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IN THE HIGH COURT FOR ZAMBIA **2019/HP/0164**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(*Civil Jurisdiction*)

IN THE MATTER OF:	**AN APPLICATION FOR JUDICIAL REVIEW**
AND	
IN THE MATTER OF:	**ORDER 53 RULE 3 OF THE RULES OF THE SUPREME COURT OF ENGLAND AND WALES (1999 EDITION) VOL.1**
IN THE MATTER OF:	**AN ORDER FOR DEPORTATION**
IN THE MATTER OF:	**REJECTION OF A REQUEST TO REVOKE THE DEPORTATION ORDER UNDER S.17 OF ACT NO.18 OF 2010 OF THE LAWS OF ZAMBIA**

BETWEEN:

MOSES SAAH TAMBA **APPLICANT**

AND

ATTORNEY GENERAL **RESPONDENT**

HIGH COURT OF ZAMBIA
02
PRINCIPAL
29 MAY 2020
REGISTRY
P.O. BOX 50067, LUSAKA

BEFORE THE HONOURABLE MRS. JUSTICE M. C. KOMBE

For the Applicant	:	*Mr. O. Ngoma - Messrs Lungu, Simwanza & Company*
For the Respondent	:	*Ms. D. Mwewa – Ag/ Senior State Advocate – Attorney- General's Chambers.*

RULING

Cases referred to:

1. **Patience Chalwe and Another v. Attorney General 2014/HP/0793.**

2. **Frederick Jacob Titus Chiluba v. Attorney-General (2003) ZR 153.**
3. **Nyampala Safaris and Others v. Wildlife Authority and Others (2004) ZR 49.**
4. **Shilling Bob Zinka v. The Attorney General (1991) Z.R.**
5. **Geoffrey Lungwagwa (on his own behalf and on behalf of 47 other Members of Parliament belonging to the United Party for National Development (UPND) v. The Attorney General-CAZ.08/178/2017.**
6. **Atlantic Bakery Limited v. ZESCO Limited - Selected Judgment No. 61 of 2018.**
7. **Council of Civil Service Unions v. Minister of State For Civil Service (1984) 3 ALL ER 935.**
8. **R v. Epping and Harlow General Commissioners, *ex parte* Gold straw [1983] 3 All ER 257.**
9. **R v. Inland Revenue Commission *ex parte* Preston (1995) A.C 410.**

Legislation and other material referred to:

1. **The Immigration and Deportation Act No.18 of 2010.**
2. **The Rules of the Supreme Court (RSC), 1999 Edition (White Book).**
3. **Grahame Aldous John Alder, Applications for Judicial Review- Law and Practice of the Crown Second Edition (Butterworth's) London, Dublin, Edinburgh, 1993.**
4. **Halsbury's Laws of England Volume 3, 4th Edition.**

This is a ruling on the Applicant's application for leave to apply for judicial review. The application is made pursuant to Order 53, rule 3 of the Rules of the Supreme Court 1999 Edition (White Book) and is supported by an affidavit deposed to by **MOSES SAAH TAMBA** and

accompanied by a Statement of Facts containing the grounds upon which the reliefs are sought. The reliefs sought are as follows:

i) *An Order of Certiorari for the purpose of quashing the Deportation Order made by the Minister of Home Affairs as well as quashing further the decision to reject the request to revoke the Order for Deportation.*

ii) *An Order of Mandamus to compel the Minister of Home Affairs to revoke the Order for Deportation.*

iii) *An Order of Mandamus to compel the Department of Immigration to issue a work permit and a spouse permit to the Applicant.*

iv) *Damages in form of compensation for the inconvenience and hardship for the time spent in prison.*

v) *Costs.*

The ground upon which the above reliefs are sought is Unreasonableness/Irrationality.

It is contended that the Applicant's Deportation Order was made unfairly and without any proof of the Applicant being a danger to the nation or being a criminal or person in bad standing with the nation or being an enemy of the State. Thus the decision by the Minister of Home Affairs was indeed irrational and unreasonable.

In the affidavit verifying the facts, the Applicant deposed that he entered Zambia lawfully and was given a work permit which was manifested in his file at immigration office; that his passport and work permit were seized from him by the immigration officers who kept them at their office until they expired.

That he was slapped with a charge of unlawful stay in Zambia and was acquitted. A copy of the certificate of acquittal was exhibited and marked **"MST1"**.

Further that upon his acquittal, he made frantic efforts to retrieve the passport and work permit from Immigration Department but the same failed as immigration officers refused to release the said documents to him.

He explained that he was married to a Zambian woman and they had a family to take care of. A copy of the Marriage Certificate was exhibited and marked **"MST2"**; that he made several attempts to appeal for a Spouse permit but it was rejected on petty grounds.

