IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 96/2014
HOLDEN AT NDOLA
(CIVIL JURISDICTION)

BETWEEN:

FOLAYINKA FOBISAIYE OLADIPO-ESAN (MALE) APPELLANT

AND

THE ATTORNEY GENERAL RESPONDENT

CORAM: **MAMBILIMA CJ, KAOMA AND MUSONDA JJS; on 6th December, 2016 and 9th December 2016**

For the Appellant: **Mr. L. LINYAMA of Eric Silwamba Jalasi and Linyama Legal Practitioners**

For the Respondent: **Major F. CHIDAKWA, Assistant Senior State Advocate and Mr. M. MUNYATI, Assistant Senior State Advocate**

JUDGMENT

MAMBILIMA, CJ delivered the Judgment of the Court.

CASES REFERRED TO:

1. **BARRY JACKSON V ATTORNEY GENERAL (1979) ZR 222**
2. **ATTORNEY GENERAL V ROY CLARKE (2008) ZR 38 VOL 1**
3. **DERRICK CHITALA, SECRETARY OF THE ZAMBIA DEMOCRATIC CONGRESS) V ATTORNEY GENERAL (1995-1997) ZR 91**
4. **RV IMMIGRATION APPEAL TRIBUNAL EX PARTE KHAN (MAHMUD (1983) Z ALL ER 420**
5. **ALEXANDER MACHINERY (DUDLEY) LTD V CRABTREE (1974) ICR 120**

6. VALERIO VENTRIGLIA, DANIELLE VENTRIGLIA AND CLAUDIA VENTRIGLIA V THE CHIEEF IMMIGRATION OFFICER AND THE ATTORNEY GENERAL 2015/HN/301
7. GENERAL MIYANDA V THE ATTORNEY GENERAL (1985) ZR 185
8. MORGAN KACHINGA CHELLAH (1978) ZR 246
9. WILSON MASAUSO ZULU V AVONDALE HOUSING PROJECT (1982) ZR 172
10. NYAMPALA SAFARIS (Z) LTD, BAOBAB SAFARIS (Z) LTD, NYUMBU SAFARIS (Z) LTD, EXCLUSIVE SAFARIS (Z) LTD, BUSANGA TRAILS (Z) LTD V ZAMBIA NATIONAL WILDLIFE AUTHORITY, ZAMBIA NATIONAL TENDER BOARD, ATTORNEY GENERAL, LUANGWA CROCODILE AND SAFARI LTD AND OTHERS (2004) ZR 49
11. DOODY V SECRETARY OF STATE FOR THE HOME DEPARTMENT (1993) 3 ALL ER AT PAGE 110

LEGISLATION REFERRED TO:

1. IMMIGRATION AND DEPORTATION ACT NO. 18 OF 2010
2. THE SUPREME COURT PRACTICE 1999

This is an appeal against a Ruling of the High Court dated 19th February, 2014, dismissing the Appellant's application for an order of certiorari to quash the decision of the Director General of Immigration, revoking his employment permit and deporting him from Zambia.

The facts of the case are brief and substantially not in dispute. The Appellant, a British national, was chief executive officer of Lafarge, Zambia and later, Lafarge, South-East Africa. He was issued with a Zambian employment permit on 14th February, 2012 which was valid for two years.

On 3rd December, 2012, the Appellant was detained by immigration officers at Kenneth Kaunda International Airport, on his return from a business trip in Malawi. He was not given any reasons for his detention other than that the officers were under instructions to detain him. That same night, the Appellant was driven to Ndola to be put on a scheduled flight to Nairobi, at Simon Mwansa Kapwepwe International Airport. His request to pass through his home to collect some medication for his spinal injury was declined. He was also not allowed to use his phone. On the way to Ndola, the Appellant was furnished with a document revoking his employment permit. The Revocation of Permit was issued pursuant to the provisions of Section 34 of the **IMMIGRATION AND DEPORTATION ACT**[1] (hereinafter referred to as **"the ACT"**) and was couched in the following terms-

> **"To: OLADIPO FOLAYINKA FOBISAIYE**
> **IN THE MATTER OF EMPLOYMENT PERMIT No. 003604...you are hereby notified that your permit has been revoked on the following grounds:**
> **(a) that you are likely to be a danger to peace and good order in Zambia**
> **Dated this 3rd day of December 2012**
> **Signed: Director General of Immigration"**

Upon arrival in Ndola, they found that the flight he was supposed to board had been rescheduled to depart later, whereupon it was decided to put the Appellant on a South African Airways flight to South Africa. He was taken to wait at a lodge for the flight which was scheduled to leave at 1300 hours.

