

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



2023/HP/2307

IN THE MATTER OF:

ORDER 53 OF THE RULES OF THE SUPREME COURT OF ENGLAND, 1999 EDITION

AND

IN THE MATTER OF:

SECTION 34,35, 36, 37, 38 AND 39 OF THE IMMIGRATION AND DEPORTATION ACT NO 18 OF 2010 OF THE LAWS OF ZAMBIA

AND

IN THE MATTER OF:

AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND

IN THE MATTER OF:

RESIDENCE PERMITS NO RP198640/5-20 AND RP196170/4-20

AND

IN THE MATTER OF:

INVESTORS PERMIT NO IP315381/8-22

AND

IN THE MATTER OF:

DEPORTATION OF HAN HO BAE, PAN PENG AND JIA YUQI

BETWEEN:

THE PEOPLE

APPLICANT

AND

THE DIRECTOR GENERAL OF IMMIGRATION
THE ATTORNEY GENERAL

1st RESPONDENT
2nd RESPONDENT

BEFORE HON MRS JUSTICE S. KAUNDA NEWA IN CHAMBERS THIS 26th DAY OF JANUARY, 2024

For the Applicant : Mr M. Tembo, Messrs G.M Legal Practitioners
For the Respondents : Mr K. Chipulu, Senior State Advocate, Attorney General Chambers

R U L I N G

CASES REFERRED TO:

1. *Ibrahim Mohammed Sherrif Nor v Attorney General* 1979 ZR 183
2. *William Steven Banda v The Chief Immigration Officer and the Attorney General* SCZ/8/197/92
3. *Phillip Mutantika and Sheal Mulyata v Kenneth Chipungu* SCZ No 13 of 2014

LEGISLATION REFERRED TO:

1. *The Rules of the Supreme Court of England, 1999 Edition*
2. *The Immigration and Deportation Act No 18 of 2010*

1. INTRODUCTION

- 1.1 The Applicants, Han Ho Bae, Pang Peng and Jia Yuqi, by this application, seek an Order of this Court to grant them temporary permits pending determination of the Judicial Review proceedings. The amended application which was filed on 8th January, 2024, is supported by an affidavit in opposition and a List of Authorities and Skeleton Arguments.
- 1.2 In opposition to the application, the Director General of Immigration and the Attorney General filed an affidavit in opposition and a List of Authorities and Skeleton Arguments in opposition on 16th January, 2024.

2. BACKGROUND

- 2.1 Han Ho Bae, Fang Peng and Jia Yuqi seeking to challenge the decision by the Director General of Immigration to deport them, on 29th December, 2023, applied ex-parte for leave to file pleadings during the Christmas vacation pursuant to **Order 2 Rule 4 of the High Court Rules, Chapter 27 of the Laws of Zambia**. On leave being granted on 30th

December, 2023, the Notice of the application for leave to apply for Judicial Review was filed on the same day.

- 2.2 Leave to commence the said Judicial Review proceedings was granted on the said 30th December, 2023. Thereafter, the Notice of the Application for Judicial Review was filed on 3rd January, 2024, and was amended on 8th January, 2024. On that date as already seen, the application for the issuance of temporary permits to Han Ho Bae, Pang Peng and Jia Yuqi was also filed.

3. AFFIDAVIT IN SUPPORT

- 3.1 The affiant of the affidavit, Malizani Tembo, Counsel seized with conduct of the matter, on behalf of Han Ho Bae, Pang Peng and Jia Yuqi, gives a background to the matter as I have highlighted in paragraphs 2.1 and 2.2 above. It is further his averment, that upon this Court granting leave to apply for Judicial Review which operated as a stay of the decision of the Director General of Immigration, the co-advocates rushed to Ndola in Order to effect service on the Director General of Immigration, as Han Ho Bae, Pang Peng and Jia Yuqi had been taken there to exit the country through Simor. Mwansa Kapwepwe international airport.
- 3.2 However, the officers there, refused to receive the Court process. The gate pass for Jia Yuqi is exhibited as 'MT3'. Also deposed, is that Han Ho Bae and Jia Yuqi were granted residents permits, while Pang Peng was granted an investor's licence. It is contended that they were denied opportunity to challenge any notice or warrant that was issued by the Hon

Minister of Home Affairs and Internal Security, as required to be done before a final removal or deportation Order.