Further that a request was made to the Chief Immigration Officer to release him through his lawyers but the said request was not attended to as the Chief Immigration Officer did not respond to his request but rejected it in the face of his lawyers through the Deputy

Chief Immigration Officer. A copy of the said request to the Chief Immigration Officer was exhibited and marked **"MST4".**

That a further request was made to the Minister of Home Affairs to revoke the Deportation Order against him. Unfortunately, the said request was attended to by the Permanent Secretary and a Secretary of Immigration against the Laws of Zambia who informed him that his request was rejected by the Minister. A copy of the said rejection was exhibited and marked **"MST5".**

He deposed that his matter was competent for judicial review as the decision allegedly made by the Minister of Home Affairs to issue the Deportation Order and refuse to revoke the Deportation Order as well as the refusal by the Chief Immigration Officer to release him was indeed unreasonable and irrational.

I did not consider the application *ex parte* but directed that it be heard *inter partes*.

The Respondent opposed the application and filed an affidavit in opposition deposed to by **FRANK MICHELO**, an Immigration Officer in the employ of the Ministry of Home Affairs under the Immigration Department.

He deposed that contrary to the contents of paragraph 4 of the affidavit in support, the Immigration Department never issued the Applicant with a work permit; was not aware of any work permit issued to the Applicant herein; that the Applicant was only issued with a Temporary permit under TP number 007069 and not a work permit as was clearly shown on Passport No. L065727 when he entered the Republic of Zambia on 19th September, 2014. A copy of the said permit was exhibited and marked **"FM1-2".**

He explained that contrary to the assertions in paragraph 5, the Applicant had not specified the time in question he was referring to as that was not the first time he was in clear abrogation of the immigration laws of the country.

That the Respondent became aware of the presence of the Applicant's presence in the country after the Applicant was arrested at Chelstone Police Station following a dispute reported there by some members of public. The Applicant was removed from the Republic of Zambia as a Class E (B) offender under the Immigration and Deportation Act No.18 of 2010 on 26th June, 2015 via Kenneth Kaunda International Airport as he had no valid permit to legalize his stay in the country. A copy of the Applicant's passport, ticket receipt and itinerary were exhibited and marked **"FM3(i) to (iv) and FM4 (i) to (ii)".**

He deposed further that the Respondent once again became aware that the Applicant was back in the Country when it was discovered that the Applicant had been arrested for another offence in May, 2016. The deponent admitted the contents of paragraph 6 of the Affidavit in support to the extent that when the Applicant was discovered to be illegally in the country, he was arrested and charged with the offence of unlawful stay in Zambia.

That the Applicant was consequently, on 7th July, 2016 placed on a Temporal permit pending disposal of the criminal proceedings against him and a report order was issued; that the Applicant was subsequently acquitted but the same had no bearing on his potential deportation as the same related to other provisions of the immigration rules of the country.

Further, that the Applicant never regularized his status in the country and left after his acquittal in 2017. That through a tip from concerned members of the public, the Respondent learned that the Applicant was in the country without any legal authorization and investigations were commenced in the matter. That this was evidenced in a letter written through a Mr. Bwalya whom he had instructed to write on his behalf requesting for his old and expired passport. A copy of the said letter and the accompanying National

Registration Card for Mr. Bwalya were exhibited and marked **"FM6 (i) and (ii)".**

He explained further that internally, the process to begin the submission for the same to the Applicant's country of origin to and through the Ministry of Foreign Affairs was commenced by the Respondent.

That the department was in receipt of an application for a spousal permit earlier dated 10th July, 2018 for the Applicant but the same was rejected because at that point the Applicant had already become a Prohibited Immigrant and was not eligible for any other permit and as such the same was irrelevant.

He deposed that on 29th November, 2018, the Respondent was finally located, arrested and detained.

That the Applicant was never granted a work permit and it was him who repeatedly refused to submit the new passport which he had obtained to the immigration department, an act which contributed to the delay in the deportation of the Applicant and continued stay in custody.

That the Respondent was aware that he was married to a Zambian woman and further they did not deny the contents of paragraph 10 of the Affidavit in support.

That a warrant for the Applicant's deportation was issued by the Minister dated 31st December, 2018.

Regarding paragraph 11 of the Affidavit in support, the Respondent denied that the 'request' was attended to by the Permanent Secretary of the Ministry of Home affairs or Secretary of Immigration as the decision of the Minister was simply being conveyed by the Secretary of Immigration; that this was an administrative issue which did not affect the decision of the Minister. A copy of the warrant of deportation signed by the Minister of Home Affairs was exhibited and marked **"FM7".**

That given the Applicant's propensity to illegally stay in the country and constant abrogation of the law, he was a danger to the peace and good order of the country and had to be detained for immediate deportation.

The Applicant filed an Affidavit in reply in which he deposed that the Temporal permit and his old passport were still in possession of the Respondent who seized them from him barely four (4) days from the

date of issuance of Temporal permit as manifested in "FM1" and "FM2" exhibited in the affidavit in opposition.

That after four (4) days of the issuance of the Temporal permit, he was arrested and unlawfully put in custody for nine (9) months by immigration officers up to June 2015, when he was removed without being taken to Court.

He explained that when he came back to Zambia in the year 2016 on a Temporal permit, he was arrested and charged for unlawful stay where upon his Temporal permit and passport were seized by immigration officers who issued him with a report order.

Further that he was acquitted of the charge of unlawful stay in Zambia and his stay in Zambia was lawful; that he never instructed anyone to write a letter on his behalf to any institution and he did not know a person by the name of Mr. Bwalya.

