the previous decision was wrong.

[2] Tort - False imprisonment - Deportation carried out unlawfully - Section 23 (1), Immigration and Deportation Act, 1965, construed.

Section 23 provides that the notice declaring person a prohibited immigrant under section 22 (2) of the Immigration and Deportation Act, 1965, must specify the period in which the individual must leave and also specify the route. The prohibited immigrant must be given the opportunity to depart of his own volition within the period and by the stated route; otherwise he will have been falsely imprisoned.

[3] Tort - Damages - Exemplary damages.

Application of the Immigration and Deportation Act by the Minister and immigration officials in the manner in which it was enacted in the belief that an individual is a prohibited immigrant is not grounds for an award of exemplary damages.

[4] Tort - Damages - Fundamental rights.

An infringement of the fundamental rights and liberties laid down in the Constitution will result in damages.

[5] Tort - Damages - False imprisonment.

Damages can be awarded for loss of property and livelihood arising out of an action of false imprisonment.

[6] Tort - Damages - Wages lost as part of award.

See [5] above.

Cases cited:

(1) *Attorney-General v Thixton* (1967) ZR 10.

(2) *Bird v Jones* (1845) 114 ER 668.

(3) *Warner v Riddiford* (1858) 140 ER 1052.

(4) *Grainger v Hill* (1838) 132 ER 769.

(5) *Rookes v Barnard* [1964] AC 1129, [1964] 2 WLR 269; [1964] 1 All ER 367.

Statutes construed:
Immigration Act (1954, No.37) ss. 5 (1) (a), 13 (1) (e), 9, 8, 18, 10 (1), 7.
Immigration and Deportation Act (1965, No. 29), ss. 22 (2), 23 (1).
State Proceedings Act (1965, No. 27), s. 4.
Interpretation and General Provisions Ordinance (1964, Cap. 1), s. 14 (3) (c)
Immigration Amendment Act, 1964.
Immigration Ordinance (1915, Cap. 33), s. 10.
Immigration (Amendment) Act, (1963, No. 19).

Federal Law (Immigration, Aliens and Deportation Modifications and Adaptions) Regulations (1963).
Constitution of Zambia (1965 App. 3), s. 24.
Immigration and Deportation (Amendment) Act (1967, No. 20).

H Mitchley, Q C, for the appellant
Ryan, Senior State Advocate, for the first and second respondents.

Judgment

Doyle JA: The facts relating to this appeal and cross - appeal are as follows. The plaintiff, Robin Edward Paton, is a citizen of the United Kingdom and Colonies and had been ordinarily and continuously resident in Zambia or Northern Rhodesia since some time in 1951 until the events which gave rise to the action which is the subject of this appeal. Since 1963 he had been a farmer in Choma and the owner of Farm 2874.

On the 4th November, 1966, in exercise of the powers conferred upon him by paragraph (a) of subsection (1) of section 5 of the Immigration Act, 1954, the then Acting Minister of Home Affairs, Mr Lewis Changufu, signed a declaration deeming the plaintiff to be an undesirable inhabitant of the Republic of Zambia on account of his standard or habits of life. The declaration was handed to an immigration officer at Livingstone. Mr Kanyanga, at about 2 p.m. on 5th November. Mr Kanyanga and another immigration officer, Mr Mpundu, set off for Livingstone to serve the declaration on the plaintiff. At Choma, as they did not know the exact whereabouts of plaintiff's farm, they enlisted the aid of the police. They were then accompanied to the plaintiff's farm by a Land - Rover containing about six policemen and another Land - Rover containing a number of persons about whose function the judge did not come to a conclusion but concerning whose presence he found that both the immigration officers were unsatisfactory in their evidence.

On arrival at plaintiff's farm at about 9 p.m. Mr. Kanyanga served a copy of the Minister's declaration on the plaintiff. A notice was also served upon him stating that he was refused permission to remain in Zambia as a prohibited immigrant by reason of the operation of paragraph (a) of subsection (1) of section 5 of the Immigration Act, 1954, and that he had a right of appeal on the grounds specified in that Act. The plaintiff had a conversation with the immigration officer Kanyanga. He then wished to continue the discussion in his house but it was made clear to him that he could not enter his house unless he was accompanied by both immigration officers. His passport; was obtained and stamped. The plaintiff inquired how long he could remain in Zambia and was told that he could apply for a temporary permit on payment of a fee of £1. The pound was produced and Mr Kanyanga issued a permit allowing the plaintiff to remain in Zambia on condition that he left on or before 9 p.m. on 6th November, 1966, and left Zambia through Livingstone. A further *pro forma* condition on the permit was that plaintiff should give to the immigration officer at the port of entry at least twenty - four hours' notice of his intended departure. It may be noted that this condition was impossible of fulfilment.

