

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

**2017/HP/1948**



**BETWEEN:**

**JACQUES BARAKA**

**APPLICANT**

**AND**

**THE CHIEF IMMIGRATION OFFICER  
THE ATTORNEY GENERAL**

**1<sup>ST</sup> RESPONDENT  
2<sup>ND</sup> RESPONDENT**

*Before Hon. Mr. Justice Mathew L. Zulu, at Lusaka the 10<sup>th</sup> day of May, 2018*

*For the Applicant: Mr. M. Lisimba, Messrs. Mambwe Siwila and Lisimba Advocates.*  
*For the Respondents: Mr. C. Mulonda, Senior State Advocate, Attorney General's Chambers.*

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**RULING**

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**Cases referred to:**

1. **R v. Epping and Harlow General Commissioners Ex. P. Goldstraw [1983] ALL E.R.257.**
2. **New Plast Industries v. The Commissioner of Lands and the Attorney General (2001) Z.R.51.**
3. **The Attorney General v. Nigel Kalonde Mutuna and two others (Appeal No.088/2012).**
4. **Nigel Kalonde Mutuna and two others v. The Attorney General (2012) 3 Z.R 565.**



5. **Patience Chalwe and another v. The Attorney General (2014/HP/0793) unreported.**
6. **The State v. The Secretary Public Service Commissioner Ex parte: Saverio Baleikanacea (Suva High Court Judicial Review HBJ No. 11 of 2014).**
7. **Public Service Commission v. Brian Singh and Public Service Appeals Board (Civil Appeal No. ABU 0005 OF 2007S).**
8. **The State v. The Secretary Public Service Commissioner and others ex parte: Anare Vuniwa (Suva High Court Judicial Review No. 29 of 1998).**
9. **Zambia Wildlife Authority and others v. Muteeta Community Resources Board Development Co-operative Society (2009) Z.R 159.**
10. **Butler Asimbuyu Sithali v. The Anti Corruption Commission (Appeal No. 98/2015).**
11. **The People v. The Registrar of the Industrial Relations Court (Ex parte Zambia Revenue Authority) (2007) Z.R,**

**Legislation referred to:**

- 1. *The Immigration and Deportation Act No. 18 of 2010.***
- 2. *Order 53 of the Rules of the Supreme Court, 1999 edition (White book).***

This is a ruling on the respondents' application for an order to set aside ex-parte Order granting the applicant leave to apply for judicial review dated 21<sup>st</sup> November, 2017.



The brief background to this application is that the applicant on 9<sup>th</sup> November, 2017 applied for leave to apply for judicial review of the decision of the Chief Immigration Officer to deport him from Zambia and sought the following reliefs: an order of certiorari to quash the decision of the Chief Immigration Officer; a declaration that the said decision is void, unlawful as it is unfair, unreasonable and contrary to the rules of natural justice; an order of mandamus compelling the Chief Immigration Officer to grant the applicant a residence permit; an order that the leave granted operates as a stay of the decision to deport the applicant; an expedited hearing if leave is granted and costs.

On 21<sup>st</sup> November, 2017, I granted the applicant leave to apply for judicial review, ex parte and ordered that the applicant be allowed to enter the country freely until the determination of the matter. Following the order granting the applicant leave to apply for judicial review, the respondents on 29<sup>th</sup> December, 2017 made the current application for an order to set aside the order granting leave to apply for judicial review. The application was made pursuant to Order 53 Rule 14 Sub rule 62 of the Rules of the Supreme Court, 1999 edition (White Book) and it was supported by an Affidavit



deposed by ChibesaMulonda, the Acting Senior State Advocate in the Attorney General's Chambers and skeleton arguments.

The deponent avers that the decision of the Chief Immigration Officer giving rise to the application for judicial review first arose on 15<sup>th</sup> July, 2014, over three years ago and that the application is unreasonably out of time. He also deposed that being dissatisfied with the decision of the Minister dismissing his appeal against deportation, the applicant ought to have proceeded by way of an appeal and not by way of judicial review.