He explained that he was eligible to apply for Spouse permit as he was married to a Zambian citizen; that he was not a convict or facing any criminal charges and there was no complaint at any police station against him.

At the hearing of the application, learned counsel for the Applicant Mr. O. Ngoma, informed the Court that he would rely on the affidavit

in support, affidavit in reply, statement of facts as well as the skeleton arguments filed in support of this application.

He submitted that the circumstances upon which leave to commence judicial review should be granted were illustrated in the case of **Patience Chalwe and another v. Attorney General**[1] where the Court held that leave may be granted in the following circumstances:

i) A party must demonstrate an arguable case.

ii) The party must have jurisdiction to apply for leave.

iii) A party must have exhausted all other remedies available and judicial review is the final and last resort.

He submitted that the Applicant had an arguable case as the reason for deportation lacked merit since the Applicant was not a threat to public security and peace.

He submitted that this matter was competent for judicial review as the decision allegedly made by the Minister of Home Affairs to issue the Deportation Order and refusal to revoke the said Order as well as the refusal by the Chief Immigration Officer to release the Applicant were indeed unreasonable and irrational.

He added that the Applicant was not an enemy of the state since he was acquitted of unlawful stay in Zambia and there was no criminal charge before the Courts of law or any law enforcement agency.

He submitted that in terms of the second requirement or ingredient for the grant of leave for judicial review, the Applicant was directly affected by the action of the Minister of Home Affairs and Department of Immigration officers under the Ministry of Home Affairs. That the Applicant was still remanded in custody pending deportation and judicial proceedings before this Court.

In terms of the third requirement, he argued that it had been met as the Applicant did follow all the procedures of appeal through the Director General of Immigration as well as the Minister of Home Affairs which rejected the request to revoke the order of deportation.

The Court was referred to the case of **Fredrick Jacob Titus Chiluba v. Attorney General** [2] where the Supreme Court stated that the remedy of judicial review is concerned with reviewing, not the merits of the decision in respect of which the application for judicial review is made but the decision-making process itself.

He referred the Court to the **Halsbury's Laws of England Volume 3, para 570** where the learned authors stated that:

"An applicant need only show, that he has prima facie or arguable case or reasonable ground for believing that there has been a breach, or threat of failure to perform a public duty."

He contended that the Applicant had not been given a fair treatment as he was not an enemy of the state or a threat to public peace and security.

He urged the Court to grant the application for an order for leave to commence judicial review against the Attorney General.

In his oral submissions, he reiterated his submissions and added that the issuance of the Deportation Order by the Minister of Home Affairs exhibited as **"FM7"** did not comply with section 18 (1)(c) of Act No. 18 of 2010 as they failed to notify the Applicant in writing the reasons for the deportation. That in fact, the Applicant was not served with the Deportation Order and only came to see it when it was exhibited. In this regard, he submitted that the Applicant was denied an opportunity to be heard.

He referred the Court to the case of **Nyampala Safaris and Others v. Wildlife Authority and Others**[3] where the Court held *inter alia* that a decision of an inferior Court or public authority may be quashed by an order of Certiorari where that court or authority acted

and failed to comply with rules of natural justice where those rules were applicable. He submitted that in this case, the rules of natural justice were applicable but they were not complied with.

He also submitted in relation to exhibit "FM7" in the affidavit in opposition that Section 39 (1) cited in that document did not apply to the prevailing case because the Applicant was not serving any term or sentence as he was acquitted of the charge. He argued that the Applicant could not be deported on the strength of section 39.

He submitted that there was a wrong reference of the law as Section 39(2) provides that:

> **"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."**

He argued that what purported to be grounds of deportation were at variance with the provisions of Section 39(2) of the Act. He submitted that since the warrant did not comply with Section 39 (1) and 39(2), it was illegal and unreasonable and could not be used to deport the Applicant as the provision cited was incorrect.

It was his submission that what he had told the Court demanded a further investigation by the Court through a substantive hearing of judicial review proceedings.

On the issue of the Spouse permit which had been raised in the affidavit in support and skeleton arguments, he argued that the Applicant was entitled to a Spouse permit and the reasons advanced by the immigration officer (Mr. Michelo) for denying the Applicant the permit were against the law and not supported by any evidence on record. He contended that they were in contravention of Section 23 (1) (a) of the Immigration and Deportation Act. That the Applicant was married to a Zambian Citizen which position was not objected to by the Respondent and the Marriage Certificate was exhibited to that effect in the Applicant's affidavit in "MST2".

He urged the Court to grant leave so that the matter could be investigated further.

In opposing the application, the learned Acting Senior State Advocate Ms. D. Mwewa on behalf of the Respondent relied on the affidavit in opposition deposed to by Frank Michelo and the skeleton arguments.

In the skeleton arguments, Ms. Mwewa submitted that judicial review proceedings and remedies were not as a matter of right and therefore were subject to the discretion of the Court. She referred the Court to Order 53 rule 14(32) of the Rules of the Supreme Court, 1965, White Book 1999 Edition in this regard.

