SELECTED JUDGMENT NO. 21 OF 2018

P.736

IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 169/2015**

HOLDEN AT NDOLA

(Civil Jurisdiction)

BETWEEN:

JAMA ABDIRASHID MOHAMED **APPELLANT**

AND

ATTORNEY GENERAL **RESPONDENT**

Coram : Mambilima CJ, Mwanamwambwa DCJ, and Mutuna, JJS

On 5th June 2018 and 8th June 2018

For the Appellant : N/A

For the Respondent : N/A

J U D G M E N T

MUTUNA. JS delivered the judgment of the court.

Cases referred to:

1) **R v Secretary of State for the Home Department ex parte Saidur Rahman (1996) ALL ER 82**
2) **R V South Western Hospital Managers and another, ex parte M (1994) 1 ALL ER 161**
3) **A. H. Shipanga v The Attorney General (1977)**

Statutes referred to:

P.737

1) **Immigration and Deportation Act No. 18 of 2010**
2) **Supreme Court practice, 1999, volume 1**

Introduction

1) The reliefs available under a writ of *habeas corpus ad subjiciendum* are often times confused with those available under judicial review. This appeal discusses the difference in the remedies available under the two processes and the effect of the issuance and service of a writ of habeas corpus on the exercise of Executive powers.

2) The appeal arises from the decision of the Learned High Court Judge, by which he dismissed an earlier order he had made issuing a writ of *habeas corpus,* directing the Respondent to bring the body of the Appellant to Court.

Background

P.738

3) The Appellant is a Kenyan national and is an Islamic teacher and priest by profession. He was employed as such by B. Diawarrah Islamic Centre and was for this purpose issued with an employment permit on 5th July 2011 by the Ministry of Home Affairs.

4) The employment permit was valid up to 27th August 2015 subject though, to revocation at the discretion of the Minister of Home Affairs (the Minister).

5) Sometime in April, 2015 the Minister declared the Appellant a prohibited immigrant and issued a warrant for his detention on 7th April 2015. As a result of this, the Appellant was arrested at about 01:21 hours the same day and taken to Kalikiliki

Police Post where he was detained up to 15:00 hours and later taken to Lusaka Central Prison.

6) On 8th April 2015, the Appellant was interviewed by eight law enforcement officers, who allegedly did not inform him of his right to counsel and, was therefore, interrogated in the absence of his counsel.

7) The following day, the Appellant was taken to Police Force Headquarters, questioned once again and later returned to Lusaka Central Prison where he was held for a period of about three weeks.

8) On 22nd April 2015, the Appellant's counsel took out an action by way of an *ex parte* motion for the issuance of a writ of *habeas corpus ad subjiciendum,* pursuant to Order 54 rules 2 and 3 as read with Order 54 rule 1 sub-rule 10 of the

Supreme Court Practice (White Book). The motion was supported by an affidavit sworn by the Appellant.

Contentions of the parties and proceedings in the High Court

9) The Appellant contended that he had been detained without reason and was not served with any order or warrant for his detention. As such, he was illegally being detained by the Respondent.

10) In addition, the Appellant contended that he was lawfully resident in Zambia by virtue of a valid work permit issued by the government of the Republic of Zambia.

11) Based on the Appellant's contentions, the Learned High Court Judge issued the writ of *habeas*

corpus ad subjiciendum, ordering the Respondent to bring the body of the Appellant to Court and show cause why the Appellant should continue in detention. The writ was accompanied by a notice returnable on 29th April 2015.

12) On the return day, the Respondent caused to be delivered to the Learned High Court Judge, the Appellant in compliance with the writ of habeas corpus. However, the Learned High Court Judge was indisposed, thus, the matter was adjourned to 30th April 2015.

13) Prior to the events stated in the preceding paragraph, and on 24th April 2015, the Minister issued a warrant of deportation for the Appellant. In pursuance of the said warrant, the Appellant was deported to Kenya on 29th April 2015. The

P.742

Respondent contended, in this regard, that the Minister acted within the powers vested in him by the ***Immigration and Deportation Act*** (the Act) and that he executed his functions in the interest of the nation. Further, and as a consequence of the deportation, the Appellant's application was overtaken by events.