The plaintiff remonstrated at the period and asked what would happen if he did not obey. The reply was that he would be taken to the border at Livingstone. Mr Kanyanga then stamped the passport of plaintiff's wife and gave her and her children permission to stay in Zambia for fourteen days.

The immigration officers and police and others then left. Plaintiff with the aid of neighbours did some packing that night. Although next day was a Sunday he managed to contact the local bank manager and got money from him with which he paid his employees. He and his wife and family left at 3 p.m. on 5th and crossed the border at 7 p.m. He remained in Salisbury as a visitor with the intention of clearing up his affairs.

On 10th January, 1967, judgment was given in the Court of Appeal in the case of *Attorney-General v Thixton* [1]. This case decided that the repeal of paragraph (e) of subsection (1) of section 13 of the Immigration Act, 1954 (which provided that United Kingdom and Colonies citizens who were resident for two years in Zambia should not be prohibited immigrants), did not affect the rights of such citizens acquired under that paragraph prior to the repeal and that such persons were therefore protected from being declared prohibited immigrants. In consequence the plaintiff's solicitor informed plaintiff that he

was not a prohibited immigrant and could return to Zambia. Plaintiff returned to Zambia by air on 9th March, 1967, arriving at Lusaka at about 9.30 a.m. He was told by an immigration officer that he was a prohibited immigrant and was not allowed to stay. He protested that he was covered by the decision in the *Thixton* case and asked to telephone his solicitor. This request was refused and he was taken by car to the Head Immigration Office. There he was transferred to another car and despite his protest was taken to Chirundu, given a notice to leave Zambia and told to walk across the bridge to Southern Rhodesia, which he did.

The Immigration and Deportation Act, 1965, had come into force on 21st February, 1967. Although no order was made under that Act, the form filled in and handed to the plaintiff at Chirundu stated that the plaintiff was a prohibited immigrant under section 22 (2) of that Act because the Minister had, in writing, declared his presence in Zambia to be inimical to the public interest. This printed form went on to say "Now therefore you are required to leave Zambia within the period of - by the following route - " The blank spaces were to be filled in appropriately by the immigration officer. No period had been inserted by the immigration officer but in the space for route the immigration officer had written: "To be removed by the Immigration at Chirundu and be handed to Rhodesian officials."

Subsequently, the plaintiff's farm was foreclosed upon by the Credit Organisation of Zambia and sold to the State for £5,100. For the purpose of the sale the property had been advertised once in the *Zambia Mail* and the only tenderer was the State.

It was agreed by the State at the hearing below that the plaintiff had, by virtue of his residence, acquired a right not to be declared a prohibited immigrant and the issue was whether or not he had been imprisoned in the course of his deportation. If he had, it followed that this was a false imprisonment.

The learned trial judge held:

(a) that the plaintiff had been imprisoned during the period between the service of the notice and the time when the temporary permit was issued;

(b) that the plaintiff had been imprisoned when removed from Lusaka airport and driven to Chirundu; and

(c) that the plaintiff had been illegally deported.

He awarded exemplary damages of K4,000 in respect of the false imprisonment of the 5th November and, taking into account these damages, he awarded a further Kl,000 in respect of the false imprisonment on 9th March. He held that the State was not liable in respect of the illegal deportation, but assessed the damage under this head at K6,500, to which he considered should be added K500 in respect of expenses incurred in Salisbury for a reasonable period when settling his affairs.

The plaintiff appealed against the failure of the learned judge to award damages for illegal deportation and also against the amount of these damages as estimated by the judge. The defendants cross - appealed on the ground that the plaintiff had not been wrongly imprisoned and that the damages were excessive.

Before I enter on the merits of the appeal and cross - appeal there are two matters with which I shall deal. At the opening of the appeal counsel for the plaintiff appellant asked leave to amend the statement of claim by adding a claim for breach of the common law right to personal safety and/or personal freedom. Counsel had some difficulty in showing how it would add to the claim but he urged that it would help him in formulating his argument. This was opposed by the defendant cross - appellant but the court allowed it *de bene esse.* Having heard the argument, I do not consider that the amendment added anything to the original claim. Nothing in the facts showed any danger to the plaintiff's personal safety and any derogation from his personal freedom was covered by the alleged false imprisonment. I shall say nothing further on this point.

