PATEL v THE ATTORNEY-GENERAL (1968) ZR 99 (HC)
HIGH COURT
MAGNUS J
4th OCTOBER 1968

Flynote and Headnote

[1] **Constitutional law - Fundamental rights and freedoms of the individual - Chapter III generally and Chapter III, section 13, construed.**
The specific limitations placed upon the protection of the fundamental rights and freedoms of the individual imposed by the various provisions of Chapter III of the Constitution must be read together with section 13 of the Constitution, which provides that such specific limitations are "designed to ensure that the enjoyment of the rights and freedoms (set forth in Chapter III) by any individual does not prejudice the rights and freedoms of others or the public interest."

[2] **Constitutional law - Sections 18 and 19 - "In order to secure the development or utilisation of property for a purpose beneficial to the community" construed.**
If Parliament considers that exchange control is desirable in the interests of the economy as a proper solution to the country's foreign exchange position, then exchange control is done "in order to secure the development or utilisation of . . . property for a purpose beneficial to the community" and, in principle, comes within the derogations permitted by sections 18 and 19 of the Constitution.

[3] **Constitutional law - Chapter III - Meaning of the word "law" as used in Chapter III of the Constitution.**
Where the word "law" is used in the relevant provisions of Chapter III, it was intended by the drafters of the Constitution that this should include a statutory instrument as well as an Act of Parliament.

[4] **Evidence - Burden of proof - Sections 18, 19 and of the Constitution - Burden of establishing whether a law is "necessary or expedient" or "reasonably required".**
The test as to whether an act is "necessary or expedient" within the meaning of section 18 (1) *(a)* or "reasonably required" within the meaning of sections 19 (2) and 22 (2) is an objective test, and the burden of establishing whether an Act is "necessary or expedient" or "reasonably required" rests upon the State.

[5] **Money - Exchange Control Regulations, 1965 - Regulation 35 construed - Meaning of the phrase "authorised officer".**
In order for an officer to be an "authorised officer" within the meaning of sub-regulation (5) of regulation 35 of the Exchange Control Regulations such officer must be specifically appointed by the Minister as an authorised officer, and a customs officer or an immigration officer is not *ipso facto* an authorised officer unless he has been so appointed.

[6] **Money - Exchange Control Regulations, 1965 - Regulation 35 construed - Meaning of "reasonably suspects".**
The question of whether an authorised officer "reasonably suspects" that a currency offence has been committed is an objective one and should not be left to the sole decision of the authorised officer who, before opening or examining a postal article, must (1) satisfy the Postmaster -General (or his authorised officer) that he has reasonable grounds for suspecting the commission of a currency offence and (2) specify the postal article in respect of which he entertains that suspicion.

[7] **Jurisprudence - Reception of English law - Effect of non - Zambian decisions.**
Zambian judges are not bound by decisions of the House of Lords, but such decisions, as is the case with other non - Zambian decisions, may have great persuasive effect.

[8] **Constitutional law - Section 18 - Meaning of the word 'expedient".**
As used in section 18 of the Constitution, the word "expedient' is far short of what is "necessary" or "reasonably required" and means "conducive to the purpose" or "suitable to the circumstances of the case".

[9] **Constitutional law - Fundamental rights and freedoms of the individual, restrictions on - Relationship between law restricting such rights and freedoms and the permitted restrictions specified in Chapter III of the Constitution.**

The relationship between a law restricting the fundamental rights and freedoms of the individual set forth in Chapter III of the Constitution and the permitted restrictions set forth in the said Chapter III must be rational and proximate.

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[10] **Constitutional law - Sections 18 and 19 of the Constitution construed - Satisfaction of the condition that the taking of possession or acquisition of property is necessary or expedient "in the interests of . . . public safety".**

The relationship between a law and public safety must be a rational and proximate relationship; and exchange control is not sufficiently proximate to public safety to warrant the Exchange Control Act or the Exchange Control Regulations, 1965, being adopted "in the interests of . . . public safety".

[11] **Constitutional law - Sections 18 and 19 of the Constitution construed - Satisfaction of the condition that the taking of possession or acquisition of property is necessary or expedient or reasonably required.**

Exchange Control Regulations, 1965, are sufficiently proximate to "the development or utilisation of property for a purpose beneficial to the community" to justify such regulations being adopted for such purpose, and the taking of possession and search of a postal article pursuant to Exchange Control Regulation 35 is "expedient" and "reasonably required" for a scheme of exchange control designed for such purpose.

[12] **Constitutional law - Fundamental rights, restrictions on - Section 18 construed - Meaning of the phrase "reasonably justifiable in a democratic society"**.

To the extent that any law makes provision for the taking possession of any property for only so long as may be necessary for the purpose of any examination, investigation, trial, or inquiry, such law is "reasonably justifiable in a democratic society".

[13] **Constitutional law - Section 19 construed - Meaning of the word "required" in section 19 (2) of the Constitution.**

The word "required" imports some degree of need and is, therefore, stronger than "expedient" but not as strong as "necessary"; and something may be "reasonably required" even though there is an alternative way of accomplishing the result desired to be obtained.

[14] **Constitutional law - Courts - Role of courts in reviewing Acts of Parliament.**

It is not the function of the courts to impose their own views of what Parliament ought to do or to decide whether or not Parliament may have chosen a better way to accomplish a desired end but, rather, merely to consider whether what Parliament has done comes within Parliament's legislative competence.

[15] **Constitutional law - Fundamental rights, restrictions on - Section 19 of the Constitution - Meaning of the phrase "reasonably justifiable in a democratic society".**

A search without a warrant of a postal packet is reasonably justifiable in a democratic society when the customs officer making the search (1) is duly authorised, (2) had a "reasonable suspicion that was objective and not subjective"(3) formed his suspicion in respect of a particular postal packet before he entered the post office, and (4) has satisfied someone of the grounds for his suspicion.

[16] **Constitutional law - Fundamental rights - Section 22 of the Constitution construed - Meaning of the word "correspondence" in section 22 (1) of the Constitution.**

The word "correspondence" implies a communication of ideas; and a series of signs and symbols unaccompanied by any explanation of what they denote is not a communication of ideas and, hence, not "correspondence" within the meaning of section 22 of the Constitution.

[17] **Constitutional law - Fundamental rights - Section 22 of the Constitution construed - Position of customs officer when acting pursuant to regulation 35 of the Exchange Control Regulations.**

A customs officer who opens a postal packet without first obtaining a search warrant does so at his own risk; and if the packet turns out to be "correspondence" within the meaning

of section 22 of the Constitution, there will have been a breach of the sender's rights under section 22 which will be the personal responsibility of the customs officer.

Statutes construed:

Constitution of Zambia (Chapter III), ss. 13, 18, 19, 22, 27, 28.

Exchange Control (Amendment) (No. 2) Regulations, 1965, regulations 35 and 35 (5).

Exchange Control Act (No.2 of 1965) s. 3.

Posts and Telegraphs Act (No.36 of 1964, Cap. AL 1), s. 17.

Cases cited:

(1) *Kachasu v Att. - Gen.* (1967) ZR 145.

(2) *Masaba v Republic* (1967) EA 488.

(3) *Edwards v Att. - Glen. for Canada* [1930] AC 124.

(4) *British Coal Corp. v R* [1935] AC 500.

(5) *James v Commonwealth of Australia* [1936] AC 578.

(6) *Gau v U.S.* 77 Law Ed., 212.

(7) *Sgro v U.S.,* 77 Law Ed., 260

(8) *Cheranci v Cheranci* (1960) NRLR 24.

(9) *Ogden v Saunders* (1827) 12 Wheat. 213.

(10) *Fletcher v Peck (* 1809) 6 Cr. 87.

(11) *Euclid v Ambler Realty Co.* (1925), 272 US 365.

(12) *Shapiro v U.S.* (1948) 335 US 1.

(13) *Liversidge v Anderson* [1941] 3 All ER 338.

(14) *West Virginia State Board v Barnette* (1943) 319 US 624.

(15) *Ramji Lal v State of U.A.* (1957) SC 620.

(16) *Aitken v Shaw* 1933 SLT (Sh. Ct.) 21

(17) *Gonsales v Thompson* 1922 CPC 477.

(18) *Entick v Carrington* (1765) 19 St. Tr. 1030.

(19) *Wolf v Colorado* 338 US 25.

(20) *MacDonald, v U.S.* 335 US 451.

(21) *Weeks v U.S.* 58 Law Ed. 652.

(22) *Carrol v U.S.* 69 Law Ed. 543.

(23) *Frank v Maryland* 3 Law Ed. 2d. 877.

(24) *Speiser v Randell* (1958) 357 US 513.

(25) *Yates v U.S.* (1958) 354 US 298.

(26) *Romesh Thapper v State of Madras* (1950) SCR 594.

(27) *American Communications v Douds* (1951) 340 US 268.

Care and Sarah, for the applicant

Skinner, Q.C., Attorney-General and Heron, State Advocate, for the respondent.

Judgment

Magnus J: This is a reference to the High Court pursuant to section 28 (3) of the Constitution of Zambia, which is contained in Schedule 3 to the Zambia Independence Order, 1964, and was brought into effect by section 3 of that Order. That subsection reads as follows:

"28....

(3) If in any proceedings in any subordinate court any question arises as to the contravention of any of the provisions of sections 13 to 26 (inclusive) of this Constitution, the person presiding in that court may, and shall if any party to the proceedings so requests, refer the question to the High Court unless, in his opinion, the raising of the question is merely frivolous or vexatious."

