

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

2020/HP/453

AND IN THE MATTER OF: THE CITIZENSHIP OF ZAMBIA ACT No. 33 OF 2016
OF THE LAWS OF ZAMBIA

AND IN THE MATTER OF: ORDER 53 OF THE RULES OF THE SUPREME
COURT 1965, (WHITE BOOK) 1999 EDITION,
VOLUME 1 AND VOLUME 2

AND IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW

AND IN THE MATTER OF: THE DECISION OF THE CHIEF PASSPORT AND
CITIZENSHIP OFFICER AND THE CITIZENSHIP
BOARD OF ZAMBIA OF 29TH 2020 TO DEPRIVE THE
APPLICANT OF HIS ZAMBIAN CITIZENSHIP AS
INDICATED IN THE NOTICE OF DEPRIVATION OF
CITIZENSHIPS

BETWEEN:

ABDUL RWIGARA SIMWAYA

AND

THE ATTORNEY GENERAL

RESPONDENT

**BEFORE HON. MRS. JUSTICE G. MILIMO – SALASINI IN CHAMBERS 25TH
DAY OF AUGUST, 2020**

APPEARANCES

For the Applicant : Mr. G. Phiri of Messrs. PNP Advocates

For the Respondent : No Appearance



R U L I N G

STATUTORY AUTHORITIES

1. ORDER 53 OF THE RULES OF THE SUPREME COURT OF ENGLAND 1965
(WHITE BOOK) 1999 EDITION, VOLUME 1

CASES REFERRED TO

1. ATTORNEY GENERAL V. NIGEL KALONDE MUTUNA, CHARLES KAJIMANGA AND PHILIP MUSONDA SCZ/8/185/2012
2. IRC V. NATIONAL FEDERATION OF SELF EMPLOYED AND SMALL BUSINESS LIMITED (1981) 2 AII ER 93
3. R V. INLAND REVENUE COMMISSIONERS, EX-PARTE NATIONAL FEDERATION OF SELF EMPLOYED AND SMALL BUSINESS LIMITED (1982) A.C. 617; 2 AII ER. 93, P. 105
4. R. V. SECRETARY OF STATE FOR THE HOME DEPARTMENT, EX-PARTE RUKSHNDA BEGUM (1990) C.O.D 109.

This is an application by the Applicant, one **Abdul Rwigara Simwaya**, for Leave to apply for Judicial Review. The application has been made via Originating Notice of Motion for Judicial Review pursuant to *Order 53 of the Rules of the Supreme Court of England 1965 (White Book) 1999 Edition, Volume 1 (RSC)*, accompanied by Notice Containing Statement (Notice) of an *Ex Parte* Application for Leave to Apply for Judicial Review pursuant to *Order 53 Rule 3 of the RSC*, an *Ex parte Order* for Leave to file for Judicial Review and an Affidavit in Support of *Ex-Parte* Summons for Leave to apply for Judicial Review. The named documents for the application were collectively filed into this Honorable Court by the Applicant on the 6th day of May 2020. The application is also supported by the Applicant's Submissions in Support of Application for Judicial Review filed on the 28th day of May 2020.

From the Notice it can be inferred that the application for Judicial Review is sought to challenge the decision of the **Chief Passport and Citizenship Officer** and **the Citizenship Board of Zambia** of

29th April, 2020 to deprive the Applicant of his Zambian citizenship as indicated in the Notice of Deprivation of Citizenship.

According to the Notice the Applicant is seeking the following reliefs:

- a) a declaration that the said decision of the Chief Passport and Citizenship Officer and the Citizenship Board of Zambia to deprive the Applicant of Zambian Citizenship is illegal, unreasonable, procedurally improper and unconstitutional;
- b) a declaration that the decision to deprive the Applicant Citizenship is irrational in that the Applicant was duly declared a Zambian citizen by the High Court of Judicature for Zambia and held a Zambian passport before;
- c) a declaration that the Applicant is a Zambian citizen;
- d) a declaration that the decision to deprive the Applicant of Zambian Citizenship is a violation of the fundamental rights of: right to personal liberty; protection from deprivation of property, protection of privacy of home and other property; freedom of movement and protection against discrimination on the grounds of place of origin;
- e) an Order of Certiorari to remove into this Honorable Court for the purposes of quashing the said decision;
- f) the Applicant hereby requests a hearing of this Application before the Judge of the High Court pursuant to Rule 3 (3) of Order 53 of the RSC;
- g) if Leave to apply is granted, a direction that such grant should operate as a stay of the decision and further proceedings on the same pursuant to Rule 3 (10) of Order 53 of the RSC;

- h) if Leave to apply is granted, a direction that the hearing of the Application for Judicial Review be expedited;
- i) an Order for costs; and
- j) that all necessary consequential directions be given.

According to the Notice and the Affidavit in Support sworn by one **Abdul Rwigara Simwaya**, the facts on which the application is anchored are that on or about the 1st day of June 2017, the Applicant through his Lawyers, Messrs. PNP Advocates, applied for a passport to the Department of National Registration, Passport and Citizenship.

