

03 MAY 2024

**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 3rd DAY OF MAY, 2024

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

J U D G M E N T

CASES REFERRED TO:

1. *Associated Provincial Pictures Houses Limited v Wednesbury Corporation* 1948 1 KB 223
2. *Commissioner of Police v Tanos* (1957) HCA 73-98 CLR 383 (1958) ALR 1057
3. *Anisminic Limited v Foreign Compensation Commission* 1969 2 AC 147
4. *Nkumbula v Attorney General* 1972 ZR 204
5. *Alexander v Crabtree* CA 1974
6. *R v Immigration Appeal, Ex-parte Khan* 1982 2 ALL ER
7. *Council of Civil Servants Union & others v Minister of State for the Civil Service (House of Lords)* 1984 3 ALL ER 950
8. *Kioa v West* (1985) 159 CLR 55
9. *Doody v Secretary of State for the Home Department* 1994 1 AC 331
10. *Derrick Chitala v Attorney General Appeal No. 92 of 1995*
11. *Mungomba and others v Machungwa and others* 2003 ZR 17
12. *Frederick Chiluba v The Attorney General* 2003 ZR
13. *Nyampala Safaris and others v Zambia Wildlife Authority and others* 2004 ZR 49
14. *Roy Clarke v Attorney General* 2008 Vol 1 ZR 38
15. *Chief Immigration Officer, the Minister of Home Affairs and the Attorney General v John Eric Toome* 2011 Vol 2 ZR 1
16. *North Western Energy Corporation v The Energy Regulation Board*, 2011 Vol 2 ZR 512
17. *Folayinka Fobisaiye Oladipo v The Attorney General Appeal No 96/2014 [2016] ZMSC 223 (9 Dec 2016)*

LEGISLATION REFERRED TO:

1. *The Rules of the Supreme Court of England, 1999 Edition*
2. *The Immigration and Deportation Act Chapter 123 of the Laws of Zambia*
3. *The Immigration and Deportation Act No 18 of 2010*
4. *The Penal Code, Chapter 87 of the Laws of Zambia*

1. INTRODUCTION

- 1.1 After the Applicants, Han Ho Bae, Pang Peng and Jia Yuqi sought to challenge the decision by the Director General of Immigration to deport them, on 29th December, 2023, by applying 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,

leave was granted on 30th December, 2023.

- 1.2 The Notice of the application for leave to apply for Judicial Review was filed on the same day. Thereafter, leave to commence the said Judicial Review proceedings was granted on the said 30th December, 2023. Then on 3rd January, 2024, the Notice of the application for Judicial Review was filed, and it was amended on 8th January, 2024. The Notice was supported by an affidavit verifying facts and a List of Authorities and Skeleton Arguments.
- 1.3 A further affidavit verifying facts was filed on 19th February, 2024, and Skeleton Arguments and a List of Authorities in support of the further affidavit in support was filed on 20th February, 2024.
- 1.4 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 29th February, 2024. An affidavit in reply was filed on 3rd March, 2024.

2. NOTICE IN SUPPORT OF THE APPLICATION FOR JUDICIAL REVIEW

- 2.1 The decision in respect of which relief is sought was stated as:
 1. Han Ho Bae, Pang Peng and Jia Yuqi challenged the decision of the Director General of Immigration to deport them from the Republic of Zambia; and
 2. Han Ho Bae, Pang Peng and Jia Yuqi challenged the decision of the Director General of Immigration by

declaring them prohibited Immigrants contrary to the Act.

2.2 The reliefs sought were named as:

- i. *An Order of certiorari to move into the High Court for the purpose of quashing the decision of the Director General of Immigration;*
- ii. *A declaration that Han Ho Bae, Pang Peng and Jia Yuqi are not prohibited immigrants within the meaning of Section 35 of the Immigration and Deportation Act No 18 of 2010 (hereinafter referred to as the Act);*
- iii. *A declaration that the Director General of Immigration's decision violated Sections 36 and 38 of the Act;*
- iv. *An Order of mandamus to compel the Director General of Immigration to renew Pang Peng's investor's permit;*
- v. *An Order of mandamus to compel the Director General of Immigration to restore Han Ho Bae and Jia Yuqi's residence permits.*
- vi. *An Order for costs;*
- vii. *And that all necessary and consequential directions be given.*

2.3 The grounds upon which relief is sought are:

ILLEGALITY

- (a) *The decision by the Director General of Immigration to deport Han Ho Bae, Pang Peng and Jia Yuqi from Zambia was illegal, as it contravened Section 35 of the Act which defines who a prohibited immigrant is.*
- (b) *The power to deport a person under Section 35 (3) of the Act is limited to persons who have been declared prohibited immigrants within the meaning of the Act. In*

the present case, Han Ho Bae, Pang Peng and Jia Yuqi did not fall into either category of persons that are prohibited immigrants. Further, Han Ho Bae, Pang Peng and Jia Yuqi have never had and have never been declared to be persons whose presence in Zambia is inimical to the public interest by the Minister.

- 2.4 The case of ***Mungomba and others v Machungwa and others*** ⁽¹¹⁾ was stated as having held that:

“As Order 53 says that any person can challenge an administrative act or omission, the people who can apply are those who feel they are affected by the administrative act or omission.”