She also referred to Order 53 rule 14 (21) of the White Book and submitted that the current stage of this application was to provide a sieve or a weeding out process, should the Court find it to be frivolous and hopeless. She added that leave was essential to ensure that only matters fit for further investigation were allowed to go for a hearing for judicial review. She contended that this was not the case herein and that she would further demonstrate.

To augment her position, she referred to Order 53 rule 3(7) of the White Book which provides that:

> **"The Court shall not grant leave unless it considers that the Applicant has a sufficient interest in the matter to which the application relates."**

She submitted that it was clear that the Applicant had sufficient interest in the matter as he was the potential deportee in question therefore the application related to him, as such the first requirement had been met.

Ms. Mwewa also referred to Order 53 rule 14 (54) of the White Book to the effect that it was only after leave was granted would the court proceed to hear the substantive application for review. That the Applicant had only satisfied the requirement that he had sufficient interest in the matter and that he had made the application promptly.

It was her contention that the Applicant had failed to demonstrate that there was a case fit for further investigation at a substantive hearing. This was because the Applicant was in constant breach of the immigration laws in this country and therefore a danger to peace and good order.

She argued that the Applicant told this Court fables as to the permits he had been issued with by the Respondent. That the Applicant had only been issued with two permits, both being Temporal permits. The first one was as shown in exhibit marked "FM1" in the affidavit in opposition which expired and was never renewed by the Applicant while he stayed in the Republic of Zambia albeit illegally until his first arrest by the Zambia Police in an unrelated matter. The second one was the Temporal permit granted during the course of the ended criminal proceedings in the Subordinate Court.

Ms. Mwewa further submitted that the Court should note that the Respondent in 2015 removed the Applicant from the country and not

deported when he was discovered to be living in the country illegally. This was done in order for him to come back and regularize as well as legalize his presence in Zambia which he did not; that this was a clear propensity for lawless behaviour. Thus she requested the Court to consider the Applicant's history with the Respondent in this matter which dated back as far as 2014 and showed his pattern of behaviour and conduct.

She submitted that under Section 10 of the Immigration and Deportation Act No. 18 of 2010, the Respondent followed the laid down procedure and it was not correct for the Applicant to make any allegations shown in the statement of facts filed into court in support of this as there was no unfairness, fraud, malice or personal interest evidenced in the affidavit in support. The allegations were therefore frivolous.

It was also submitted that from the date of acquittal and the Applicant's departure from the Republic of Zambia and as late as 8th October, 2018 on exhibit marked FM6(i) the Applicant was not present in Zambia. Therefore by his mere entry into the country without the necessary legal approvals by operation of the law he became a prohibited immigrant who did not qualify for any admission into Zambia. She added that the Respondent was in receipt of an

application for a Spouse permit on 10th July, 2018 from the Applicant's alleged spouse which the Respondent did not qualify for rendering the same to be irrelevant at the time.

She further submitted that the Warrant of Deportation was made pursuant to Section 39(2) of the Immigration and Deportation Act No.18 of 2010.

In view of the foregoing, she submitted that there was nothing fit for further investigation by this Court.

In her verbal submissions, Ms. Mwewa stated that she had three points to buttress and argue.

The first point related to Spouse permit. She argued that Order 53/14/27 provides that the Court will not normally grant judicial review where there is another avenue of appeal. She submitted that their contention was that the Applicant had not exhausted the avenue of appeal as provided for under Act No. 18 of 2010. That the letter by the Respondent exhibited as "MST5" dated 24th January, 2019 showed that the Applicant was making a request to the Minister for his office to revoke the Deportation Order issued.

She submitted that there was therefore no appeal before the Minister with regard to the Spouse permit. She added that the Applicant

should have exhausted the administrative procedures before seeking any relief before this Court.

The second point related to the legal basis as to why the Deportation Order was granted or issued. She argued that as exhibited and evidenced by the affidavit in opposition, the Respondent was not aware of when the Applicant came into the Republic after he had left the country following his acquittal from the Magistrates Courts.

She drew the attention of the Court to "FM6(i), a letter dated 8th October, 2018 and addressed to the Director of Immigration. That even though the Applicant denied knowing the author of the letter, it evidenced that the Applicant left the Country after his acquittal, and that it was not known how he entered the country.

She argued further that the deponent to the affidavit in opposition deposed that the Applicant never regularized his stay following the acquittal. As such, by operation of the law and in particular Section 35(1) of the Act, the Applicant was a Prohibited Immigrant with no legal status to be in the country. She added that in "Class G" of the second schedule of the Act, any person entering Zambia who was required under Section 11 to appear before an Immigration Officer and failed to comply with that provision, fell under Class (D) and (E) by operation of the law.

On exhibit "FM7", Ms. Mwewa submitted that Section 39(1) was only referred to and captioned there to the extent that it was a warrant. Secondly, she argued that Section 39(2) was not a wrong reference as there was reasonable ground to suspect that the Applicant was likely to be a danger to peace and good order on the totality of the evidence.

In the alternative, she relied on the case of **Bob Zinka v. The Attorney General**[4] where the court stated that even where a wrong provision of the law had been used by a public officer for as long as the said officer had power and authority to do so, the act may not be invalidated.