14) On the 30th April 2015, when the application came up before the Learned High Court Judge again, he was informed that the Appellant had been deported. He, at this point, noted that there was no affidavit in opposition and, as such, he could only rely on the contentions by the Appellant. The Judge accordingly ordered as follows:

14.1 The body of the Appellant to be brought to Court on 14th May, 2015 at 9.00 hours. If the Appellant would have been deported, the Respondent at its own cost, to ensure that he is conveyed back to the Court's jurisdiction by 14th May, 2015.

14.2 The officer-in-charge at Lusaka Central Prison, senior superintendent Bilkin Davis and O. Munjungagwa of the Immigration Department together with Pulukuta Martin to appear on the return date pursuant to the Court's subpoena to that effect. The said persons to come and explain why they removed the Appellant from jurisdiction and thereby failed to comply with the writ of habeas corpus issued on 24th April 2015.

15) Before the hearing date, the Respondent and Appellant filed affidavits in opposition and reply, respectively. The Respondent reiterated its contentions and restated that whilst the initial hearing which was scheduled for 29th April 2015 was pending, the Minister had already put in motion other processes which culminated in his exercise of the powers vested in him to deport a prohibited immigrant.

P.744

16) In the Appellant's affidavit in reply sworn by one Gilbert Phiri, counsel for the Appellant, the Appellant responded to the Respondent's contentions as follows:

16.1 The Minister's powers to deport could not override the Court's order to produce the Appellant.

16.2 The Appellant whom he had visited regularly in prison had by 24th April 2015, not been served with any warrant or notice of deportation.

16.3 The deportation of the Appellant which was effected whilst the matter was pending before Court is a clear defiance of the writ of habeas corpus especially that the then counsel for the Respondent and one Chilola an immigration officer were aware of the writ.

16.4 The Minister abused his statutory functions by issuing a warrant of deportation in the face of the writ of habeas corpus issued by the Court

16.5 The Respondent has failed to demonstrate how it was acting in the interests of the nation by deporting the Appellant and that the Appellant's claim has not been overtaken by events because the Court order for his production is still in force.

16.6 The facts as presented by the Respondent in relation to when he was deported were not correct because counsel had contrary information given to him by the Appellant.

Consideration of the application by the Learned High Court Judge and decision.

17) The Learned High Court Judge considered the evidence and arguments by counsel. He began by commenting on the form and manner in which the Appellant presented his case and found that the reliefs he sought were best suited to an application for judicial review pursuant to Order 53 of the ***White Book.***

18) The Learned High Court Judge then went on to make findings of fact which dismissed the contentions made by the Appellant as follows: the Appellant was not detained without warrant because the evidence in the affidavit in opposition

revealed that the warrant for his arrest was signed by an immigration officer on 7th April 2015; the ground for the Appellant's detention as it appeared in the warrant was that he was a prohibited immigrant; the Respondent had complied with the directive in the writ of *habeas corpus* by delivering the body of the Appellant to Court on the initial return date of 29th April 2015; and the Respondent explained its failure to produce the body of the Appellant on the subsequent return date of 30th April 2015 by way of the affidavit in opposition.

19) In relation to the powers of the Minister in deportation matters, the Learned High Court Judge found that pursuant to section 39(2) of the Act, the Minister has power to sign a deportation

warrant in respect of a prohibited immigrant if he believes that such person is a danger to the peace and good order of the country. Further, when exercising these powers, the Minister is not obliged to give reasons for his decision.

20) The Learned High Court Judge was also satisfied that on the face of the documentary evidence produced by the Respondent, it was in the interest of national security and good order of the country that the Appellant was deported.

21) By way of conclusion, the Learned High Court Judge declined to consider the Appellant's request for the Respondent's officers to be held in contempt of Court for disobeying the second order of the Court dated 30th April 2015, directing the production of the Appellant's body, because there

was no formal application before him to that effect. He also declined to consider the legality of the Minister's acts because, in his view, such consideration could only be made through an application for judicial review. The Judge accordingly vacated his order of 30th April 2015.