3.3 The averment is that despite Han Ho Bae, Pang Peng and Jia Yuqi having been declared as prohibited immigrants classified as Class H Sub Class b, they can still be admitted and allowed to enter Zambia upon the grant of temporary permits. It is also stated that during the period that Han Ho Bae, Pang Peng and Jia Yuqi were appearing before the Subordinate Court for the criminal offences for which they were subsequently discharged, they obeyed the conditions of the bail or bond, and did not leave the country until the matter was concluded.

3.4 Further in averment, it is stated that Han Ho Bae, Pang Peng and Jia Yuqi are desirous of being present and render evidence during the Judicial Review proceedings, as they are the persons that were subjected to the entire ordeal of the deportation process from Lusaka until the final expulsion in Ndola.

4. LIST OF AUTHORITIES AND SKELETON ARGUMENTS IN SUPPORT

4.1 It is argued that the application has been made pursuant to ***Order 53/14/48 of the Rules of the Supreme Court of England*** which empowers this Court to make interim Orders, and states as follows:

“The jurisdiction to grant interim relief in judicial review proceedings arises on the grant of leave to move for judicial review. An application for an

interlocutory injunction or other interim relief can be made ex parte with the application for leave."

- 4.2 Other arguments advanced, relate to the purpose of Judicial Review proceedings. It is also argued that Zambia has ratified human rights protocols and *Article 10 of the Universal Declaration on Human Rights*. The argument is further that Zambia, like any other nation, recognises the rights of individuals, regardless of their nationality, which right is enshrined in **Section 5 (3) of the Immigration and Deportation Act**.
- 4.3 Still in argument, the contention is that under **Section 27 of the Immigration and Deportation Act**, a temporal permit may be issued.

5. AFFIDAVIT IN OPPOSITION

- 5.1 By way of opposing the application, Kelvin Chipulu, the advocate in conduct of the matter on behalf of the Director General of Immigration and the Attorney General, avers that prior to their deportation, Han Ho Bae, Pang Peng and Jia Yuqi were facing charges of human trafficking, sexual exploitation and giving false information. He states that during the course of those criminal proceedings, the Director of Public Prosecutions (DPP) entered a nolle prosequi, which saw the criminal proceedings being discontinued.
- 5.2 Counsel deposes that such termination of the criminal proceedings does not mean that Han Ho Bae, Pang Peng and Jia Yuqi were exonerated. He further avers that Han Ho Bae, Pang Peng and Jia Yuqi were deported after their presence

in the country was deemed to be inimical to good order. Further, that they fall in the class of prohibited immigrants that are not entitled to be issued temporary permits.

- 5.3 It is also stated that to Counsel's belief, there was no requirement to grant Han Ho Bae, Pang Peng and Jia Yuqi opportunity to challenge the warrants of deportation that were issued by the Minister of Home Affairs and Internal Security.

6. LIST OF AUTHORITIES AND SKELETON ARGUMENTS IN OPPOSITION

- 7.1 The law relied on, in opposing the application is cited as ***Section 35 of the Immigration and Deportation Act***, stating that under that provision, any person who belongs to a Class that is set out in the Second Schedule shall be a prohibited immigrant, and shall not qualify for a visa, temporary resident permit or admission in any other manner. Class B in the Second Schedule which provides that prostitutes or person who are engaged in human trafficking is highlighted in that regard.
- 7.2 It is argued that ***Section 35 of the Immigration and Deportation Act*** uses the word "shall", connoting that it is a mandatory requirement. In support of that position, the case of ***Phillip Mutantika and Sheal Mulyata v Kenneth Chipungu*** ⁽³⁾ is relied on, as having held that provisions that use the word "shall" are couched in mandatory terms. Thus, by using the word "shall", the

provision is not regulatory, and does not give the Court discretionary power.