On the third point, she referred the Court to Order 53/14/34 which provides that decisions in Immigration matters were capable of challenge in Judicial Review. That Order 53/14/35 went further to provide for illegal entrants. That where a decision that someone was an illegal entrant was susceptible to challenge by way of judicial review, the Court investigated whether the evidence justified that decision.

She submitted that on the totality of the evidence in the affidavit in opposition, the Applicant was only issued with two permits and that

he had no legal status, not for the fault of the Immigration Department but his own.

She urged the Court not to grant leave as there was nothing fit for further investigation.

In response to a question from the Court on whether the Respondent was still holding on to the Applicant's passport, she submitted that the Respondent started processing the Applicant's expired passport to his country of origin through the Ministry of Foreign Affairs; that the Respondent had his new passport as they wanted to have him deported but for these proceedings.

In reply, Mr. Ngoma submitted that the Applicant was not at fault and his purported Prohibited Immigrant status was because his travel documents being the passport which was valid when he was put in custody when appearing in the Subordinate Court was still in the custody of the Immigration Department. That he made several efforts to have the said documents released being the passport and the Temporal permit endorsed therein. He argued that the situation of being a Prohibited Immigrant was largely caused by the Immigration Department. He told the Court that the new passport was handed over for issuance of a Temporal permit which had not been issued.

He further submitted that there was no evidence that the Applicant's behaviour was a danger to public peace as the Applicant was not facing any criminal charges in Zambia and there was no complaint at any Police Station in Zambia.

He argued that in relation to exhibit "FM6", a letter by Mr. Bwalya, the Applicant was not the author and did not instruct the said Mr. Bwalya to write the letter on his behalf; that it was therefore wrong to attribute the said letter to him. That the Applicant came back to Zambia on a Temporal permit in 2016, and that same year he was arrested and subsequently acquitted. He argued that the Applicant was not a Prohibited Immigrant and did not fall under Class (E) (F) and (G) of the Second Schedule.

He contended in this respect that the Applicant never left the country as his documents were in the custody of the Immigration Department and that it was unfair for the Respondent to argue that the Applicant never regularized or legalized his stay because it was the Respondent who failed to extend his Temporal permit.

On Order 53/14/34 and 35 he argued that the Applicant was not an illegal entrant because he entered Zambia and was issued a Temporal permit. That this was evidenced by the act of the Immigration

Department which kept his old and new passport which passport had with it endorsed the Temporal permit.

He contended that the issues raised called for further investigation by way of judicial review.

He further argued that the construction and drafting of the Deportation Order were matters that required further investigation in terms of the law cited being Section 39(1) and (2) of the Act.

He contended that in consideration of the evidence, this was a matter amenable to judicial review as the reasons for deportation by the Respondent of being a danger to peace and public order required further investigation on the ground of unreasonableness, illegality and irrationality.

Those were the submissions by the parties which I have carefully considered.

By this application, the Applicant seeks leave to commence judicial review proceedings. When making an application for leave, the Applicant is required to comply with the rules and procedure provided for under Order 53 of the Rules of the Supreme Court. Thus according to Order 53 rule 3, an applicant is required to file the following documents:

(a) a Notice in Form 86A containing a statement of

(i) The name and description of the applicant,

(ii) The relief sought and the grounds upon which it is sought,

(iii) The name and address of the applicant's solicitors (if any) and

(iv) The applicant's address for service; and

(b) *An affidavit verifying facts relied upon.*

The Applicant herein has filed a Statement on Application for Leave to apply for judicial review. Although this statement contains the names, description and address of the Applicant, the relief sought and the grounds upon which relief is sought, it does not contain the decision in respect of which relief is sought. However having read the reliefs, I have come to the conclusion that the decision being challenged or in respect of which relief is sought is the decision of the Minister of Home Affairs to issue a Deportation Order and to refuse to revoke the said Deportation Order.

The grounds upon which the relief is sought is unreasonableness /irrationality. Thus the Applicant seeks an Order of Certiorari to quash the Deportation Order and also to quash the decision to reject to revoke the Order for Deportation.

Before I proceed to consider whether leave to apply for judicial review should be granted, it is important to state from the outset that

judicial review refers to the power of the High Court to supervise inferior courts, tribunals, public bodies and officers entrusted with statutory powers in the exercise of those powers.

According to the authors of the book entitled Applications for Judicial Review: Law and Practice of the Crown Office, the basis of this supervisory power of the High Court is to make such bodies and tribunals do their duty and stop them from doing things which they have no power to do.

However, access to judicial review is not a matter of right and is therefore subject to the discretion of the Court. In this regard, an application for judicial review is a two-stage process. The applicant must first apply for leave to move for judicial review.

At leave stage, the Court is required to eliminate at an early stage any applications which are frivolous, vexatious or hopeless. This is to ensure that an application is only allowed to proceed to a substantive hearing if the Court is satisfied that there is a case fit for further investigations of the exercise of power by public authorities at a full *inter partes* hearing. If leave is granted the applicant can proceed with the substantive application for judicial review.

