IN THE HIGH COURT OF ZAMBIA **2015/HP/0162**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

IN THE MATTER OF: **AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW.**

IN THE MATTER OF: **SECTION 35 AND 36 OF THE IMMIGRATION AND DEPORTATION ACT NO. 18 OF 2010 ('THE ACT').**

IN THE MATTER OF: **ORDER 53, RULE 3 OF THE RULES OF THE SUPREME COURT 1999 EDITION.**

BETWEEN

MAMBO MERCI POLE POLE **APPLICANT**

AND

DIRECTOR-GENERAL OF IMMIGRATION **1st RESPONDENT**

THE ATTORNEY GENERAL **2nd RESPONDENT**

Before the Hon. Mrs. Justice M.C. Kombe this 14th day of April, 2016

For the Applicant: *Mr. Yosa Yosa - Messrs Simeza, Sangwa & Associates.*

For the Respondents: Mrs. Susan Wanjelani- Deputy Chief State Advocate, *Attorney-Generals' Chambers.*

J U D G M E N T

Cases referred to:

1. **Ibrahim Mohamed Sheriff Noor v Attorney General (1979) Z.R. 183.**
2. **Derrick Chitala v Attorney General (1995-97) ZR 96.**
3. **Council of Civil Service Unions and Others v Minister for the Civil Service (1984) 3 All ER 935 at 950.**

4. **Roy Clarke v Attorney General (2004) ZR 297.**
5. **North-Western Energy Company Limited v The Energy Regulation Board (2011) 2 Z.R 512.**
6. **Chief Immigration Officer, the Minister of Home Affairs and Attorney General v John Eric Tolmay (2011) 2 Z.R 1.**
7. **Ridge v Baldwin (1963) 2 All ER 66.**
8. **Durayappath v Fernando [1967] 2 All ER 152.**
9. **Fredrick Jacob Titus Chiluba v the Attorney General (2003) Z.R 153.**
10. **Francis Xavier Nkhoma v Godfrey Miyanda-National Secretary of the Movement for Multi-Party Democracy (Sued on his own behalf and on behalf of the Movement for Multi-Party Democracy) (1995) S.J. (S.C).**
11. **Abley v Dale (1850) 20 L.J.C.P 33.**
12. **Shilling Bob Zinka v The Attorney General SCZ Judgement No. 9 of 1999.**
13. **Chief Constable of North Wales Police v. Evans (1982) 1. WLR 1155.**
14. **Nebukandeza Occo v. The People (1979) Z.R. 112.**

Legislation and other material referred to:

1. **The Immigration and Deportation Act, No. 18 of 2010.**
2. **The Rules of the Supreme Court of England, 1999 Edition (White Book).**
3. **Dr. Smith's Judicial Review, Sixth edition (Sweet and Maxwell, London: 2007).**

This is an application for judicial review pursuant to Order 53 Rule 5 of the Rules of the Supreme Court, 1999 Edition (White Book). It is brought by the Applicant **MAMBO MERCI POLE POLE** who is challenging the decision of the Director General of Immigration, the 1st Respondent herein made on 13th September, 2014 to deport him from Zambia within twenty-four (24) hours of being apprehended.

The reliefs which the Applicant seeks are stated hereunder as follows:

(i) An order of certiorari to remove into the High Court for the purpose of quashing the said decision;

(ii) A declaration that the Applicant is not a prohibited immigrant within the meaning of section 35 of the Immigration and Deportation Act, No. 18 of 2010 (hereinafter 'the Act');

(iii) A declaration that the Director General's decision violated section 36 and section 38 of the Immigration and Deportation Act No. 18 of 2010;

(iv) An order of mandamus to compel the First Respondent to renew the Applicant's investor's permit;

(v) An order of mandamus to compel the First Respondent to allow the Applicant to enter Zambia;

(vi) Damages against the Director General to misfeasance in public office;

(vii) An order for costs; and

(viii) And that all necessary and consequential direction be given.

The grounds for judicial review are premised on the following:

(1) <u>ILLEGALITY</u>

a) The decision by the 1st Respondent to deport the Applicant from Zambia was illegal as it contravened Section 35 of the Act which defines who a prohibited immigrant is.

b) The power to deport a person under Section 35 (3) of the Act is limited to persons who have been declared prohibited immigrants within the meaning of the Act. In the present case, the Applicant did not fall into either category of persons that are prohibited immigrants. Further, the Applicant was never and has never been declared to be a person whose presence in Zambia is inimical to the public interest by the Minister. The Applicant is therefore not

a prohibited immigrant, within the definition of "prohibited immigrant" in the Act.

(2) PROCEDURAL IMPROPRIETY

a) It is contended that the 1st Respondent was under a mandatory duty not to eject the Applicant from Zambia in a period of less than 48 hours from the time of service of the notice. In the Applicant's case the notice was served on him at Kasumbalesa border post as he was being ejected from Zambia contrary to the procedure specified under section 36 (2). The deportation of the Applicant was in this regard fraught with procedural impropriety.

b) It is further contended that the Applicant has a right under section 38 to make representations to the immigration officer in writing within 48 hours of receipt of the notice. The 1st Respondent in deporting the Applicant in less than 24 hours of being apprehended and a notice under Section 36 being served on him denied the Applicant his statutory right to make representations and to contest the 1st Respondent's decision.

The Notice of application for leave to apply for judicial review contained facts to the effect that the Applicant was a citizen of the Democratic Republic of Congo; that he had been resident in Zambia since April 2009; was married to Furaha Joselyn Bahati and they had five (5) children together who were resident in Lusaka; that he was an investor within the meaning of Section 2 of the Zambia Development Agency Act. No. 6 of 2006; that he had been a holder of an Investor's Permit by virtue of his investment in Zambia and had applied for renewal of the said permit following its expiry and was scheduled to appear before the immigration officer on 14th September, 2014.

The Notice further revealed that on 12th September, 2014 around 22:00 hours without any warning, the Applicant was apprehended by immigration officers and was immediately taken to Kasumbalesa border post and was deported to the Democratic Republic of Congo on 13th September, 2014; that the Applicant was

deported before his application for renewal of his investors permit could be considered. Furthermore, that the Applicant was served with the notice of deportation on 13th September, 2014 immediately prior to his deportation from Zambia contrary to the requirements of Section 35 of the Act; that the said notice did not prescribe the part of the schedule pursuant to which the Applicant had been declared a prohibited immigrant but stated that he belonged to class '39(2)' of the Act which provided for the deportation of any person whose presence in Zambia or conduct was likely to be a danger to peace and good order in Zambia under a warrant signed by the Minister.