The action was originally brought against the Attorney-General and Mainza Chona in his capacity of Minister of Home Affairs. Subsequently an application was made to the Registrar, and granted, to add Lewis Changufu in his capacity of Minister of Home Affairs. Under the State Proceedings Act, 1965, actions against the State are brought against the Attorney-General. There is no provision for suing the Minister of Home Affairs or any

person in his capacity as such. Mr Mitchley has argued that both Mr Chona and Mr Changufu were in fact sued personally. In my opinion this submission is completely untenable and no argument was directed to this point in the court below. The action was conducted throughout as an action against the State. The learned trial judge appeared to have disregarded the matter as his judgment is expressed as given against the State. In my opinion the attempt to sue these two persons in their ministerial capacity was completely incorrect and without any basis in law.

Coming to the principal matters, I find it convenient to deal first with the cross - appeal. Mr Ryan, for the defendant cross - appellant, first argued that *Thixton*'s case was wrongly decided. He submitted that this court was not bound by its previous decisions. The United States Supreme Court, the Supreme Court of the Republic of Ireland, the ultimate courts of Canada, Australia, South Africa and most European countries hold themselves free, if they think it right to do so, to refuse to follow a previous decision. Recently, the House of Lords in England has abandoned its rigid adherence to the rule of *stare decisis*. I have no doubt that this court as the ultimate Court of Appeal for Zambia is not absolutely bound by its previous decisions. It can, however, only be for very compelling reasons that the court would refuse to follow a decision of the court and only where the court clearly considered that the previous decision was wrong. The relaxation of the rule is not its abandonment and ordinarily the rule of *stare decisis* should be followed. Abandonment of the rule would make the law an abyss of uncertainty. Mr Ryan urged that it was open to this court to refuse to follow a previous decision which was not unanimous. That, in my view, is not compelling reason. *Thixton*'s case was fully argued and it has certainly not been shown that it was clearly wrong. Indeed I, as the dissenting judge in that case, recognised and recognise that the result which flowed from the majority decision was more in accord with natural justice than that which flowed from the view of the law which I felt compelled to take. This point therefore fails.

Counsel then attempted to distinguish this case from *Thixton*'s case. He argued that *Thixton*'s case [1] had only decided that rights accrued under paragraph (e) of subsection (1) of section 13 of the Immigration Act, 1954, were saved by section 14 (3) (c) of the Interpretation and General Provisions Ordinance, upon the repeal of paragraph (e) by the Immigration (Amendment) Act, 1964. He submitted that the plaintiff had, prior to the enactment of the Immigration Act, 1954, acquired an immunity under section 10 of the Immigration Ordinance (Cap. 33 of the Laws of Northern Rhodesia). This immunity was acquired by three years' residence in Northern Rhodesia. If plaintiff already had this immunity prior to the enactment of the Immigration Act, 1954, no immunity could accrue to him under the latter Act. He submitted that the Interpretation and General Provisions Ordinance it relation to the Immigration (Amendment) Act, 1964, only saved the immunity accorded under the provision actually repealed by the latter Act and that immunity accrued under an earlier act was lost. If this interesting argument were correct it would have the extraordinary result that residents of long standing would have no protection while (leaving aside the effect of the Immigration and Deportation Act, 1967) later residents would be protected. This argument was not, however, addressed to the trial judge before whom it was admitted that if the plaintiff were imprisoned, he was entitled to a verdict by virtue of *Thixton*'s case [1]. Furthermore, the argument depends on the fact that the plaintiff had been resident in Northern Rhodesia for three years prior to the enactment of the Immigration Act, 1954. This Act came into operation on the 1st November, 1954. Although it was proved that plaintiff became resident in Zambia in 1951, there was no proof that he was so resident prior to the 1st November of that year. The point does not therefore arise and it is unnecessary for this court to decide it.