However, when the High Court is exercising its supervisory jurisdiction, the Supreme Court in the case ***Frederick Jacob Titus Chiluba v. Attorney General*** stated that:

> **"The remedy of judicial review is concerned with reviewing, not the merits of the decision in respect of which the application for judicial review is made, but the decision -making process itself."**

I should hasten to point out the guidance given by the Court of Appeal in the case of **Geoffrey Lungwagwa (on his own behalf and on behalf of 47 other Members of Parliament belonging to the United Party for National Development (UPND) v. The Attorney General** [5] on what the court is supposed to consider at this stage. Mchenga DJP stated that:

> **"We should state that necessarily the court is called upon to view the facts and the legislation in question, not in depth but not perfunctorily either. A view should be formed on the material and that view should reveal an arguable case.**

It is on the basis of the foregoing that I approach the evidence and the legislation in question in this case.

To begin with, I have noted from the verbal submissions that learned counsel for the Applicant argued that the issuance of the

Deportation Order by the Minister of Home Affairs which was exhibited as **'FM7'** did not comply with Section 18 (1) (a) of Act No. 18 of 2010 as no reasons for the deportation were specified in the Order and that the Applicant was not served with the Deportation Order and that he only saw it when it was exhibited. That in this regard, the Applicant was denied an opportunity to be heard as the rules of natural justice were not complied with.

What I discern from this argument is that the Applicant has raised the ground of procedural impropriety which has two aspects. First the disregard of express statutory procedural requirements and second, the violation of general principles of fair procedure implied by common law.

It was also argued in relation to the Deportation Order that Section 39 (1) cited in that document did not apply to the prevailing case because the Applicant was not serving any term or sentence as he was acquitted of the charge. Mr. Ngoma also argued that there was a wrong reference to Section 39(2) in the Deportation Order; thus what purported to be grounds of deportation were at variance with the provisions of Section 39(2). That in this regard, since there was non-compliance with Section 39 (I) and (2), it was illegal to have relied on these provisions.

Although counsel vehemently advanced these arguments, I have carefully considered the contents of the Statement of Application for leave to apply for judicial review which was filed pursuant to Order 53 rule 3 of the Rules of the Supreme Court.

What is so apparent is that counsel for the Applicants did not confine himself to the ground of Unreasonableness/Irrationality in the Statement but advanced these other grounds of procedural impropriety and illegality. In short, counsel raised issues which were not pleaded as it is clear that he never sought leave to amend the Statement by adding grounds of illegality and procedural impropriety.

In view of the foregoing, is the Court precluded from considering these grounds?

I will start with the first ground of procedural impropriety. As I have mentioned, Mr. Ngoma submitted that the procedure under Section 18 (1) of the Act was not complied with as the Applicant was not notified in writing and the reasons for his deportation were not availed to him.

When it comes to the nature of evidence to be adduced on applications for judicial review, the Supreme Court in the case of ***Fredrick Titus Chiluba*** made pertinent pronouncements when it held *inter alia* that:

> **'But before delving into the issue of the nature of the evidence on applications for judicial review, a point must be made at this juncture that the hearing of an application for judiciai review does not start from the day set for the motion. The application starts with a notice of application for leave to apply for judicial review accompanied by an affidavit verifying the facts relied upon, which frequently are not in dispute. The requirement of an affidavit commits an applicant to stating the basis of his case on oath. Thus, the affidavit must contain all the basic factual material on which reliance will eventually be placed. The affidavit forms the basis of the applicant's application for judicial review together with the notice of motion. (Underlining mine for emphasis only).**

I have considered the affidavit evidence adduced by the Applicant. It is clear that the Applicant did not allude to the evidence relating to procedural impropriety which counsel referred to in his submissions. In short, the affidavit did not contain all the basic factual material on which he sought to place reliance but the material was introduced by counsel. This offends the rules of evidence as counsel is not supposed to adduce evidence from the bar.

So while the Supreme Court in the case of **Anderson Kambela Mazoka and others v. Levy Patrick Mwanawasa and others** (6) emphasized the long standing principle that where any matter not pleaded is let in evidence, and not objected to by the other side, the court is not and should not be precluded from considering it, this principle does not apply with equal force in the present case because the evidence has been adduced on an un-pleaded ground which is contentious by counsel and not the Applicant.

For these reasons, I shall not consider this ground although there was no objection on behalf of the Respondent.

The ground of illegality is a legal point which counsel raised in the submissions. While it is not contained in the Statement, on the authority of ***Anderson Mazoka*** case I shall proceed to consider it as there was no objection raised by counsel for the Respondent and in any event, counsel addressed it in her verbal submissions.

The gist of the Applicant's argument is that there was a wrong reference to Section 39(1) and 39(2) in the Deportation Order; thus what purported to be grounds of deportation were at variance with the provisions of Section 39(2). That in this regard, since there was non- compliance with Section 39 (1) and (2), it was illegal to have relied on these provisions.

Ms. Mwewa on behalf of the Respondent submitted that Section 39(1) was only referred to and captioned to the extent that it was a warrant. On the argument that Section 39(2) was a wrong reference as the purported reasons were at variance with the provisions of Section 39(2), counsel argued that Section 39 (2) was not a wrong reference as there was reasonable ground to suspect that the Applicant was likely to be a danger to peace and good order on the totality of the evidence.