- 2.5 Further authority was sought from the case of ***Derrick Chitala v Attorney General*** ⁽¹⁰⁾ stating that the Supreme Court in that matter held as follows:

“By “illegality” as a ground for judicial review, I mean that the decision maker must understand correctly the law that regulates his decision-making power and must give effect to it.”

- 2.6 That ***Section 36 of the Act*** confers on Han Ho Bae, Pang Peng and Jia Yuqi with a legal entitlement at the barest minimum, to make representation to the Minister of Home Affairs and Internal Security within the prescribed time, and unfortunately the Director General of Immigration acted in a manner that made it impossible, in contravention of the law.

PROCEDURAL IMPROPRIETY

- 2.7 It was contended that the Director General of Immigration was under a mandatory duty not to eject Han Ho Bae, Pang

Peng and Jia Yuqi from Zambia, in a period of less than Forty-Eight (48) hours from the time of service of the notice.

- 2.8 In the case of Han Ho Bae, Pang Peng and Jia Yuqi, the notice was served on them at Simon Mwansa Kapwepwe International Airport in Ndola, as they were being ejected from Zambia, contrary to the specified procedure under **Section 32 (2)**. The deportation of Han Ho Bae, Pang Peng and Jia Yuqi was in this regard fraught with procedural impropriety.
- 2.9 It was further contended that Han Ho Bae, Pang Peng and Jia Yuqi had the right under **Section 38** to make representations to the Immigration Officer within 48 hours of receipt of the notice. The Director General of Immigration in deporting Han Ho Bae, Pang Peng and Jia Yuqi by misleading them that they were to pick the permits, and taking them to a location upon being apprehended, and a notice under **Section 36** being served on them on the date of ejection, denied Han Ho Bae, Pang Peng and Jia Yuqi their statutory right to make representations, and to contest the Director General's decision.
- 2.10 Han Ho Bae, Pang Peng and Jia Yuqi referred to the decision in the case of **Roy Clarke v Attorney General** ⁽¹⁴⁾ stating that the Supreme Court in that matter held that:

“There is a presumption that procedural fairness is required whenever the exercise of a power adversely affects an individual's rights protected by common law or created by statute.”

3. SUBMISSIONS AT THE HEARING

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

- 3.1 At the hearing, Counsel for Han Ho Bae, Pang Peng and Jia Yuqi submitted that they applied for judicial review, and relied on the affidavit verifying facts, which was filed on 30th December, 2023, as well as the statement of even date and the further affidavit verifying facts which was filed on 19th February, 2024. It was also Counsel's submission that they relied on the affidavit in reply which was filed on 13th March, 2024.
- 3.2 Further reliance was placed on the List of Authorities and Skeleton Arguments filed in support of the application, on 8th January, 2024 and 20th February, 2024. It was Counsel's prayer that the reliefs sought be granted.

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

- 3.3 It was stated in response, that in opposing the application, reliance was placed on the affidavit in opposition and the List of Authorities and Skeleton Arguments in opposition which were filed on 29th February, 2024.
- 3.4 In augmenting, Counsel submitted that it is settled in this jurisdiction, that the remedy of judicial review is not concerned with the merits of the decision, but with the decision-making process itself. It was stated that Han Ho Bae, Pang Peng and Jia Yuqi sought to impugn the decision of the Director General of Immigration to deport them on the grounds of illegality and procedural impropriety.

- 3.5 However, it was their submission that in determining whether there was illegality in the manner that Han Ho Bae, Pang Peng and Jia Yuqi were deported, the Court would have to consider:
1. Who had the power to deport Han Ho Bae, Pang Peng and Jia Yuqi;
 2. Who deported Han Ho Bae, Pang Peng and Jia Yuqi.
- 3.6 Counsel further submitted that the evidence on record showed that Han Ho Bae, Pang Peng and Jia Yuqi were deported under **Section 39 (2) of the Immigration and Deportation Act**. It was stated that under that provision of the law, and Immigration Officer, has power, if they are of the view, that the presence of an individual within the country, is inimical to good order and national security, to deport such a person, provided that the deportation is done under a warrant that is signed by the Minister.
- 3.7 Still in submission, Counsel stated that **Section 3 of the Immigration and Deportation Act**, defines an Immigration Officer, as including the Director General of Immigration. Therefore, in line with the definition, the Director General of Immigration had power to deport Han Ho Bae, Pang Peng and Jia Yuqi, on the provisions of **Section 39 (2) of the Act** being satisfied.
- 3.8 The addition was that, exhibited to the affidavit in opposition were the warrants of deportation, which were signed by the Minister of Home Affairs. It was contended therefore, that the deportations were not done ultra vires the Act.