The Notice of application further revealed that the Applicant was not shown any such warrant signed by the Minister and that there was in fact no such warrant signed by the Minister; that the notice served on the Applicant stated that the Applicant was to leave Zambia immediately and he was not afforded the opportunity to make representations in writing within a period of 48 hours of receipt of notice to leave Zambia; that the Applicant was apprehended and immediately transported to Kasumbalesa border post where he was deported to the Democratic Republic of Congo; that the Applicant was denied the opportunity to wind up his affairs in Zambia; that the Applicant's family remained in Zambia with no one to take care of them as the Applicant was denied the opportunity to bid farewell to his family.

The Notice of application for leave to apply for judicial review is supported by an affidavit verifying facts, a further affidavit verifying facts and an affidavit in reply. All these affidavits were sworn by **FURAHA JOSELYN BAHATI**, the spouse to the Applicant, except for the further affidavit verifying facts which was sworn by Counsel for the Applicant herein **YOSA GRANDSON YOSA**.

In the affidavit verifying facts relied on for leave to apply for judicial review, filed into Court on 6th February, 2015, **FURAHA JOSELYN BAHATI** deposed that she was the spouse to the Applicant; that she had read the Notice of Application

prepared by the Applicant's Advocates and confirmed that the facts and matters stated therein and the grounds in the said application were true to the best of her knowledge. The deponent exhibited the following:

(a) Applicant's passport and Investors Permit and which were collectively marked as **"FJB1".**

(b) A copy of the Notice to Prohibited Immigrant to Leave Zambia' served on the Applicant on 13th September, 2014 marked as **"FJB2".**

(c) A copy of payment receipt for the extension of Investor's Permit to the Department of Immigration dated 9th July, 2014 marked as **"FJB3"**.

(d) A copy of the 'Notice to appear before an Immigration Officer' marked as **"FJB4".**

In the further affidavit verifying facts sworn by **YOSA GRANDSON YOSA** filed on the 19th March, 2015, he deposed that on 6th February, 2015, the Applicant filed the application for leave to apply for judicial review; that as the Advocates with conduct of this matter, they had to obtain instructions from the Applicant through his spouse and other friends; that at times, they had to wait for the Applicant's spouse who frequently traveled to the Democratic Republic of Congo to return to Zambia to receive vital documents and to execute the documents to be lodged with the Court.

Counsel explained that as a result, there had been a delay in clarifying certain aspects of the Applicant's instructions as direct communication with the Applicant had proved difficult; that the delays occasioned before Court had been as a result of the time it took to transmit documentation from the Democratic Republic of Congo.

The Respondents opposed the application for judicial review and on 23rd March, 2015, filed into Court an affidavit in opposition sworn by **KILIAN LWIINDI**, the Principal Immigration Officer in the Immigration Department.

He responded to paragraph 4 of Applicant's affidavit verifying facts by stating that the Applicant was initially granted an Employment Permit on 9th March, 2010 to work as a Sales Manager for Christian International Partnership; that the Applicant resigned his position on 27th June, 2011 and was issued a Temporary Permit on 2nd April, 2012 as a dependent to his wife who held an Employment Permit as Manageress at Shukuru Mercy Shopping Centre; that the Applicant was enlisted as Managing partner of Shukuru Mercy Shopping Centre and was issued an Investor's Permit on 30th April, 2013.

The deponent further explained that on 22nd July, 2013, the Applicant was arrested for fraudulently obtaining birth records for his children purporting that they were born at the University Teaching Hospital in Lusaka when in actual fact they were all born in the Democratic Republic of Congo; that the Applicant was consequently convicted of the offence of using a forged document on 12th June, 2014 and fined K 2000.00 in default to serve three (3) months custodial sentence. The deponent exhibited copies of the Warrant of Commitment and Certificate of Conviction and the same were marked **"KL1"** and **"KL2"** respectively.

Furthermore, the deponent explained that the Minister of Home Affairs, in the execution of his duties under the Immigration and Deportation Act, signed the Applicant's Warrant of Deportation on 8th August, 2014. A copy of the said warrant was exhibited as **"KL3".**

The Applicant through his spouse **FURAHA JOSELYN BAHATI** filed into Court an affidavit in reply on 27th August, 2015. In the affidavit, she explained that the sentence pronounced by the Court was for the Applicant to pay a fine of K 2000.00 and in default of payment to serve three (3) months simple imprisonment; that the said K 2000.00 was paid in full on 12th June, 2014. She exhibited a true copy of the receipt for payment extracted from the General

Revenue Cash Book at the Subordinate Court and the same was marked **"FJB1".**

She further explained that the Applicant did not and had never served any custodial sentence during his stay in Zambia; that in response to paragraph 8 of the affidavit in opposition, the Applicant had informed her that he was never served with any such warrant and the reasons for the Applicant's deportation were never disclosed to him; that the Applicant was apprehended on the 12th September, 2014, by immigration officers without any warning and immediately deported to the Democratic Republic of Congo on 13th September, 2014.

On behalf of the Applicant, Learned counsel Mr. Yosa Yosa filed written submissions into Court on the 27th August, 2015. In his written submissions, Mr. Yosa first gave background facts of the case as contained in the Notice of Application for leave to apply for Judicial Review. I will therefore not reproduce the facts as I have already referred to them in this Judgment.

Mr. Yosa submitted that the application for judicial review was premised on two grounds namely; illegality and procedural impropriety.

Under illegality, Mr. Yosa submitted that the Respondents position was that the Applicant was deported because he was convicted of the offence of forgery before the Subordinate Court of Lusaka and there after the Minister invoked the provisions of Section 39(1) of the Immigration and Deportation Act and issued a warrant of deportation for the Applicant.

Mr. Yosa submitted that the Minister had no power to issue a warrant of deportation where the sentence imposed by the Court was a fine. He submitted that the power to deport a foreign citizen on account of a conviction for an offence only arose where such foreign citizen had been sentenced to serve a term of imprisonment and that on the expiration of the term of imprisonment that such individual was liable to be deported.

