

THE CHIEF IMMIGRATION OFFICER
THE MINISTER OF HOME AFFAIRS
THE ATTORNEY GENERAL

v

JOHN ERIC TOLMAY

SUPREME COURT

MAMBILIMA, D.C.J., CHIBESAKUNDA, AND CHIBOMBA, H.JJS.,

20th OCTOBER, 2009 and 11th APRIL, 2011.

S.C.Z. Judgment No. 9 of 2011)

[1] Administrative Law - Judicial review - Immigration and -Deportation Act - Whether the decision to deport was unreasonable, oppressive and outrageous.

This is an appeal against the decision of the High Court in which it held that the appellants decision to deport the respondent from Zambia on the ground that his presence was likely to be a danger to peace and good order in Zambia, was unreasonable, oppressive, and outrageous.

Held:

1. Although the Minister has power under section 26(2) of the Immigration and Deportation Act to deport any person, justice must nevertheless be done to the individual.
2. There are however situations where an individual's rights May, nevertheless take a second, or a subordinate place, or position.
3. 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.
4. 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 security, 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.
5. In determining whether or not 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.
6. 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.
7. The Court has jurisdiction to go behind the deportation order if reasons given are not proved, and that the Court can question the validity of the deportation order.
8. 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.

9. Although the Minister is not bound to give reasons for the deportation, the Court had power to question his decision making process, once the respondent challenged this in Court.

10. The trial judge was on firm ground when he questioned the decision of the Minister of Home Affairs to deport the respondent from Zambia.

Cases referred to:

1. R v Secretary of the State of Home Affairs Ex parte Honseball [1977] 1 W.L.R. 766.
2. Noor v The Attorney General (1979) Z.R. 183.
3. Council of Civil Servants Union v Minister of civil service [1985] A.C. 374.
4. Bugday cay v Secretary of State of Home Affairs [1987] 1 ALL E.R. 940
5. Associated Chemicals Limited v Delamain (Zambia) Limited and Another (1998) Z.R. 9.
6. Secretary of State for the Home Department v Rethman [2002] 2 B.H.R.C 413 2 L.C.R 650.

Legislation referred to:

1. Immigration and Deportation Act, cap 123, s. 26(2).

S. Anderson (Mrs), Assistant Senior State Advocate, for the appellants.

W.M. Kabimba of Messrs Wynter M. Kabimba and Company for the respondent.

CHIBOMBA, J.S.: delivered judgment of the Court. This is an appeal against the decision of the High Court at Lusaka, in which the learned judge held that the appellant's decision to deport the appellant from Zambia on ground that his presence was likely to be a danger to peace and good order in Zambia was unreasonable, oppressive, and outrageous. As a consequence, the learned trial judge, ordered that all the permits, and licenses held by the respondent in Zambia be restored to him.

The facts of this case are that the respondent, a Zimbabwean national, residing in Zambia, was on 28th April, 2003, issued with a warrant of deportation from Zambia by the Minister of Home Affairs pursuant to section 26(2) of the Immigration and Deportation Act, chapter 123 of the laws of Zambia; the Act. The warrant of deportation was executed on 14th July, 2003. At the time the warrant of deportation was issued, the respondent was outside the country, and the effect was that he could not come back to Zambia.

The respondent then applied for leave to issue judicial review to bring into the High Court, the decision of the Minister of Home Affairs to deport him from Zambia for quashing. The High Court granted the leave sought. The learned High Court judge then proceeded to hear the application for judicial review. As stated above, the learned trial judge came to the conclusion that the decision to deport the respondent from Zambia on ground that his presence was likely to be a danger to peace and good order in Zambia was unreasonable, oppressive, and outrageous. And he consequently quashed the deportation order and ordered that all the permits and licences held by the respondent in Zambia should be restored to him.

Dissatisfied with the decision, the appellants have appealed to the Supreme Court advancing, and arguing two grounds of appeal as follows:-

“1. that the learned trial judge in the Court below misdirected himself in law and in fact when he held that the appellants acted unreasonably, oppressively and outrageously in deporting the respondent from Zambia to Zimbabwe on 28th April, 2003, on ground that his presence was likely to be a danger to peace and good order in Zambia; and

2. that the learned trial judge in the Court below misdirected himself in both law and fact when he quashed the decision of the Minister to have deported the applicant and ordered that all permits and licenses held in Zambia be restored to him.”

In support of the two grounds of appeal raised, the learned acting Senior State Advocate, Mrs. Anderson, relied on the arguments in the appellants' heads of arguments which she augmented with oral submissions.

With respect to the first ground of appeal, it was argued, on behalf of the appellants, that the decision of the Minister of Home Affairs to deport the respondent was highly justified as it was done within the ambit of the law, in particular, section 26(2) of the Immigration and Deportation Act, chapter 123 of the laws of Zambia, hereinafter referred to as the Act. section 26(2) provides that:-

“Any person who in the opinion of the Minister is by his presence or his conduct likely to be a danger to peace and good order in Zambia May, be deported from Zambia pursuant to a warrant under the hand of the Minister.”