Grounds of appeal to this Court

22) The Appellant is aggrieved by the decision of the Learned High Court Judge and has launched this appeal advancing six grounds of appeal as follows:

22.1 The Court below erred in law and fact when [it] held that evidence in an affidavit in Reply sworn by counsel for the Appellant was hearsay and that paragraph 8 and 9 of the said affidavit alluded to legal arguments and conclusions;

22.2 The Court below erred in law and fact when it held that the Respondent complied with the Court's order to produce the body of the Appellant before the Court when the said Appellant was instead deported on 30th April,

2015 when the matter was supposed to come up for hearing of writ of habeas corpus ad subjiciendum;

22.3 The Court below misdirected itself in both law and fact when it held that the Minister of Home Affairs in the exercise of his powers under the act did not need to give reasons for his decision to deport the appellant where there was in existing writ of habeas corpus ad subjiciendum requiring the production of the Appellant before Court on 30th April 2015;

22.4 The Court below fell into grave error and misapprehended the law on habeas corpus when it held that on the face of the documents produced by the Respondent it was in interest of national security and the good order of this country that the Appellant was deported when there was no such evidence before the Court;

22.5 The Court below erred in law and fact when it held that it was in the interest of national security and the good of the country for the Appellant to be deported because at the time of delivering its ruling there was no challenge to the detention warrant or deportation order;

22.6 The Court below erred in law and fact and fell in grave error when it vacated the orders it had decreed in its ruling of 30th April, 2015 requiring the Respondent to deliver the body of the Appellant before Court.

The arguments presented before this Court by the parties

P.750

23) Counsel for both parties filed heads of argument in support and opposing the appeal, which they relied on as they both had filed notices of non-appearance in accordance with our rules. They, therefore, did not attend the hearing. Further, the Appellant withdrew ground 1 of the appeal and thus, only argued grounds 2 to 6 of the appeal.

24) In regard to ground 2 of the appeal, the Appellant questioned the finding by the Learned High Court Judge that the Respondent had complied with his order to bring the body of the Appellant by delivering the Appellant to Court on 29th April 2015. The arguments here, were that on the date in issue, the Learned High Court Judge was indisposed and did not sit. The matter was, therefore, adjourned to 30th April 2015, on which day the Respondent was obliged to bring the

Appellant to Court because the parties were both informed of this new date and the notice of motion for the writ of *habeas corpus* compelled the Respondent to present the Appellant to Court *"at such time as the Court may direct"*.

25) The Appellant took the view that he was denied justice by the Respondent's failure to deliver him to Court. He argued that in terms of Order 54 rule 1sub-rule 5 of the ***White Book***, after the writ of *habeas corpus* was served upon the officer in charge at Lusaka Central Prison, the said officer as goaler became responsible to the Court in place of the Minister, to deliver the Appellant to Court. Consequently, the Learned High Court Judge should have determined whether or not the Appellant's detention should continue and the

Respondent having failed to deliver the Appellant to Court of 30th April 2015 there is merit in ground 2.

26) Under ground 3 of the appeal, the Appellant questioned the finding by the Learned High Court Judge that the Minister has no obligation under the Act to give reasons for his decision to deport a person. The Appellant argued that the question of legality and otherwise of the Appellant's deportation was immaterial because what fell for determination by the Learned High Court Judge was the breach of its order by the Respondent to produce the Appellant before him. According to the Appellant, in terms of Order 54 rule 1 sub-rule 5 of the ***White Book***, the deportation order issued by the Minister could not override

the command in the writ of *habeas corpus* because its effect is that it stayed the Minister's decision in line with Order 53 rule 3 sub-rule 10(a) of the ***White Book***.

27) The Appellant reproduced part of the provisions of Order 54 rule 1 sub-rule 5 of the ***White Book*** as follows:

> **"Thus the Court will not permit a would be immigrant to be compulsorily removed from its jurisdiction if he has sought the protection and assistance of the Court. Since any compulsory removal necessarily involves some deprivation of liberty a writ of habeas corpus is an alternative remedy to a "stay" under 0.53, r.3 (10)(a)."**

The Appellant contended that as a consequence of the foregoing order, the effect of the issuance of the writ of *habeas corpus* by the Learned High Court Judge on 24th April, 2015, was that it

stayed any further actions by the Executive against the Appellant.