They came back to the airport and as he was being escorted to board the South African Airways flight to Johannesburg, the Appellant was handed a Notice of Prohibited Immigrant to leave Zambia. The notice was stamped 5th December, 2012. It stated that the Appellant had become a prohibited immigrant under Section 35 (1) and (2) of the Act and that the immigration authorities had been directed by the Minister of Home Affairs to order him to leave the country within 24 hours of receipt of the notice.

According to the notice, which was signed by one, J. Kapata, an Immigration Officer, the Appellant was a prohibited immigrant because he belonged to persons named in Class D of the Second Schedule to the Act. These are persons whose permit to remain in Zambia has expired or has been revoked. The Appellant was also

said to be a prohibited immigrant because the Minister of Home Affairs had, in writing, declared his presence in Zambia to be inimical to the public interest.

From the record, it would appear that after his expulsion from Zambia, the Appellant, through his lawyers, appealed to the Minister for temporary exemption from the Class D category under Section 35 (5) of the Act to enable him to return to work while a long-term settlement was being sought but his application was rejected.

The Appellant, through his lawyers, issued process seeking judicial review. He sought an order of certiorari, to move into the High Court, for purposes of quashing, the decision of the Director General of Immigration to revoke his work permit and deport him on the ground that the decision was procedurally improper and irrational.

On the ground of procedural impropriety, the Appellant contended that the purported revocation of his permit and his subsequent deportation from Zambia were illegal and *void ab initio* as the *sine qua non* (condition precedent) in Section 10 of the Act

was not satisfied. He alleged that he was neither accorded an opportunity to be heard nor was he given any reasons for the revocation of his work permit as provided for under Section 10 (1) of the Act. Section 10 of the Act provides that:-

> **"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 the reasons for the decision and give the person at least forty-eight hours to make representations."**

Further, the Appellant contended that he was not given the mandatory minimum notice prior to deportation in line with the provisions of Section 36 of the Act.

On the ground of irrationality, the Appellant argued that the decision of the Director General, purporting to revoke his permit and deport him, was premised on improper motives and bad faith, as no proper investigations were conducted. In short, the action taken was Wednesbury unreasonable.

The Respondent did not call any witnesses but relied on an affidavit filed in opposition to the Appellant's application. In the said affidavit in opposition, deposed to by one, Enos Chibombe, Principal Immigration Officer, it was averred that the State was not

obliged to furnish reasons for declaring a person a danger to peace and good order. That the Director-General of the Immigration Department is vested with power under the Act to issue, revoke and/or cancel any permit issued under the Act. That there is no requirement under the Act for the Director General to hear the Applicant after being served with a Notice to leave the country. That any person who is aggrieved with the decision of the Director-General can appeal to the Minister and that in this case, the Applicant appealed to the Minister against exemption from the class of prohibited immigrants in the schedule to the Act and not against the notice to leave. He contended that the matter was prematurely before the Court as the Appellant did not exhaust the administrative procedures available to him under the Act. He further contended that the Appellant was never deported but merely given a notice to leave the country.

The State did not call evidence in the lower Court but relied on the affidavit in opposition which was sworn by Enos Chibombe. The Judge noted that the affidavit contained legal arguments and did not challenge the facts of the case as put forward by the

Appellant. From the line of questioning in cross examination, the Judge gleaned that the defence by the State was premised on two points:-

> **(1) the Appellant did not appeal against the revocation of his employment permit and therefore, his application was prematurely before the court; and**
> **(2) the State is not obliged to furnish a person with reasons as to why he is a danger to peace and good order.**

On the first point, the Judge found that the Appellant conceded in cross examination that he had not appealed against the revocation of his work permit although he had given his lawyers instructions to do so and that on the second point, the Appellant had also conceded that the State was not obliged to furnish him with reasons as to why he was considered a danger to peace and good order.