The question therefore to be decided is whether or not there was a false imprisonment. It is self - evident that in respect of the incident of 9th March there was a false imprisonment. Plaintiff was physically removed from Lusaka and taken to Chirundu and put over the border. He was not a prohibited immigrant so there was no justification for this. It may be noted in passing that even if the Minister had made an order under the Immigration and Deportation Act, 1965, which came into operation on 21st February, 1967, and even if that order had been valid, there would still have been a false imprisonment. Section 22 (2) of the 1965 Act enables the Minister to declare that the presence of a person is inimical

to Zambia and thereupon that person becomes a prohibited immigrant. Section 23 (1) provides that an immigration officer may require a person to whom section 22 (2) applies to leave Zambia. Section 23 (1) provides that the notice must then specify:

(a) . . . that he is person to whom section 22 (2) applies;

(b) the period within which he is required to leave Zambia; and

(c) the route by which he shall travel in leaving Zambia.

In the notice actually served on the plaintiff no period or route was specified. The section does not enable officers of the Immigration Department merely to bundle a person into a motor car and deliver him to the border. The prohibited immigrant must be given an opportunity to depart from Zambia of his own volition within the period and by the route specified.

The incident of the 5th November, 1966, raises more difficulty. The learned trial judge recited the following passage from *Clark & Lindsell* on Tort, 12th ed., paragraph 552:

"A false imprisonment is complete deprivation of liberty for any time, however short, without lawful cause. 'Imprisonment is no other thing but the restraint of a man's liberty, whether it be in the open field, or in the stocks, or in the cage in the streets or in a man's own house, as well as in the common gaol: and in all the - places the party so restrained is said to be a prisoner so long as he hath not his liberty freely to go at all times to all places whether he will without bail or mainprise or otherwise.' The prisoner may be confined within a definite space by being put under lock and key or his movements may simply be constrained by the will of another. The constraint may be actual physical force, amounting to an assault, or merely the apprehension of such force or it may be submission to a legal process. A mere physical interference with freedom of locomotion does not amount to an imprisonment. If a road is blocked so that a man is prevented from exercising a right of way and he is compelled to turn back, it cannot be said that he has thereby been made prisoner."

He referred to the cases of *Bird v Jones* [2], where it was held that to prevent a person proceeding in any direction but one was not false imprisonment and to *Warner v Riddiford* [3] and *Grainger v Hill* [4].

In the latter case two sheriff's officers went to the plaintiff who was ill in bed and told him that if he failed to deliver a certain register or find bail they would either take him or leave one of the officers with him. The plaintiff being unable to provide bail and being alarmed gave up the register. It was held that there was sufficient restraint of his person to amount to false imprisonment.

In the former case the plaintiff, after an altercation about money, was invited to enter a waiting - room by two policemen. Whilst in the room, he was refused permission to go upstairs and ultimately he was allowed to go but accompanied by a policeman. Willis, J, said: "I think it impossible that, upon these facts, anyone can doubt that it was meant to be conveyed to the mind of the plaintiff that he should not go out of the presence or control of the officers. That in my opinion clearly amounts to an imprisonment."

The learned trial judge then dealt with the matter in the following passages:

"After the notice was served, the plaintiff became a prohibited immigrant, and assuming that the notice was given under section 9 (1) and not under section 7 (1) (b) of the 1954 Act, the immigration officers would have been empowered under section 8 (2) (as amended) to remove the plaintiff or cause him to be removed from Zambia and, pending the completion of the arrangements therefor, to cause him to be detained in the nearest convenient prison or gaol. They insisted on his being interviewed by the two of them, but they did not require to exercise their powers of detention as the plaintiff allowed the interview to continue and in the course of it applied for and obtained a temporary permit.

Mr Kanyanga said that if the plaintiff had told them he was not going or if he had torn up the order, they would have gone to Choma and telephoned headquarters for instructions. I do not believe this. I do not think that in the presence of the police and the people in the third vehicle they would have acted in this fashion. I decide that if the plaintiff had said he would not obey the order or if he had not applied for a permit, he would have been detained. I further decide that, in the interval between the service of the notice on him and the granting of the permit, it was conveyed to his mind that he should not go out of their presence and control, that he was constrained by the will of another and was under arrest and falsely imprisoned.

I consider, however, that he was not imprisoned after the permit was issued. It is stretching the meaning of the word too much to regard a person as being 'imprisoned' when he is free to go where he wishes and do what he likes on condition that he reports to certain place at a certain time. The plaintiff's position to my mind was analogous to that of a person on bail."