To put matters in context, Section 39(1) provides that:

> **"After receiving the particulars under section thirty 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."**

The above provision relates to warrants of deportation signed by the Minister in respect of a non-citizen of Zambia who has been convicted. In the present case, there is no evidence that the Applicant was convicted of any offence. Be that as it may, can it be argued that reference to this section requires a further investigation by this Court?

I am inclined to agree with the learned State Advocate Ms. Mwewa that this section was captioned only to the extent that it was a Warrant of Deportation because the heading is clear that the document is a Warrant of Deportation and not that the reasons for the deportation was because the Applicant was a non-citizen who was convicted and serving a term of imprisonment. I say this because there is nothing in the warrant to suggest this. In any event, a wrong reference to the law does not invalidate the action taken for as long as there is a legitimate source of power to issue such a warrant. The case of ***Shilling Bob Zinka v. The Attorney General*** is instructive on this point. I have noted from the provisions of the Act that the Minister is empowered to issue a Deportation Order not only for the reasons under Section 39(1) but also Section 39(2).

In relation to Section 39(2), this provides that:

> **"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."**

The relevant portion of the Warrant of Deportation **'FM7'** reads as follows:

"WHEREAS MOSES TAMBA a 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 in pursuant to Section 39(2) of the Immigration and Deportation Act, No. 18 of 2010;

NOW THEREFORE, you are commanded to cause the deportee to be deported from the Republic of Zambia to LIBERIA

AND FOR DOING SO, THIS SHALL BE YOUR WARRANT."

What I discern from the foregoing is that the Applicant was declared by the Minister to be a prohibited immigrant as his presence was inimical to the public interest. The declaration of a person as a prohibited immigrant is covered under Section 35 of the Act. I have noted that under Section 35(1), a person is a prohibited immigrant if he belongs to a class set out in the second schedule and under subsection 2, if a person's presence in Zambia is declared in writing by the Minister to be inimical the public interest.

Once a person is declared a prohibited immigrant by virtue of this section, his presence in Zambia shall be unlawful and he may deported from the country in accordance with the Act.

Going by the contents of the warrant of deportation, the deportation of the Applicant was being made pursuant to Section 39(2) of the Act. The ground for deportation under this section is where 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.

When I consider paragraph 26 of the affidavit in opposition, the ground for the deportation was that the Applicant was considered to be a danger to peace and good order. This ground as was stated by the Supreme Court in the case of the **Attorney-General v. Roy Clarke** [7] when dealing with a similar provision under the repealed Immigration Act is broad enough to catch any conduct.

Given the foregoing, I am of the considered view that the reasons for the deportation were not at variance as reference to Section 39(2) was not wrong. In any event, if there was a variance, the Applicant would not have been able to challenge the decision on the ground of irrationality as he would not have known the reasons for the deportation. The fact that in the Statement he filed he argued (as it will become clear shortly in this ruling) that there was no evidence that his behaviour was a danger to public peace and good order means that he understood the reasons for the deportation.

Having considered the legislation as guided by the Court of Appeal in the ***Geoffrey Lungwagwa*** case, I have formed a view and I find that there is no case fit for further investigations on the ground of illegality.

Going back to the Statement filed by the Applicant, the grounds upon which the relief is sought is that the reasons advanced by the Respondent for deporting the Applicant were petty and false as there was no strict proof of the allegation of criminality, misbehavior and general unwanted behaviour; that there was no evidence that the Applicant's behaviour was a danger to public peace and good order as he was not facing any criminal charges in Zambia and there was no complaint at any police station in Zambia against him. Thus it was unreasonable for the Respondent to have deported the Applicant.

The Respondent on the other hand contends that the Applicant's history with the Respondent which dated as far back as 2014 showed a pattern of lawless behaviour on his part as he never regularized his status in the country.

As I have already mentioned, judicial review is concerned not with the merits of the decision but with the decision making process. On unreasonableness Lord Diplock in the case of **Council of Civil**

Service Unions v. Minister of State For Civil Service[8], explained the meaning of Unreasonableness/Irrationality when he stated:

> **"By irrationality, I mean what can now be succinctly referred to Wednesbury unreasonableness. It applies to a decision, which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it."**

Given the foregoing, can it be said that there is a case fit for further investigation as the decision by the Respondent to deport the Applicant was so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it?

I have examined the affidavit evidence adduced by the Respondent and the submissions made in support of the decision to deport the Applicant from the country. Without going into the matter in depth, the view I hold is that evidence and submissions relied upon have not revealed any unreasonableness on the part of the Respondent as the history with the Respondent has shown a tendency by the Applicant to stay in the country without regularizing his stay. For instance, there is evidence that he was removed from the country on 26th June, 2015 as he had no valid permit to legalize his stay in the country.

After his removal, the Applicant came back into the country and there is no documentary evidence that he had a permit to be in the country. The Applicant in his affidavit in support did not bother to disclose this material evidence but only alluded to it after the Respondent had raised it in the affidavit in opposition.