The circumstances in which this reference was made are as follows. On the 11th May, 1968, the applicant, Mr Jasbhai Umedbhai Patel, was served with a summons charging him with (1) doing an act preparatory to the making of a payment outside Zambia, contrary to regulation 9 of the Exchange Control Regulations, 1965, and section 6 of the Exchange Control Act (Cap. 276) and, in the alternative, (2) attempting to export currency, contrary to regulation 17 (1) of the aforementioned Regulations and section 6 of the aforementioned Act and section 352 of the Penal Code (Cap. 6). The particulars to both charges consisted of the allegation that, on divers dates between 3rd and 10th May, 1968, at Ndola, he placed or caused to be placed in the post sixty - five airmail envelopes for transmission outside Zambia, addressed to 55 Oakfield Road, London N.4, each containing eight ten - kwacha notes, making a total of K5,200, it being alleged that, in relation to charge (1), this was an act preparatory to the making of a payment outside Zambia, and, in relation to charge (2), that this was an attempt illegally to export a total of K5,200 legal tender in Zambia.

After a number of adjournments, the matter was heard on 28th June, 1968, at the Ndola Magistrates Court, before Mr W. Bruce - Lyle, the Senior Resident Magistrate. The first witness for the prosecution was Mr Gordon David Hilditch, a Customs Officer at Ndola, who testified that On 3rd May, 1968, he went to the General Post Office at Ndola at 9 a.m. to examine the outgoing airmail. He found four envelopes. He stated that he had no search warrant but that he had authority given him as a Customs Officer under what the note of his evidence refers to as section 35, but presumably means regulation 35, of the Exchange Control Regulations. Apart from that, he had instructions from his superior officer to examine mail, but no consent from any owner of mail through the post. He added that he took possession of some mail because he believed that it contained money going outside Zambia, and he took this mail back to the Customs House. He was then asked by Mr. *Heron*, for the prosecution, "What did you find in the mail?" At this point, Mr Cave, for the defence, objected to questions as to search at the Post Office, or as to search of correspondence in the absence of a search warrant, or the consent of the owner of the mail and submitted that a serious question arising out of the evidence was that it posed a question which affected the fundamental rights of the individual which were guaranteed by the Constitution. This question was, "Does a customs officer, no matter what his instructions are, have the right to subject to search the correspondence of an individual, when there is enshrined in the Constitution a protection against this sort of arbitrary action?" He then went on to make certain submissions which have been elaborated in far greater detail in the argument before me and which I will refer to later in dealing with that argument. In the circumstances, he objected to the leading of further evidence as to the result of this search by the witness.

The learned senior resident magistrate considered Mr Cave's submissions as a request to refer to the High Court the question of whether regulation 35 of the Exchange Control Regulations was valid. He did not consider the request frivolous or vexatious but as an important issue which should be decided by the High Court in accordance with section 28 of the Constitution. The question was, therefore, referred to the High Court for determination.

Accordingly, a reference was signed on 8th August, 1968, by Mr Cave, on behalf of the applicant, and Mr Heron, on behalf of the respondent, in the following terms:

"Whereas in proceedings in the Subordinate Court of the First Class for the Ndola District Holden at Ndola in the case of the above - mentioned criminal prosecution, a question arose as to the contravention of one or more of the provisions of Chapter 3 of the Constitution of Zambia

NOW THEREFORE William Bruce - Lyle the person presiding in the said Court, not being of the opinion that the raising of the said question was merely frivolous or vexatious did refer the following questions to the High Court:

1. Did the opening, examination and seizure of the postal article constitute a contravention of the applicant's right to privacy of property as guaranteed by section 19 of the Constitution.

2. Did the opening, examination and seizure of the postal article constitute a contravention of the applicant's freedom of expression as guaranteed by section 22 of the Constitution.

On the opening of the proceedings before me, Mr Cave submitted a third question, as follows:

3. Did the opening, examination and seizure of the postal articles constitute a contravention of the applicant's right to protection from deprivation of property as guaranteed by section 18 of the Constitution."

The learned Attorney-General raised no objection to the addition of this ground and the argument proceeded on the basis of whether there had been a contravention of section 18 of the Constitution as well as of sections 19 and 22.

Before the argument proceeded, I raised the question of whether the proceedings were properly before me. As far as I am aware, there has only been one previous application in our High Court under section 28 of the Constitution of Zambia and that was the case of *Kachasu v The Attorney-Genera*l [1], which came before the learned Chief Justice last October. This was an application under section 28 (1) which provides that, if any person alleges that any of the provisions of sections 13 to 26 (inclusive) of the Constitution has been, is being or is likely to be, contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress. The learned Chief Justice there observed that, although section 28 (7) gives authority for the making of rules to regulate the practice and procedure in respect of proceedings under the section, none have so far been made. Consequently, so far as that case was concerned, Order 7, rule l(c) of the High Court Rules applied and application under section 28 (1) was by originating notice of motion. That was a case, however, of a person applying for a determination under subsection (1), where no proceedings were pending before any court. On the equivalent provision in the Constitution of Uganda, it was pointed out in *Masaba v Republic* [2], at pages 491 - 492, by Udoma, C.J.:

"It seems to me that the application contemplated . . . must be 'original proceedings' initiated by 'a person who alleges that any of the provisions . . . has been, is being or is likely to be contravened'. Where such an allegation is made, and there is pending in court no proceeding concerning such allegation, proceedings should normally be initiated by the person who alleges that he is affected by the act done . . . in the instant case . . . there is still pending in the criminal court the criminal case against the accused."

He then suggested that in such a case, the usual practice was to have the issues, as affecting the Constitution, framed or settled by the parties and thereafter to have the matter dealt with in accordance with the provisions of article 95 (1) of the Constitution of Uganda, which provided that, where any question as to the interpretation of that Constitution arose in any proceedings in any court of law, other than a court martial, the court might, and should if any party to the proceedings so requested, refer the question to the High Court consisting of a bench of not less than three judges of the High Court. Our own provision, in section 28 (3), is limited, of course, to proceedings in a subordinate court, the reference is to the High Court (i.e. including a single judge), and there is the *proviso* that the question raised should not be frivolous or vexatious. But in the absence of any specific rules, I feel that the procedure suggested in *Masaba v Republic* for a case where proceedings are already pending is equally applicable to cases arising under section 28 (3) of our Constitution and I am satisfied that it is the proper procedure in the present case. This is the procedure which has been followed and I am satisfied that the proceedings are properly before me.

[1] Section 28 of the Constitution provides a remedy when it is alleged that there is a contravention, or a threatened contravention, of sections 13 to 26 inclusive, that is to say of the provisions which are designed to protect the fundamental rights and freedoms of the individual. These are defined in section 13, which reads as follows:

"13. Whereas every person in Zambia is entitled to the fundamental rights and freedoms of the individual, that is to say the right, whatever his race, place of origin, political opinions, colour, creed, or sex, but subject to respect for the rights and freedoms of others and for the public interest to each and all of the following, namely:

(a) life, liberty, security of the person and the protection of the law;

(b) freedom of conscience, of expression and of assembly and association; and

(c) protection for the privacy of his home and other property and from deprivation of property without compensation;

the provisions of this Chapter (i.e. Chapter III) shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedom of others or the public interest."

I have said that this section is definitive because it makes the provisions of the chapter effective for the purpose stated, that is, "for the purpose of affording protection to those rights and freedoms" and subjects them to limitations which are designed for a specific purpose, namely the purpose set out in the section and which I have stressed above. There are thus two purposes of these limitations: (1) to preserve the rights and freedoms of others; and (2) to preserve the public interest. It is necessary, therefore, in considering the specific limitations imposed by the other provisions of Chapter III, to read them together with section 13.

Now, it is alleged that the applicant's rights and freedoms have been contravened in three respects, namely his right to protection from deprivation of property under section 18, his right to protection for the privacy of his home and other property under section 19 and his right to protection of his freedom of expression under section 22.

The relevant parts of those provisions are as follows:

"18. (1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied, that is to say:

(a) the taking of possession or acquisition is necessary or expedient -

(i) in the interests of defence, public safety, public order, public morality, public health, town and country planning or land settlement; or

(ii) in order to secure the development or utilisation of that, or other, property for a purpose beneficial to the community;

(b) provision is made by a law applicable to that taking of possession or acquisition -

(i) for the prompt payment of adequate compensation; and

(ii) securing to any person having an interest in or right over the property a right of access to a court or other authority for the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he is entitled, and for the purpose of obtaining prompt payment of that compensation.

(2) No person who is entitled to compensation under this section shall be prevented from remitting, within a reasonable time after he has received any amount of that compensation, the whole of that amount (free from any deduction, charge or tax made or levied in respect of its remission) to any country of his choice outside Zambia.

. . .

(4) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) of this section.

(a) to the extent that the law in question makes provision for the taking of possession or acquisition of any property -

. . .

(vii) for so long as may be necessary for the purpose of any examination, investigation, trial or inquiry . . .'

and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society . . .' . .

19. (1) Except with his own consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision -

(a) that is reasonably required in the interests of defence, public safety, public order, public morality, public health, town and country planning, the development and utilisation of mineral resources, or in order to secure the development or utilisation of any property for a purpose beneficial to the community;

and except so far as that provision or, as the case may be, anything done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

22. (1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference . . . freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision -

(a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health . . .

and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society."