28) Turning to ground 4 of the appeal, the Appellant questioned the holding by the Learned High Court Judge that it was in the interest of national security and good order in the country that the Appellant be deported, from two fronts. The first was that the documentary evidence led by the Respondent was insufficient for a Court to make the inference it made because there were no details as to the danger posed by the Appellant's continued stay in Zambia. The burden of proof placed upon a respondent in such matters is higher than the civil burden of proof but lower than the criminal standard.

29) Our attention in this regard was draw to the case of ***R v Secretary of State for the Home Department ex parte Saidur Rahman[1].***

30) Secondly and as argued under ground 3, the question that fell for determination by the Court was not the legality or otherwise of the deportation because the Appellant had in any event not been served with the deportation order.

31) The Appellant concluded that the Learned High Court Judge misdirected himself because he did not afford him an opportunity to justify his stay in Zambia but rather considered matters surrounding the deportation and national security.

32) Ground 5 of the Appeal challenged the refusal by the Learned High Court Judge to consider the

legality or otherwise of the Appellant's detention and deportation order, because no application to that effect was presented before him. The Appellant reiterated his earlier argument that at this stage what the Court was called upon to do was consider whether or not he should continue in unlawful detention.

33) Lastly, under ground 6 of the appeal the Appellant contested the order made by the Learned High Court Judge rescinding its order of 30th April 2015 directing the Respondent to bring the body of the Appellant back to the jurisdiction of the Court and to present it before him. The Appellant contended that the order of rescission by the Court amounted to reviewing its own decision which was a misdirection because it was not

moved by the Respondent to review its decision nor was there fresh evidence presented justifying the review. In support of the latter contention, the Appellant cited a plethora of authorities on review which we have not quoted because they have no bearing on the decision we have reached in the latter part of this judgment.

34) In response to ground 2 of the appeal, the Respondent's argument was simply this, that there was no misdirection on the part of the Learned High Court Judge because the Respondent did indeed produce the body of the Appellant before him on 29th April 2015 in compliance with the writ of *habeas corpus*.

35) The Respondent concluded by arguing that it had placed evidence before the Learned High Court Judge which he accepted to the effect that before the Court issued the order for the production of the body of the Appellant and issuance of the writ of *habeas corpus*, the Minister had put in motion processes which culminated in the exercise of the powers vested in him by the Act. That it was in the entire discretion of the Court to accept the said evidence in line with the provisions of Order 54 rule 1 sub-rule 3 of the ***White Book***.

36) In regard to ground 3 of the appeal, the Respondent took issue with the argument advanced by the Appellant that the Learned High Court Judge should not have considered the

legality or otherwise of the deportation but should have considered the reasons for the failure by the Respondent to comply with his order for the production of the body of the Appellant. According to the Respondent, the wording of the provisions of Order 54 rule 1 sub-rule 5 of the ***White Book*** does not make it mandatory for Executive powers to be stayed on the issuance of a writ of *habeas corpus* because the phrase *"certain circumstances"* and the word *"may"* has been used in the Order. The use of the said phrase and word implies that the stay is discretionary, which discretion is exercised by the Court.

37) Concluding arguments under ground 3 of the appeal, the Respondent contended that the Minister has no obligation to give reasons for his

actions by virtue of section 39(2) of the Act. The only consideration to be made by the Minister is the existence of reasonable grounds to believe that a particular person's presence in Zambia or his conduct is likely to be a danger to the peace and good order in Zambia.

38) In relation to ground 4 of the appeal, the Respondent repeated the arguments advanced under ground 3 of the appeal.

39) As regards ground 5 of the appeal, the Respondent contended that the finding made by the Court which was contested in the ground arose from the argument by the Appellant suggesting that the Respondent's officers should have been held in contempt for disobeying a Court order. The Respondent argued that the Learned

High Court Judge was on firm ground when he refused to entertain the application on the ground that no formal application to that effect was laid before him.