I fully agree with the findings of the judge except that I do not understand his reference to a notice under section 7 (1) (b) of the Act. I have no doubt that *Bird v Jones* was not applicable to the circumstances but that they fell fairly and squarely within the principle set out by Willis, J. Clearly, the plaintiff was under constraint and, equally clearly, he only escaped from that constraint by providing the fee and obtaining a temporary permit. Had he not produced the fee he would have been physically arrested. It is plain that the presence of the unnecessarily large posse of police in the first Land - Rover and the band of hangers - on in the second Land - Rover was intended to bring this home to the plaintiff. Furthermore, the wording of section 9 of the 1954 Act itself indicates that there must be a restraint. Subsections (1) and (2) of section 9 of the Act read as follows:

"9. (1) Whenever leave to enter Zambia is withheld by an immigration officer or whenever any person is detained, restricted or arrested as a prohibited immigrant, notice of that fact and the grounds of refusal, detention, restriction or arrest shall be given by the immigration officer in writing to such person.

(2) Every person to whom such notice has been given may appeal to the nearest magistrate's court and such appeal shall be heard by the magistrate presiding at such court."

The provisions of subsection (2), which relate to appeal, depend on the fact that a notice has been given under subsection (1), the giving of notice itself depends on the fact, in the case of a prohibited immigrant already in the territory, that he has been detained, restricted or arrested.

I consider, therefore, that the learned trial judge rightly found that there was a false imprisonment in respect of the incident of 5th November, 1966.

The remaining question arising from the cross - appeal is that of damages. The learned trial judge rightly directed himself in law in respect of the categories of cases in which an award of exemplary damages could serve a useful purpose. He quoted the following passage from Lord Devlin's exposition in *Rookes v Barnard* [5]:

"The first category is oppressive, arbitrary and unconstitutional action by the servants of the Government. I should not extend this category - I say this with particular reference to the facts of this case - to oppressive action by private corporations or individuals . . . in the case of the Government, it is different, for the servants of the Government are also the servants of the people and the use of their power must always be subordinate to their duty of service."

He then went on to say:

In my judgment the present case falls fairly and squarely into this category. The immigration officers arrived in force at the plaintiff's farm at nine o'clock at night. I have decided that they technically imprisoned the plaintiff. The condition of his release was that he should leave Zambia within twenty - four hours, that is to say, on the following day, a Sunday. This was despite the fact that the plaintiff had been resident in Zambia for fifteen years and was a farmer. If any further indication of the oppressive and arbitrary nature of the action is required, it can be seen in the documents given to the plaintiff. The 'Notice to Prohibited Immigrant' informed him of his right to appeal within three days (and by the *Interpretation and General Provisions Ordinance*, these would not include a Sunday). The wording of the 'Temporary Permit' was designed to show its duration in days and not in hours; and, although the holder was required to give to an immigration officer at least twenty - four hours' notice (excluding Sundays) of his intended departure, the immigration officer gave the plaintiff only twenty - four hours' notice to quit Zambia and the notice expired on a Sunday. The immigration officers were not acting on their own initiative, but under orders from their ministry. The whole procedure was designed so that the plaintiff would be unable to test in court the validity of the actions taken against him.

In these circumstances. I award K4,000 as damages for the false imprisonment on 5th November, 1966.

With regard to 9th March, 1967, the immigration officers, clearly acting under directions from their superiors, also acted in an arbitrary and oppressive manner. The judgments in the *Thixton* case were delivered on 10th January, 1967. Steps were then taken to change the law, but the Act did not come into force until 13th March, 1967. It was abundantly clear that, on 9th March, the plaintiff could not be deported or arrested for that purpose, yet the immigration officers did arrest him and did imprison him until he was conveyed across the border, and they did not permit him to communicate with his solicitors. In view of the damages already awarded, I award K5,000 for this second false imprisonment."

With regard to the first incident it must be borne in mind that the officers were carrying out what they conceived to be the law in relation to a person whom they believed to be a prohibited immigrant. It is necessary in my view to consider whether they were carrying out the law in an oppressive manner or whether they were merely carrying out a law which was itself oppressive.

It may be noted that although the Immigration Act, 1954, originally contained or appeared to contain provisions whereby an immigration officer could order a prohibited immigrant to leave the country and the provisions for detention in prison only came into operation if the order was disobeyed, these provisions were removed by an amending Act of 1963. Section 8 of the Act as in force on 5th November, 1966, reads as follows:

"8. (1) Subject to the provisions of this Act, no prohibited immigrant shall be allowed to enter or remain in Zambia.