The gist of the respondents' arguments is that under Order 53 Rule 4(1) of the White Book, an application for leave to apply for judicial review must be made promptly and within three months from the date the grounds for the judicial review first arose. It is contended that the grounds giving rise to judicial review in this matter first arose on or around 15<sup>th</sup> July, 2014 when the applicant was issued with a Notice of Prohibited Immigrant to leave Zambia.

It is also argued that the applicant did not exhaust the administrative procedures and that the action was wrongly commenced as section 10 of the Immigration and Deportation Act



No. 18 of 2010 provides that a person aggrieved with the decision of the Minister on appeal should commence an action by way of an appeal. It is contended that the jurisdiction to grant judicial review will not be exercised where other remedies are available and have not been utilized. The cases of **R v. Epping and Harlow General Commissioners Ex. P. Goldstraw**<sup>1</sup> and **New Plast Industries v. The Commissioner of Lands and the Attorney General**<sup>2</sup> were cited as authority.

When the matter came up for hearing on 13<sup>th</sup> February, 2018 counsel for the respondent relied on the Affidavit in Support and the skeleton arguments. The Applicant did not file any affidavit in opposition to the application to set aside ex-parte Order granting leave to apply for judicial review but counsel for the Applicant made oral arguments in opposition to the application. In his arguments, counsel contended that the Immigration and Deportation Act only provides for administrative procedures and not for the mode of commencement of proceedings. He argued that the applicant did not appeal against the decision of the Minister as he was not given enough time to lodge the appeal having been given about two



hours between being served with the Notice of Prohibited Immigrant to leave the country and his deportation. He argued that according to Order 53 of the White Book, this court has the discretion to grant leave even after time has elapsed and the court rightly exercised its discretion in this case.

In reply, counsel for the respondent contended that section 10(5) of the Immigration Act provides for the mode of commencement of cases by a person aggrieved with the decision of the Minister, which is by way of an appeal to a court.

I have considered the affidavit evidence and the arguments of the parties. The issue for determination is whether I should discharge the order granting leave to apply for judicial review granted on 21<sup>st</sup> November, 2017 on the grounds that the application was not made promptly, that the applicant ought to have proceeded by way of an appeal and not judicial review and that the applicant did not exhaust all the alternative avenues available to him.

This court has the power to set aside an order granting leave to apply for judicial review under Order 53 Rule 14(4) of the White Book. However, the exercise of such power is discouraged and it is



only in exceptional circumstances where it can be shown that the application does not raise questions fit for further investigation at trial and consequently that the application will clearly fail that this power will be exercised. This position was affirmed by the Supreme Court in the case of **The Attorney General v. Nigel Kalonde Mutuna and two Others**<sup>3</sup>.

I am further persuaded by the decision in the case of **Nigel Kalonde Mutuna and two others v. The Attorney General**<sup>4</sup> and **Patience Chalwe and another v. The Attorney General**<sup>5</sup>, where the grounds on which leave to apply for judicial review may be set aside were highlighted and these are-

- 1. A serious material non-disclosure;***
- 2. Where an alternative remedy was available but not used by the applicant e.g. an appeal***
- 3. Undue delay on the applicant's part;***
- 4. Where the proceedings are not properly constituted;***
- 5. Failure to disclose an arguable case.***

I will now consider the grounds on which the respondents seek to have the order granting leave discharged. Firstly, it is argued that the application for judicial review was not made promptly in any event that it was not made within 3 months from the date the



grounds for judicial review first arose. Order 53 Rule 4(1) of the Rules of the Supreme Court provides-

***An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made.***

I am persuaded by the interpretation that was given in the case of **the State and the Secretary Public Service Commissioner v. Ex parte Saverio Baleikanacea**.<sup>6</sup> That an application for judicial review should be made promptly, meant that it be made as soon as is practicable, or as soon as the circumstances of the case will allow, but in any event within three months. The court also stated that the primary requirement is that the application is made promptly and the requirement of three months is a secondary provision. The court therefore, held that an application for leave can be refused even if made within three months if the circumstances of the case are such that it should have been made earlier than the date on which it was made even if made within the three months, including on the last day of the three months. **See: Public Service Commission v. Brian Singh and Public Service Appeals Board**<sup>7</sup>.