It was counsel's submission therefore that Section 39(1) did not apply where the sentence imposed was a fine. In that regard, Counsel cited the case of ***Ibrahim Mohamed Sherriff Noor v Attorney General***[1], where the Court reviewed the effect of Section 26 (1) of the repealed Immigration and Deportation Act which was in identical terms with Section 39 (1) of the current Act. Bweupe J (as he was then) stated that:

> ***'I must say that this section empowers the Minister to act where a person has been sentenced to a term of imprisonment by the Court. This is not the case here.'***

In view of the above, counsel submitted that the Applicant upon conviction was sentenced to a fine with imprisonment arising only in the event of failure to pay the fine. He went on to argue that since the Applicant paid the fine and did not serve any term of imprisonment, the provisions of Section 39(1) did not apply to him as the conditions under Section 39(1) were not met to warrant the Minister to invoke the power to issue a warrant of deportation under that section. In this regard, Mr. Yosa submitted that the power to issue the warrant for deportation was erroneously invoked therefore rendering it illegal and a nullity.

To further advance his argument, Mr. Yosa cited the case of ***Derrick Chitala v Attorney General***[2], where the Supreme Court cited with approval and adopted the speech of Lord Diplock in the case of ***Council of Civil Service Unions and Others v Minister for Civil Service***[3] wherein it was stated that:

> ***'By illegality, as a ground for judicial review I mean that the decision maker must understand correctly the law that regulates his decision making power and must give effect to it.'***

Mr. Yosa also relied on the case of ***Roy Clarke v Attorney General***[4] where the Supreme Court held that:

'Illegality or ultra vires entails that all public bodies and officials must act within the law. Ministers exercise powers as a consequence of statute and common law and cannot act beyond those powers as that would be illegal or ultra vires. When considering whether a body has been acting ultra vires, the Court will look at the relevant statutory provisions and the purpose of the statute.'

Based on these authorities, Mr. Yosa submitted that the Minister ought to have firstly considered and established whether the Applicant had been sentenced to serve a term of imprisonment and whether the Applicant had in fact served such sentence in accordance with Section 39 (1) of the Immigration and Deportation Act.

In furtherance of his argument on illegality, Mr. Yosa also referred the court to the case of ***North-Western Energy Company v The Energy Regulation Board*** [5] where it was held that:

'Under the ground of 'illegality' the Court seeks to establish whether a decision-maker acted within the purview of the law that regulates his decision-making power, and has consequently given proper effect to it. Thus an administrative decision, or action is flawed and illegal if it falls outside the parameters of the law that regulates the exercise of the power...a decision is illegal if it:

i. ***Contravenes or exceeds the terms of power which authorizes the making of the decision.***

ii. ***Pursues an objective other than for which the power to make the decision was conferred;***

iii. ***Is not authorized by any power; and***

iv. ***Contravenes or fails to implement a public duty.'***

Mr. Yosa submitted that a perusal of the Warrant of Deportation and Notice to Prohibited Immigrant to leave Zambia showed that the warrant did not support the reasons advanced by the Respondent in the affidavit in opposition and

skeleton arguments filed on 26th May, 2015 that the Applicant's conviction was the reason for the deportation. This, counsel submitted, flew in the teeth of the Warrant of Deportation and Notice to Prohibited Immigrant issued which gave the reason behind the deportation of the Applicant as being that the Applicant was a person who by his presence was likely to be a danger to peace and good order in Zambia.

Mr. Yosa also referred the court to the case of ***The Chief Immigration Officer, the Minister of Home Affairs and Attorney General v John Eric Toomey***[6] where the Supreme Court held that:

> ***'The Court has power to review deportation orders under Section 26(2) to protect the rights of an individual...The Court has jurisdiction to go behind the deportation order if the reasons given are not proved and the Court can question the validity of the deportation order.'***

In summing up his submission on the ground of illegality, Mr. Yosa submitted that on the facts of this case, there was nothing that had been placed before Court to show the real reason behind the Applicant's deportation. Counsel added that there were no facts to support the assertion that the Applicant was indeed a person who by his presence was likely to be a danger to peace and good order in Zambia. He submitted that the conviction in the Subordinate Court could not by any stretch of interpretation be said that it went to show that the Applicant was a person who by his presence was likely to be a danger to peace and good order in Zambia. Therefore the application of Section 39 (2) to the Applicant was improper and illegal.

On the ground of procedural impropriety, Mr. Yosa submitted that the provisions of Section 36 (1) applied to any deportation be it under Section 35 or upon direction by the Minister under Section 39. Counsel reproduced Section 36 which provides that:

36. (1) Any immigration officer shall, if so directed by the Minister, by notice served in person on any prohibited immigrant or a person to whom subsection (2) of section 35 relates, require that immigrant or person to leave Zambia.

(3) Any notice served in accordance with subsection (1) shall specify in relation to the person on whom it is served-

(a) The class set out in the Second Schedule to which it is considered the person belongs, or that the person is a person to whom subsection (2) of section thirty five relates;

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

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

(4) The period within which a person shall be required to leave Zambia shall, except in the case of a person who, within seven days of that person's appearing before an immigration officer in accordance with this Act has been served with a notice under this section, be less than forty eight hours and shall commence-

(a) In a case where such person does not make representations under this Act, from the time that person is served with such notice requiring the person to leave Zambia; or

(b) In the case where such person makes representations in accordance with this Act, from the time that person is advised that the representations have been unsuccessful.

Based on the above provision, Mr. Yosa submitted that Section 39 could not be read in isolation but rather was supposed to be read together with Section 36 of the Act which provided for the formalities to be followed during a deportation.

Counsel submitted that Section 36 clearly applied even in a situation where the immigration officer was acting on the direction of the Minister as in the instant case. In this regard, it was argued that the 1st Respondent was under a mandatory duty to comply with Section 36 of the Act and therefore was not

entitled to eject the Applicant from Zambia in a period of less than 48 hours from the time of the notice.

To augment his arguments, counsel cited the case of ***Council of Civil Service Unions and Others v Minister for the Civil Service*** where it was stated that:

> ***'Susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.'***

Furthermore, as to the right of an individual facing deportation to make representations under a deportation order under an identical provision to Section 39 of the Act, Counsel cited the ***Ibrahim Mohammad*** case where the court stated that:

> ***'It would, in my view, be contrary to natural justice that a person who has been in Zambia for fifteen years married with children and is an established resident, would be thrown out of the Country on information provided to the Minister in the dark corner by an official who might have had an interest of his own to serve. It is trite law that such a person should have been given an opportunity to answer the charge before a Court of law. It behooves those in the corridor of power, therefore, to strive to be more cautious and adhere to axiom of equitable principle that no man shall be condemned unheard.'***

The court was again referred to the case of ***John Eric Tolmay*** where the Supreme Court endorsed the principles espoused in the ***Ibrahim Mohammed*** case and held that:

> ***'As much as we agree that the Minister has power under section 26 (2) of the Act to deport any person, the authorities cited, not only from Zambia but also from England show that great as the public interest is, justice must nevertheless be done to the individual.'***

In view of the above, Mr. Yosa submitted that an individual deported under Section 39 was entitled to make representations against the decision taken against him and to be heard.