In considering the Respondent's contention, that the matter was prematurely before the Court, the Judge referred to Order 53/14/27 of the **SUPREME COURT PRACTICE 1999** (hereinafter referred to as the '**White Book**') which states that:-

> **"The courts will not normally grant judicial review where there is another avenue of appeal. 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" (R V EPPING AND HARLOW GENERAL**

COMMISSIONERS, EX P GOLDSTRAW (1983) 3 ALL ER 257, p. 262, per Sir Donaldson MR.)

The learned trial Judge found the manner in which the Appellant was treated to be ***'shocking and unacceptable'*** in that he was detained without being told the reasons for his detention; he was separated from his lawyers in a manner that can best be described as an abduction; reasons were availed as he was being driven to Ndola, a port for his removal from Zambia; and he was denied access to medicine despite informing the officers that he was in severe pain.

Apart from the mistreatment of the Appellant, the Judge found that the Appellant's rights were abrogated and immigration procedures given in the law were disregarded in that Regulations 39 and 40 of the Immigration and Deportation (General) Regulations 2011 as read with Section 34 of the Act require that before a permit is revoked, the person affected should be personally served with a notice notifying him/her of the State's intention to revoke his/her permit. According to the Judge, a Revocation Permit Notice is only valid if the requisite notice specified in Section 34(2) of the Act has been served on the affected person and the person has been given

an opportunity to make representations as provided by Section 10 of the Act. The Judge then observed that:-

> **"There is no provision in the Act that dispenses with the requirement for a Notice. I therefore take the view that the Revocation of Permit dated 3rd December 2012 (but stamped 5th December 2012) was void and of no effect because it was not preceded by the required Notice."**

The Judge then went on to consider the Notice to Prohibited Immigrant to leave Zambia, stamped 5th December 2012, which was issued under Section 35 of the Act and served on the Appellant at Simon Mwansa Kapwepwe International Airport in Ndola. The Judge noted that the Appellant had first been declared a danger to public peace and good order in Zambia and later declared inimical to the public interest. The Judge was of the view that the Notice to Prohibited Immigrant to leave Zambia issued under Section 35 of the Act was a completely separate document and the reasons for the Minister's decision to find the Appellant inimical to the public interest were not given.

The learned Judge referred to the case of **BARRY JACKSON V ATTORNEY GENERAL**[1] a High Court decision in which SAKALA J (as he then was) considered the provisions of Section 22(2) of the

repealed Immigration Act, which are identical to the provisions of Section 35 (2) of the current Act. They state:

> **"35 (2) Any person whose presence in Zambia is declared in writing by the Minister to be inimical to the public interest shall be a prohibited immigrant in relation to Zambia"**

SAKALA, J, held inter alia, that:

> **"It is not for the Courts to decide what is inimical to the public interest, but for the Minister, and when making an order under Section 22(2) he is not a judicial officer, but he acts administratively. He is an executive officer bound to act in the public interest, and it is left to his judgment whether upon the facts a non-Zambian may be declared inimical to the public interest. The question of an inquiry of affording the party an opportunity to be heard does not therefore arise.**

The Judge noted that in this case, the Appellant was served with the Notice to leave Zambia as he was boarding the plane at Ndola, giving him 24 hours to leave Zambia. That he was denied the 24 hours notice. The Judge was of the view that the behaviour of the immigration officers and the treatment of the Appellant after the Notice had been served had no effect on the validity of the Notice. That while the Applicant would be entitled to seek relief for his mistreatment using other processes of law, he would not be entitled to an Order of Certiorari quashing the decision of the Minister ordering him to leave Zambia. According to the Judge, to interfere

with a deportation or removal that has already been effected, would be to interfere with the Minister's statutory authority because the Minister has the duty and legal authority to declare an alien whose presence in Zambia is, in his opinion, inimical to the public interest. That the Minister's authority is discretionary and he is not obliged to give reasons.

The Judge distinguished the case of **ATTORNEY-GENERAL V ROY CLARKE**[2] from the case in casu, in that in the case of **ROY CLARKE,** reasons for the deportation were disclosed and the Court found that the said reasons did not warrant the deportation of Mr. Clarke. He opined that all that exists in this case, is the presumption that the deportation was a direct consequence of the revocation of the Appellant's employment permit. That despite the clear breach of the Appellant's rights by the Director of Immigration to be given notice and to be heard, no details were provided as to why the Appellant had been found to be a danger to peace and good order in Zambia.