40) The Respondent's final response was under ground 6 of the appeal and it addressed the Appellant's challenge to the decision by the Learned High Court Judge to vacate his order of 30th April 2015. The arguments were simply these: the Respondent had complied with the order to bring the body of the Appellant when it brought him to Court on 29th April 2015; the Learned High Court Judge acted within his powers under Order 39(1) of the ***High Court Act*** when he reviewed his decision especially that the Minister acted within his powers by continuing a

process which he had began before the order of 30th April 2015 was given; and there was no challenge to the deportation warrant order made by the Appellant.

Reasoning and decision by this Court

41) Regard having been had to the record of appeal and submissions by the parties, the following questions are in dispute in the determination of this appeal:

41.1 What is the purpose of a writ of habeas corpus ad subjiciendum;

41.2 What is the effect of the issuance and service of a writ of habeas corpus ad subjiciendum on the exercise of Executive powers;

41.3 Did the Learned High Court Judge misdirect himself when he determined the legality of the incarceration of the Appellant.

42) In respect of the first question, the writ of *habeas corpus* is not provided for by any statute in

Zambia. As such, resort is had to the ***White Book***.

The relevant provision of the ***White Book*** is Order 54 which at rule O sub-rule 2, the Editorial Introduction, which sets out the purpose of the writ of *habeas corpus ad subjiciendum* as follows:

> "**The writ of habeas corpus may take various forms ... The writ of habeas corpus ad subjiciendum, which is used to test the validity in the commitment of a prisoner, or want of jurisdiction to hold him, is the most important of all the writs of this dominion**"

43) By the foregoing rule, the primary object of the writ of *habeas corpus ad subjiciendum* is to ascertain the validity or otherwise of the detention of an individual. The investigation extends to the determination of the jurisdiction of the goaler as well. We have deliberately referred to the object as being the *"primary"* object because

we will demonstrate in the latter part of this judgment that the writ of *habeas corpus ad subjiciendum* may serve another purpose.

44) Turning to the second issue which is the effect of the issuance and service of the writ of *habeas corpus ad subjiciendum* on the exercise of Executive powers, the ***White Book*** at Order 54 Rule 1 sub-rule 5, which we have quoted partially in the earlier part of this judgment, has the following to say:

> "**In certain circumstances habeas corpus may serve to prevent the removal of an applicant from the jurisdiction. Thus the Court will not permit a would-be immigrant to be compulsorily removed from its jurisdiction if he has sought the protection and assistance of the Court. Since any compulsory removal necessarily involves some deprivation of liberty a writ of habeas corpus is an alternative remedy to a "stay" under O.53, r.3(10(a). The effect of service of such a writ is to make the "goaler" responsible to the Court in place of the authority which ordered the detention, leaving it to**

the Court to determine on the return of the writ whether the detention should continue."

45) The exercise of Executive powers is checked by means of judicial review under Order 53 of the ***White Book***. The action to curtail the exercise of Executive powers under this Order is commenced initially by obtaining leave to issue judicial review proceedings. Pursuant to Order 53 rule 3 sub-rule 10(a), where leave to apply for judicial review is granted; if the relief sought is an order of prohibition or certiorari; and the Court so directs; the grant shall operate as a stay of proceedings to which the application relates until the final determination of the matter.

46) The effect of the stay we have referred to in the preceding paragraph is that it halts the exercise of Executive powers by retaining the status quo as

at the date of the order granting leave. Further, it is this stay which is referred to in Order 54 Rule 1 sub-rule 5 of the ***White Book*** which means that once the writ of *habeas corpus* was issued and served upon the Respondent, the Minister was obliged, as the Appellant argued, to halt all proceedings in relation to the deportation of the Appellant. Further, the officer-in-charge at Lusaka Central Prison as *"goaler"* was compelled by the writ to bring the body of the Appellant before the Learned High Court Judge, not only on the initial return day of 29th April, 2015 but also on all the other days the Court would so direct. To this extent we agree with the arguments by the Appellant that the Respondent disobeyed the writ of *habeas corpus* when it went ahead and

deported the Appellant and thus failed to produce his body on 30th April 2015 and the subsequent days set for hearing of the matter.