Further, in response to the Respondent's contention that the Applicant was deported pursuant to Section 39 (1) and that the said section did not provide for the right to be heard, Mr. Yosa submitted that that did not negate the requirement to apply the rules of natural justice. To fortify his argument, counsel relied on the case of ***Ridge v Baldwin***[7] and argued that the 1st Respondent acted in breach of laid down statutory procedure as well as the rules of natural justice when the Applicant was denied an opportunity to make representations against the decision to deport him from Zambia. Mr. Yosa drew the courts attention to the case of ***Durayappath v Fernando*** [8] where Lord Upjohn stated that:

> ***'Their lordships were of course, referred to the recent case of Ridge v Baldwin where this principle was very closely and carefully examined. In that case no attempt was made to give an exhaustive classification of the cases where the principle audi alteram partem should be applied in their lordships' opinion it would be wrong to do so. Outside well-known cases such as dismissal from office, deprivation of property and expulsion from clubs, there is a vast area where the principle can be applied only on most general considerations...Outside the well-known classes of cases; no general rule can be laid down as to the application of the general principle in addition to the language of the provision. In their Lordships' opinion there are three matters which must always be borne in mind when considering whether the principle should be applied or not. These three matters are; first what is the nature of the property, the office held, status enjoyed or services to be performed by the complainant of injustice. Secondly, in what circumstances or on what occasion is the person claiming to be entitled to exercise the measure of control entitled to intervene. Thirdly, when a right to intervene is proved, what sanctions in fact is the latter entitled to impose on the other.***

It is only on a consideration of all these matters that the question of the application of the principle can properly be determined.'

In the instant case, it was argued that the Applicant enjoyed the status of an investor in Zambia and was carrying on business in Zambia and that the Applicant and his family were resident in Zambia and had established a life for themselves in Zambia. In this regard Mr. Yosa submitted that the Minister was only entitled to intervene if the Applicant had been sentenced to a term of imprisonment as the sanction of deportation was extremely grave as it adversely affected the life of an individual and his family. Therefore, it was Mr. Yosa's submission that it could not be contended when all these factors were considered that there was no obligation to afford the Applicant an opportunity to be heard.

In summing up on the ground of procedural impropriety, Counsel submitted that the 1st Respondent acted in breach of laid down procedure as well as the rules of natural justice when the Applicant was denied the opportunity to make representations against the decision to deport him from Zambia.

By way of conclusion, Mr. Yosa submitted that the Applicant had demonstrated that the decision to deport him was not only illegal but also procedurally improper. His prayer was that the said decision be quashed and that the remedies sought in the notice of application for the leave be granted.

The Respondents filed into court their skeleton arguments on the 23rd March, 2015, way before the Applicant submitted his arguments and also filed their submissions on 2nd September, 2015.

On behalf of the Respondents, Learned counsel Mrs. S. Wanjelani submitted that in exercising its jurisdiction on judicial review, the Court should not place itself in the position of an Appellate Tribunal against the decision of the Respondent,

but should merely concern itself with the decision making process rather than the merits of the decision itself.

Mrs. Wanjelani submitted that this preposition had been stated in a plethora of authorities and she cited the case of ***Fredrick Jacob Titus Chiluba v the Attorney General***[9] where the Supreme Court stated:

> ***'The emphasis is that the purpose of judicial review is not to provide an appeal procedure against decisions of public bodies on their merits, but to control the jurisdiction of the public bodies by ensuring that they comply with their duties or by keeping them within the limits of their power. For instance, when the High Court is reviewing a decision of a public body, it will not admit evidence which is relevant to whether the decision is a reasonable one; but it will admit evidence which is relevant to whether the decision is one which the body had power to make or whether it was made in the circumstances in which a reasonable body could have made it'***

Counsel further referred the court to Order 53 of the White Book which lists the grounds for judicial review as being:

(a) where there is want of or excess jurisdiction;

(b) where there is an error on the face of the record;

(c) where there is a failure to comply with the rules of natural justice; and

(d) where the decision is unreasonable as specified in the Wednesbury Corporation.

Mrs. Wanjelani submitted that the Respondents Affidavit in Opposition had demonstrated the sequence of events leading up to the Applicant's current status. She submitted that the exhibits showed that the Applicant was a convict and was deported pursuant to the warrant of deportation under the hand of the Minister.

She went on to argue that the Second Schedule of the Immigration and Deportation specified classes of Prohibited Immigrants. She referred to Class H of the Schedule which provides that:

> ***Any person who-***
>
> .....
>
> ***(c) Has been convicted of an offence in Zambia.***

Mrs. Wanjelani submitted that the Applicant was convicted of the offence of using forged documents on 12th June, 2014 and therefore, he could not claim that he was not a prohibited immigrant as stated in the Act. She referred the court to Section 39 (1) of the Immigration and Deportation Act which provides that:

> ***39 (1) After receiving the particulars...in respect of a person who is not a citizen, the Minister, unless the term of imprisonment is set aside on appeal shall, at the expiration of the sentence, under a warrant signed by the Minister, deport that person from Zambia.***

In light of the cited provision, it was submitted that the Section in fact compelled the Minister to issue the warrant of deportation. She submitted that the Applicant was convicted on 12th June, 2014, was sentenced to three months imprisonment and was deported upon expiration of the term on 12th September, 2014.