- 3.9 As regards the second ground for seeking the application, being procedural impropriety, Counsel stated that this was defined in the case of ***North Western Energy Corporation v The Energy Regulation Board*** ⁽¹⁶⁾, as including failure to observe the rules of natural justice and the procedural rules that are laid down in a statute.
- 3.10 Thus, this Court, in determining this ground, should establish whether the procedural rules were followed when deporting Han Ho Bae, Pang Peng and Jia Yuqi. The case of ***Nyampala Safaris Limited and others v Zambia Wildlife Authority and others*** ⁽¹³⁾ was stated as having guided that a decision can be quashed, where the rules of natural justice, if applicable, have not been complied with.
- 3.11 The view taken, was therefore that there are circumstances when an Act of Parliament may provide procedural rules that do not include the rules of natural justice. The submission by Counsel, was this is what appeared to be the case, under ***Section 39 of the Immigration and Deportation Act***. He based this submission, on the argument, that under ***Section 39 (5) of the Act***, once a warrant is duly signed, an individual is detained or removed from Zambia at the earliest possible opportunity.
- 3.12 Counsel went on to state that the second requirement is that where the individual is in custody, the authorities will proceed to remove them from the country. It was also Counsel's submission that under that Section, there is no provision for the individual to be heard.
- 3.13 Consequently, in the context of the holdings in the cases ***North Western Energy Corporation v Energy Regulation***

Board ⁽¹⁶⁾ and **Nyampala Safaris Limited and others v Zambia Wildlife Authority and others** ⁽¹³⁾, the only requirement that was placed on the Director General of Immigration, after the warrant was signed by the Minister of Home Affairs and Internal Security, was to arrest and detain Han Ho Bae, Pang Peng and Jia Yuqi, and deport them at the earliest possible instance.

3.14 It was stated that Han Ho Bae, Pang Peng and Jia Yuqi, in the affidavit verifying facts had attested to this. Counsel's contention was that in keeping in mind that Han Ho Bae, Pang Peng and Jia Yuqi had only advanced Two (2) grounds in seeking the application, it was clear that there was neither illegality nor procedural impropriety in the manner that they were deported.

3.15 On that premise, the prayer was that the application should fail, with costs.

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

3.16 In reply, Counsel stated that invitation was made to the Court, to strictly observe the conduct of the person who was charged with the responsibility of implementing the **Immigration and Deportation Act**. Counsel's submission was that the use of power was cardinal in analyzing whether it was used fairly and properly.

3.17 The submission was further that this Court would observe that the matter began in June, 2023, and Han Ho Bae, Pang Peng and Jia Yuqi were discharged of the criminal charges that they were facing. Thus, they were innocent of the allegations of giving false information and human

trafficking. It was stated that there is a presumption of innocence, until one is proven guilty.

- 3.18 Therefore, it was surprising that persons who were in the country from June, 2023 to December, 2023 would be deemed to be inimical to the State. Counsel still in reply also submitted that the requirement that the deportation be done at the first reasonable opportunity was not used in the manner in which it is couched by the law. This, he submitted, was because there was delay for a period, and to deem innocent individuals as a threat to peace was illegal and defeated the procedural requirements.
- 3.19 Reliance was placed on the case of **Attorney General v Roy Clarke** ⁽¹⁴⁾ as being applicable in relation to the speed at which the recommendation to deport Roy Clarke was made. The view taken was that in this case, the Director General of Immigration, was merely trying to remove Han Ho Bae, Pang Peng and Jia Yuqi illegally. Therefore, the application for judicial review should be granted.

4. DECISION OF THIS COURT

- 4.1 I have considered the matter. It is for the grant of judicial review. It is a trite principle of law, that judicial review proceedings are concerned not with the merits of the decision, but the decision-making process.
- 4.2 In the case of **Nyampala Safaris and others v Zambia Wildlife Authority and others** ⁽¹³⁾ the holding in that regard was as follows:

“That the remedy of judicial review is concerned not with the merits of the decision, but the decision-making process itself.

The purpose of judicial review is to ensure that the individual is given fair treatment by the authority, to which he has been subject and that it is not part of that purpose to substitute the opinion of the Judiciary or of the individual Judges for that of the authority constituted by law to decide the matter in question.

- 4.3 This is also reflected in the explanatory notes in ***Order 53/14/19 of the Rules of the Supreme Court of England, 1999 Edition***, which state the scope of judicial review as:

“The remedy of judicial review is concerned with reviewing, not the merits of the decision in respect of which the application for judicial review is made, but the decision-making process itself. It is important to remember in every case that the purpose of [the remedy of judicial review] is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question.”

- 4.4 A review of the affidavits and the List of Authorities and Skeleton Arguments that have been filed for and against the application in this matter, reveal that in the further affidavit verifying facts, Han Ho Bae, Pan Peng and Jia Yuqi deposed that Han Ho Bae was granted a Residence Permit

No RP-196170/4-20, which was exhibited as 'BYP1' to the affidavit.

- 4.5 It was also averred that Pang Peng was granted an Investors' Permit No IP 315381/8-22, which expired on 16th August, 2023. However, prior to that licence expiring, as shown by the receipt exhibited as 'BYP2', Pang Peng had made an application to renew the said licence.
- 4.6 It was stated that Jia Yuqi was granted a residence permit No RP-198640/5-20, which was exhibited as 'BYP3'. The averment was that on 19th June, 2023, the Director General of Immigration detained Pang Peng and Jia Yuqi at Richard Kachingwe Police Station and directed Two (2) Immigration Officers to seize Jia Yuqi's butchery in Lusaka.
- 4.7 Then thereafter on 20th July, 2023, other Chinese nationals were arrested and were taken to Richard Kachingwe Police Station. The affidavit further shows that on 21st July, 2023, Han Ho Bae was detained by the Director General of Immigration at Kabwata Police Station. The contention was that Han Ho Bae, Pang Peng and Jia Yuqi were detained for Fifteen (15) days on the instructions of the Director General of Immigration.
- 4.8 Then on or around 7th July, 2023, the Three (3) were taken to Court at the Lusaka Magistrate's complex, and from there, they were remanded at the Lusaka Correctional Facility. In the meantime, Han Ho Bae, Pang Peng and Jia Yuqi applied for bail before the Magistrate which was granted. It was stated that they continued appearing in Court whilst on bail, until somewhere in September, 2023, when the matter was withdrawn by the State.