On the exercise of statutory discretion, the learned Judge in the Court below referred to the case of **DERRICK CHITALA**

(Secretary of the Zambia Democratic Congress) V ATTORNEY GENERAL[3] and in particular, the words of NGULUBE, CJ, when he said:-

> **Where Parliament has given to a Minister or other person or body discretion, the court's jurisdiction is limited in the absence of a statutory right of appeal, to the supervision of the exercise of that discretionary power, so as to ensure that it has been exercised lawfully. It would be a wrongful usurpation of power by the judiciary to substitute its judicial review, on the merits and on that basis quash the decision."**

The learned trial Judge then stated:-

> **"The information on which the Minister relies to declare a person inimical to the public interest reaches him from a variety of intelligence sources, some of which the Director of Immigration may not be privy to. The reasons for the deportation are unknown and there is no basis for finding that the Minister made a perverse decision. Under the circumstances, interfering with the Minister's findings would be to usurp the Minister's statutory power and substitute his view with the judicial view."**

The Judge then noted that the Appellant was not seeking an order of certiorari against the Minister's decision for him to leave Zambia but against the decision of the Director General of Immigration. That the facts in this case show that the Appellant's employment permit was revoked by the Director General of Immigration. That the Appellant was served with the Notice to Prohibited Immigrant for two reasons:-

a) **he was a prohibited immigrant under Section 35 of the Act in that his permit to remain in Zambia had been revoked; and**
b) **he was a prohibited immigrant because the Minister had declared his presence in Zambia as being inimical to the public interest and ordered that he must leave Zambia within 24 hours.**

The Judge found that although the Appellant was subjected to bad treatment and the Appellant was classified to be in Class D of the Schedule to the Act after revocation of his permit to remain, there was the declaration by the Minister that his presence in Zambia was inimical to the public interest. According to the Judge, ordering relief against the failure by the Director General of Immigration to follow procedure will serve no purpose because the effect of that decision was overtaken by the Minister's decision to declare the Appellant inimical to public interest. Consequently, the Judge declined to grant an order for certiorari as prayed by the Appellant.

It is against this Ruling that the Appellant has now appealed to this Court advancing three grounds of appeal, namely-

1. **That the learned trial Judge erred in law when he correctly held that the Revocation of Permit dated 3rd December, 2012 was void and was of no effect because it was not preceded by the required notice, but then proceeded to hold that there was no nexus between the Revocation of Permit and the Notice to Prohibited Immigrant to leave Zambia.**

2. **That the learned trial Judge erred in law when he held that ordering relief against the Director General of Immigration will serve no purpose when he had earlier held as follows-**

> ***"I find that there was a breach in the procedure employed in deporting the Applicant."***

3. **That the learned trial Judge erred in law when he abdicated his role of adjudicating on all issues in controversy but instead opined as follows-**

> ***"The Applicant is perfectly entitled to seek relief for his mistreatment by utilising some other processes of law but he would most certainly not be entitled to an order of Certiorari to quash the decision of the Minister ordering him to leave Zambia."***

The learned Counsel for the Appellant filed written heads of argument which he augmented with oral submissions. In advancing arguments in support of the first ground of appeal, he submitted that the learned trial Judge, after he held that the Revocation of Permit was void and of no effect, ought to have equally held that the Notice to Prohibited Immigrant to leave Zambia was illegal as the chain of events and the circumstances of the deportation were all derived from the same set of facts. In Counsel's opinion, there was a direct nexus or chain of causation between the Revocation of Permit and the Notice to Prohibited Immigrant to leave Zambia because the revocation of the

employment permit is what led the Appellant to fall in the Class D category of prohibited immigrants.

Counsel further argued that having found the Notice of Revocation null and void meant that the Appellant's work permit was valid, and consequently, the Appellant did not qualify to belong to the class of persons classified in Class D of the Schedule to the Act because he had a valid work permit. That the condition precedent for a person to fall under class D was that their work permit was either revoked or had expired. He argued further that the Judge fell into grave error when he found that the Notice of Prohibited Immigrant to leave Zambia issued under Section 35 of the Act was different from the Minister's decision which found the presence of the Appellant to be inimical to the public interests and did not require giving of reasons.