These, then, are the provisions in respect of which it is alleged that the applicant's rights have been infringed. The infringement alleged is brought about by the purported exercise by the customs officer concerned of the powers conferred upon him by regulation 25 of the Exchange Control Regulations, 1965, which was substituted for the original regulation 35 by the Exchange Control (Amendment) (No.2) Regulations, 1966 (S.I. No. 438 of 1966), regulation 4. These Regulations were made under the regulation - making powers conferred upon the Minister of Finance by section 3 of the Exchange Control Act, 1965. That section, so far as it is relevant to the present proceedings, reads:

"3. (1) Notwithstanding anything to the contrary contained in any enactment, the Minister may make regulations relating directly or indirectly to - . . .

(c) The control of -

(i) imports into and exports from Zambia; and

(ii) the transfer or settlement of property; and

(iii) payments; and

(iv) transactions in relation to debts.

(2) Without derogation from the generality of the provisions of subsection (1), regulations made under this section may provide for - . . .

(f) entering on any premises and the search of any premises or person for the purpose of giving effect to any regulation . . .

. . .

(3) Where any regulations made under this section provide for the compulsory taking possession or acquisition of any property or any right or interest in any property, provision shall be made by those regulations for the determination of and prompt payment of adequate compensation in respect thereof.

(4) Different regulations, orders, rules or directions may be made under this section . . . generally, in relation to anything with respect to which provision is made in subsection (1)."

The words "notwithstanding anything to the contrary contained in any enactment" cannot include anything contained in Chapter III of the Constitution, nor has it been argued before me that it could. These words, therefore, should, I think, be read as subject to anything contained in the said Chapter III and, indeed, so far as anything is purported to be done under the section which is in conflict with the provisions of that chapter, I would have no hesitation in holding that such action would be invalid as being in contravention of the Constitution.

As I have said, in exercise of the powers conferred on the Minister of Finance by section 3 of the Act, the Minister made the Exchange Control Regulations, 1965 (S.I. No. 207 of 1965). Regulation 35 of those Regulations in its original form provided that the provisions of the Customs and Excise Act, 1955, and the Posts and Telegraphs Act, 1954, should apply in respect of all goods or articles imported or exported or attempted to be imported or exported in contravention of the Regulations, or any order made or direction given thereunder and any reference in those laws to illegal importations or attempted illegal importations or to postal articles believed to contain goods or articles in respect of which an offence was being committed or was being attempted to be committed, as including a reference to anything prohibited to be imported or exported under those Regulations. I need not go into the effect of this provision in any great length, since it has now been revoked and superseded. Briefly, so far as postal articles are concerned, this meant that

a postal article believed to contain, say, currency, the import or export whereof was prohibited by the Exchange Control Regulations, could be opened by either the Postmaster -General or an officer authorised by him in writing in this regard (Posts and Telegraphs Act, 1954, section 17), or, in certain cases, an authorised officer might deliver it to the nearest customs office or customs officer for examination (ibid., section 23). There is a further provision in section 24 whereby, if the Postmaster -General has reason to believe that a postal article contains goods in respect of which an offence is being committed, or is being attempted to be committed, or if he is requested to do so by the Minister, he may request the addressee or the sender to attend at a specified time and post office and open the postal article himself in the presence of an officer deputed for the purpose. Only if the addressee or sender fails to attend or refuses to open the postal article may it be opened by the deputed officer.

I should also mention that section 17 contains a general provision, which I may have to consider later, as follows:

"17. (1) Save as otherwise provided in this Act, no person shall, after any postal article has been delivered to a post office, open or return the postal article to any person or persons unless he is authorised to do so in writing by the Postmaster -General or any other officer authorised in writing in this regard by the Postmaster General.

(2) The Postmaster -General or such other officer may in such individual circumstances as appear to him to justify such a course grant written authority for opening or returning any such postal article.

As I have said, however, regulation 35 was revoked and another regulation 35 substituted therefor by the Exchange Control (Amendment) (No.2) Regulations, 1966 (S.I. 438 of 1966) also made by the Minister of Finance in exercise of his powers under section 3 of the Act. This new regulation now reads as follows:

"35. (1) Where any authorised officer defined in sub-regulation (5) as 'any person for the time being appointed by the Minister as an authorised officer and including any customs officer, immigration officer or police officer (which I interpret as meaning any such officer duly authorised for the purpose and not merely a customs, immigration or police officer merely because he happens to be such an officer), reasonably suspects that any postal article contains foreign currency, currency of Zambia or any other article is being or may be imported into or exported from Zambia in contravention of those Regulations, he may open and examine such postal article and may seize any foreign currency, currency of Zambia or other article found there in which he reasonably believes to be intended for import into or export from Zambia in contravention of these Regulations.

(2) Any postal article opened under subsection (1), together with its contents shall, unless it is required for the purpose of any criminal proceedings, thereafter to [*sic*] be delivered or forwarded to the person to whom it is addressed:

Provided that any currency or other article seized in respect of which these Regulations have been contravened may be retained by the authorised officer.

(3) Whenever any currency or other article is retained under the *proviso* to subsection (2) -

(a) that currency or other article shall thereupon become the property of the Republic;

(b) the authorised person shall forthwith notify the person to whom the postal article was addressed -

(i) of the seizure and retention of that currency or article;

(ii) that the value of such currency or article will be refunded in Zambian currency on demand by the owner thereof.

(4) The Permanent Secretary, Ministry of Finance, shall pay in Zambia to any person who he is satisfied is the owner of any currency or other article seized and retained under this section, the equivalent value in Zambian currency of such currency or article."

"Postal article" is defined in sub-regulation (5) as having the meaning assigned thereto by section 2 of the Posts and Telegraphs Act. It is there defined as including any letter, postcard, printed paper, newspaper, commercial paper, patterns, sample, parcel, or other article whatsoever in course of transmission by post, and a telegram when conveyed by post.

Before we finally leave the Regulations, I should refer to regulation 38 of the original Regulations, which still remains in force. This provides that, where, under the provisions of the Regulations, any property is compulsorily taken possession of, or any interest in or right over any property is compulsorily acquired, the owner is entitled to adequate compensation and may apply to the High Court for the determination of *(a)* his interest or right; *(b)* the legality of the taking possession or acquisition of the property, interest or

right; and *(c)*the amount of any compensation to which he is entitled. The High Court has power to order prompt payment and the manner in which compensation is to be paid, subject to the provisions of the Regulations.

With the background of the relevant legislation firmly in mind, I now have to consider the applicant's complaint. Apart from the evidence given in the proceedings in the subordinate court, I have before me affidavit evidence as follows:

1. An affidavit by Gordon David Hilditch sworn on 6th August, 1968.
2. An affidavit by the applicant also sworn on 6th August, 1968.
3. An affidavit by Justin Bevin Zulu sworn on 6th August, 1968.
4. A further affidavit by Gordon David Hilditch sworn on 13th August, 1968.

Mr Hilditch, to whose evidence the subordinate court I have already referred, deposes that, between 2nd May, 1968, and 9th May, 1968, he "reasonably suspected" (without stating the grounds upon which that reasonable suspicion was founded) that postal articles containing Zambian currency were being exported from Zambia in contravention of regulation 35 of the Exchange Control Regulations, 1965. On 3rd May, 1968, at the Central Post Office, Ndola, he took possession of and examined four envelopes addressed to 55 Oakfield Road, London, N.4, each of which contained K80 wrapped in brown paper. Between 2nd May, 1968, and 9th May, 1968, at the same post office, he also took possession of and examined sixty - one envelopes addressed to the same address in London, each of which likewise contained K80 wrapped in brown paper. He goes on to aver that none of these envelopes contained any correspondence or communication. He further deposes that, between 2nd and 9th May, 1968 he also took possession of and examined forty - nine envelopes addressed to various addresses outside Zambia containing postal orders or cheques expressed in foreign currency to a total equivalent value of K6,130. There is no evidence, nor is it alleged, that any of these last - mentioned envelopes had any connection with the applicant and this information is no doubt given as evidence of wide - scale attempts at evasion of the Exchange Control Regulations. Finally, he says that, to the best of his knowledge, there was no legal authority for the exportation of the sums of money mentioned.

Mr Hilditch's second affidavit repeats much of the information given in his first affidavit, its main purpose being apparently to exhibit and thereby bring before the court the sixty - five envelopes and their contents to which he had earlier referred.

The applicant, in his affidavit, deposes that, between 3rd and 10th May, 1968, he posted certain correspondence in the posting box at the Ndola Post Office, such correspondence comprising sixty - five sealed envelopes addressed to 65 Oakfield Road, London, N.4, and each containing a number of Zambian currency notes enclosed in a paper wrapper. Each and every such wrapper contained writing; in the form of symbols made by him and constituting a message by him to the addressees of the envelopes. I have seen some of these wrappers and the so - called "symbols" seem to consist of either one or three pencilled crosses. There is no indication as to what these crosses were meant to denote, neither does the deponent indicate their meaning in his affidavit. He goes on to say that on 11th May, 1968, at the Central Police Station, Ndola, he was shown all the "said correspondence" by a police officer and that each envelope had been opened and the contents removed, his information being that this was done by Mr Hilditch, who had seized and retained the contents under a power purporting to be conferred by regulation 35. He adds that he gave no consent to the opening, examination, seizure or retention of the postal articles concerned, which were his property and concludes with an allegation of the contravention of his rights under sections 13 to 20, inclusive, of the Constitution, which is the subject of the application now before me.