47) The Respondent has sought to justify the deportation subsequent to the service of the writ of *habeas corpus* by arguing that the wording of Order 54 Rule 1 sub-rule 5 of the ***White Book*** is couched in discretionary and not mandatory terms. Whilst we agree with the argument, we still take the position that the circumstances of this case, which involve the incarceration for deportation purposes of an individual, fall squarely in the ambit of the Order and thus, the discretion should have been exercised in favour of granting the stay.

P.768

48) Last of all, our consideration is of the third question which deals with the manner the Learned High Court Judge proceeded during the hearing on the return of the writ of *habeas corpus*.

49) The Appellant has contended that the business of the day on 30th April 2015 was for the Court to ascertain why the body of the Appellant was not produced and not the legality or otherwise of the deportation. The Respondent's contention is that the Court was on firm ground in proceeding in the manner that it did because the Minister, in any event, was empowered under the Act to declare the Appellant a danger to national security and deport him.

50) Under the first of the three questions we have held that the primary purpose of the writ of

habeas corpus ad subjiciendum is to determine the validity of a person's incarceration. How then does the Court go about doing this? In answer to this question, we must start by restating how the Learned High Court Judge proceeded in the matter.

51) In determining the application before him, the Learned High Court Judge made two crucial observations. The first one was that he noted that the arguments by counsel for the Appellant were asking him to question the legality or otherwise of the Appellant's incarceration. He stated that he could not proceed to do so because such determination could only be made by way of judicial review pursuant to Order 53 of the ***White Book*** and not a writ of *habeas corpus*. The

Learned High Court Judge was on firm ground when he made this finding as we have stated in the latter part of this judgment.

52) The second observation he made was that by contending that the Minister's action of deporting the Appellant, despite the writ of *habeas corpus ad subjiciendum,* was calculated to circumvent the course of justice, counsel for the Appellant sought the Court to hold the officers of the Respondent in contempt of Court. He found that he could not do so because there was no application laid before him for leave to commence contempt proceedings. Our comments on this finding is in the latter part of the judgment.

53) The Learned High Court Judge then went ahead to determine that the actions by the Minister were

indeed taken in the interest of national security and the good order of the country. This was based on the Court's finding that, *prima facie,* the documents relied upon by the Respondent to justify the Appellant's incarceration were in order. He held further that the Minister, in the exercise of his powers under the Act, is not required to give reasons. This latter holding is what has aggrieved the Appellant and is our focus of attention in dealing with the third question.

54) In deciding the question, we have once again sought solace in Order 54 rule 1 sub-rule 5 of the ***White Book***. The relevant portion of the order states as follows:

> **"It is usually a sufficient response to an application for habeas corpus to satisfy the Court that there is, ex facie, a statutory authority for the detention. If the legal or**

> **factual merits of the underlying processes which had led to the detention could be entertained, there would be no distinction between habeas corpus and judicial review."**

We understand the foregoing order to mean that the task of the Learned High Court Judge was restricted to determine whether or not the Minister had statutory authority to detain the Appellant. It did not extend to ascertaining whether or not there was procedural or legal defect in the manner the Minister executed his functions because this is the preserve of judicial review.

55) To the extent, therefore, that the Learned High Court found that the Minister was empowered under the Act (which was not disputed) to deport the Appellant he was on firm ground. He however, misdirected himself when he went further and

sought to justify the actions by the Minister by holding that they were indeed in the interest of national security and good order of the country and that the Minister was not obliged to give reasons for his decision. The reason for this is that the findings hinge on making a determination as to the propriety and otherwise (legally and procedurally) of the Ministers actions.