In the alternative, Counsel argued that the Judge fell into grave error when he held that notwithstanding that the Notice of Revocation was invalid, the Respondent could still be deported on the ground that his presence was found to be inimical to the public interest by the Minister and the Court could not inquire as to why

the Minister had declared that the Appellant was inimical to the public interest.

Counsel argued further that there must be evidence that the Appellant was a danger to peace and good order. To support his contention, Counsel cited the case of **R V IMMIGRATION APPEAL TRIBUNAL EX PARTE KHAN (MAHMUD)**[4] in which it was held that:-

> **"Where Tribunals are hearing immigration matters, sufficient reasons must be given indicating that the point in issue was adequately considered and therefore, the decision maker relied on some evidence."**

He also relied on the case of **ALEXANDER MACHINERY (DUDLEY) LTD V CRABTREE**[5] in which DONALDSON, P held that:-

> **"Failure to give reasons for the basis of a decision amounts to a denial of justice and is in itself an error of law"**

On the case of **BARRY JACKSON V ATTORNEY GENERAL**[1], relied on by the Judge in the Court below, Counsel submitted that this case was based on the repealed **IMMIGRATION AND DEPORTATION ACT OF 1965 (CAP 123 OF THE LAWS OF ZAMBIA**. According to Counsel, the old Act did not have a provision similar to Section 10 of the Act. He went on to state that

in making a decision whether to revoke an employment permit, the Department of Immigration must be guided by Section 10 of the Act. That this Section clearly provides that a person adversely affected by the decision of the Immigration Department must be furnished with reasons for the same and be accorded 48 hours to make any representations. He submitted that these requirements were not met with respect to the Appellant in that he was not afforded an opportunity to be heard.

Counsel also referred us to a Ruling by the same Judge, in the case of **VALERIO VENTRIGLIA, DANIELLE VENTRIGLIA AND CLAUDIA VENTRIGLIA V THE CHIEF IMMIGRATION OFFICER AND THE ATTORNEY GENERAL**[6] and submitted that it is on all fours with the case in casu and yet the Judge reached a different conclusion.

On the second ground of appeal, the Appellant's argument, in the main, was that the learned trial Judge erred when he held that ordering relief against the Director General of Immigration would serve no useful purpose because the effect of his decision was overtaken by that of the Minister. Counsel for the Appellant

submitted that after holding that there was a breach in the procedure employed to deport the Appellant, the learned trial Judge ought to have proceeded to grant the relief as prayed or any other relief. To buttress his arguments, Counsel for the Appellant referred us to a number of authorities, among them the case of **GENERAL MIYANDA V THE ATTORNEY GENERAL**[7] in which the principle of when a Court ought to decline to grant a remedy on the ground that it will not serve a useful purpose was discussed. In this case, the Court declined to order that the Appellant should be reinstated in the Army. The Court observed that it "**...would be wholly eccentric for this Court to grant a disruptive declaration when an obvious and adequate remedy is available in the form of damages.**" The Court, in the same case, earlier observed that a declaration will not be made when no useful purpose can be served.

Counsel also referred to the case of **MORGAN KACHINGA CHELLAH**[8] in which the Court held that:

> **"Even if the proceedings were outside the jurisdiction of the inferior tribunal, that fact would not deprive the Court of jurisdiction to award certiorari in its discretion where the issue of certiorari would serve a useful purpose by placing the invalidity of the proceedings beyond doubt."**

the lower Court was on firm ground when it held that an order of certiorari could not be granted as the Appellant's situation had been overtaken by the Minister's decision to declare him inimical to the public interest. According to Counsel, the Appellant could not be entitled to an order of certiorari or any other relief as against the Minister, because he did not take up any administrative action against the Minister's decision.