In relation to the purported breach of the mandatory requirement for the Applicant to be allowed to make representation in line with Section 39 (1), Mrs. Wanjelani submitted that there was no provision for the Applicant to be given notice, make representations or specify time period within which to leave the country. On this point, she referred the court to the case of ***Francis Nkhoma v Godfrey Miyanda (National Secretary of the Movement for Multi-Party Democracy (Sued on his own behalf and on behalf of the Movement for***

Multi-Party Democracy) [10] where the Court citing the case of ***Abley v Dale*** [11] stated:

> ***'If the precise words used are plain and unambiguous we are bound to construe them in their ordinary sense, even though it does lead to an absurdity or manifest injustice. Words may be modified or varied where their import is doubtful or obscure, but we assume the functions of legislators when we depart from the ordinary meaning of the precise words used, merely because we see, or fancy we see, an absurdity or manifest injustice from an adherence to their literal meaning.'***

Mrs. Wanjelani submitted that the 1st Respondent complied with the provision of Section 36 of the Act in that the Applicant was identified in the Notice and the period within which to leave the Country was specified.

Further, she argued that even if this were not so, the authority to issue the warrant could be traced to Section 39 and thus legitimate. In aid of this, counsel cited the case of ***Shilling Bob Zinka v The Attorney General*** [12] where it was stated that where the exercise of a power could be traced to a legitimate source, the exercise of such a power under a wrong provision did not invalidate the action and the right to be heard did not apply where it was obvious from legislation that it did not apply in particular circumstances.

Mrs. Wanjelani submitted that the Applicant had failed to prove the grounds for judicial review.

In the Respondents submission filed on 2nd September, 2015, it was contended that since the Applicant had admitted that he had been convicted of a criminal offence, the substitution of imprisonment with a fine did not in any way negate the fact that the Applicant was convicted and sentenced. Mrs. Wanjelani cited Section 35 (1) and (3) to support the argument that whichever way one looked at it, the Applicant was a prohibited immigrant who did not qualify for entry into the country and that the Applicant had failed to prove his case and thus the application should be dismissed with costs.

I have carefully considered the affidavit evidence adduced by the parties, the submissions and authorities filed into Court which are of great assistance.

From the outset, I wish to state that the basic principle underlying the public law remedy of judicial review is not to disarm the decision maker of discretionary or statutory power vested in the public officer but to ensure that the discretionary power is not abused and the decision maker acts within the confines of the statutory provision.

Thus, judicial review as the words imply is not an appeal from a decision but a review of the manner in which the decision was made. These words were stated by Lord Brightman in the case of ***Chief Constable of North Wales Police v. Evans***[13]. Lord Halisham LC in the same case stated that:

> ***'The purpose of judicial review is to ensure that an individual is given fair treatment by a wide range of authorities whether judicial, quasi, judicial or administrative to which the individual has been subject. It is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted to decide the matters in question.'***

Our Supreme Court re-affirmed this position in the case of ***Fredrick Jacob Titus Chiluba v the Attorney General*** when it held that:

> ***'The emphasis is that the purpose of judicial review is not to provide an appeal procedure against decisions of public bodies on their merits, but to control the jurisdiction of the public bodies by ensuring that they comply with their duties or by keeping them within the limits of their power. For instance, when the High Court is reviewing a decision of a public body, it will not admit evidence which is relevant to whether the decision is a reasonable one; but it will admit evidence which is relevant to whether the decision is one which the body had power to make or whether it was made in circumstances in which a reasonable body could have made it.'***

Judicial Review will therefore lie on the grounds of:

(i) **Illegality**

(ii) **Unreasonableness**

(iii) **Procedural impropriety**

In the instant case, the application for judicial review is premised on two grounds, namely: **illegality** and **procedural impropriety.**

In respect to illegality, the same arises where an inferior court or tribunal or public authority charged with a public duty acts without or in excess of its jurisdiction.

Lord Diplock in the case of ***Council of Civil Service Unions and Others*** explained illegality when he stated that:

> ***'By 'illegality' as a ground for judicial review, I mean that the decision maker must understand correctly the law that regulate his/decision making power and must give effect to it.'***

Further, according to De Smith's on Judicial Review, paragraph 5002 at page 225, it states that;

> ***"an administrative decision is flawed if it is illegal. A decision is illegal if it:***
>
> *(a)* ***Contravenes or exceeds the terms of the power which authorises the making of the decision;***
> *(b)* ***Pursues an objective other than that for which the power to make the decision was conveyed;***
> *(c)* ***It is not authorised by any power; and***
> *(d)* ***Contravenes or fails to implement a public duty."***

In respect of procedural impropriety Lord Diplock in the same case of ***Council of Civil Service Union*** stated that:

> ***'I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act***

with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review, under this head covers also failure by an administrative tribunal to observe rules that are expressly laid in the legislative instrument by which its jurisdiction is conferred, even though such failure does not involve any denial of natural justice.

Thus, in the case of ***North-Western Energy***, a case cited by counsel for the Applicant Justice P. Matibini held that:

'Under procedural impropriety the goal of achieving or securing procedural fairness towards the person who will be affected by the administrative decision is underscored. In keeping with this aim, the Courts ensure that administrative decisions or actions conform with the procedural rules that are expressly laid down in the statute, or instrument by which the jurisdiction of the administrative body, or public official is conferred.'

Furthermore, De Smith on Judicial Review had the following to say:

'There is a presumption that procedural fairness is required whenever the exercise of a power adversely affects an individual's rights protected by common law or created by statute. This includes right in property, personal liberty impositions. The duty to afford procedural fairness is not however limited to the protection of legal rights in the strict sense. It also applies to more general interests of which the interests in pursuing a livelihood and in personal reputation have received particular recognition.'

Having outlined the basic principles of judicial review as well as explained what is meant by illegality and procedural impropriety as grounds for judicial review, I shall proceed to determine the first ground of illegality in order to establish whether the decision to deport/remove the Applicant from Zambia was illegal to warrant this court's review.

In doing so, it is pertinent first to construe the content and scope of the instrument conferring the duty or power upon the 1st Respondent/Minister to remove/deport the Applicant from Zambia on the grounds given in the affidavit in opposition.