- 4.9 The further averment made, was that on the matter being withdrawn, the Three (3) were immediately rearrested, and were detained at Richard Kachingwe Police Station, until they applied for a Writ of Habeas Corpus, which was exhibited as 'BPY4'. Thus, they were taken to Court for the second time on 22nd September, 2023, for the alleged offences.
- 4.10 It was deposed that the passports which were exhibited as 'BPY5', were confiscated from them, when they were initially detained in June, 2023. Then following their release, Han Ho Bae, Pang Peng and Jia Yuqi went about their normal business, while the other Chinese nationals left the country.
- 4.11 The averment was that on 28th December, 2023, Han Ho Bae, Pang Peng and Jia Yuqi received notification to go and collect their immigration permits, from Immigration Headquarters in Lusaka. On arrival, the Three (3) were directed to go to Room 107, where they were informed by the Director General of Immigration that they needed to conduct an inspection.
- 4.12 The contention was that, in the absence of any due formalities, Han Ho Bae, Pang Peng and Jia Yuqi were escorted by officers of the Director General of Immigration onto a large bus, and their cell phones were confiscated and the sim cards for the phones were removed. Then they were driven north at high speed with Four (4) male Immigration Officers closely monitoring them, who exhibited behaviour that was closely compared with that of

kidnapping, transporting prisoners or taking someone for execution.

- 4.13 The averment was further that a brief stop was made at Kapiri Mposhi where they were halted by Police Officers, at which the Immigration Officers presented some documentation to allow them passage, and they continued receiving instructions on phone throughout the journey. Then on arrival in Ndola around 17:00 hours, Han Ho Bae, Pang Peng and Jia Yuqi were detained on the guise of inspection, at which body searches, constant surveillance and violence was executed.
- 4.14 It was also deposed that on the morning of 29th December, 2023, they were taken to what appeared to be a Chinese Lodge, where the Immigration Officers served them Chinese food. Thereafter, they were taken to what they later came to know as the Immigration Special Unit, where they were confined until 31st December, 2023, without access to communication.
- 4.15 The averment was that on that date, they were informed that they would be returned to Lusaka via aeroplane, and they were taken to Simon Mwansa Kapwepwe International airport using the unconventional back route, and were presented air tickets upon arrival at the airport. Then they were made to sign documents before their belongings were returned to them, and they were taken on board an Ethiopian Airlines aeroplane, when they were still uncertain about the contents of the paperwork.
- 4.16 Han Ho Bae, Pang Peng and Jia Yuqi contended that they did not know who paid for the operation and all the costs

related to food, accommodation and their air tickets. It was their assertion, that they experienced the worst abuse ever, and as foreigners, who were resident permit and investors' licence holders, who had lived in Zambia for more than Twenty-Three (23) years for Han Ho Bae, Five (5) years for Pang Peng and Sixteen (16) years for Jia Yuqi, they could not imagine that something so unjust could happen.

- 4.17 The averment was also that their passports were stamped that they were Prohibited Immigrants, classified as Class H (b), as shown on exhibit 'BPY7', and that they did not have sight of the warrant of deportation. That was how these proceedings were commenced, and despite this Court granting an Order, which was availed to the Immigration Officers in Room 107, those officers acting under some Orders compelled them to enter the aeroplane.
- 4.18 It was stated that they could not jointly depose to the affidavit, as Han Ho Bae arrived on 16th February, 2024, after the Director General of Immigration approved the grant of a temporal permit, which was exhibited as 'BPY8', which was issued by officers of the Director General of Immigration at Kenneth Kaunda International Airport.
- 4.19 Han Ho Bae, Pang Peng and Jia Yuqi deposed that the Director of Public Prosecutions entered a nolle prosequi and they were duly discharged of the criminal charges. They stated that they had not been convicted of any criminal offence. It was also their averment, that following their release on bail on 19th June, 2023, they complied with the bail conditions, and their individual or joint conduct

was never a threat to good Order. It was stated that they were not heard before being deported.