We have considered the Ruling of the Court below, the submissions of Counsel and the issues raised in this appeal. As we have stated above, the facts in this case are not in dispute. They reveal a degree of high handedness on the part of the authorities in the way they treated the Appellant The learned trial Judge expressed his displeasure at this treatment in the following terms:

> **"I shall state from the outset that the behaviour of the immigration authorities and the manner in which they treated the Respondent is to say the least shocking and unacceptable. Zambia is a country of laws and it is quite clear that the Respondent was treated as though he had no rights whatsoever."**

We could not agree more. Clearly, there was an affront to the Appellant's human rights. We must state that there is an obligation upon those entrusted with the exercise of public power to treat

persons fairly and respect their human rights. As we stated in the case of **NYAMPALA SAFARIS (Z) LTD AND OTHERS**[10], when such exercise of power is questioned through judicial review, the role of the court is to ensure that the individual is given fair treatment by the authority to which he is subjected. Persons within the boundaries of Zambia are entitled to the protection of the law and for the Bill of Rights to have any meaning, there must be sanctions for arbitrary behaviour.

However, the Court below after finding that the revocation of the Appellant's permit was null and void and of no effect for breach of Section 34(2) of the Act, which requires an affected person to be given the requisite notice and afforded an opportunity to make representations, upheld the Notice to Prohibited Immigrant to leave Zambia issued by an Immigration Officer on 5th December, 2012 purportedly upon the direction of the Minister. While acknowledging that the two decisions to revoke the Appellant's permit and to declare the Appellant's presence in Zambia to be inimical to the public interest may have been based ***'on the same broad facts'***, the Judge was of the view that the decisions were

'made by different officials with different powers.' The first ground of appeal is premised on these findings by the trial Judge. It is argued that the Court below erred when it found that there was no nexus between the two.

In upholding the decision of the Minister, the learned Judge in the Court below appears to have relied on Section 10 of the Act and the case of **BARRY JACKSON V ATTORNEY GENERAL**[1] in which SAKALA J, as he then was, when interpreting a similar provision in the repealed **IMMIGRATION AND DEPORTATION ACT**, held that it was not for the courts to decide what was inimical to the public interest but for the Minister when making an order. That though an affected person was entitled to make written representations to the Minister he/she was not entitled to be heard in the event that the representations were rejected and neither was the person entitled to be given reasons for the rejection.

Under Section 10 of the Act, a person affected by a decision, other than a decision relating to deportation or removal, is entitled to be notified of the decision, furnished with reasons for the decision, and given at least 48 hours to make representations. In

relation to the case in casu, the Judge was of the view that the Minister has statutory authority and discretion to declare the presence of any alien in the country to be inimical to the public interest and hence liable to deportation or removal and by virtue of the provisions of Section 10 of the Act, the Minister is not obliged to disclose his reasons for arriving at such a decision. This, in a way, implies that the exercise of the Minister's discretion under the Act is final and cannot be questioned.

We did state, in the case of **ATTORNEY-GENERAL V ROY CLARKE**[2] that ***"There is nothing like unfettered discretion immune from judicial review;... that in a Government under law, like ours, there can be no such thing as unreviewable discretion."*** The Court below was alive to this principle. In a situation, such as in this case, where legislation seems to grant absolute discretion by leaving little or no room to question the legitimacy of an exercise of public power, courts ought to be conscious of emerging trends towards a more open and transparent government that promote the rule law, human rights and curbs arbitrariness. The Court should go behind the orders and delve

into the circumstances in which the power was exercised especially where there is prima facie evidence of arbitrariness or perverse actions, to ensure that it was exercised lawfully and within the confines of the law.

The kernel of the argument by the learned Counsel for the Appellant in support of the first ground of appeal is that there is a direct nexus or chain of causation with respect to the validity of the Notice of Revocation of Permit and the Notice to the Prohibited Immigrant. That having found the revocation of the Appellant's permit to have been null and void, it followed that the Appellant was a holder of a valid permit at the time that the Immigration issued a Notice to Prohibit Immigrant. The Respondent's argument in response is that the power to revoke the Appellant's permit and the power to declare his presence inimical to the public interest were exercised under different circumstances and the Minister's decision superseded that of the Director General of Immigration.

Under Section 34(1) of the Act, the Director-General of Immigration has the power, after giving a notice in writing, to revoke any permit issued under the Act, if the holder among others,

is likely to be a danger to peace and good order in Zambia. Such a notice must specify the grounds on which the permit is revoked. The Court below properly found that the revocation of the Appellant's work permit was void and of no effect as it was not preceded by the requisite notice and no reasons were advanced for the action.