The preamble of the Immigration and Deportation Act No. 18 of 2010 ('the Act') provides that the Act was enacted to inter alia:

> ***'Consolidate the law relating to immigration; provide for the appointment of the Director General of Immigration and other immigration officers and provide for their powers and functions...provide for the prohibited immigrants and other specified persons and their deportation from Zambia...'***

Section 2 of the Act which is the Interpretation clause states that a 'prohibited immigrant'

> ***'has the meaning assigned to it in section thirty five.'***

Section 35 (1) and (2) thus provides that:

> ***35. (1) Any person who belongs to a class set out in the Second Schedule shall be a prohibited immigrant in relation to Zambia and shall not qualify for a visa, any temporary residence permit, residence permit or admission in any other manner to Zambia.***
>
> ***(2) Any person whose presence in Zambia is declared in writing by the Minister to be inimical to the public interest shall be a prohibited immigrant in relation to Zambia.***

The Second Schedule has listed the different classes of prohibited immigrants. Relevant to the present case is Class H which reads as follows:

> ***'Class H***
>
> ***Any person who-***
>
> ***(a) Before entering Zambia has been sentenced elsewhere than in Zambia to a term of imprisonment following that person's conviction of an offence;***
>
> ***(b) In the opinion of the Director General of Immigration is not of good character; and***
>
> ***(c) Has been convicted of an offence in Zambia.'***

It is important to mention at this juncture that the Respondents argued that the Applicant was deported from Zambia pursuant to Section 39 (1) of the Act although the Warrant of Deportation marked as **"KL3"** in the affidavit in opposition and the Notice to Prohibited Immigrant to Leave Zambia marked as **"FJB2"** in the affidavit verifying facts indicates Section 39(2).

Therefore, I will consider the two sections referred to by the Respondents in order to determine whether the decision to have the Applicant deported or removed was tainted with illegality.

Section 39(1) of the Act provides that:

> ***'After receiving the particulars under Section thirty three of the Penal Code, in respect of a person who is not a citizen, the Minister, unless the term of imprisonment is set aside on appeal shall at the expiration of the sentence under a warrant signed by the Minister, deport that person from Zambia.'***

Under this provision, reference is made to Section 33 of the Penal Code and that provision reads as follows:

> ***'Whenever a court shall sentence to a term of imprisonment any person-***
>
> ***(a) Who is not a citizen; and***
>
> ***(b) Who has been convicted of an offence under this Code or under any written law other than an offence relating to the deriving of a motor vehicle set out in the Roads and Road Traffic Act or any regulations for the time being in force made thereunder;***
>
> ***the public prosecutor shall forth with forward to the Minister responsible for home affairs the particulars of the conviction and sentence and all other particulars specified in the Second Schedule.***

Thus in the case of ***Nebukandeza Occo v. The People*** [14], it was held that:

> ***'once a non-citizen is convicted of a criminal offence, the prosecution was duty bound by section 33 of the Penal Code to***

forward particulars of the convicted foreigner to the Minister in terms of Section 26(1) of the Immigration and Deportation Act and it was mandatory on the part of the Minister at the expiration of the sentence to sign a deportation order...'

It is important to state that Section 39(1) of the Act is couched in the same words as Section 26(1) of the repealed Chapter 123.

In view of the foregoing, the question to ask at this point is this: Did the Minister have the powers to invoke Section 39(1) when he purportedly issued a warrant of deportation following the Applicant's conviction and sentence?

Although it is not in dispute that the Applicant was convicted of the offence of using forged documents, counsel for the Applicant argued that Section 39 (1) did not apply to the Applicant as he was sentenced to pay a fine with imprisonment arising only in the event of failure to pay the fine. On the other hand, counsel for the Respondents argued that the Minister was compelled to issue a warrant of deportation following the Applicant's conviction and sentence to a term of three (3) months imprisonment.

I have carefully analyzed the evidence adduced by both parties. What is clear is that when the Applicant was convicted, he was sentenced to pay a fine of K2000.00 in default to serve three (3) months imprisonment. The Respondents in their affidavit in opposition revealed this in paragraph 8 which reads as follows:

'That the Applicant was consequently convicted of the offence of using a forged document on 12th June, 2014 and fined K2000.00 in default to serve three(3) months custodial sentence.' (Underline mine for emphasis only).

However, exhibits marked collectively as **'FJB1'** in the Applicant's affidavit in reply shows that the Applicant paid the amount of K2000.00 the same day he was convicted on 12th June, 2014.

In my view, the power to deport a foreign citizen on account of a conviction for an offence only arises where such foreign citizen has been sentenced to serve a term of imprisonment and on the expiry of the term of imprisonment the Minister has the power to deport such a person from Zambia.

I hold this view based on the case of ***Nebukandeza Occo*** which I have referred to above wherein it was held that it was mandatory at the expiration of the sentence for a Minister to issue a warrant of deportation.

Furthermore, I am persuaded by the holding of Bweupe J (as he then was) in the case of ***Ibrahim Mohamed Sheriff Noor v. Attorney General*** when he held that:

> ***'I must say that this section empowers the Minister to act where a person has been sentenced to a term of imprisonment by the court.'***

In view of the foregoing, it follows that since the Applicant did not default in the payment of the fine of K2000.00 but actually paid the fine, then Section 39(1) of the Act which the Respondent argued compelled the Minister to issue a warrant of deportation, did not apply to him. Therefore, in the absence of any evidence that the Applicant served a term of imprisonment, Section 39(1) could not legally have been the basis for his deportation.

In this regard, I do not accept the Respondents' argument that the substitution of imprisonment with a fine did not negate the fact that the Applicant was convicted and sentenced as payment of a fine was serving of the sentence imposed by the court. I say so because if it was the intention of Parliament to include the deportation of a foreign citizen after payment of a fine, the Act would have expressly provided for that. However, it is clear from the wording of Section 39(1) that the intention of Parliament was for the Minister to deport a foreign citizen upon the expiration of a custodial sentence. I therefore consider the argument by the Respondents to be misconceived.

For the foregoing reasons I find that when the Minister purportedly issued the warrant of deportation under Section 39(1) of the Act, he acted beyond his powers or without jurisdiction as the said provision could only be invoked if the Applicant had served a term of imprisonment. Since the Applicant only paid the fine and did not serve a term of imprisonment, it means that the Minister did not have the powers to invoke Section 39(1). Hence I hold that the decision was illegal as it contravened and exceeded the provisions of Section 39(1).

As I have alluded to, I will consider Section 39(2) which was the provision cited in the Notice to Prohibited Immigrant to Leave Zambia served on the Applicant and the Warrant of deportation signed by the Minister. For ease of reference, this section reads as follows:

> ***'If an immigration officer has reasonable grounds to believe that any person's presence in Zambia or conduct is likely to be a danger to peace and good order in Zambia, that person shall be deported from Zambia under a warrant signed by the Minister.'***

There is no doubt that a person can be deported from Zambia pursuant to the above provision if there are reasonable grounds to believe that any person's presence in Zambia or conduct is likely to be a danger to peace and good order in Zambia.