- 4.20 In the further List of Authorities and Skeleton Arguments, the provisions of **Sections 34-39 of the Immigration and Deportation Act** were cited. Also referred to, were **Sections 3 and 33 of the Penal Code, Chapter 87 of the Laws of Zambia**, as well as **Section 81 of the Criminal Procedure Code, Chapter 88 of the Laws of Zambia**.
- 4.21 The Director General of Immigration and the Attorney General in the affidavit in opposition, which was deposed to by Ian Mutamina, an Immigration Officer, was that prior to their expulsion, Han Ho Bae, Pang Peng and Jia Yuqi were involved in human trafficking, sexual exploitation and giving false information to an Immigration Officer.
- 4.22 He stated that, that was how they were later arrested and charged with the said offences, and they were taken to Court. However, the Director of Public Prosecutions entered a nolle prosequi, which resulted in the criminal proceedings being discontinued. The averment was that despite the entry of the nolle prosequi, that did not entail that Han Ho Bae, Pang Peng and Jia Yuqi were exonerated or cleared of the criminal offences.
- 4.23 It was also Ian Mutamina's contention, that the Director General of Immigration, had the power to arrest and detain Han Ho Bae, Pang Peng and Jia Yuqi pending their deportation. He added that their detention and deportation was done pursuant to warrants, which were duly signed by the Minister of Home Affairs and Internal Security, which were collectively exhibited as 'IM1'.

- 4.24 He stated that Han Ho Bae, Pang Peng and Jia Yuqi did not lodge any appeal prior to the Immigration Department or the Minister of Home Affairs to challenge their deportation. It was also his averment, that as advised by the advocates for the Director General of Immigration and the Attorney General, there is no avenue of appeal to the Immigration Department or the Minister for persons that are deported under a warrant that is signed by the Minister.
- 4.25 That arising from that, Han Ho Bae, Pang Peng and Jia Yuqi were properly and regularly deported. It was stated that no further instructions or notice was issued by the Director General of Immigration. The allegations stating that there were Chinese nationals who were allegedly involved in the criminal offences that Han Ho Bae, Pang Peng and Jia Yuqi were also facing, was said to be within their peculiar knowledge, as no details of the same had been provided.
- 4.26 The contention was that the passports and permits for Han Ho Bae, Pang Peng and Jia Yuqi were withdrawn to facilitate further investigations, and to prevent them from leaving the country before the matter was concluded, as they were a flight risk. It was stated that the named Chinese national left the country before Han Ho Bae, Pang Peng and Jia Yuqi were deported.
- 4.27 It was denied that unreasonable force was used on Han Ho Bae, Pang Peng and Jia Yuqi when they were escorted using a bus. The averment was that when being led to the bus which had other passengers, their phones were withdrawn and switched off, only for security purposes. The

assertion was further that contrary to the assertions, Han Ho Bae, Pang Peng and Jia Yuqi were informed that they would be deported through Simon Mwansa Kapwepwe International Airport.

- 4.28 Further, there was no use of unconventional back routes to take them to the airport, as there is only road that goes to the said airport. It was denied that Han Ho Bae, Pang Peng and Jia Yuqi were forced to sign any documents, but that rather, the contents of the deportation warrants were explained to them, and were duly served on them.
- 4.29 It was also stated that the costs incidental to the deportation, were borne by the State. The averment was that an Immigration Permit Holder, is not exempt from being answerable for any offence allegedly committed by them under the ***Immigration and Deportation Act*** or any other law. It was reiterated that Han Ho Bae, Pang Peng and Jia Yuqi had sight of the deportation warrants, as they were duly served the same, and they accordingly acknowledged them.
- 4.30 It was deposed that, as advised, by the advocates for the Director General of Immigration and the Attorney General, the warrants were regularly and validly issued, and the deportation of Han Ho Bae, Pang Peng and Jia Yuqi did not require a prior criminal conviction. The averment was also that there was reasonable belief that Han Ho Bae, Pang Peng and Jia Yuqi's presence in Zambia was likely to be a danger to good order.
- 4.31 Two grounds were relied on in applying for judicial review and I will deal with them one by one.

**PROCEDURAL IMPROPRIETY, ILLEGALITY,
IRRATIONALITY AND UNREASONABLENESS**

- 4.32 On this ground, the argument by Han Ho Bae, Pang Peng and Jia Yuqi was that as seen, they were arraigned before the Subordinate Court, twice on the same charges. They stated that on the second occasion, the Director of Public Prosecutions (DPP) entered a nolle prosequi on 14th November, 2023. Then from there, Han Ho Bae, Pang Peng and Jia Yuqi continued with their normal activities until 28th December, 2023, when they were called by officers of the Director General of Immigration to go and collect their documents.
- 4.33 However, unknown to them, that was just a rouse for them to be subjected to the treatment that they received, as deposed to in the affidavit filed in support of the Notice. They contended that contrary to the provisions of **Section 34 of the Immigration and Deportation Act**, without any notice in writing to them, the Residents' Permits which were granted to Pang Peng and Jia Yuqi were revoked.
- 4.34 This they, argued was a necessary step preceding actual deportation of any person, who holds a valid permit under the **Immigration and Deportation Act**. However, the permits were confiscated without any formalities, which went against the rules of natural justice, and the procedural requirements.
- 4.35 The contention was further that the law should not be read in isolation, and reference was made to **Section 39 (2) of the Immigration and Deportation Act**, which provides for the deportation of any person whose presence in Zambia,

or whose conduct is likely to be inimical or a danger to peace and good order. The assertion was that it was unknown, the reasons for the deportation of Han Ho Bae, Pang Peng and Jia Yuqi's deportation on 31st December, 2023, as the criminal proceedings were duly discontinued, thereby setting them free.