We have taken time to examine the relevant documents and the law under which they were issued.

A copy of the document entitled '**Notice to Prohibited Immigrant to Leave Zambia**' that was addressed and given to the Appellant has been exhibited on page 73 of the record of appeal. It reads in the relevant parts as follows:-

> **"WHEREAS you are a prohibited immigrant-**
>
> **(a) under Section 35(1) of the Immigration and Deportation Act, 2010, because you belong to Class D of the second Schedule to that Act; and**
> **(b) under Section 35(2) of the Immigration and Deportation Act, 2010, because the Minister has, in writing, declared your presence in Zambia to be inimical to the public interest;**
>
> **IN EXERCISE of the powers contained in Section 36(1) of the Immigration and Deportation Act No. 18 of 2010, and upon the direction of the Minister, I order you to leave Zambia within the period of 24 hours of your receipt of this notice by the following route, to Britain through Simon Mwansa Kapwepwe International Airport."**

It is signed by an Immigration Officer and dated 5th December 2012 though stamped 6th December 2012.

Section 35(1) and (2) of the Act that is referred to in this document states as follows:-

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

Thus, according to Section 35(2), the declaration by the Minister that a person's presence is inimical to the public interest is made in writing. In other words, there must be a document containing a declaration to this effect. The rationale for requiring the declaration to be in writing under the hand of the Minister is not far-fetched. These matters impact on a person's human rights and it must be shown that it is the Minister, who is clothed with the discretion, who exercised the power. Armed with the Minister's declaration, an immigration officer can then invoke Section 36(1) of the Act, which states:-

> "36(1) **Any immigration officer shall, if so directed by the Minister, by notice served in person on any prohibited immigrant or**

person to whom subsection 2 of Section thirty-five relates, require that immigrant or person to leave Zambia."

We have combed through the record of appeal. There is no document anywhere on the record to suggest that there was any declaration made by the Minister in writing, to the effect that the presence of the Appellant in Zambia was found to be inimical to the public interest other than the document at page 73. The affidavit of Enos CHIBOMBE filed in opposition to the Appellant's application for judicial review did not allude to any such document. It merely traversed the issues relating to the revocation of the Appellant's permit. It would appear to us, that quite apart from the breach of Section 34 (2) in relation to the revocation of the Appellant's permit, there was also a breach of Section 35(2) of the Act in that there was no evidence of any declaration in writing that was made by the Minister, to the effect that the Appellant's presence in Zambia was inimical to the public interest.

A perusal of the document at page 73, which is a Notice to Prohibited Immigrant shows that the Appellant was declared a prohibited immigrant on the two grounds mentioned in Section 35 of the Act, that is; belonging to Class D of the Second Schedule.

This covers persons whose permits have been revoked; and the declaration ***'in writing'*** by the Minister that the presence of the Appellant in Zambia was inimical to the public interest.

The Revocation of Permit document on page 72 of the record is dated 3rd December 2012 but stamped 5th December 2012. This was the same date that the Notice to Prohibited Immigrant to Leave Zambia was dated. The trial Judge did allude to the possibility that the classification of the Appellant in Class D of the Second Schedule to the Act and his being declared inimical to the public interest may have been based on the same broad facts. The sequence of events in this case lend credence to this view. It would not be far-fetched to conclude that the Director General of Immigration, having failed to comply with the provisions of the law in Section 34(2) of the Act to give the requisite notice and furnish the grounds for the revocation of the Appellant's permit invoked Section 35(2) to allege that the Minister had declared the Appellant's presence inimical to the public interest to evade the requirement to give reasons.

At common law, there is no general duty to give reasons for administrative decisions. This position was echoed in the case of **DOODY V SECRETARY OF STATE FOR THE HOME DEPARTMENT**[11] where it was stated that the law does not, at present, recognise a general duty to give reasons for administrative decisions. In the new dispensation of open government, there is a growing school of thought advocating that reasons must be given for administrative decisions to show the considerations that the decision maker relied on to arrive at the decision and most importantly, to assist the affected persons and those reviewing the decision when it is challenged. This view is so strong that others have argued, as did DONALDSON J in the case of **ALEXANDER V CRABTREE**[5] referred to us by the Appellant, that failure to give reasons for a decision amounts to a denial of justice and is, in itself, an error of law.