However the Applicant contended that nothing that had been placed before this court to show that this was indeed the reason behind the Applicant's deportation as there was nothing to show that there existed any facts to support the assertion that the Applicant was indeed a person who by his presence was likely to be a danger to peace and good order in Zambia.

On the other hand, the Respondents did not adduce any evidence in support of the reason indicated in the warrant and the notice that the Applicant was a

person who by his presence was likely to be a danger to peace and good order in Zambia.

In considering this section therefore, I have had recourse to the guidance given by the Supreme Court in the ***John Eric Tolmay*** case on how this power should be exercised as the court had an opportunity to consider a Section 26(2) in the repealed Act, Chapter 123 of the Laws of Zambia which is couched in similar terms with Section 39(2) of the Act. The Supreme Court in that case held *inter alia* that:

(1) Although the Minister has powers under Section 26(2) of the Immigration and Deportation Act to deport any person, justice must nevertheless be done to the individual.

(2) The Court can and has power to review deportation orders under Section 26(2) of the Immigration and Deportation Act in order to protect the rights of an individual.

(3) Although it is for the Minister and not the judiciary to decide whether in any particular case the requirements of the duty to act fairly outweighs that of national interest, there is also a duty on the part of the public officer in whom discretionary power has been vested to evaluate the case as a whole in order for him to determine whether an individual is a threat to national security.

(4) In determining whether an individual is a threat to national security, a public officer must point to materials on which he can reasonably and proportionately come to the conclusion that the individual poses a threat to national security.

(5) Although the Minister has under section 26(2) of the Immigration and Deportation Act the power to deport any person from Zambia whom he considers a threat to national security this power must be exercised on reasonable grounds and that the court may question this power once the individual challenges the deportation order.

(6) The court has power to go behind the deportation order if the reasons given are not proved and that the court can question the validity of the deportation order.

(7) Although the Minister was not bound to give reasons for deportation under section 26(2) of the Immigration and Deportation Act, the court has power to intervene if it is shown that there is misuse of power and that the Minister will then be requested to answer.

What is clear from the above holding is that although the Minister is not bound to give reasons for the deportation, it is now settled law that courts have the jurisdiction to inquire into the reasons for a deportation once an individual challenges the deportation and the public officer must point to materials on which he can reasonably and proportionately come to the conclusion that the individual poses a threat to national security.

In the present case, there is nothing that has been placed before this court by the Respondents on which it can reasonably and proportionately be said that the immigration officer came to a conclusion that the Applicant's presence in Zambia was likely to be a danger to peace and good order.

What the affidavit evidence has revealed in my view are contradictions as to the actual reasons behind the Applicant's deportation or removal from Zambia. I say so because of the following:

(i) The Applicant was served with a notice issued pursuant to Section 36. The notice is supposed to specify the class set out in the Second Schedule to which it is considered the person belongs. However, this notice did not indicate the class to which the Applicant belonged as set out in the Second Schedule but it only indicated that he belonged to Class **'39(2)'** of the Second Schedule. Class **'39(2)'** is not provided for under the Second Schedule.

(ii) The reason advanced by the Respondents in the affidavit was that the Applicant was convicted of the offence of using a forged document and that following his conviction and sentence, the Minister on 8th August, 2014 signed a warrant of deportation. The provision of the law cited in this warrant was Section 39(2) and not Section 39(1) which supports the reason given in the affidavit. No explanation was proffered by the Respondents for this discrepancy.

(iii) The Respondents affidavit evidence made no reference to the notice marked **'FJB2'** in the Applicant's affidavit verifying facts issued under Section 36 and served on the Applicant on the day he was removed from Zambia on 13th September, 2014.

I must state that there must be consistency and certainty in decisions made by public officers especially those decisions that affect the rights of individuals. However, these apparent contradictions on the actual or definite reason for the deportation, in my view have established a *prima facie* misuse of power by the Minister and the 1st Respondent. The 1st Respondent should have therefore given reasons for these discrepancies especially that the Applicant had challenged his deportation/removal from the country. In the absence of any definite reason why Section 39(2) was invoked to deport/remove the Applicant from Zambia, doubt has been cast on the validity of the warrant of deportation signed by the Minister and the notice issued by the immigration officer.

For the foregoing reasons, I find that when the Minister and the 1st Respondent issued a warrant of deportation and Notice for the Prohibited Immigrant to Leave respectively citing Section 39(2), they did not act within the purview of the law that regulates their decision making power and therefore, they were pursuing an objective other than that for which the power under Section 39(2) was conferred.

Consequently, I hold that the decision to deport/remove the Applicant from Zambia pursuant to Section 39(2) of the Act constituted an illegality within the principles stated above.

The Applicant's second ground for seeking judicial review is procedural impropriety. His contention is that the 1st Respondent was under a mandatory duty not to eject him from Zambia in a period of less than 48 hours from the time of service of the notice. Furthermore, it was argued that the Applicant had a right under Section 36 to make representations to the immigration officer in writing within 48 hours of receipt of the notice. In this regard, the Applicant contends that the 1st Respondent acted in breach of laid down statutory procedure as well as the rules of natural justice when he was denied the opportunity to make representations against the decision to remove him from Zambia.

On the other hand, the Respondents contend that there was no provision under Section 39 (1) of the Act which required the Applicant to be given Notice, make representations or specify the time period within which he was supposed to leave the country. However, the Respondents also argued that Section 36 was complied with as the Applicant was identified in the Notice and the period of time within which to leave was specified.

In response to the Respondents argument that there was no provision under Section 39(1), for the Applicant to be given notice or make representations, the Applicant's contention is that Section 39(1), the provision under which the purported deportation order was made was supposed to be read together with Section 36 of the Act.

I should state from the outset that when the Applicant was removed from the country on 13th September, 2014, he was issued with a Notice to Prohibited Immigrant to leave Zambia pursuant to Section 36 of the Act. This Notice was marked as exhibit **'FJB2'** in the affidavit verifying facts. The Respondents have

not disputed the existence of this notice. Furthermore, the Applicant's contention is that he was not shown the warrant of deportation marked **'KL3'** in the affidavit in opposition. Similarly, there is no evidence to challenge the Applicant's evidence that he was not served with the warrant.

Therefore, in determining this ground, I shall consider the procedure to be followed when one is required by notice under Section 36 to leave the country as the notice served on the Applicant when he was removed from Zambia was issued under Section 36. This section reads as follows:

(1) Any immigration officer shall, if so directed by the Minister, by notice served in person on any prohibited immigrant or a person to whom subsection (2) of section thirty five relates, require that immigrant or person to leave Zambia.