- 4.36 With reference to **Article 180 of the Constitution of Zambia Act No 2 of 2016**, the argument was that it provides that the DPP shall not be subject to the direction or control of any person or an authority in the performance of the functions of that office, except that the DPP shall have regard to the public interest, the administration of justice, the integrity of the judicial system, and the need to prevent and avoid abuse of the legal system.
- 4.37 Thus, it was argued that by the DPP discontinuing the criminal proceedings against Han Ho Bae, Pang Peng and Jia Yuqi, thereby discharging them, he acted independently and within his powers. The argument was also that Han Ho Bae, Pang Peng and Jia Yuqi are not persons whose presence or conduct in Zambia is likely to be a danger to peace and good Order.
- 4.38 It was argued that in relation to **Section 39 (2) of the Immigration and Deportation Act**, the fundamental right to be heard cannot be ignored. As authority, the case of **Kioa v West** ⁽⁸⁾, was cited, stating that the Court in that matter held that:

“It is a fundamental rule of the common law doctrine of the rules of natural justice expressed in traditional terms that generally speaking,

when an Order is made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity to reply to it.”

- 4.39 Further reliance was placed on the case of ***Commissioner of Police v Tanos*** ⁽²⁾, the argument being, that it held that a person has a right to be heard and exonerate themselves. It was argued that ***Section 39 (2) of the Immigration and Deportation Act*** appears to effectively disperse with the requirement for giving notice.
- 4.40 Thus, it was contended, that it was essential that this matter be treated as one that falls squarely on the right to be heard, as the Director General of Immigration could not ignore the fact that Han Ho Bae, Pang Peng and Jia Yuqi appeared before the Subordinate Court over the alleged offences.
- 4.41 Taking the argument further, it was stated that even if the Director General of Immigration may have had a reasonable belief that Han Ho Bae, Pang Peng and Jia Yuqi’s presence in Zambia or conduct, was likely to be a danger to peace and good Order, sufficient reasons needed to be given by the tribunal dealing with immigration matters, for the decision to make it apparent to the parties directly, or by inference that it had considered the point in issue between the parties, and it was further required to indicate the evidence forming the basis of the decision.

4.42 The case of ***R v Immigration Appeal, Ex-parte Khan*** ⁽⁶⁾ was cited as authority, stating that *Lord Kane* in that matter, stated as follows:

“The basis of the proposition is that in the absence of reasons, it is impossible to determine whether there was an error in the law. Failure to give reasons thereof amounts to a denial of natural justice....”

4.43 Still in argument, it was contended that the use of the word ‘likely’, in ***Section 39 (2) of the Immigration and Deportation Act***, means a high probability of occurring or being true; that is very probable. *Lord Greene* in the case of ***Associated Provincial Pictures Houses Limited v Wednesbury Corporation*** ⁽¹⁾ was quoted as having stated that:

“When it is said that something is to be done within the discretion of the authorities, that something is to be done according to the law and not humour, is to be not arbitrary, vague or fanciful, but legal and regular.”

4.44 Reliance was also placed on the case of ***Chief Immigration Officer, the Minister of Home Affairs and the Attorney General v John Eric Toome*** ⁽¹⁵⁾ stating that the Supreme Court in that matter, held that the Court has power to review deportation Orders under ***Section 26 (2)*** to protect the rights of an individual, and to go behind a deportation order, if the reasons are not proved and the Court can question the validity of a deportation Order.

- 4.45 Based on the above case, it was contended that in this matter, there was no security threat as evidenced by the conduct of the Director General of Immigration to justify the deportation, pursuant to **Section 39 (2) of the Immigration and Deportation Act**, which provision is equivalent to the now repealed **Section 26 (2) of the Immigration and Deportation Act, Chapter 123 of the Laws of Zambia**.
- 4.46 The definition of *deportation* in **Section 3 of the Immigration and Deportation Act** was cited, as well the *Second Schedule* to **Section 35 of the said Act**, stating that Han Ho Bae, Pang Peng and Jia Yuqi were classified as Class H (b) prohibited immigrants on 31st December, 2023.
- 4.47 In the List of Authorities and Skeleton Arguments in opposition, the Director General of Immigration and the Attorney General referred to the case of **Council of Civil Servants Union & others v Minister of State for the Civil Service (House of Lords) (7)**, stating that *Lord Diplock* in that matter, as regards illegality and procedural impropriety stated that:
- “Judicial review has I think developed to a stage.. one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call ‘illegality’, the second ‘irrationality’ and the third ‘procedural impropriety’.**
- By ‘illegality’ as a ground for judicial review I mean that the decision-maker must understand**

correctly the law that regulates his decision-making power and must give effect to it..... I have described the third head as ‘procedural impropriety’ rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision.”

- 4.48 Further reliance was placed on the cases of ***Derrick Chitala (Secretary of the Zambia Democratic Congress v Attorney General*** ⁽¹⁰⁾ and ***Roy Clarke v Attorney General*** ⁽¹⁴⁾, which cases effectively held that in considering whether a body has acted ultra vires, the Court will look at the relevant statutory provisions and the purpose of the statute. Therefore, illegality is a matter of statutory interpretation.
- 4.49 Premised on that, the argument was that in order to establish the illegality of the Director General of Immigration’s decision, to deport Han Ho Bae, Pang Peng and Jia Yuqi, this Court would have to make a finding that the Director General of Immigration either lacked the powers to deport them in the manner that he did, or that indeed, while he had the requisite power to do so, he exceeded those powers.
- 4.50 Reference was made to ***Section 39 (2) of the Immigration and Deportation Act***, stating that it was the provision of the law that was invoked, in making the deportation Orders. It was stated that as shown in the affidavit which was filed in opposition to the application for judicial review, Han Ho Bae, Pang Peng and Jia Yuqi were involved in

heinous offences, such as human trafficking and sexual exploitation.