7. SUBMISSIONS AT THE HEARING

SUBMISSIONS BY COUNSEL FOR HAN HO BAE, PAN PENG AND JIA YUQI

- 7.1 In submitting, Counsel stated that they relied on the affidavit that was filed in support of the application, together with the List of Authorities and Skeleton Arguments in support. By way of augmentation, Counsel submitted that the Order that granted leave to commence Judicial Review proceedings was clear, that the leave would operate as a stay of the Director General of Immigration's decision.
- 7.2 It was added that the record was clear that the Director General of Immigration was fully aware of the Court proceedings of both the 30th and 31st December, 2023, as evidenced by the affidavit of service.
- 7.3 On the word "stay" of a Judgment, the case of ***William Steven Banda v The Chief Immigration Officer and the Attorney General*** (2) was called to aid as authority, stating that the Supreme Court in that matter, in clarifying the meaning of Order of stay of Judgment, stated that it meant any doubt as to the nationality of the applicant was in abeyance, until such time that the appeal was disposed of.
- 7.4 Therefore, in this matter, this Court having stayed the actions of the Director General of Immigration, the application made, sought the revival of what the Court had earlier ordered. It was also Counsel's submission that

Section 35 (3) of the Immigration and Deportation Act is clear in provision, that where a matter is pending before any Court in Zambia, the grant of a temporal permit is proper.

- 7.5 Still in submission, it was stated that Han Ho Bae, Pan Peng and Jia Yuqi are resident permit holders, and reliance was placed on the case of ***Ibrahim Mohammed Sherrif Noor v Attorney General*** ⁽¹⁾ stating that the said case is instructive, that declaring an established resident who lawfully acquired such status, as a danger to good Order is invalid at law.
- 7.6 Counsel also submitted that the Attorney General had argued that Han Ho Bae, Pan Peng and Jia Yuqi were discharged of the criminal charges that they were facing prior to their deportation. The view taken, was that being the position, the State did not have conclusive evidence to prosecute the alleged offences.
- 7.7 Thus, the prayer was that this Court gives effect to its' initial Order which would enhance its' dignity and respect, especially in the eyes of those who hold public office.

RESPONSE BY COUNSEL FOR THE DIRECTOR GENERAL OF IMMIGRATION AND THE ATTORNEY GENERAL

- 7.8 It was stated in response, that in opposing the application, the State relied on the affidavit in opposition and the List of Authorities and Skeleton Arguments in opposition, which were filed on 16th January, 2024. In augmenting, the submission reiterated that Han Ho Bae, Pan Peng and Jia Yuqi were discharged of the criminal offences that they were facing, following the entry of a nolle prosequi by the DPP.

- 7.9 Thus, contrary to the assertions by Counsel for Han Ho Bae, Pan Peng and Jia Yuqi, that the State did not have evidence to prosecute them on the charges, that is not the only reason why a nolle prosequi is, and can be entered. The submission was that as a matter of law, the DPP is not obliged or required to give reasons for entering a nolle prosequi.
- 7.10 Therefore, it was an assumption, which should be treated as such, that the State did not have any evidence to prosecute. Counsel therefore reiterated the prayer that the application be dismissed.
- 7.11 It was also submitted in the alternative, that should the Court be of the view that Han Ho Bae, Pan Peng and Jia Yuqi are entitled to be granted temporal permits, the same should be tied to the hearing of the Judicial Review proceedings.

REPLY BY COUNSEL FOR HAN HO BAE, PAN PENG AND JIA YUQI

- 7.12 The reply was that entry of nolle prosequi's is a well-known function of the DPP. As such, whether reasons were given or not, it remained that Han Ho Bae, Pan Peng and Jia Yuqi were discharged. Counsel agreed with the alternative submission by Counsel for the Director General of Immigration and the Attorney General.