[2] The only other evidence filed was an affidavit by Justin Bevin Zulu, the Governor of the Bank of Zambia, sworn on 3rd August, 1968. Speaking as an expert, he deposes to the objects of exchange control, which he says are *(a)* to enable a country to maintain the value of its currency against other currencies, thereby, maintaining the purchasing power of its currency in the international markets, and *(b)* to conserve and increase its holdings

of foreign exchange so that it may obtain its imports on the most favourable terms and have the foreign exchange necessary to pay for those imports. He says that the majority of countries including fully developed democratic countries, protect their economies by exchange control legislation and that such control is not only desirable but essential in the underdeveloped and developing countries for the conservation and increase of their holdings of foreign exchange, in order to pay for purchases of essential goods, services and equipment necessary for the industrialisation and development of their economies.
He goes on to say that, if Zambia's balance of payments falls into deficit, there will not be sufficient foreign exchange available for the purchase of essential goods, services and equipment and, in consequence, the development of the country would be retarded to the economic detriment of Zambia and all the people of Zambia. I take it that what this deponent had in mind thus far was that part of the permitted derogation in sections 18 and 19 of the Constitution which permits a departure "in order to secure the development or utilisation of . . . property for a purpose beneficial to the community" and I will say at once that, while there might be room for argument as to the advantages or otherwise to the economy of exchange control, if Parliament, in its wisdom, considers that such control is desirable in the interests of the economy (I do not have to go so far as to consider whether it is essential or not), there is sufficient volume of international opinion in favour of that control for me to accept that it is done "in order to secure the development or utilisation of . . . property for a purpose beneficial to the community" and that, in principle, it comes within the permitted derogations.
He then proceeds to explain how the export of Zambia currency affects our foreign exchange position. When, at the time of the making of the affidavit, Zambian currency was negotiated abroad, the State, through the Bank of Zambia, had to redeem it by payment of the appropriate currency, thus, depleting the country's resources of that currency by an equivalent amount. This is no longer the case but I am concerned in this case only with the position as it was at the relevant time.
Mr Zulu then tells us that, in order to protect our foreign exchange, residents travelling from Zambia were permitted to take notes out of Zambia to a maximum of K20 except in the case of expatriates employed in Zambia, who were permitted to export rather more provided that they were issued with special permits by an authorised dealer. Notwithstanding this limitation, the value of Zambian notes repatriated had nearly doubled between the years 1966 and 1967, and such a rise was not warranted by the *bona fide* export of currency permissible under the Exchange Control Regulations. The inference is that large sums of money were illegally being exported and that something like wholesale evasion of the Regulations appeared to be taking place.
If one accepts, therefore, that exchange control is a proper solution to the country's foreign exchange position, as I must, there appears to be a real problem which the Government has to face and one which, as I have said, comes in principle within the permitted derogations.
The applicant, however, alleges that the actual method adopted went further than the permitted derogations allowed and that his rights, and his right to enjoy these rights, had been hindered. As I have said, the specific infringements alleged are of his rights under (1) section 18 of the Constitution, in that possession has been compulsorily taken of his property and that the conditions under which this could lawfully be done had not been justified; (2) section 19 (1), in that a search had been made of his property without his consent; and (3), section 22, in that his correspondence had been interfered with without his consent.
Mr Cave conceded that these rights, although fundamental, were not absolute but were subject, in particular, to subsection (4) of section 18, and subsection (2) of sections 19 and 22. I would add that they were also subject to the exceptions contained in paragraphs *(a)*and *(b)* of subsection (1) of section 18. Mr. Cave submitted that the effect of these provisions was to allow a restraint when it is imposed by a law which satisfies the specified requirements and when the law or anything done under it is reasonably justifiable in a democratic society. In the present case, the hindrance of the applicant's rights was effected by the exercise of the purported powers conferred on a customs officer by regulation 35 of the Exchange Control Regulations and he submitted that the restraint on

the individual's right imposed by that regulation did not satisfy the requirements of those subsections and were, in any case, not justifiable in a democratic society.
It was further submitted that the Exchange Control Act itself was unconstitutional so far as it did not make express provision in itself but merely conferred enabling powers on the Minister. Being unconstitutional it was therefore void and, being void, it could not satisfy the requirements of the subsections which dealt with the permitted derogations. In any event, regulation 35 itself did not satisfy these requirements. Furthermore, it was argued, neither the regulation nor the searches conducted thereunder would be tolerated in a democratic society. Thus, the search and seizure of the applicant's mail, when it hindered his enjoyment of his rights, constituted a contravention of those rights.
[3] Mr Sara argued that none of the permitted derogations was valid unless provision was made therefor by an Act of Parliament as distinct from a statutory instrument. He based his argument on the wording of the provisions themselves. Thus, section 18 (1) (b) says "provision is made by a law . . ." Section 18 (4) says: "Nothing contained in or done under the authority of any law shall be held inconsistent with . . . " Section 19 (2) opens with a similar statement and so does section 22 (2). There was, he said, a distinction between "a law" and a document "having the force of law", as does a statutory instrument. The Interpretation Ordinance (Cap. 1) has a definition of "written law" which includes, *inter alia*, a statutory instrument. But the Constitution is to be interpreted in accordance with the Interpretation Act, 1889 (see section 125 (15)) and that Act has no such definition. He cited section 71 (1) of the Constitution, which provides: "Subject to the provisions of this Constitution, the legislative power of Parliament shall be exercised by bills passed by the National Assembly and assented to by the President. Section 71 (7) reads: "When a bill that has been duly passed is assented to in accordance with the provisions of this Constitution it shall become law and the President shall thereupon cause it to be published in the *Gazette* as a law." Section 71 (9) reads: "All laws made by Parliament shall be styled 'Acts' and the words of enactment shall be 'enacted by the Parliament of Zambia'." Therefore, he said, statutory instruments, though having the force of law, were not "laws" within the meaning of the Constitution. He further urged in support of this argument that *(a)* when a statute impaired the rights of the individual, it should be given the narrowest possible construction; and *(b)* one should readily assume that it was the intention of Her Majesty in Council when entrenching the rights of the individual and in providing for those rights to be breached in certain circumstances, that, if this is done, it should be done by an Act of Parliament and not by the act of a Minister.
When, therefore, section 18 (1) *(b)* says "provision is made by a law" this means an Act of Parliament. The only relevant Act in the present case is the Exchange Control Act (Cap. 276) and this does not make the provision required by paragraph *(b)* (ii) with regard to right of access to a court and to compensation. The Act merely authorises the Minister to make regulations, and it is regulation 38 of the Regulations which makes the provisions required in paragraph *(b)* (ii). Regulation 35 provides for compulsory taking of possession and compulsory acquisition, and since this provision is made by regulation and not by the Act itself, it is void as being unconstitutional. Similarly, section 18 (4) *(a)* refers to "the law in question" and the "law", that is the Exchange Control Act, does not make such provision. A similar argument would apply to sections 19 (2) and 22 (2).
Replying on this point, the learned Attorney-General cited *Edwards v Attorney-General for Canada* [3], per Lord Sankey, L.C., at page 136, where it was held that a constitutional statute should not be given "a narrow and technical construction" but "a large and liberal interpretation". To construe the word "law" in the narrow sense submitted by Mr Sarah would be giving the word "a narrow and technical" construction. He also pointed out that, although section 57 of the Constitution vests the legislative power in Parliament, section 73 allowed Parliament to confer on any person or authority power to make statutory instruments. The provisions of a statutory instrument will be enforced by the courts in the same manner as the provisions of an Act of Parliament. He also drew my attention to section 27 of the Constitution which deals with the setting - up of a special tribunal to deal with certain constitutional matters. In particular, reference can be made to the tribunal in regard to whether the provisions of a bill or statutory instrument are inconsistent with Chapter III. He pointed out that statutory instruments were, therefore, part of the general

scheme of Chapter III. Furthermore, section 73 (3) provides that, where a tribunal appointed under section 27 reports to the President that any provision of a statutory instrument is inconsistent with any provision of Chapter III, the President may, by order, annul that statutory instrument. Again, therefore, Chapter III did not only contemplate legislation under the permitted derogations being carried out by an Act of Parliament.
Finally, the learned Attorney-General pointed out that regulation 7 of the Zambia Independence Order, 1964, preserved a proclamation under section 4 of the Preservation of Public Security Ordinance. This Ordinance is purely enabling and everything done thereunder is by regulation.
It is convenient to dispose of this point right away, since, if Mr Sarah is right, regulation 35 is clearly invalid and is in contravention of Chapter III.
As to the point made by the learned Attorney-General that a constitutional statute must not be given "a narrow and technical" construction, as enunciated in *Edwards v Attorney-General for Canada* [3], or he construed in a "narrow and pedantic sense" (*British Coal Corporations v R* [4] at page 518), "that principle may not be helpful, where the section is . . . a constitutional guarantee of rights" (*James v Commonwealth of Australia* [5] per Lord Wright, M.R, at page 614). It has been held that "the provisions of the Bill of Rights are to be broadly construed" (*Grau v U.S.* [6] at page 213), but this is so that they may be "protected against gradual encroachments that seek to deprive them of their effectiveness" (ibid.). In other words, a Bill of Rights must be broadly construed in favour of the individual rather than in favour of the State (*see Sgro v U.S.* [7] at page 265). If, therefore, I had to depend entirely on extrinsic construction for the meaning of the word "law" in the relevant provisions, I would be inclined to follow that construction which favoured the applicant rather than that which favoured the State. I do not, however, have to do this, because I think it is clear, from the wording of Chapter III itself, that, where reference is made to a "law", a statutory instrument is included. Quite apart from the general provisions in section 73 (1), which gives Parliament power to pass enabling legislation, I think section 27 concludes the matter. Subsection (3) *(b)* reads:

"in the case of a statutory instrument, whether or not in the opinion of the tribunal any, and if so which, provisions of the instrument are inconsistent with this Chapter of the Constitution.'