- 4.51 Further, that they were not cleared by the Courts of law, as a nolle prosequi was entered. Thus, the contention was that there were reasonable grounds upon which the Director General of Immigration formed the view to deport them, as their presence in the country was a danger to peace and good order.
- 4.52 It was further argued that under **Section 39 (5) of the said Immigration and Deportation Act**, the Director General of Immigration had the power to arrest and detain Han Ho Bae, Pang Peng and Jia Yuqi before they were deported. The contention was that based on that provision, there was no requirement for Han Ho Bae, Pang Peng and Jia Yuqi to be served notices that they were prohibited immigrants. It was argued that all that was required, was that they be ejected out of the country at the earliest reasonable opportunity.
- 4.53 In so arguing, it was stated that the Director General of Immigration and the Attorney General were mindful of the decision in the case of **Nkumbula v Attorney General** ⁽⁴⁾, that provisions of the law must not be read and construed in isolation, but that the words, phrases or provisions in an enactment, must be construed in their context. Thus, a reading of **Section 39 (2) and (5) of the Immigration and Deportation Act** together, showed that Han Ho Bae, Pang Peng and Jia Yuqi were duly deported.
- 4.54 For a decision to be illegal in judicial review, it must be shown that the decision-maker did not understand

correctly the law that regulates their decision-making power and give effect to it. In the case of ***Anisminic Limited v Foreign Compensation Commission*** ⁽³⁾ it was held that a decision will be illegal, where a tribunal makes a decision, which it had no authority to make.

4.55 In this matter, the warrants of deportation for Han Ho Bae, Pang Peng and Jia Yuqi, which are exhibited as 'IM1' to the affidavit in opposition, show that they were issued pursuant to ***Section 39 (1) of the Immigration and Deportation Act No 18 of 2010***.

4.56 The reasons for the deportation were stated in those warrants as being that Han Ho Bae, Pang Peng and Jia Yuqi were persons whose presence in Zambia had been declared in writing by the Minister to be inimical to the public interest and they were prohibited immigrants in Zambia pursuant to ***Section 39 (2) of the Immigration and Deportation Act No 18 of 2010***. The warrants were signed by the Minister of Home Affairs Hon Jack Jacob Mwiimbu.

4.57 ***Section 39 (1) of the Immigration and Deportation Act***, provides as follows:

“39. (1) After receiving the particulars under section thirty-three of the Penal Code, in respect of a person who is not a citizen, the Minister, unless the term of imprisonment is set aside on appeal, shall, at the expiration of the sentence, under a warrant signed by the Minister, deport that person from Zambia.”

4.58 The provisions of **Section 39 (2) of the said Immigration and Deportation Act** on the other hand are:

“(2) If an immigration officer has reasonable grounds to believe that any person’s presence in Zambia or conduct is likely to be a danger to peace and good order in Zambia, that person shall be deported from Zambia under a warrant signed by the Minister.”

4.59 It has been seen that Han Ho Bae, Pang Peng and Jia Yuqi were discharged of the criminal charges that they were facing before the Subordinate Court after the DPP entered nolle prosequis. Therefore, the warrants issued for deporting them could not have lawfully been issued under **Section 39 (1) of the Immigration and Deportation Act** as was done in this case, as **Section 33 of the Penal Code, Chapter 87 of the Laws of Zambia** states that:

“33. Whenever a court shall sentence to a term of imprisonment any person-

(a) who is not a citizen of Zambia; and

(b) who has been convicted of an offence under this Code, or under any written law other than an offence relating to the driving of a motor vehicle set out in the Roads and Road Traffic Act or in any regulations for the time being in force made thereunder;

the public prosecutor shall forth with, forward to the Minister responsible for home affairs the particulars of the conviction and sentence and all

other particulars specified in the Second Schedule.”

- 4.60 There were no convictions against Han Ho Bae, Pang Peng and Jia Yuqi, so ***Section 39 (1) of the Immigration and Deportation Act*** could not be invoked in deporting them.
- 4.61 Further, in addition to the warrants being issued under ***Section 39 (1) of the Immigration and Deportation Act***, the reasons for the deportation, as stated on the warrants, was that Han Ho Bae, Pang Peng and Jia Yuqi were persons whose presence in Zambia, had been declared in writing by the Minister to be inimical to the public interest. Therefore, they were prohibited immigrants.
- 4.62 The reasons as stated on the warrants were not in consonance with the argument that was advanced by the Director General of Immigration and the Attorney General that it was the Director General of Immigration that invoked his powers under ***Section 39 (2) of the Immigration and Deportation Act*** which has been seen above, to deport Han Ho Bae, Pang Peng and Jia Yuqi.
- 4.63 This is because, the Minister has powers under ***Section 35 (2) of the Immigration and Deportation Act*** to declare the presence of persons in Zambia in writing to be inimical to the public interest. That Section provides as follows:
- “(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.”***
- 4.64 In terms of ***Section 39 (2) of the Immigration and Deportation Act***, an Immigration Officer, has powers on

reasonable grounds, to believe that any person's presence in Zambia or whose conduct is likely to be a danger to peace and good Order in Zambia, and when they form that conclusion, the affected person shall be deported under a warrant that is signed by the Minister.