That on or about the 6th day of June 2017, the Chief Passport and Citizenship Officer informed the Applicant that his application of issuance of new passport had been rejected as the acquisition of his Zambian Citizenship was questionable. Further, that on or about the 20th day of June 2020, the Applicant appealed the aforesaid decision of the Chief Passport and Citizenship Officer to the Minister of Home Affairs, as provided under the law.

Both the Notice and Affidavit in Support disclose further that on or about 27th June 2020, the Permanent Secretary of the Ministry of Home Affairs Professor Elwyn Chomba (PS) wrote a letter to the Applicant directing that he should appeal instead to the Citizenship Board of Zambia which is chaired by the Minister of Home Affairs.

That on or about the 31st day of July 2017, the Applicant through his Advocates wrote back to the Minister of Home Affairs informing him that the law reposed the power to deal with appeals against rejecting of application for passports on the Minister and not the PS and further that the appeal was with regard to a passport and not citizenship and as such, he could not appeal to the Citizenship Board of Zambia.

The Applicant further asserted in the Notice and Affidavit in Support that the decision of the Minister of Home Affairs to advise that the Applicant applies to the Citizenship Board of Zambia was not tenable as the High Court of Zambia had already settled the issue of his citizenship to which the Respondent and the Minister of Home Affairs were parties and which decision has to date not been appealed against. The Applicant asserted further that he previously held a Zambian Passport which was cancelled but should have expired in 2019.

The Applicant has further asserted that on the 12th day of February 2019, he appealed to the High Court through Notice of Appeal of the decision of the Minister of Home Affairs dated the 27th day of July 2017, against the decision of the Minister to settle the refusal by the Chief Passport and Citizenship Officer to issue him with a new passport. That as a result of the said appeal, on the 10th day of October 2019, the High Court rendered its judgment regarding the Applicant's appeal wherein it was ordered that the Applicant's appeal be sent back to the Minister of Home Affairs for his determination.

That on the 7th day of October 2019, the Applicant's advocates wrote to the Minister of Home Affairs wherein they served him the Judgment in order for him to make a decision regarding whether or not to issue the Applicant with a passport. That on the 17th day of March 2020, the Applicant instead received a letter enclosed with a Notice of Intention to deprive him of his Zambian citizenship wherein he was given 14 days within which to show cause in writing to the Board why he should not be deprived his citizenship.

That on the 30th day of April 2020, the Applicant was served with a Notice of Deprivation of Citizenship dated 29th April 2020. And that on the 2nd day of April 2020, the Applicant filed an application to commence Judicial Review proceedings but which was not heard nor *ex parte* order issued in cause No. 2020/HP/0358 despite repeated follow ups by Counsel and the action was subsequently discontinued on 4th May 2020.

It suffices to also indicate that according to the Notice and the Applicant's submissions in support of the application for leave to apply for Judicial Review the reliefs sought include illegality, procedural impropriety, unreasonableness/irrationality and proportionality. The Applicant has canvassed the grounds on which the said reliefs are being sought.

I have considered the Applicant's application for leave to apply for judicial review. I have particularly paid attention to the facts deposed by the Applicant in the Affidavit in Support as well as the

Notice. I have further considered the Applicant's submissions in support of the application. For the avoidance of doubt, I must state that at this stage, it is not for me to delve into the merits of the matter nor is it for me to consider the grounds and reliefs sought by the Applicant. However, it is for me to determine whether this is a matter suitable to grant the Applicant leave to apply for Judicial Review.

It is now axiomatic that the first stage in the application for Judicial Review proceedings is the stage for the application for leave to apply for Judicial Review. This is in view of *Order 53 Rule 3 (1) of RSC which provides that:*

No application for judicial review shall be made unless the leave of the Court has been obtained in accordance with this rule.

I must hasten to register that at this stage the Court is not concerned with the merits and/or substantive issues of the case that have necessitated the application. However, the Court is concerned with the question whether the Applicant has presented an arguable case which require further investigation. I am fortified by the case of **IRC v. National Federation of Self Employed and Small Business Limited**¹ in which the House of Lords had occasion to mull over principles in play during an application for judicial review and it was held that:

The whole purpose of requiring that leave should be obtained to make an application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If on quick perusal

of the material then available, the court thinks that it discloses what might turn out to be an arguable case in favor of granting the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief.

I am further fortified by the case of **R v. Inland Revenue Commissioners, Ex-parte National Federation of Self Employed and Small Business Limited**,² in which it was held by Lord Denning that:

The requirement that leave must be obtained is designed to prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived.

Further, in **R. v. Secretary of State for the Home Department, Ex-parte Rukshnda Begum**,³ the Court of Appeal held that the test to be applied in deciding whether to grant leave to move for Judicial Review is whether the judge is satisfied that there is a case fit for further investigation at a full *inter-partes* hearing of a substantive application for Judicial Review.