If it were not possible to legislate in respect of the permitted derogations by statutory instrument, there would be nothing for a tribunal to decide. Every statutory instrument made with such intention would be inconsistent in its totality with Chapter III, and there would be no necessity to consider "whether or not . . . any, and if so which, provisions of the instrument are inconsistent . . ." (section 27, subsection (3) (b)). For this reason, therefore, I think that, where the word "law" is mentioned in the relevant provisions, it was intended that this should include a statutory instrument as well as an Act of Parliament.
[4] The next point raised was, on whom lies the burden of proof? It was conceded by Mr. Cave that the applicant carries the burden of proving that his rights under the relevant provisions have been contravened and, indeed, the learned Chief Justice has so held in *Kachasu's* [1] case, *supra*, at page 20. He has also conceded that it is for the applicant to show that the legislation is "not to be reasonably justifiable in a democratic society" (section 19) and, indeed, the very wording of that provision "except so far as that provision . . . is shown not to be reasonably justifiable . . ." (section 19), clearly means that the applicant must show that it is not reasonably justifiable. This, too, was held by the learned Chief Justice in *Kachasu's* [1] case, *supra*, at page 22. Mr Cave contended, however, that the *onus* of proving that the legislation concerned comes within the permitted derogations is on the State, on the ground that such matters are within the peculiar knowledge of the State. The learned Attorney-General's reply to this contention was that there was a presumption in favour of constitutionality and he cited in this regard the judgment of the learned Chief Justice in *Kachasu's* [1] case, at page 22, where he said:

"There is, however, a presumption that the Legislature has acted constitutionally and that the laws which it had passed are necessary and reasonably justifiable - *see Arzika, v Governor, Northern Region,* (1961), A.N.L.R 379, per Bate, J, at p. 382 - and I think this presumption extends to rules made by a Minister under statutory powers

conferred on him by the Legislature. It is part of the applicant's case that regulation 35 is unconstitutional and invalid. The *onus* is on him to prove it . . ."

The learned Chief Justice proceeded to cite the case of *Cheranci v Cheranci* [8], which is discussed in 1963 J.A.L. at pages 159 and 160. Unfortunately, the report itself is not available to me, but from the discussion in the Journal, it seems that Bate, J, in that case was concerned more with what was reasonably justifiable in a democratic society, with which I shall deal in due course, than with the *onus* of proof in relation to the permitted derogations. In *Arzika's* case even this point did not arise, since it was concerned with whether certiorari or prohibition would lie against the Governor in respect of an executive act.

The "presumption in favour of constitutionality" is dealt with at some length by Basu in his *Commentary on the Constitution of India*, 4th Ed., Vol. l, at page 199, *et seq.* He says of this presumption that "it is self - imposed in as much as neither Constitution (i.e. of India and of the United States) has laid down any rule of presumption in this respect either way". In the United States, it has been held that all reasonable doubt of a statute's validity must be resolved in favour of the statute and it should not be pronounced to be unconstitutional unless it is clearly proved to be so (*Ogden v Saunders* [9]). The presumption means that - "there should be such an opposition between the Constitution and the law that the judge should feel a clear and strong conviction of their incompatability" (*Fletcher v Peck* [10]). Basu then goes on (at page 199) to state that, on the United States, decisions, certain corollaries follow from this rule of presumption, one of which is that the burden lies upon him who attacks a statute to show that there has been a clear transgression of the constitutional principles. In construing the impugned statute, the court must consider the legislative scheme as a whole, with reference to the injury complained of (*Euclid v Ambler Realty Co.* [11]). Basu adds, however, at page 200, that the principle of so construing a statute as to avoid the constitutional question has been carried to an undesirable extent in the United States, where judges, in their zeal to save a statute from unconstitutionality, have openly strained the language of the statute or narrowed down its meaning. He concludes, at page 201, that, when the court strained the language of a statute when the statute is plainly capable of a different or wider meaning, the court is leaving the citizen, as to his subsequent conduct, to the vagaries of statutory interpretation rather than constitutionality and the position of the citizen becomes more and more hazardous according to the degree of perversion which the language of the statute suffers at the hands of the court in its attempt to save the statute. He adds that in the United States cases which he had considered, the Supreme Court had overlooked the restraint which it had earlier placed upon its zeal to avoid the constitutional issue and he cites Vinson, C.J, in *Shapiro v U.S.* [12]:

"The canon of avoidance of constitutional doubts must, like the 'plain meaning' rule of interpretation of statutes, give way where its plain application would produce a futile result or an unreasonable result 'plainly at variance with the policy of the legislation as a whole'."

The policy of the legislation which we have here to consider, namely Chapter III of the Constitution, is stated in section 13, that is, to secure the fundamental rights and freedoms of the individual. That is the aim of that chapter, the limitations imposed being, not a principal object of the legislation, but a restriction on that object, namely, "limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest".

Looking more closely at the specific provisions with which we are concerned, i.e. sections 18, 19 and 22, section 18 is subject to an exception "where the following conditions are satisfied . . . " one of them being that the taking of possession is necessary or expedient for one of the specified purposes. I shall be dealing in due course with the question of whether, in considering generally the exercise of powers under the relevant provisions, the approach should be objective or subjective. Here we are dealing with a requirement that a stated set of facts should exist, namely that certain conditions should be satisfied, and one of them is that the action taken is "necessary or expedient". If it is neither necessary nor expedient, then the exception cannot apply. It is therefore a condition precedent to the existence of the exception that it should be "necessary or expedient". In

the light of what I shall have to say later, I think the test of whether it is necessary or expedient is an objective one and must be proved. Further, I agree with Mr Cave's submission that the facts upon which a conclusion on this aspect must be based are peculiarly within the knowledge of the Government and this is a further reason why I think that the *onus* of proving their existence should be placed on the State.
Similarly, sections 19 (2) and 22 (2) provide that the derogations there permitted are so permitted "to the extent that the law in question makes provision *(a)* that is reasonably required. . ." in the specified interests. Again, this is a condition precedent to the validity thereof and, again, I think the test is objective and the facts upon which it is to be based are peculiarly within the knowledge of the Government. I think therefore, that it is for the State to satisfy me that the law concerned is reasonably required in the specified interest.
Having said this, I should observe that, notwithstanding the learned Attorney-General's submission concerning the burden of proof, he has filed evidence of the facts upon which he relies and he has addressed argument to me in support thereof, so I do not think he will find himself at any disadvantage by reason of my decision on this point.
Having disposed of these, what I might term secondary issues, I now come to the main issues before me. These centre round regulation 35 of the Exchange Control Regulations under the purported authority of which the acts complained of were done. I have already decided that, if legislation otherwise qualifies as coming within the permitted derogation, that legislation can be as validly enacted by statutory instrument as by an Act of Parliament, provided, of course, the statutory instrument itself comes within the powers conferred by the enabling Act under which it is made. The powers to make regulations relating to exchange transactions and to the control of imports into and exports out of Zambia are among the regulation - making powers conferred on the Minister of Finance by section 3 of the Exchange Control Act, 1965, and that section expressly sanctions the inclusion in such regulations of provisions for "entering on any premises and the search of any premises or person for the purpose of giving effect to any regulation".
[5] I have already referred to the text of regulation 35. It applies "where any authorised officer reasonably suspects that any postal article contains foreign currency, currency of Zambia or any other article and that such foreign currency, currency of Zambia or other article is being or may be imported into or exported from Zambia in contravention of these Regulations . . ." These, then, are the conditions precedent to the exercise of the powers conferred on an authorised officer by the Regulations. Firstly, he must reasonably suspect that a postal article contains foreign or Zambian currency or other prohibited article; secondly, he must reasonably suspect that it either is being or may be imported or exported and, thirdly, he must reasonably suspect that such import or export is in contravention of the Regulations. I have already said that I interpret the definition in sub-regulation (5) of "authorised officer" that the officer must be specifically appointed by the Minister as an authorised officer, whether he be a customs officer, immigration officer, or police officer and a customs officer or an immigration officer is not, *ipso facto*, an authorised officer unless he has been so appointed. This disposes of the argument advanced before me that, under the regulation, the humblest police constable is given *carte blanche* to walk into any post office and tamper with the mails. I do not think that the regulation gives any person, whether an authorised officer or not, any such power. The authorised officer must have reasonable suspicion that a postal article contains the matter specified. The regulation refers to "any postal article". I understand this to mean that the suspicion of the authorised officer must be directed at a specific postal article and he must be in a position to say, "I reasonably suspect that that particular postal article contains Zambian currency (or whatever other relevant matter)", before his power to open and examine or to seize begins to operate.
[6] The question arose in the course of argument whether this 'treasonable suspicion" is a subjective suspicion or an objective suspicion. Mr Heron drew my attention to the House of Lords case of *Liversidge v Anderson* [13], and particularly to the dissenting opinion of Lord Atkin, at page 349 et seq. This case concerned regulation 18B of the Defence (General) Regulations, made during the war of 1939 to 1945, which gave the Home Secretary power to detain a person if he had reasonable cause to believe that person to be a person of hostile associations. The majority of the House held that, where such

power was entrusted to a Secretary of State, he was given administrative plenary discretion and could not be made to disclose the grounds for his reasonable cause to believe, in other words, that the test was subjective. Lord Atkin did not agree that even Secretaries of State were so privileged, but it was common ground that lesser mortals were not and in their case the test was an objective one.