It was contended that the decision to deport the respondent was made in order to maintain peace and good order which seemed threatened by his conduct.

In support of the above contention, the case of *Budgacay v Secretary of the State of Home Affairs (4)*, was cited in which it was stated that:-

“Under the ground of unreasonableness, the Court is concerned with the thought process of the decision maker when exercising the discretion bestowed upon him.”

It was argued that the decision to deport the respondent in the current case was not driven by ill motive, or arbitrariness on the part of the Minister and that the Court of appeal in England stated, in the case of *R v Secretary of the State for Home Affairs Ex parte Hosenball (1)*, that:-

“Great as is public interest in the freedom of the individual and the doing of justice to him, nevertheless, in the last resort it must take second place to the security of the country itself.”

Reference was made to what Lord Denning, M.R. stated in the above cited case. This is that:-

“Where national security was involved the ordinary principles of natural justice were modified for the protection of the realm.”

It was contended that the respondent's freedoms guaranteed by the constitution must not override national security, and that therefore the Minister was on firm ground in deporting the respondent on ground of national security. The case of *Council of Civil Servants Union v Minister of Civil*

Service (3), was cited in which Lord Fraser, stated that:-

“It is the executive to decide, and not the judiciary whether in any particular case, the requirements of the duty to act fairly outweighs that of national security.”

It was argued that in matters of national security, the executive cannot be said to be unreasonable once all facts are duly considered and a decision is made. That although the Minister is not obliged to give reasons for deportation, when the decision is called into question by the Court, the facts must seemingly correspond with the decision arrived. That in the Secretary of State for the Home Department v Rethman (6), the House of Lords held that:-

“The Secretary of the State should evaluate the case as a whole in order to determine whether the individual is a threat to national security. However, in doing this, he must be able to point to materials on which he can reasonably and proportionately come to the conclusion that the individual poses a threat to national security.”

Further, that the appellants' hope to show that the respondent was engaged in activities that were likely to endanger the peace and good order of the nation, and that in his affidavit in support of his application for judicial review, the respondent stated that:-

“... inspite of the said warning I continued to lobby and work towards the success of the project as it was a cause I strongly believe in and is most welcomed by the local community.”

It was argued that the result of this campaign is what, in the Minister's opinion, was likely to incite the local people against the leadership and that therefore, peace and order was threatened by the respondent's actions. That the 2nd appellant had regard to these relevant considerations in making the decision to deport the appellant in line with the provision of section 26(2) of the Act. That therefore, there was nothing unreasonable, oppressive, or arbitrary with the decision of the Minister of Home Affairs.

In her oral submissions in respect of the first ground of appeal, Mrs. Anderson, submitted that the Minister was within law as he acted under section 26(2) of the Act, and that under that section, the Minister has wide discretionary power to deem any person a threat to good order and peace. And that under this section, the Minister can form an opinion without giving reasons, and that he cannot be questioned for doing so.

She contended that although the Court can delve into the reasons, the Minister pleaded section 26(2) on national security. Mrs. Anderson referred to the cases cited in the appellants' heads of arguments which we have already mentioned above.

With respect to the second ground of appeal, the appellants repeated the arguments in ground one. In addition, it was submitted that the respondent's business interests would not be affected or suffer any loss since he is merely a shareholder of an incorporated company which has a separate legal personality from him. That even in his absence, his company can continue to exist without his direct involvement. The case of Associated Chemicals Limited v Hill and Delamain Zambia Limited and Another (5), was cited in which it was held that:-

“A company is...not, like a partnership, or a family, a mere collection, or aggregation of individuals. In the eyes of the law, it is a person distinct from its members, or shareholders, a metaphysical entity, or function of law, with legal but no physical existence.”

In her oral submissions in respect of the second ground of appeal, Mrs. Anderson contended that it is not the respondent's business interest which is a threat to national security or good order and peace, but his personal presence.

That therefore, the appeal should be upheld on the above ground. On the other hand, in opposing this appeal, the learned counsel for the respondent, Mr. Kabimba, relied on the respondent's heads of arguments which he also augmented with oral submissions.

In response to the first ground of appeal, it was argued in the respondent's heads of arguments that section 26(2) under which the respondent was deported does not vest absolute and unfettered powers in the Minister as it does not exclude the original jurisdiction of the Court to review the exercise of such power. That it cannot be said that it was the intention of the legislature to vest the exercise of arbitrary power in a public officer. Further, that this argument was dispelled in the case of *Noor v The Attorney General (2)*, in which the Court held that:-

“Courts have jurisdiction to go behind the face of a deportation order, and if reasons given are not proved, queries as to its validity can be made.”

That the Court went further to hold that:

“The Minister is not bound to give reasons for deportation under section 26(2.) However, Courts can intervene if a prima facie misuse of power is established and the Minister will be requested to answer.”