(2) An immigration officer may, subject to the provisions of subsection (3), remove or cause to be removed from Zambia by such route as a chief immigration officer may determine any person who has been given a notice in writing referred to in subsection (1) of section *nine*, and, pending the completion of arrangements for his removal, may cause the person to be detained in the nearest convenient prison or gaol.

(3) The provisions of subsection (2) shall not apply in relation to a person who appeals in terms of subsection (1) of section *nine* or makes representations in terms of section *ten* or is exempted in terms of paragraph (a) of subsection (1) of section *seven* or is the holder of a permit issued in terms of this Act unless and until -

(a) his appeal is withdrawn or abandoned or is dismissed; or

(b) the decision in connexion with which the representations were made is confirmed; or

(c) his exemption is withdrawn; or

(d) his permit is cancelled or expires or otherwise ceases to be valid; as the case may be."

Subsections (1) and (2) of section 9 have already been set out earlier in this judgment. Subsection (3) provides as follows:

"9. (3) An immigration officer may cause a person who appeals in terms of this section to be detained in the nearest convenient prison or gaol until the appeal is finally determined or the person abandons or withdraws the appeal, as the case may be, and if the person is so detained he shall, on the dismissal, abandonment or withdrawal of the appeal, be deemed to be detained in terms of subsection (2) of section *eight*."

It would appear from subsection (2) of section 8 that it is the duty of an immigration officer, when a person becomes a prohibited immigrant, to set in train the machinery for removing that person from the territory and that ordinarily in accordance with the provisions of the subsection, a prohibited immigrant would be detained in prison pending the completion of arrangements for his removal. He could be detained in prison even if he had appealed or made representations but not If he was exempted from the provisions of paragraph (a) of subsection (1) of section 7 or was the holder of a temporary permit to remain.

It has already been noted that to set in train the procedure for appeal a prohibited immigrant must first be detained, restricted or arrested.

The provision which enables mitigation of these somewhat Draconian provisions is the issue of a temporary permit. A temporary permit enables a prohibited immigrant to remain in Zambia for a specified period and one of the conditions is that he shall leave Zambia within a specified period without expense to the Government. A temporary permit is ordinarily issued under section 18 of the Act. That section, however, expressly prohibits the issue of a temporary permit to a person who is a prohibited immigrant by reason of the provisions of paragraph (a) of subsection (1) of section 5, though it gives power to the Minister to give a direction to issue a permit to such a person. Such a direction would be exceptional.

The plaintiff did not indicate that he wished to appeal or make representations and indeed it is obvious that an appeal would have been hopeless as, by reason of the provisions of section 10 (1) of the Immigration Act, 1954, it could only have been directed to the identity of the person affected.

As the plaintiff was a prohibited immigrant under paragraph (a) of subsection (1) of section 5, he could not, except on the direction of the Minister, be the holder of a temporary permit issued under section 18. He might also have been given a temporary permit if the Minister so directed under section 7. Such direction would also clearly be exceptional. It seems possible, therefore, that in granting the plaintiff a temporary permit the immigration officer was in fact exceeding his powers.

It would seem to me therefore that the behaviour of the immigration officer was, unwittingly perhaps, substantially in accordance with a law, which itself was oppressive in

its effect and a law which, it may be noted, was originally enacted by the Federal Parliament.

The reference by the judge to the period of three days in which the appeal could be lodged seems erroneous as, although the wording in the permit remains, the part of subsection (2) of section 9 which provided for this period was deleted by the Federal Law (Immigration, Aliens and Deportation) (Modifications and Adaptations) Regulations, 1963.

The presence of the posse and the hangers - on, though much to be deprecated, does not make the action of the immigration officers oppressive once it is accepted that it was their duty to restrict, detain or arrest the plaintiff in order to set in train the necessary procedures under the Act.

Nor do I consider that the action of the Minister in making the declaration on a Saturday, which he was entitled to do, can be considered oppressive in the legal sense. As has already been. observed, the learned judge's reference to a three - day period to appeal was incorrect. I do not consider, therefore, that his strictures or conclusions were justified.