On the question of the privilege of a Secretary of State, Lord Atkin said (at pages 357 and 358):

"Even if it were open to a judge to consider the question of expediency, what are the suggested grounds which compel him to adopt the hitherto unheard of 'subjective' construction? It is said that it could never have been intended to substitute the decision of judges for the decision of the Minister, or, as had been said, to give an appeal from the Minister to the courts. No one, however proposes either a substitution or an appeal. A judge's decision is not substituted for the constable's on the question of unlawful arrest, nor does he sit on appeal from the constable. The judge has to bear in mind that the constable's authority is limited, and that he can arrest only on reasonable suspicion, and the judge has the duty to say whether the conditions of the power are fulfilled If there are reasonable grounds, the Judge has no further duty of deciding whether he would have formed the same belief, any more than, if there is reasonable evidence to go to a jury, the judge is concerned with whether he would have come to the same verdict."

He went on to say (at page 361):

"In England amidst the clash of arms the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which, on recent authority, we are now fighting, that the judges are no respecters of persons, and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law. In this case, I have listened to arguments which might have been addressed acceptably to the Court of King's Bench in the time of Charles I. I know of only one authority which might justify the suggested method of construction. 'When I use a word,' Humpty Dumpty said in rather a scornful tone 'it means just what I choose it to mean, neither more nor less.' 'The question is,' said Alice, 'whether you can make words mean different things.' 'The question is,' said Humpty Dumpty, 'which is to be the master - that's all.' (*Alice Through the Looking Glass,c.v.*). After this long discussion, the question is whether the words 'If a man has' can mean 'If a man thinks he has'. I am of the opinion that they cannot . . .".

[6] [7] Unlike the judges of England, I am not bound by decisions of the House of Lords, although they have great persuasive effect, as indeed is the case with all the other non - Zambian decisions cited to me, whether they be from the United States, Nigeria, or India. It is Zambian law which I have to interpret and not the law of any other country. However, as I have pointed out, even the majority opinion in *Liversidge v Anderson* [13], applies the subjective test only to Secretaries of State. So far as anyone else is concerned, the question of "reasonable suspicion" and similar terms is an objective one. In the present case, therefore, I think that the question of whether an authorised officer "reasonably suspects" that a currency offence has been committed is an objective one and it should not be left to the sole decision of the authorised officer. I will not go into the question of whether he ought to apply for a search warrant at this stage, although I will have to deal with that question at the appropriate time. But I am of the opinion that he must satisfy somebody that he has grounds for reasonable suspicion. Whom he has so to satisfy does not appear from the regulation itself. I have, however, already made reference to section 17 of the Posts and Telegraphs Act, 1954, which provides that, save as otherwise provided in that Act, no person may, after a postal article has been delivered to a post office, open or return the postal article to any person or persons unless he is authorised to do so in writing by the Postmaster -General or any other officer authorised in writing in this regard by the Postmaster -General. Indeed, once a postal article has been delivered to a post office, the Postmaster -General is a bailee of such article until it has been delivered to the addressee and is under a duty not to deliver it to anyone else unless he is under a specific legislative requirement to do so. It is true that the enabling Act, namely section 3 of the Exchange Control Act, empowers the Minister to make regulations "notwithstanding anything to the contrary contained in any enactment", but the effect of this is to authorise the Postmaster –General to hand over a postal article to an authorised officer if, as I hold, he, or an officer duly authorised by him in writing, can be satisfied that there are reasonable grounds for the authorised customs officer (I use this term to avoid ambiguity) suspecting that a currency offence is, or is about to be, committed. In other words, before the authorised customs officer can exercise his power under the regulation to open or examine a postal article, he must satisfy the Postmaster -General or his authorised officer, such as the postmaster at the post office concerned, that he, in fact, has reasonable

grounds for suspecting the commission or attempted commission of a currency offence, and, as I have said, he must specify the postal article in respect of which he entertains that suspicion. In thus deciding that the test in the present case is an objective and not a subjective one, I am fortified by the fact that it was Mr Heron, on behalf of the State, who argued this point.

We now come to the substance of the applicant's complaint. He complains that his rights have been breached in respect of three of the "freedoms" contained in Chapter III of the Constitution and I propose to examine his complaint in respect of each.

The first freedom which he alleges has been breached is the protection to which he is entitled from deprivation of his property under section 18. Subsection (1) of that section provides that no property of any description may be compulsorily acquired, unless the conditions laid down in paragraphs *(a)* and *(b)* of that subsection are satisfied. Although we have not yet reached the stage where any property of the applicant's has been compulsorily acquired, I am satisfied on the evidence that property belonging to the applicant has been taken possession of and that this was done without his consent. It was therefore, taken possession of compulsorily. Unless, therefore, it can be shown, and, as I have held, shown by the State, that this taking possession was done in the excepted circumstance, *prima facie* there has been a breach of the applicant's right under section 18. Counsel for the State argues that paragraph *(a)* is satisfied for two reasons, viz. it was necessary or expedient (i) in the interests of public safety; and (ii) in order to secure the development or utilisation of that property for a purpose beneficial to the community. With regard to paragraph *(b)*, the Exchange Control Act, in section 3 (3) requires regulations made thereunder which provides for (*inter alia*) the compulsory taking possession of property to make provision for the determination of and prompt payment of adequate compensation, regulation 35 (3) and (4) of the Regulations make provision for payment of compensation to the equivalent value in Zambian currency so that one must say that adequate compensation is provided for, while regulation 38 expressly states that the owner of the property is entitled to adequate compensation and not only gives a right to apply to the High Court for the determination of the amount of compensation, but gives the High Court power to order prompt payment. As I have already held that the term "provision is made by a law" includes provision made by statutory instrument, to find that the condition set out in paragraph *(b)* has been satisfied.

[8] I will now examine whether paragraph *(a)* has been complied with. As I have observed, it is argued that the Exchange Control Act and the regulations made thereunder were necessary or expedient not only for the purposes of sub-paragraph (ii) of paragraph *(a)* but also in the interests of public safety under sub-paragraph (i). It will be noted that in this section, the criterion is whether the taking of possession is necessary or expedient. It is not necessary, therefore, for the State to show that the taking of possession was essential for the desired purpose, but merely that it was expedient.

I see from the Oxford English Dictionary that the word "expedient", when used as an adjective, has three principal meanings. The first is "hasty" or "speedy". The second is "conducive to advantage in general, or to a definite purpose; fit, proper, or suitable to the circumstances of the case". The third is "in depreciative sense, 'useful' or 'politic' as opposed to 'just' or 'right'." I cannot conceive that the draftsman of the Order in Council intended to use the word in this last sense, nor would the definition "hasty" or "speedy" appear to be appropriate. The second definition would seem to be the appropriate one here, especially "conducive to the purpose" in hand or "suitable to the circumstances of the case". It is, therefore, far short of what is "necessary" or even what is "reasonably required", a term which I shall have to consider in connection with section 19.

[9] [10] Now the learned Attorney-General has argued at some length that the exchange control legislation in general, and regulation 35 in particular, apart from being necessary or expedient in order to secure the development of the property for a purpose beneficial to the community, was also necessary "in the interests of public safety". He cited *Basu*, Vol. 1, at page 627: " 'public safety' ordinarily means security of the public or their freedom from danger, external or internal". He also cited *Kachasu*'s case, where our own learned Chief Justice accepted his argument (at pages 23 and 24), that the applicant's right to enjoy freedom of conscience, and all the other rights guaranteed by Chapter III, depended

upon the continuance of the organised political society established by the Constitution, which, in turn, depended upon national security, without which any society was in danger of collapse or overthrow, and that the provision there being considered, which made it compulsory for children attending State schools to sing the national anthem and salute the national flag, made for national unity and was therefore made in the interests of public safety. In the present case, the learned Attorney-General argued that, in order to retain national security, it was necessary to have some measure of economic prosperity or at least to avoid economic stagnation or depression, which, he urged, might endanger the national security and the exchange control legislation was, therefore, expedient in the interests of public safety.

It may well be that, in Regulations designed to promote national unity, the interest of public safety might well play a prominent part. Here, however, we are concerned with Regulations designed to promote the economy. Again quoting *Basu* (Vol. 1, at pages 551 and 552), "not only should the restriction, in order to be valid, relate to any of the grounds mentioned in the relevant limitation clause, but the relationship between the impugned legislation and any of the relevant specified grounds must be rational or proximate. This also follows from the expression 'in the interests of' . . ." This expression has been held to include power to curb tendencies rather than to wait for the actual danger to come upon us (*see West Virginia State Board v Barnette* [14]), but "they are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect" (ibid., per Jackson, J at page 63q). In other words, they must be proximate tendencies (*see Raji Lal v State of U.A.* [15]). It could conceivably happen that complete financial anarchy might so weaken the economy that internal disaffection might be caused, leading to rioting and civil disturbance. So might widespread unemployment, caused, say, by over population. So might prolonged drought which disrupted agricultural production. One might think of many things which could, ultimately, affect the public safety. None of them would, however, have the quality of proximateness which would justify involving this exception. Nor do I think that exchange control is sufficiently proximate to public safety to warrant the present legislation being adopted "in the interests of" public safety. Nor do I think that, when the exchange control legislation was drafted, did the draftsmen have in mind that they were doing so in the interests of public safety, nor, for that matter, did the Minister of Finance have this in mind in approving the Regulations.