In our jurisdiction, Section 10 of the Act insulates the Minister from having to give reasons when deporting or removing a person from Zambia. When dealing with such cases, the courts have confined themselves to the supervision of the exercise of the

Minister's discretionary power to ensure that it has been exercised according to the law. As we have stated above, in doing so, courts must be wary to protect persons against arbitrariness more so where excesses are apparent. There is, therefore, need to construe legislation conferring such discretion strictly.

In this case, there is no evidence of the Minister's declaration in writing as required by Section 35(2) of the Act to show that the Minister's discretion was ever exercised. On the other hand, the Revocation of Permit by the Director General of Immigration suffered a mortal blow for failure to comply with the provisions of Section 34(2) of the Act. In the face of the affront to the human rights of the Appellant, the law needed to be interpreted strictly. Breach of Section 35(2) of the Act means that just like the Revocation of Permit Order, the Notice to Prohibited Immigrant to Leave Zambia had no leg to stand on, thereby exposing procedural impropriety.

Be that as it may, the events in the case show that there was a nexus between the Revocation of Permit and the Notice to Prohibited Immigrant to Leave Zambia. They were issued more or

less at the same time. The chain of events were triggered by the Revocation of the Permit. It is anybody's guess whether the Appellant would still have been served with the Notice to Prohibited Immigrant to Leave Zambia had departure of the flight that the Appellant was supposed to board not been rescheduled. These events and the manner in which the Appellant was treated, ought to have put the Court below on inquiry. The Court should have imputed bad faith and unreasonable exercise of power on the part of immigration authorities and granted the order of certiorari.

On the submission that this case is on all fours with the case of **VALERIO VENTRIGLIA**[6], our view, upon perusal of the Ruling, is that the case raised similar issues with regard to compliance with Section 34(2) of the Act. The Judge found that the revocation of the permit was void and of no effect because the requisite notice had not been given. There was no issue of the Minister having declared the Applicant's presence in Zambia to be inimical to the public interest. To that extent, that case can be distinguished from the case in casu.

Coming to the second ground of appeal, it is clear to us that the decision of the trial Judge, that ordering relief against the Director General of Immigration would serve no useful purpose, was predicated on his conclusion that the Appellant was validly removed from Zambia on the finding by the Minister that his presence in the country was inimical to the public interest. His view was that the action of the Minister superseded that of the Director General of Immigration. Against this background, the Judge was of the view that ordering relief against the Director General would serve no useful purpose since the Minister's decision would stand. In view of the position that he took, it would have been a contradiction to hold otherwise. The second ground of appeal appears not to have been properly formulated.

The third ground of appeal accuses the Judge in the Court below of having abdicated his role to adjudicate on all issues in controversy when he advised the Appellant to seek relief for his mistreatment by utilising some other process of law Counsel cited among others, the case of **WILSON MASAUSO ZULU V AVONDALE HOUSING PROJECT**[9] in which we held that it is the duty of every

trial Court to adjudicate upon all aspects of the case. The response by the Respondent is that the Appellant cannot seek relief which he has not expressly pleaded.

We agree with the Respondent that a case is defined by its pleadings. In judicial review proceedings, the Court has power to grant orders of mandamus, prohibition, certiorari, declarations, injunctions and even damages if these have been pleaded. The pleadings in this case show that the Appellant only sought the prerogative writ of certiorari relying on procedural impropriety and irrationality, He did not plead for the other reliefs. The learned trial Judge cannot therefore be faulted for having confined himself to the reliefs that were pleaded.

In sum, this appeal succeeds. The determination of the Court below upholding the Minister's decision to declare the Appellant inimical to the public interest is set aside. We find and hold that the removal of the Appellant from Zambia was unlawful.

Costs in this Court and the Court below shall be for the Appellant to be taxed in default of agreement.

I.C. Mambilima
CHIEF JUSTICE

R.M.C. Kaoma
SUPREME COURT JUDGE

M. Musonda
SUPREME COURT JUDGE