The plaintiff had been resident in Zambia for some fifteen years and, bearing in mind the reason for declaring him a prohibited immigrant, it is hardly conceivable that a period of grace for a decent interval to enable him to settle his affairs - say a week or even a month - would have caused any damage to the State. In a State whose policy is based on humanism, it would have been both appropriate and pleasing to have seen both the Minister and the immigration officials doing their best to administer a clearly oppressive law in a lenient and humane manner. If, however, they merely applied that law in the manner in which it was enacted in the belief that the plaintiff was a prohibited immigrant, I do not consider that this can give grounds for an award of exemplary damages. I consider, therefore, that the learned judge was in error when he awarded K4,000 as exemplary damages for the incident of 5th November.

As regards the incident of the 9th March, it is plain that the immigration authorities were aware that the plaintiff was not a prohibited immigrant. They were aware that the legislature was in process of enacting a law which would enable the plaintiff to be declared a prohibited immigrant and they were aware that that law had not yet been enacted. They disregarded this completely. As one of the immigration officers said in evidence, his instructions from his superiors were to deport the plaintiff whatever he said and not to allow him to see his lawyer. This flagrant and disgraceful disregard of the law and of common decency was clearly oppressive and arbitrary. It fully merited an award of exemplary damages. The learned judge on this head awarded a sum of Kl,000 damages. In making this award he said that it was in view of the damages already awarded. Clearly he would have awarded considerably more if he had not already made an award, which was by consequential necessity also erroneous.

The learned trial judge is no longer in the territory, and it is not therefore possible to send the case back to him to assess the damage in accordance with the view I have expounded. I am satisfied, however, that he was looking at the case as a whole when he awarded K5,000 for the two incidents and I am satisfied that this was a fully justifiable award in the circumstances. I would have reversed the amount, namely Kl,000 for the first incident and K4,000 for the second. In the circumstances, I am prepared to uphold the judge's award in its result.

That disposes of the cross - appeal. There remains the appeal. The learned trial judge dealt with the matter of damages for wrongful deportation in the following passages:

"I must, however, consider whether there is any other ground on which I can award damages for the actual wrongful deportation, and, if necessary, amend the pleadings accordingly.

A tort may be regarded either as a wrong or as breach of right. Clerk and Lindsell has the following passage in paragraph 12:

' When the plaintiff can establish that he has a right already recognised at common law or by statute, which avails persons generally, any violation of that legal right gives rise to an action for damages in tort.' "

But there is a footnote to the word "statute": "This presents difficulty owing to the necessity that every statute must be interpreted according to its precise terms."

"Mr Ryan's defence is therefore based largely on the novelty of the action, and Clerk and Lindsell deals with this in paragraphs 106 to 112, summarising the position: It is submitted that in principle and on authority novelty

alone is not a defence to a claim in tort, but in practice judges will be reluctant to state a new principle of liability save by way of rationalising, though thereby extending, a number of analogous instances in which a claim has been sustained. To this may be added the undoubted principle that a recognised legal right, other than one created by statute will sustain an action for infringement without proof of damage, save where the right has been recognised only in equity.'

These passages are of course not authoritative, and I have heard no argument on them. If there had been an infringement of the fundamental rights and liberties laid down in the Constitution, I would have had no hesitation in deciding that damages would follow but, in accordance with the decision in *Thixton*'s case, I must decide that the plaintiff had no right under the Constitution to liberty of movement, but merely under the 1954 Act a right to non-prohibited immigrant status. This Act did not impose any corresponding duty on anyone; and although I have heard no argument on it, it appears to me that a statutory duty was not imposed on the State to which section 4 of the State Proceedings Act, 1965, would apply. I therefore decide that the State is not liable for the illegal deportation."

A claim for wrongful or illegal deportation was not pleaded, but the Judge indicated that he would have amended the pleadings if he had found there was a supportable claim. He appeared to conceive that the decision in *Thixton*'s case precluded any such claim. I have been unable to find any justification in *Thixton*'s case for this view and, indeed, it is in direct conflict with section 24 of the Constitution which in terms confers the right to move freely throughout Zambia, the right to reside in any part of Zambia, the right to enter Zambia and immunity from expulsion from Zambia.