[11] The learned Attorney-General is, I think, on firmer ground when he relates these Regulations to sub-paragraph (ii) "in order to secure the development or utilisation of that, or other, property for a purpose beneficial to the community". The nexus between this and exchange control is, to my mind, so clear that I do not think one could reasonably argue to the contrary. I am satisfied, therefore, that the taking of possession, so far as it affects section 18, was expedient for a scheme of exchange control which was designed in order to secure the development of the nation's financial resources for a purpose beneficial to the community

[12] This does not, however, dispose of section 18. Subsection (4) of that section goes on to provide for certain "deemings" and provides (*inter alia*) that nothing contained in or done under the authority of any law is to be held to be inconsistent with or in contravention of subsection (1) to the extent that the law in question makes provision for the taking of possession of any property for so long only as may be necessary for the purposes of any examination, investigation, trial or inquiry. This provision is an extension of, rather than a limitation on, the exceptions referred to subsection (1). So long as the taking of possession is for one of these specific purposes and is temporary, it would seem that it is unnecessary to show that the taking of possession comes within paragraph *(a)* of subsection (1). There is, however, a limitation that each taking of possession is only valid "so far as that provision . . . is shown not to be reasonably justifiable in a democratic society".

So far as this section is concerned, it is the taking of possession of the applicant's property with which I am concerned, and I am asked to decide whether the opening, examination and seizure of the postal articles which contained this property was a contravention of his rights under the section. The section is not, of course, concerned with opening or examination, which fall to be considered under sections 19 and 22. It is the seizure or taking possession of the contents of the envelopes with which I have to deal under section

18. I have already said that I consider that exchange control comes within the excepted derogation in paragraph *(a)* (ii) of subsection (1) and that the exchange control legislation under which the taking of possession was effected was expedient for that purpose. I do not have to consider whether it was necessary. I do not think that the method in which the contravention of the Regulations came to light is relevant on this point, since the taking of possession followed thereon and was, in fact, an extraneous action. That being so, I do not have to consider whether this action was affected by subsection (4) of the section. However, if subsection (4) does fall to be considered, I am satisfied on the evidence that the taking of possession in the present case is "for so long only as may be necessary for the purpose of any examination, investigation, trial or inquiry". I will have to consider, for the purposes of sections 19 and 22, the meaning of the expressions "reasonably justifiable in a democratic society", but for the purpose of section 18, I should think that, on any interpretation of the term, retention of evidence pending trial is reasonably justifiable in any sort of society. In any case, it has not been shown to me by any evidence addressed on behalf of the applicant, or by any argument addressed to me on the point, that such retention is not reasonably justifiable in such a society. My answer, therefore, to the third question put to me for my decision, which I have taken first for convenience, must be, "No"

I now come to section 19. The question which I am asked on this section is whether the opening, examination and seizure of the postal article constituted a contravention of the applicant's right to privacy of property as guaranteed by section 19. That section secures protection for the privacy of a person's home and other property. Subsection (1) provides that, except with his own consent, no person may be subjected to the search of his person or his property or the entry by others on his premises. Here, the applicant complains of the search of his property without his consent by a customs officer purporting to act under the authority of regulation 35. The search is supported by the affidavit evidence of Mr Hilditch, and the absence of consent appears from the Record of the Subordinate Court proceedings at page 3, lines 3 - 5. There was, therefore, a prima facie breach of the applicant's rights under section 19 (1). The learned Attorney-General submitted, however, that this was justified under the permitted derogations in subsection (2), on the ground that it was reasonably required both in the interests of public safety and in order to secure the development or utilisation of the property for purpose beneficial to the community.

[13] It will be noted that, in this section, for a law or an action under it to come within the permitted derogations, it must be "reasonably required" for one of the specified purposes, unlike section 18, under which it must be "necessary or expedient".

The learned Chief Justice in *Kachasu*'s case (at page 26) pointed out that "reasonably required" does not mean "necessarily required" or even "urgently required". On the other hand, the word "required" imports some degree of need and is therefore stronger than "expedient" although not as strong as "necessary". The expression "reasonably required" occurred in paragraph *(h),* Schedule I to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (now case 8 of Schedule 3 to the Rent Act, 1968) in the United Kingdom legislation, which allowed a landlord of a dwelling - house, to which that Act was subject, to obtain possession without proof of alternative accommodation where it was "reasonably required" as a residence for himself or certain members of his family. Under that provision it was held that the expression "reasonably required" meant "a genuine present need, something more than desire, although something less than absolute necessity" (*Aitken v Shaw* [16]). Something may be "reasonably required" even though there is an alternative (*see*, e.g. *Gonsales v Thompson* [13], where it was held that, a landlord may have several houses let to different tenants but it must be left to him to say which of his houses he desires to occupy). [14] On this analogy, there may be different ways in which Parliament may achieve its object. It is not for the courts to decide whether or not Parliament may have chosen a better way or to express their opinion on which is the best way. I will not go into the considerable volume of authority on the role of the courts in deciding constitutional questions. The learned Chief Justice has dealt with this point in *Kachasu's* [1] case at page 26. It is sufficient here for me to say that it is not the function of the courts to impose their own views of what Parliament ought to do, but merely to consider whether what Parliament has done, whether an individual judge

agrees therewith or not, comes within Parliament's legislative competence. If, therefore, Parliament, in its wisdom, decides that a certain course of action is wanted to meet a certain need and that need comes within the excepted derogations, so long as that course of action is reasonably required, the fact that another course might, in opinion of the court, be better, is immaterial.

[10] I have, therefore, to decide whether, in the present case, regulation 35 itself was reasonably required either in the interests of public safety or in order to secure the development, etc., of any property for a purpose beneficial to the community or whether the action of the customs officer acting under the authority of the regulation was so reasonably required. As regard public safety, I have already dealt therewith. I do not consider that the question of exchange control is sufficiently proximate to the question of public safety and I must therefore hold that regulation 35 is not reasonably required in the interests of public safety. It follows that anything done under the authority therefor is not so reasonably required.

[11] In the case of development or utilisation of property for a purpose beneficial to the community, however, I think the nexus is clear, as I have already said, and I think that regulation 35 was reasonably required for that purpose. As regards the action of the customs officer, I have his statement that he reasonably suspected the commission or threatened commission of the offence mentioned in the regulation but I have no evidence of the grounds for that suspicion, nor whether it was communicated to anyone. Bearing in mind the interpretation which I have given of regulation 35, I am acting on the assumption that he followed the procedure which I have said he ought to follow and, on that assumption, the action taken under the authority of the regulation was also reasonably required for the purpose stated. If he did not, other considerations must arise. [15] All this is, however, subject to the exception to subsection (2) "except so far as that provision (i.e. the regulation) or, as the case may be, anything done under the authority thereof, is shown to be reasonably justifiable in a democratic society". Mr Cave has submitted that neither regulation 35, nor a search conducted thereunder, is reasonably justifiable in democratic society. He based his argument principally on the ground that the regulation did not provide for a search warrant to be obtained before the search was made and that, in fact, Mr Hilditch did not obtain a search warrant before opening, examining and seizing the postal articles concerned. He submitted that no democratic society does or could tolerate search without warrant when that search was of a man's correspondence. Search without warrant was fundamentally objectionable and has been so considered since 1765, when *Entick v Carrington* [18] enunciated the principle that law officers could not break into a man's home and search his person in order to obtain evidence. He also cited the United States case of *Wolf v Colorado* [19] at page 27, "security of one's privacy against arbitrary action by the police is basic in a free society". This principle had been followed consistently by both the United States and the English courts, the reason being to secure the guaranteed rights of the individual to freedom from search. He cited, among other cases, *MacDonald v U.S.* [20] and *Weeks v U.S.*[21], and argued that the customs officer must have formed his suspicion before going to the post office and therefore could have first obtained a search warrant. He pointed out that in England there are some seventy - one statutes which give a power of search and only two of these, the Incitement to Disaffection Act, 1934 and the Larceny Act, 1916, permitted police officers to conduct a search without warrant. Even these two required the written authority of a senior police officer and none permitted search without some document or previous written authority. Furthermore, there was no power of search without warrant in the exchange control legislation of Tanzania, Uganda or Kenya. The United Kingdom Exchange Control Act, 1947, required a warrant from a justice of the peace, who must be satisfied there were reasonable grounds by an information on oath by an authorised treasury official (Schedule 5, rule 2).

The learned Attorney-General, in reply, argued that, although the United States 4th Amendment went even further than the *Entick v Carrington* [18] principle was taken in England, the United States Supreme Court had long held that there was a fundamental difference between the search of premises or a person and the search of a motor - car, ship or vehicle, and also a further fundamental difference between a search for ordinary

criminal purposes and a search for contraband. Thus, in *Carrol v U.S.* [22], it was held that customs officers might, without warrant, search vehicles and ships to prevent the import or export of contraband. Furthermore, it was common practice in most countries for customs officers to search the luggage and effects and, indeed, the persons, of travellers entering a country, to ensure that those effects are such as may be properly be brought into the country. The definition of "contraband" was "articles forbidden to be imported or exported". He further cited *Frank v Maryland* [23], where Frankfurter, J, held that, apart from customs laws, inspection was not unconstitutional when part of a regulatory scheme. In particular, when dealing with a movable object as an adjunct to a regulatory scheme it is reasonable to make such provision. In the same way as customs officers could search cars, ships and aeroplanes for contraband, since these are transitory, so it is necessary in the case of mails, which by their very nature have to be moved quickly. The exchange control scheme was designed to protect the wealth of the country and was analogous to the customs law. Regulation 35 was part of the general preventative scheme to stop the export of wealth. It was designed to prevent currency control evasion, its purpose being to prevent people using the mails as a method of illegally exporting currency. It was common knowledge that the post could be used as such a method. A power of search was, therefore, not only reasonable but essential to secure compliance. It was, therefore, reasonably required for the specific purpose.