I also find solace in the holding of the Supreme Court in the case of **Attorney General v. Nigel Kalonde Mutuna, Charles Kajimanga and Philip Musonda**⁴ in which the Supreme Court explained the rationale for the application for leave to apply for judicial review. The Supreme Court held:

That the first stage of the judicial review is a stage of applying for leave. At that stage and this is common ground that it is a filter stage. The applicant is only required to present sufficient evidence for the court to be satisfied that the issues raised require further investigation. In other words, the applicant has to establish a *prima facie* case or present arguable issues or present issues fit for further investigations. We also agree that at this stage the court is not concerned with the merit but rather question of the process of reaching the decision being challenged.

In view of the cited authorities, it is for me to consider whether the Applicant has presented to this Honourable Court, an arguable case which require further investigations.

A perusal of the affidavit evidence tendered by the Applicant shows that this Honourable Court dealt with the issues of the Applicant's citizenship through a judgment rendered by Justice C.F.R Mchenga in 2012. The said judgment which has been exhibited to the Affidavit in Support and therein marked "**ARS6**" shows that the Applicant was declared Zambian citizen by this Honourable Court. The record shows that the said judgment has never been appealed against by the Respondent.

Further, the Applicant asserts that on the 1st day of June 2017 through his Advocates applied for a passport to the Ministry of Home Affairs through the Department of National Registration, Passport and Citizenship. That the said application for a passport was rejected on ground that the Applicant's acquisition of Zambian

citizenship was questionable. Consequently, the Applicant appealed to the Minister of Home Affairs against the decision of the Chief Passport and Citizenship Officer to reject the Applicant's application for a new passport. That the Minister through the PS of the Ministry of Home Affairs responded to the Applicant's appeal by directing the Applicant to appeal to the Citizenship Board which is chaired by the Minister of Home Affairs.

The Applicant has averred in paragraph 7 of the Affidavit in Support that since his appeal was against the refusal by the Chief Passport and Citizenship Officer to grant him a passport and not citizenship, it was not tenable for him to appeal to the Citizenship Board when appeals against rejection of passports lie to the Minister of Home Affairs. Further that on the 12th day of February 2019, the Applicant appealed to this Honourable Court against the indecision of the Minister of Home Affairs to consider his appeal against the decision of the Chief Passport and Citizenship Officer.

The Applicant has thus referred me to exhibit marked **"ARS9"** which is a Judgment by the learned Justice M.D. Bowa on the Applicant's appeal against the Minister of Home Affairs' indecision to consider his appeal against the Chief Passport and Citizenship Officer for the refusal to grant him a passport. In the said judgment the learned judge found that the Minister of Home Affairs did not pronounce himself on the Applicant's appeal against the decision of the Chief Passport and Citizenship Officer to reject the Applicant's application for a passport. Given that the appeal to this Honourable Court was premature, the learned Judge referred the matter back

to the Minister of Home Affairs to determine the applicant's application for a passport.

The Applicant has asserted that contrary to the directive of this Honourable Court in the said judgment, on the 17th day of March 2020, the Applicant was instead served with a Notice of Intention to deprive him of his Zambian citizenship. That on the 30th day of April 2020, the Applicant was also served with a Notice of Deprivation of Citizenship dated 29th April 2020. The Applicant has asserted in paragraph 18 of the Affidavit in Support that the decision of the Chief Passport and Citizenship Officer and the Citizenship Board to deprive him of the Zambian citizenship is unlawful, illegal, and unconstitutional and is a move calculated at circumventing the decisions of the High Court.

I have considered the Applicant's affidavit evidence. It is clear from the evidence that in 2012 this Honourable Court through a judgment by Justice C.F.R. Mchenga, declared the Applicant Zambian citizen. The record shows that the said judgment has to date never been appealed against by the Respondent.

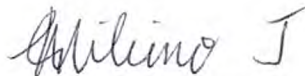
I also find as a matter of fact that contrary to the judgment of this Honourable Court by Justice M.D. Bowa, the Minister of Home Affairs has to date, not determined the Applicant's appeal against the decision of the Chief Passport and Citizenship Officer to reject to grant the Applicant a passport. That contrary to the directive by the said judgment, the Chief Passport and Citizenship Officer and the Citizenship Board deprived the Applicant citizenship.

In view of the foregoing, I am satisfied that the Applicant has presented an arguable case worth further investigation into why the Minister of Home Affairs has not acted on the appeal by the Applicant against the decision of the Chief Passport and Citizenship Officer. I therefore, grant the Applicant leave to apply for Judicial Review which shall consequently operate as stay of the decision of the Chief Passports and Citizenship Officer and the Citizenship Board of Zambia to deprive the Applicant of his Zambian citizenship.

I further direct that the Applicant should file the requisite documents for the application for Judicial Review within 90 days (three months) from the date hereof and that the Respondent should file documents in response within 90 days (three months) of being served the documents for the application by the Applicant.

I make no Orders as to the costs of this application.

Delivered at Lusaka this 25th day of August, 2020



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**G. MILIMO – SALASINI
HIGH COURT JUDGE**