It was argued that the learned trial judge made a finding of fact that on the basis of the above cited authority, the Court has power to intervene in a deportation of an individual under section 26(2) if a prima facie misuse of power is established. And that in this case, the learned trial judge found that the Minister's affidavit, as already stated, neither gives reasons nor provides the facts or documentary exhibits of the appellant's deportation. It merely stresses the fact that the Minister is not bound to give reasons. Therefore, from the respondent's affidavit in opposition, this Court is unable to discern any reason, or factual premises preceding the Minister's decision to deport the applicant from Zambia.

Further, that the respondent was deported from Zambia by the Minister because his presence in Zambia was deemed to be a danger to peace and good order. That however the learned trial judge was on firm ground when he held the Minister's decision to deport the respondent to be unreasonable, unduly oppressive, and outrageous in its defiance of logic or accepted moral standards such that no reasonable person in authority who had applied his mind to the question to be decided could have arrived at it, and that he accordingly quashed the deportation order. In response to Mrs. Anderson's oral submissions that once the Minister has made his decision, the Court cannot question him, Mr. Kabimba submitted that this argument is not correct. Mr. Kabimba cited the case of *Noor v The Attorney General (2)*.

He argued that in the above cited case, the Court made it clear that it has jurisdiction to go beyond the deportation. Mr. Kabimba contended that the findings of the trial judge was that the Minister's affidavit did not disclose any reasons for deportation under section 26(2). That however,

there was an attempt by a State Advocate to give reasons as can be seen from the judgment by the trial judge. That the trial judge was therefore on firm ground in granting judicial review by order of certiorari to quash the Minister's decision to deport the respondent and by granting consequential orders. In response to the second ground of appeal, the arguments advanced in response to the first ground of appeal were repeated.

We have seriously considered this appeal together with the arguments advanced in the respective heads of arguments, the oral submissions by the learned Advocates for the parties and the authorities cited. We have also considered the judgment by the learned judge in the Court below.

It is our considered view that this appeal raises the question whether the Minister of Home Affairs had the power to deport the respondent in this matter. The answer requires the interpretation of section 26(2) of the Act which, as stated above, empowers the Minister to deport any person from the Republic of Zambia who in the opinion of the Minister, by his presence or conduct, is a danger to peace and good order in Zambia.

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. There are however situations where an individual's rights may, nevertheless take second place as was stated in *R v Secretary of the State for Home Affairs Ex parte Hosenball* (1). The above cited case shows that the Court can and has power to review deportation orders under section 26(2) to protect the rights of an individual.

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 security, 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. This was clearly stated by the House of Lords in England in the case of *Secretary of State for the Home Department v Rethman* (6). The House of Lords went further and stated that in doing so, 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.

It follows that although the Minister under section 26(2) has 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 in Court.

The case of *Noor v The Attorney General* (2), is apt in this case as it shows authoritatively that the Court has jurisdiction to go behind the deportation order if reasons given are not proved and that the Court can question the validity of the deportation order.

The Court, in that case also stated that although the Minister was not bound to give reasons for deportation under that section, the Court had power to intervene if it is shown that there is misuse of

power and that the Minister will then be requested to answer.

In the current case, the learned trial judge found as a fact that he had power to intervene in the deportation of the respondent under section 26(2) as a prima facie case of misuse of power had been established.

The Minister, in his affidavit, did not give reasons or facts for the respondent's deportation. However, it is clear that the respondent was deported from Zambia because the Minister felt that his presence in Zambia was a danger to peace and good order. Though the Minister was not bound to give reasons for the deportation, the Court had power to question his decision making process once the respondent challenged this in Court.

Therefore, although Mrs. Anderson has argued at length that the reason why the respondent was deported from Zambia is as the respondent stated in his affidavit in support of his application for judicial review, that in spite of the warning from Government, he continued to lobby and work towards the success of the project as it was a cause he strongly believed in, and it was most welcomed by the local community, we do not accept this argument because this is not the reason which the Minister gave at the time he made his decision to deport the respondent from Zambia. He did not give this as a reason. So this came afterwards and in the respondent's affidavit after the Court was already seized of the matter.

We accordingly uphold the findings of fact by the learned judge that on the basis of the case of *Noor v The Attorney General (2)*, and as acknowledged by the learned counsel for the parties, the Court has power to intervene in a deportation of an individual by the Minister under section 26(2) if a prima facie misuse of power is established.

The learned trial judge was on firm ground when he quashed the decision of the Minister of Home Affairs to deport the respondent from Zambia. We find no merit in the first ground of appeal.

With respect to the second ground of appeal, which is that the learned judge in the Court below misdirected himself both in law and in fact when he quashed the decision of the Minister to deport the respondent and in ordering that all permits and licenses held in Zambia be restored to him; our view is that since we have held that the learned trial judge was on firm ground in quashing the deportation order by the Minister, the second ground of appeal is otiose and as such we need not rule on it.

For the reasons given above, this appeal fails. The same is dismissed with costs to the respondent to be taxed in default of agreement.

Appeal dismissed.