The learned Attorney-General then went on to make a submission which appears to have been accepted by the learned Chief Justice in *Kachasu's* case (at pages 28 and 29). This was that, when a court applies the test of what is reasonably required in Zambia, then, so long as Zambia continues to be a democracy, that which is reasonably required in Zambia must be reasonably justifiable in democratic society. On the few occasions when this expression has fallen to be interpreted in the equivalent constitutional provision of other countries, such as Nigeria, a similar trend of interpretation has been adopted. I think that the difficulty, and indeed the obscurity, of the expression has somewhat encouraged this approach. I rather suspect that the constitutional draftsman included the expression more for its emotional effect than with any real regard to what it means. However, it is there and has to be given some meaning. As Mr Cave submitted, with considerable force, if what is reasonably required in Zambia is to be equated with what is reasonably justifiable in a democratic society, the latter part of the subsection would be tautologous and completely unnecessary. If I decided, therefore, that the regulation or what was done under it was reasonably required in Zambia, there would be nothing for me to decide on the issue of whether it was reasonably justifiable. To adopt the view submitted by the learned Attorney-General seems to me to be begging the question. It involves adopting an axiom, namely that Zambia is a democratic society, and to proceed from there to the assumption that "Zambia" must be equated with "democratic society''. In rejecting this suggestion, I am not for a moment suggesting that Zambia is not a democratic society, but, for the purpose of the Constitution, I think it is necessary to adopt the objective test of what is reasonably justifiable, not in a particular democratic society, but in any democratic society. I accept the argument that some distinction should be made between a developed society and one which is still developing. but I think one must be able to say that there are certain minima which must be found in any society, developed or otherwise, below which it cannot go and still be entitled to be considered as a democratic society.

This brings me to the greatest difficulty with which we are faced in determining the meaning of this expression. What is "democratic society"? There are countries of greatly differing ideological character, all of whom claim that they are democracies, although in many cases they may arrive at this conclusion by following Humpty Dumpty's principle. "When I use a word, it means just what I choose it to mean, neither more nor less." The Oxford English Dictionary defines "democracy" as coming from the Greek "demokratia", popular government, from "demos", the common people, plus "kratia" from "kratos", rule, sway authority. It thus gives the meaning of the word as:

(1) Government by the people; that form of government in which the sovereign power resides in the people as a whole, and is exercised either directly by them (as in the small republics of antiquity) or by officers elected by them. In modern use often more vaguely

denoting a social state in which all have equal rights, without hereditary or arbitrary differences of rank or privilege.

(b) A state or community in which the government is vested in the people as whole.

(2) That class of the people which has no hereditary or special rank or privilege; the common people (in reference to their political power).

In the United States, there are at least two cases in which an attempt was made to define what constituted a "democratic country". In *Speiser v Randell* [24], it was defined as "a free society in which government is based upon the consent of an informed citizenry and is dedicated to the protection of the rights of all, even the most despised minorities". In *Yates v U.S.* [25], at page 344, it was described as "a free government - one that leaves the way wide open to favour, discuss, advocate, or incite causes and doctrines however obnoxious and antagonistic such views may be to the rest of us". Or, as Voltaire put it, "I disapprove of what you say, but I will defend to the death your right to say it.

" In an Indian case, *Romesh Thapper v State of Madras* [26], we find the following statement: "Freedom of speech and of the Press lay at the foundation of all democratic organisation, for, without free political discussion, no public education, so essential for the proper functioning of the processes of popular Government is possible."

All this is, however, subject to the security of the State (see *American Communications v Douds* [27] and 1 *Basu*, page 618 et seq.), so that some degree of control is permissible in the interests of security but only so far as Is reasonably necessary for that purpose.

The questions I have here to decide are whether the power of search as contained in regulation 35 and exercised by Mr Hilditch under the authority of that regulation was, (a) reasonably required for the purposes of the scheme of exchange control, which I have already held is expedient in order to secure the development and utilisation of property for a purpose beneficial to the community; and (b) whether it was reasonably justifiable in a democratic society.

The evidence clearly showed that the post was easily capable of being used as method of illegally exporting currency and that, in fact, there was wide - scale evasion of the exchange control regulations in this regard and strong reason for believing that a large part of this evasion was taking place through the post. I have no hesitation in holding, therefore, that some form of supervision of the mails to prevent such evasion was reasonably required for the purpose of enforcing exchange control. It was also not unreasonable to provide that, if a person, such as a customs officer, was vested with the necessary authority and had reasonable suspicion that an offence was being attempted in respect of any particular postal article, that he ought to have some means whereby he could investigate whether that suspicion was fact. This is what regulation 35 provides and, in this connection (that is to say, on the question whether it was reasonably required) it is not for me to say whether this was the best method by which this could be done or whether a better method could have been adopted. As I have already said in regard to section 18, if Mr Hilditch pursued his powers in the objective manner which I have said regulation 35 requires (and I have no evidence before me to the contrary), his action was also reasonably required for the specified purpose.

But is the regulation, and was Mr Hilditch's course of action, reasonably justifiable in a democratic society? Here, I think, is the essential difference between what is reasonably required in Zambia and what is reasonably justifiable in democratic society. As I have said, power of this nature is reasonably required to secure the proper functioning of exchange control, and for this purpose the method by which such control is exercised is of purely secondary consideration. But method is fundamental when one comes to consider what is reasonably justifiable in a democratic society. Here, it is the manner in which the power of search was exercisable and in fact exercised which is in question. In particular, is this particular power of search, when exercisable without the obtaining of a search warrant, so justifiable? I have mentioned the many cases on powers of search cited to me by counsel in argument and, in particular, the leading case of *Entick v Carrington*, which condemned the issue of general warrants and, *a fortiori*, search without warrant. *Entick v Carrington*was especially directed against searches for political purposes, but the general conception of search without warrant was condemned and this principle was upheld, both

in England and in the United States, by later authorities. Indeed, as Basu observes, the United States has carried this principle much further than England. I would have no hesitation in saying that, if our Parliament were to introduce a measure which gave the police, or any other official, *carte blanche* powers of search at their own discretion, that such a measure would not be reasonably justifiable in any democratic society.

I am, however, impressed by the points made by the learned Attorney-General, when he drew my attention to United States authorities which indicated a fundamental difference between the search of premises and the search of a motor - car, ship or vehicle and between a search for ordinary criminal purposes and a search for contraband. I think I can also take judicial notice of the common practice of customs officers the world over to search the luggage, effects and persons of travellers in their search for contraband. I accept the learned Attorney-General's definition of contraband as including illicit currency imports or exports and his analogy between a moving vehicle, ship or aeroplane and articles in the post, which are also in transit. Some degree of haste is therefore necessary to impose a proper control. I also take note of the decision in *Frank v Maryland* [23], that inspection without warrant was not unconstitutional when it was part of a regulatory scheme.

I do not ignore the fact that, in other countries, exchange control schemes have not found it necessary to include powers of search without warrant, but, as I have already observed, I do not have to decide whether there is a better method but whether the method here adopted is not reasonably justifiable. On the basis that the customs officer is duly authorised, that his "reasonable suspicion" is objective and not subjective that he must form this suspicion in respect of a particular postal packet and before he enters the post office, and that he must satisfy somebody of the grounds for his suspicion, I cannot say that regulation 35 is not reasonably justifiable in a democratic society. Again, I hold Mr Hilditch's action in searching the applicant's postal packets so justifiable on the basis that he acted in accordance with my interpretation of the regulation. My answer on the question relating to section 19 must therefore also be in the negative.

[16] The section provides that, except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression. That is the freedom guaranteed by the section, the particular matters which follow being definitive of that freedom. One of those matters is freedom from interference with his correspondence. The applicant alleges that, by opening, examining and seizing the postal articles in question, Mr Hilditch, and, through him, the State, has interfered with his correspondence.

I have seen the postal articles concerned, and, as I have said, they consist of a number of envelopes, which were obviously originally sealed, each addressed to a different person at the same address in London, each containing a number of Zambia currency notes in a brown paper wrapper, and each wrapper having upon it either one pencilled cross or three pencilled crosses. These crosses, the applicant says in his affidavit, constituted messages. Had he said what these messages were, I should have been more impressed. The section guarantees that, as one way of enjoying his freedom of expression, the individual shall not have his "correspondence" interfered with. This can only mean his freedom to express himself by correspondence, as well as his freedom to express himself by holding opinions, and receiving and communicating ideas. The Oxford English Dictionary defines ."correspondence" in the context in which the term is used here as "intercourse, communication (between persons); intercourse or communication by letters; the letters that pass between correspondents". "Correspondent" is defined as "one who communicates with another by letters". The communication of ideas seems to be an essential feature of these definitions as it seems to be in the section. I think it would be stretching the English language too far to say that a pencilled cross or a series of pencilled crosses constitute communication of ideas, even when they are described as "signs or symbols", especially when unaccompanied by any explanation of what they denote.

I therefore find that these postal packets did not constitute "correspondence" within the meaning of section 22 and my answer to the question of this section must also be in the negative.

That being the case, I do not have to consider whether the permitted derogations in subsection (2) of the section apply here. If I did, I would have to find that they do not.

The only ground there provided which was argued before me was that of public safety and I have already rejected this ground as being applicable in the present case.
[17] Finally, I would add a word of warning to customs officers when they act by virtue of regulation 35. If they do not obtain a search warrant before tampering with any postal packet, it will be their personal responsibility should they prove to have been wrong. In particular, if a postal packet turns out to be "correspondence" in the true sense, there will have been a breach of the sender's rights under section 22, which, fortunately for the customs officer concerned in the present case, it has fortuitously turned out not to be here. It should be remembered however, when dealing with a sealed packet, that the answer can only be obtained after it is opened and, if a customs officer opens it, he does so at his own risk.
Application refused.