(2) Any notice served in accordance with subsection (1) shall specify in relation to the person on whom it is served-

(a) the class set out in the Second Schedule to which it is considered the person belongs, or that the person is a person to whom subsection (2) of section thirty five relates;

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

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

(3) The period within which a person shall be required to leave Zambia shall, except in the case of a person who, within seven days of that person's appearing before an immigration officer in accordance with this Act has been served with a notice under this section, be not less than forty eight hours and shall commence-

(a) In the case where such person does not make representations under this Act, from the time that person is served with such notice requiring the person to leave Zambia; or

(b) In the case where such person makes representations in accordance with this Act, from the time that person is advised that the representations have been unsuccessful.

In the first place, it is clear that the above provision relates to the deportation or removal from the country of any prohibited immigrant or person to whom subsection (2) of Section 35 relates.

As I have already alluded to, Section 35 defines a prohibited immigrant as any person who belongs to a class set out in the Second Schedule and any person whose presence in Zambia has been declared in writing by the Minister to be inimical to the public interest. If any such person is served with a notice under Section 36, then the notice should specify in relation to that person on whom it is served the following:

(a) the class set out in the Second Schedule to which it is considered the person belongs or that the person is a person to whom subsection (2) of section thirty five relates;

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

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

Subsection (3) further provides that:

> ***The period within which a person shall be required to leave Zambia shall except in the case of a person who within seven days of that person's appearing before an immigration officer in accordance with this Act has been served with a notice under this section, be not less than forty eight hours and shall commence-***
>
> ***(a) In the case where such persons does not make representations under the Act, from the time that person is served with such notice requiring the person to leave Zambia; or***
>
> ***(b) In case where such person makes representations in accordance with this Act, from the time that person is advised that the representations have been unsuccessful.***

What I construe from the above provision is that the notice should specify the period within which the person is required to leave Zambia which period should not be less than forty eight hours. Further, the person served is required to make representations and if representations are not made, the period within

which that person is required to leave commences from the time that person is served with the Notice. If the person makes representations, then the period when the person will be required to leave will commence from the time that person is advised that the representations have been unsuccessful.

I have examined the notice marked **"FJB2"** which was served on the Applicant. The following has been revealed.

(i) The notice did not specify the class set out in the Second Schedule to which it was considered the Applicant belonged but it merely stated that he belonged to Class '39(2)' of the Second Schedule. This class is not provided for under the Second Schedule. Thus the immigration officer did not comply with Section 36(2).

(ii) The Applicant was ordered to leave Zambia immediately after being served with the notice on 13th September, 2014 and was not given an opportunity to make representations. Again, the immigration officer did not comply with Section 36(3) which gives a person a minimum of forty eight hours within which to leave the country and also to make representations.

Having considered the above, I am of the view that the removal of the Applicant from the country was hastily done resulting in the failure by the immigration officer to observe the mandatory procedural rules that are laid down in the law as the Applicant was not given an opportunity to make representations.

I should further add that in the context of what was stated by ***De Smith*** in the book Judicial Review, a passage I have referred to in my judgment, the 1st Respondent was supposed to exercise procedural fairness when exercising his powers under Section 36 as the power to remove the Applicant from the country was going to adversely affect his rights created by statute.

In view of the foregoing, I find that the 1st Respondent acted in breach of Section 36 the provision under which the notice served on the Applicant was issued as the Applicant was removed from the country in less than twenty four (24) hours of being apprehended and he was not given an opportunity to make representations.

Consequently, I hold that the decision to remove the Applicant from Zambia was fraught with procedural impropriety as the 1st Respondent did not observe the procedural rules as laid out in the law.

Having said so, the net result of my findings is that on the totality of the evidence adduced and on the law relating to the grounds for judicial review, I hold that the Applicant has proved the grounds of illegality and procedural impropriety attendant in the decision to deport or remove him from Zambia.

In this regard, the following reliefs are hereby granted:

(i) An order of Certiorari. The decision by the 1st Respondent/Minister to remove/deport the Applicant from Zambia is hereby brought into this court and quashed on the ground of illegality and procedural impropriety.

(ii) An order of Mandamus. The 1st Respondent being a public officer is compelled to allow the Applicant to enter Zambia and to consider the Applicant's application for renewal of the Investor's Permit according to law.

However, I decline to order the 1st Respondent to renew the Applicant's Investor's Permit as prayed for by the Applicant as the effect of this order sought is to compel the 1st Respondent to determine the application for renewal in a particular way when the application has to be considered in accordance with the law.

The Applicant also prayed for declaratory orders that the Applicant is not a Prohibited Immigrant within the meaning of Section 35 of the Immigration and Deportation Act and that the 1st Respondent's decision violated section 36 and Section 38 of the Act.

It is trite law that a declaration is a discretionary remedy and a party is not entitled to it as of right. The real question of interpretation that the 1st Respondent violated Section 36 has been decided in favour of the Applicant therefore, I find that no useful purpose will be served by making such a declaration. I decline to make this declaration.

Furthermore, I decline to declare that the Applicant is not a prohibited immigrant within the meaning of Section 35 of the Act as there is evidence that he was convicted of the offence of using a forged document. However, I have quashed the decision to remove/deport him from the Zambia as the said decision was tainted with illegality and was fraught with procedural impropriety.

On the claim for damages, Order 53 rule 7 of the White Book gives the court the discretion to award the applicant damages if:

(i) He has included in the statement in support of his application for leave a claim for damages arising from any matter to which the application relates.

(ii) The court is satisfied that if the claim had been made in an action begun by the applicant at the time of making his application, he could have been awarded damages.

However, the power to award damages is subject to Order 18 rule 12 of the White Book which requires the applicant to give particulars of damages claimed.

In the present case, the Applicant has included in his Notice of application for leave to apply for judicial review a claim for damages. However, on the evidence

adduced, I am not satisfied that if the claim had been made in an action begun by the Applicant at the time of making his application, the Applicant could have been awarded damages as he has not provided the particulars for the claim for damages. I therefore decline to grant this order for damages.

Since the Applicant has succeeded on the two grounds of illegality and procedural impropriety, I award costs to the Applicant to be agreed, in default to be taxed.

Leave to appeal is granted.

Delivered at Lusaka this 14th day of April, 2016

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M.C. KOMBE
JUDGE