8. DECISION OF THIS COURT

- 8.1 I have considered the application. It was made pursuant to *Order 53/14/48 of the Rules of the Supreme Court of England*. That Order states that:

“The jurisdiction to grant interim relief in judicial review proceedings arises on the grant of leave to move for judicial review. An application for an interlocutory injunction or other interim relief can be made ex parte with the application for leave. In deciding whether to grant interlocutory relief at the ex parte stage, the Judge should consider whether the urgency and the other circumstances of the case warrant the grant of ex parte relief and should have regard to the approach adopted in the case of applications under O.29 for ex parte relief. Unless the Judge is satisfied that the urgency and other circumstances of the case justify the grant of ex parte relief, he should adjourn the application for interlocutory relief for inter partes hearing.

With a view to avoiding two hearings, the applicant should give notice to the Respondent (s) of any ex parte application for interim relief, so that the Respondent (s) can consider whether to attend the ex parte hearing and make representations.”

- 8.2 The above provision is clear, in explaining that a Judge can grant interim relief on granting leave to commence judicial review proceedings, looking at the urgency and circumstances of the case. The evidence on record, shows that Han Ho Bae, Pan Peng and Jia Yuqi were deported after

they were discharged of the criminal charges that they were facing in the Subordinate Court.

8.3 The interim relief sought, is that they be granted temporal permits pending the hearing of the Judicial Review proceedings, so that they can give evidence in that regard. The grant of temporal permits is governed by the ***Immigration and Deportation Act No 18 of 2010***.

8.4 ***Section 27 of the said Immigration and Deportation Act*** provides as follows:

“27. (1) An immigration officer may issue a temporary permit to a prohibited immigrant or to any person in respect of whom the Minister directs that such permit be issued.

(2) An immigration officer may, as a condition precedent to the issuance of a temporary permit, require a prohibited immigrant or any other person to deposit such sum, not being more than a prescribed amount, for the purpose of securing compliance with the conditions specified in the permit and, if any such condition is not complied with, the Director-General of Immigration shall authorise that the money be used for purposes of deporting the person or that the money be forfeited to the State.

(3) A temporary permit shall specify the prescribed conditions attaching to the permit and the period of the permit’s validity, except that no period in

excess of ninety days shall be specified without the approval of the Director-General of Immigration.

(4) Except under a temporary permit, any person who belongs to class C specified in the Second Schedule and who returns to Zambia commits an offence and is liable, upon conviction, to a fine not exceeding two hundred thousand penalty units or to imprisonment for a period not exceeding two years, or to both."

- 8.5 It will further be seen that the provisions of **Section 35 of the said Act** are:

"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.

(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.

(3) Subject to section thirty six, the presence within Zambia of any prohibited immigrant shall be unlawful and such person shall be arrested without warrant, detained and deported from Zambia in accordance with this Act:

Provided that if the prohibited immigrant has a pending case before any court, the prohibited immigrant shall not be deported from Zambia until after the determination of the prohibited immigrant's case before the court.

(4) An immigration officer may take or cause to be taken in the officer's presence for the purposes of record and identification, the measurements, photograph, finger and palm prints of any prohibited immigrant:

Provided that all records of the measurements, photograph, finger and palm prints shall be destroyed or handed over to a person who an immigration officer is satisfied has ceased to be a prohibited immigrant and who makes an application in that behalf.

(5) Notwithstanding subsection (1), the Minister may, in the prescribed manner, exempt any person from all or any of the classes set out in the Second Schedule."

8.6 The Second Schedule of the Act states that:

SECOND SCHEDULE

(Section 35)

Classes of Prohibited Immigrants

Class A

Persons capable of transmitting a prescribed disease

Any person who is infected or inflicted with or is a carrier of a prescribed disease and who is capable or likely to become capable of infecting any other person with such disease or of transmitting to any person such disease.

Class B

Prostitutes and persons engaged in human trafficking etc.

Any prostitute or person who, in Zambia, is or has engaged in human trafficking.