On the authority of the ***Geoffrey Lungwagwa*** case, I have not formed a view that the documents before me have revealed an arguable case fit for further investigations at a substantive hearing. I therefore decline to grant leave based on this ground.

I should pause here and also consider Applicant's contention that the rejection by the Minister to revoke the Deportation Order was unlawfully done by a third person instead of the Minister of Home Affairs.

On this point, the Respondent has denied this assertion and contends that the decision of the Minister was simply conveyed by the Secretary of Immigration and that this was an administrative issue which did not affect the decision of the Minister.

I have carefully considered the contents of the letter dated 24th January, 2019 addressed to the Applicant's advocate Mr. Osborne Ngoma on the request to revoke the Order of Deportation.

What is apparent from this letter is that the Immigration Secretary was merely conveying the decision made by the Minister of Home Affairs in relation to the Applicant's request to him to revoke the Deportation Order.

It is for this reason that I find that there was nothing unlawfully done by the Immigration Secretary as the decision to reject the request was was made by the Minister of Home Affairs. Consequently, this does not call for further investigations.

I now move to consider the question of the Spouse permit. The Applicant contends that he is entitled to Spouse permit and the reasons advanced by the Immigration Officer for denial in paragraph 18 of the affidavit in opposition were in contravention of Section 23 (1)(a) of the Immigration and Deportation Act. That the Applicant is married a Zambian Citizen which position was not objected to by the Respondent and the Marriage Certificate was exhibited to that effect in the Applicant's affidavit in **"MST2"**.

The Respondent on the other hand has argued that Order 53/14/27 provides that the Court will not normally grant judicial review where there is another avenue of appeal. That the Applicant should have exhausted the administrative procedures before seeking any relief before this Court.

It is important to note that in determining whether or not to grant leave to commence judicial review proceedings, the court should also consider whether the applicant has exhausted alternative remedies. The governing principle therefore is that the court will refuse to grant a judicial review remedy where another suitable remedy is available.

Thus paragraph 53/14/26 of the RSC states that even in the case of inferior courts and tribunals against whom judicial review does lie, an applicant will not normally be permitted to proceed by way of judicial review if there is another avenue of appeal against the decision concerned. In the case of **R v. Epping and Harlow General Commissioners, *ex parte* Gold straw** [9], Sir John Donaldson M.R. stated that:

> **'It is a cardinal principle that save in the most exceptional circumstances, the jurisdiction to grant judicial review will not be exercised where other remedies were available and have not been used'.**

Similarly in the case of **R v. Inland Revenue Commission *ex parte* Preston**[10] Lord Templeman stated that leave for judicial review should not be granted where an alternative remedy is available where for example under statute there is an appeal structure as doing so would be a means of circumventing this.

It is clear from the foregoing that it is only in exceptional cases where the court would grant relief by way of judicial review without requiring the applicant to pursue the alternative remedy available.

Section 10 of the Immigration and Deportation Act provides for appeals procedure. For the sake of completeness this section provides that:

> **(1) After making a decision under this Act, which adversely affects a person, other than a decision relating to a deportation or removal, an immigration officer shall notify that person of the decision and give the person at least forty-eight hours to make representations.**
>
> **(2) The immigration officer shall where a person makes any representation under this subsection(1), within fourteen days of receiving the representation, notify the person of the decision made, with respect to the representation.**
>
> **(3) Any person aggrieved with a decision of the immigration officer under subsection (1) may, within forty-eight hours of receiving the decision, appeal to the Minister.**
>
> **(4) The Minister may, upon receiving an appeal under subsection(3), reverse or modify the decision of the immigration officer within ten days;**
>
> **Provided that the Minister shall not take any decision before consulting the Director-General of Immigration and obtaining the Director's advice.**

(5) Any person aggrieved with a decision of the Minister under subsection (4) may, within forty eight hours of the Minister's decision, if appropriate, appeal to a court, which, may suspend, reverse or modify the decision."

Section 10(3) requires any aggrieved person to appeal against a decision by an immigration officer to deny him a spouse permit. I have not seen any evidence adduced by the Applicant to show that he did appeal against the decision of the Immigration Officer to deny him a Spouse permit.

I am not satisfied that this case qualifies to be an exceptional circumstance where the Court would grant relief by way of judicial review without the Applicant pursuing the alternative remedies available.

In this regard, I agree with the argument advanced by the Respondent that the Applicant should have exhausted the administrative procedure provided for under Section 10 (3) by appealing to the Minister. The only appeal which was made to the Minister as shown by exhibit marked 'MST5' was the request to revoke the Deportation Order.

Since no appeal was made in relation to the Spouse permit, I find that the decision not to grant the Applicant a Spouse permit cannot

be a basis for justifying that leave to commence judicial review be granted.

The net result of my findings based on the reasons I have highlighted above is that the Applicant's application for leave to commence judicial review proceedings has no merit as there is no case fit for further investigation at the substantive hearing. The Application is accordingly dismissed.

Considering the circumstances of the case, I make no order as to costs.

Delivered at Lusaka this 29th day of May, 2020

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M.C. KOMBE
JUDGE