However, it does not seem to me to be necessary to invoke this provision in order to enable damages to be awarded in respect of the loss of the plaintiff 's farm and livelihood. This loss seems to me to flow from the false imprisonment It is clear to me that the plaintiff, once deported, would not have been permitted to re-enter Zambia at any time relevant to this case. On the one occasion he tried to come back to Zambia and his farm, he was immediately detained and removed from Zambia. If a private person ejected another person from property on which he carried out his livelihood and picketed that property in such a manner that, whenever the person returned, he was imprisoned and prevented from entering the property, there is no doubt that the injured person could recover damages for the loss sustained by his inability to carry on his livelihood and for any loss sustained if the property were sold by reason of his non-occupation. These damages would flow directly from the action of the defendant. I see no difference in this case. The plaintiff was wrongfully ejected from his farm by imprisonment and threat of imprisonment. When he attempted to return, he was again falsely imprisoned and that would have happened on any occasion when he attempted to return. In consequence, he was unable to work his farm and the Credit Organisation of Zambia foreclosed.

I consider that the State, even on the pleadings as they stand, is liable in damages in respect of any period during which the plaintiff would have lawfully worked his farm and was unlawfully prevented from doing so and for damages flowing from the forced sale. As regards the first matter, it would, however, be contrary to reason to disregard the fact that the State would have deported plaintiff as soon as it could lawfully do so. Damages cannot be awarded on the basis of a long term of peaceful occupation, but only in respect of a period of approximately four months from 5th November, 1966, namely up to the date of enactment of the Immigration and Deportation (Amendment) Act, 1967.

The learned trial judge assessed damages in respect of the illegal deportation in the following passages:

"After the plaintiff's deportation the farm was sold by the Credit Organisation of Zambia. At my request, Mr Ryan obtained accounts from them. These are not complete, as the account No. 4 mentioned at p. 33 of the Bundle is not included, possibly because a Mr Nel took over the 1966/67 crop. There is no explanation with the accounts and, strange to say, the debits and credits balance exactly and there is no indebtedness on either side.

Captain Robertson (who is also a farmer) valued the farm at £15,000 but I heard no evidence as to value from a professionally qualified man. I would put its value at £10,000. From this figure, the moneys due to the Credit Organisation of Zambia have to be deducted. In round figures, I take these to be £5,000. The net value to the plaintiff of the farm was therefore £5,000. The plaintiff estimated he would have made a net profit of £4,000 during season. I think this was optimistic in view of his past record and in any event he did not do a full season's work on the farm. I should have made this figure £2,000. He probably lost about £500 on his implements, although they have not been sold. All in all, I should therefore have estimated his loss at about £6,500. In my opinion, the deportation was responsible for about half of this loss, namely £3,250, to which must be added £250 for living expenses in Salisbury (anything further than this is too remote). I should therefore have assessed the further damage at seven thousand kwacha. "

I do not follow the learned judge's reasoning in assessing the loss at £6,500 and then finding that the illegal deportation was responsible for about half; but using his figures I am able to arrive at damages as follows.
The farm was valued by the judge at £10,000 on admittedly very meagre evidence. No professional evidence of value was called. It may be argued that this assessment is high by reason of the fact that the actual sale only fetched £5,100. The Credit Organisation of Zambia was not a party to the action and was not therefore in a position to explain why the farm was sold in the manner it was. One must therefore be cautious in criticism. I cannot, however, refrain from saying that the sale by this quasi - Government corporation, after one advertisement in the Zambia Mail, a medium and method clearly not adequate in view of the fact that there is a daily paper circulating in Zambia with a much greater and more diverse readership, raises a strong suspicion that it was not intended that a fair price should be obtained. I therefore accept the assessment of the trial judge and assess damages on this head at the difference between £5,100 and £10,000, namely £4,900 or K9,800.
In the light of my observation as to the likely period of tenure of the plaintiff, I think that the assessment for loss of livelihood was too high. I would reduce this to K2,000.
The plaintiff was seeking his living expenses in Salisbury up to the date of action, a period of about seventeen months, on the grounds that he was a visitor awaiting the result of the action. I do not consider that this is in any way reasonable. Clearly the plaintiff was put to unnecessary expense for some reasonable period. The learned trial judge awarded K500 and I consider he was right. I also accept his assessment of probable loss on sale of machinery at K1,000.
In the result therefore I would allow the appeal and award additional damages of K13,300. I would give the costs of appeal and trial to the plaintiff /appellant except that the costs, if any, of the State, in respect of the application to add Mr Changufu as a defendant, should be paid by the plaintiff/ appellant.

Judgment
Pickett J: I have read the judgment of my brother Doyle and I entirely agree with the reasons given. I have nothing to add.

Judgment
Evans J: I agree, and for the reasons given by my brother Doyle.
Appeal allowed.