Class C

Persons previously deported or barred from the country

Any person who under any law in force at the time has been deported or removed from, required to leave, or prohibited from entering into or remaining within Zambia:

Provided that a person with respect to whom an immigration officer is satisfied that the ground on which the person was so dealt with no longer applies to the person shall not belong to this Class.

Class D

Persons whose permits to remain in Zambia become invalid

Any person in Zambia with respect to whom a permit to remain in Zambia has been revoked or has expired.

Class E

Any person, not being the holder of a valid permit to remain in Zambia, who—

- (a) is likely to become a charge on the Republic in consequence of the person's inability to support the person's self and any of the person's dependants in Zambia and to provide for the removal of the person's self and such dependants from Zambia;*
- (b) has contravened any provision of this Act or regulations made hereunder or has failed to comply with any lawful requirement made under this Act or such regulations;*
- (c) remains in Zambia for a period or periods totalling not less than three months in any period of twelve months; or*
- (d) has made any false representation to or concealed any information from an immigration officer which is relevant to the person's entry into or presence within Zambia.*

Class F

Persons entering without proper travel documents Visitors who are likely to be a charge on the Republic or who contravene this Act, etc.

Any person appearing before an immigration officer on entering Zambia, who is of the apparent

age of sixteen years or more and who, on demand by the immigration officer, fails to establish that the person is the holder of a valid passport.

Class G

Persons who fail to report to an immigration officer on entering Zambia.

Any person entering Zambia who is required under section eleven to appear before an immigration officer and who fails to comply with the provisions of that section.

Class H

Any person who—

(a) before entering Zambia has been sentenced elsewhere than in Zambia to a term of imprisonment following that person's conviction of an offence;

(b) in the opinion of the Director-General of Immigration is not of good character; and

(c) has been convicted of an offence in Zambia.

- 8.7 In this case, while the deportation orders have not been exhibited, the affidavit deposed to on behalf of Han Ho Bae, Pan Peng and Jia Yuqi states that they were deported and declared as Prohibited Immigrants, classified as Class H sub class b. In line with that, they fall under the Second Schedule of the Act, that provides that, that class of

- prohibited immigrants are not eligible to be granted visas, temporal permits or indeed admission in any other manner.
- 8.8 Han Ho Bae, Pan Peng and Jia Yuqi were not declared as prohibited immigrants and deported pursuant to Class B of the Second Schedule contrary to arguments by the Attorney General. While it may be that they were discharged on charges of human trafficking, sexual exploitation and giving false information, Counsel who deposed to the affidavit on their behalf, averred that they were deported under Class H sub Class b.
- 8.9 In fact, the Attorney General admits that averment in the affidavit in opposition. Be that as it may, the Second Schedule of the Act states the class of prohibited immigrants who are not eligible for the grant of visas, temporal permits or admission in any other manner.
- 8.10 However, it will be seen that under **Section 35 (3) of the Immigration and Deportation Act**, a person who is declared as a Prohibited Immigrant, shall not be deported while a matter is pending in Court. That in itself, entitles such persons to be granted temporal permits pending determination of Court proceedings.
- 8.11 That being the position, it follows that a prohibited immigrant who falls under the Second Schedule is eligible to be granted a temporal permit, as long as there are pending Court proceedings in their respect, and that is an exception to the provision in **Section 35 (1)**.

- 8.12 That said, and line with the enhancing human rights in the conduct of such cases, I direct, that as there are pending Judicial Review proceedings that have been instituted by Han Ho Bae, Pan Peng and Jia Yuqi who were deported following their declaration as prohibited immigrants, challenging such decision, that the Immigration Officer pursuant to **Section 27 of the Immigration and Deportation Act** shall issue temporary permits to them, which temporal permits shall be valid only for the period that the Judicial Review proceedings shall remain in place.
- 8.13 The matter shall come up on 31st January, 2024 for hearing of the Judicial Review proceedings at 14:30 hours. Costs shall be in the cause, and leave to appeal is granted.

DATED AT LUSAKA THE 26th DAY OF JANUARY, 2024

Kaunda
S. KAUNDA NEWA
HIGH COURT JUDGE