56) The explanation we have given in the preceding paragraphs on the distinction of the issues to be determined at judicial review as opposed to *habeas corpus* is in agreement with a decision of the Queens Bench Division in England referred to in Order 54 rule 1 sub-rule 5 of the ***White Book*** of ***R v South Western Hospital Managers and***

***another ex parte*[2].** Though it is a decision of an inferior and foreign Court, we find it persuasive.

57) In that case, the question which fell for determination by the Court was whether the actions of doctors, social welfare workers and hospital managers to detain a mental patient could be questioned in the light of a decision by a tribunal to the contrary. The Court held that since the doctors, social welfare workers and hospital managers were required under the ***Mental Health Act*** to exercise their judgment to detain a patient irrespective of a tribunal decision to the contrary, they were on firm ground when they detained the patient. The decision of the Court went on to say that even if the procedure adopted by the doctors, social welfare workers

and managers of the hospital was flawed, it could not be questioned by way of *habeas corpus* because such question was reserved for judicial review.

Conclusion

58) In view of the determination we have made of the three questions posed arising from the grounds of appeal deployed by the Appellant, the appeal only succeeds to the extent that the Learned High Court Judge failed to find that the service of the writ of *habeas corpus* had the effect of staying the deportation of the Appellant. Further, it was a misdirection on the part of the Judge to delve into the procedural propriety of the actions of the Minister.

59) The decision we have made in the preceding paragraph does not, however, affect the predicament which the Appellant finds himself in. By this we mean that, although the service of the writ stayed the deportation i.e. the Minister should not have taken further steps in the deportation, he nonetheless went ahead and deported the Appellant. This action effectively altered the status quo as there was no longer anything to stay and the position could not be remedied by the order which the Learned High Court Judge made on 30th April 2015 that the Appellant should be returned to the jurisdiction of the Court by the Respondent by the next sitting.

60) We sympathize with the Appellant in the manner in which his detention and deportation were

handled by the Respondent, which would appear, on its face, to have been calculated at perverting the course of justice. We thus, condemn the Respondent's actions in the strongest terms especially that this is not the first time the Respondent has displayed such conduct.

61) However, the remedy available to the Appellant as an aggrieved party in such circumstances lies in an action before the Court for leave to file an application for contempt of court. The Court, where appropriate would punish the offender for contempt of court and not order the restoration of the status quo which had already been disturbed. There was thus, a misdirection on the part of the Learned High Court Judge when he ordered the return of the Appellant to the

jurisdiction by the Respondent at its expense and to render explanation for his deportation. The problem is compounded by the fact that, and we have held, it was not in line with the purpose of the issuance and service of a writ of *habeas corpus*. Consequently, the Appellant's success in the appeal is by and large academic.

62) Our decision in the preceding paragraph may seem to be at odds with our earlier decision in the case of **A. *H. Shipanga v The Attorney General*[3]** where we ordered the issue of a writ of *habeas corpus* and directed the Respondent to make a request to a foreign government for the return of the Appellant in that matter. The case arose from facts similar to the facts in this case except that by the time we ordered the issue of the

writ of *habeas corpus* the Appellant had already been deported. One might then ask why we are not taking the same approach in this matter and endorsing the argument by the Appellant in this case that the Learned High Court Judge ought not to have vacated the order for the return of the Appellant to the jurisdiction of the Court? The answer lies in the fact that the circumstances in this case are distinguishable from the circumstances in the ***Shipanga*** case in that in the latter case, we were not called upon and, therefore, did not consider the effect of the issuance and service of a writ of *habeas corpus* on the exercise of Executive powers. We thus, did not consider the effect, as we have done in this appeal, of Order 54 rule 5 sub-rules 1 of the ***White Book***. In addition, our order in the ***Shipanga*** case directed the Respondent to make a request to the foreign government where the Appellant was deported (through diplomatic channels) to bring back the Appellant as opposed to the Learned High Court Judge's order which

compelled the Respondent to return the Appellant to the jurisdiction of the Court. This latter order ignored jurisdictional and diplomatic issues that surround the return of a deported person.

63) We accordingly allow the appeal to the extent we have stated in the preceding paragraph, that is, grounds 2 and 3 partially succeed, grounds 4 and 5 succeed to the full extent while ground 6 fails. Costs are to follow the event and to be taxed in default of agreement.

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I.C. MAMBILIMA
CHIEF JUSTICE

.....

M.S. MWANAMWAMBWA
DEPUTY CHIEF JUSTICE

.....

N.K MUTUNA
SUPREME COURT JUDGE