The Supreme Court in the case of **Zambia wildlife Authority and others v. Muteeta Community Resources Board Development Co-operative Society**<sup>8</sup> also considered when time will start to run where the decision sought to be impugned is part of a process which finally determined the rights of the applicant and the following was stated citing with approval the decision of the Court of Appeal in the Fuji case of **the State v The Secretary Public Service Commissioner and Others ex parte: Anare Vuniwa**<sup>9</sup>:

*The assumption must be that where the decision which is sought to be impugned were taken merely as part of process which finally determined the applicant's rights or obligation, then the correct course should be to wait the final outcome of the process before applying for leave to prove the judicial review.*

The above authority was also affirmed by the Supreme Court in the case of **Butler Asimbuyu Sithali v. The Anti Corruption Commission**<sup>10</sup>. The applicant should have been on alert and thus promptly applied for leave for judicial review when he noticed the delay and reluctance on the part of the respondent's officers to avail him the warrant of seizure when requested for the same.



In the present case, the respondents contend that the grounds for judicial review first arose on 15<sup>th</sup> July, 2014 when the Chief Immigration Officer issued the Notice to Prohibited Immigrant to leave the country which Notice is exhibited in the Affidavit verifying facts marked **"JB5"**. The applicant's counsel has not disputed this allegation. On the evidence before me, I find that the grounds for judicial review first arose on 15<sup>th</sup> July, 2014 when the Notice to Prohibited Immigrant to leave the country was issued and served on the applicant and pursuant to which Notice the applicant was deported from the country on even date as is confirmed by the exhibit marked **"JB6"**.

I am further of the view that the present case does not fall within principle in the case of **the State v. The Secretary Public Service Commissioner and Others ex parte: Anare Vuniwa<sup>9</sup>** cited above. In any event, section 10 (4) of the Immigration Act mandates the Minister once an appeal has been lodged to render a decision within 10 days from the date of receipt of the appeal. I am therefore, of the considered view that the applicant not having received a response within the prescribed 10 days after lodging his appeal,



which appeal as confirmed by the exhibit marked “**JB6**” was lodged within three months from the date the decision to deport him was made, the applicant ought to have promptly lodged his application for judicial review as opposed to waiting for two years from 23<sup>th</sup> September 2014 to 30<sup>th</sup> September, 2017, when he allegedly received a response to his appeal.

Further, I am guided by the decision in the case of the **People v. The Registrar of the Industrial Relations Court (Ex parte Zambia Revenue Authority)**<sup>11</sup>, where the court stated that judicial review applications are very urgent applications and that there is need for strict observance of the mandatory procedural requirements of the law. Further, that since the application for judicial review was made out of time, the lower court did not have jurisdiction to deal with the application for leave to issue judicial review proceedings. The court guided that the applicant should have first applied for leave for an extension of time within which to apply for leave to issue judicial review proceedings and only after that leave was granted, should the applicant have applied for leave to apply for judicial review.




In the light of the foregoing, I find that the applicant in the present case, having been out of time to apply for leave to issue judicial review proceedings, this court had no jurisdiction to entertain the application for leave to apply for judicial review. The applicant should have first made an application for leave for an extension of time within which to apply for leave to issue judicial review proceedings. In the light of the foregoing, I hereby discharge the Order granting leave to apply for judicial review dated 21<sup>st</sup> November, 2017. In view of the above, I vacate my Order allowing the Applicant to enter the country freely until the determination of the matter. I shall not delve into the other grounds on which the respondent sought to have the order granting leave to apply for judicial review discharged.

I award costs to the respondents

Leave to appeal is granted.

**Delivered at Lusakathe.....10<sup>th</sup> day of.....May.....2018.**

  
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**MATHEW. L. ZULU**  
**HIGH COURT JUDGE**