

**ANUPBHAI MUNUBHAI PATEL v THE ATTORNEY-GENERAL IN THE MATTER OF S.16 OF THE STATE PROCEEDING ACT CAP.92 AND IN THE MATTER OF: THE IMMIGRATION AND DEPORTATION ACT, CAP.122 (1993 - 1994) Z.R. 57 (H.C.)**

HIGH COURT  
B.M. BWALYA, J.  
23RD AND 31ST MARCH, 1993.  
(HP/366 of 1993)

**Flynote**

Bail - Immigration and Deportation Act - Detainee - Whether admissible to bail.

**Headnote**

The applicant sought bail pending the hearing of his originating notice of motion challenging the Minister's order to deport him from Zambia. At issue was whether a person detained under the Immigration and Deportation Act can be granted bail.

**Held:**

There is no provision under the Act which bars or restricts the Court from admitting an applicant to bail who is being held for any offence or for any reason under the Act.

**Cases referred to:**

- (1) Oliver John Irwin v The People (1993-94) Z.R. 7.
- (2) In re Robinson [1854] 23 LJ Q.B. 286.
- (3) The State v Gopolong Mackenzie (1968-70) Botswana Law Reports pp 308-9.

**Legislation referred to:**

1. Constitution of Zambia, cap. 1 s. 13(3).
2. Immigration and Deportation Act, cap.122, ss. 17, 26, 36.
3. State Proceedings Act, cap.92, s.16.

**Works referred to:**

Archibold Criminal Pleading, Evidence and Practice 36th ed. para.203-205.  
Halsbury's Laws of England, 4th ed. para.1031-1033.

For the plaintiff: M. Nchito, of Shamwana and Co.  
For the defendant:: C.P. Mwanakatwe, State Advocate.

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**Judgment**

**B.M. BWALYA,J.:**

This is an application to the High Court to admit the plaintiff/applicant to bail pending the hearing of the applicant's organising notice of motion challenging the Minister's order to deport him from Zambia. In support of the application, the applicant states in his affidavit that his continued incarceration will be against the norms of justice enshrined in the Constitution and that his application against the deportation is likely to succeed and, should therefore be admitted to bail.

In opposition to bail the respondent/defendant, through the affidavit of Katuta Kosta Nsemukila, opposes the bail application on the basis that the applicant's warrant of deportation is issued pursuant to s.26(2) of the

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Immigration and Deportation Act, cap.122 and that therefore his detention is lawful.

In submission the learned counsel for the applicant argued that the applicant is eligible for bail because he has lived in Zambia since at the age of 3 to date and is in business together with his father who is a Zambian citizen.

The learned counsel for the plaintiff/applicant cited para.1031-1033 of Halsbury's *Laws of England*, art.13(3) of the Constitution and s.17 of the Act (4) in support of his argument.

In response the learned Solicitor-General argued and submitted that the objection by the State to bail is in the following grounds:

1. that the applicant is held pursuant to a warrant of deportation under s.26(2) of the Immigration and Deportation Act, cap.122; and
2. that the applicant is likely to apply for a temporary permit in terms of s.17 of the Act, cap.122 to the appropriate authority.

I have considered the affidavit filed herein by both parties, their submissions and arguments, and all these raise one main issue: can bail granted to a person, detained under the Immigration and Deportation Act, cap.122 and, consequent to the finding of the Court to this question, is the applicant eligible for admission to bail?

The answer to both questions is in the affirmative. There is no provision in the Act which bars or restricts this Court from admitting an applicant to bail who is being held for any offence of any reason under the Act. This can easily be deduced from s.36(3) of the Act, which reads as follows:

"Any person detained under this Act and not serving a sentence of imprisonment shall be treated as a person awaiting trial."

This provision treats a person detained under the Act as a person awaiting trial and it is trite law that such a person in this jurisdiction, whatever the offence and under whatever law alleged to be committed, is entitled to apply for bail before the High Court and the Court has discretion to admit such applicant to bail unless where specifically restricted by law. The case of *Oliver John Irwin* [1] is instructive.

In any case for bail the proper test of whether bail should be granted or refused is whether it is probable that the applicant will appear to take his trial. In applying this the Court takes into account the following considerations:

- (i) The nature of the accusation against the applicant and the severity of the punishment which may be imposed.
- (ii) The nature of the evidence in support of the charge.
- (iii) The independence of the sureties if bail is granted.
- (iv) The prejudice to the applicant if he is not admitted to bail.
- (v) The prejudice to the State if bail is granted.

In addition to the foregoing considerations to be taken into account when granting or refusing bail, I may add that there could be special circumstances that the Court may take into account outside the five considerations, special circumstances which may be peculiar to the particular applicant.

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In the case before me the applicant is an established resident as shown by exh. "P1", his certificate of residence shown in evidence; his father is a citizen of Zambia; the applicant is a businessman in partnership with his father, he has been a resident in Zambia since the age of 3, he went to school here as his evidence shows and this has not been challenged. This in my view creates special circumstances in favour of the applicant which show that granting him bail would not prejudice the State or indeed society if he is not granted bail. This is obvious, it needs no elaboration - his freedom and freedoms of movement is thereby handicapped.

Having said that I find this a legitimate case where I should admit the applicant to bail pending the determination of the substantive matter before this Court. The bail conditions are as follows:

- (i) Bail on his own recognisance for K5 000.00.
- (ii) The applicant must surrender his passport to the police.
- (iii) One working surety on own recognisance for K5 000.00.

The hearing of the substantive cause is adjourned to 4th May, 1993, at 09:00 hours for trial.

Application granted.

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