4.65 An *Immigration Officer* is defined in **Section 3 of the Act** as:

“immigration officer” means a person appointed as an immigration officer in accordance with section four and includes the Director-General of Immigration and, in relation to the exercise of any power or the performance of any duty, any person on whom such power or duty has been conferred or imposed under this Act;”

4.66 The arguments that were advanced by the Director General of Immigration and the Attorney General, were that it was the Director General of Immigration, who formed the reasonable belief that Han Ho Bae, Pang Peng and Jia Yuqi's presence in Zambia or that their conduct was likely to be a danger to peace and good order in Zambia. The warrants for their deportation were signed by the Minister of Home Affairs and Internal Security.

4.67 However, as already noted, the warrants were issued under **Section 39 (1) of the Immigration and Deportation Act**, and the reasons for the deportations on the warrants was attributed to the Minister having exercised powers under **Section 35 (2) of the said Immigration and Deportation Act**. On that basis, it cannot be said that the Director

General of Immigration as the decision maker understood the law that governed his decision-making powers.

4.68 Further, Han Ho Bae, Pang Peng and Jia Yuqi contended that Han Ho Bae and Jia Yuqi were the holders of residents permits, which were exhibited as ‘BPY1’ and ‘BPY2’ and Pang Peng was the holder of the investors licence which was exhibited as ‘BPY3’ to the further affidavit verifying facts. Pang Peng’s investor’s permit expired on 16th August, 2023.

4.69 It was argued that pursuant to **Section 34 of the Immigration and Deportation Act**, Han Ho Bae and Jia Yuqi should have been given notice in writing of the intention to revoke their residents permits. However, their permits were confiscated without any just formalities, which went against the rules of natural justice.

4.70 The argument was further that under **Section 34 (1) of the Immigration and Deportation Act**, there is listed, instances under which a permit may be revoked. That in this matter, the provisions of **Section 34 (1) (g) of the Act** applied. **Section 34 of the said Immigration and Deportation Act** provides as follows:

“34. (1) The Director-General of Immigration may, by notice in writing, revoke any permit issued under this Act if the holder—

(a) has contravened any provision of this Act or any other law;

(b) obtained a permit by means of any representation which was false in any

- material particular or by means of the concealment of any material information;*
- (c) has failed to comply with any requirement or condition of a permit issued under this Act;*
- (d) has become or is likely to become a charge on the Republic in consequence of failure to support oneself and such of that person's dependents as may be in Zambia; or*
- (e) is likely to be a danger to peace and good order in Zambia.*
- (2) A notice to revoke a permit referred to in subsection (1), shall be served in person on the holder of the permit and it shall specify-*
- (a) the permit to be revoked; and*
- (b) the grounds on which the permit is being revoked.*
- (3) Every permit, other than a temporary permit, issued under this Act to a person who thereafter becomes an illegal immigrant shall cease to be of force and effect at such time as the holder becomes an illegal immigrant.*
- (4) Any permit surrendered under this Act shall be cancelled."*

4.71 The contention was that **Section 39 (2) of the Immigration and Deportation Act** could not be read in isolation from the above provision.

4.72 The Supreme Court, in the case of ***The Chief Immigration Officer, the Minister of Home Affairs and the Attorney General v John Eric Tolmay*** ⁽¹⁵⁾ had this to say on **Section 26 (2)** of the now repealed ***Immigration and Deportation Act, Chapter 123 of the Laws of Zambia***:

“As much as we agree that the Minister has power under section 26(2) of the Act to deport any person, the authorities cited, not only from Zambia but also from England, show that great as the public interest is, justice must nevertheless be done to the individual. There are however situations where an individual's rights may, nevertheless take second place as was stated in of R v Secretary of the State for Home Affairs Ex parte Hosenball (1). The above cited case shows that the Court can and has power to review deportation orders under section 26 (2) to protect the rights of an individual.

Although it is for the Minister and not the judiciary to decide whether in any particular case, the requirements of the duty to act fairly outweighs that of national security, there is also a duty on the part of the public officer in whom discretionary power has been vested to evaluate the case as a whole, in order for him to determine whether an individual is a threat to national security. This was clearly stated by the House of Lords in England in the case of Secretary of State for the Home Department v Rethman (6). The

House of Lords went further and stated that in doing so, the public officer must point to materials on which he can reasonably and proportionately come to the conclusion that the individual poses a threat to national security.

It follows that although the Minister under section 26(2) has power to deport any person from Zambia whom he considers a threat to national security, this power must be exercised on reasonable grounds and that the Court may, question this power once the individual challenges the deportation in Court.

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

The Court, in that case also stated that although the Minister was not bound to give reasons for deportation under that section, the Court had power to intervene if it is shown that there is misuse of power and that the Minister will then be requested to answer.”

4.82 **Section 26 (2) of the Immigration and Deportation Act, Chapter 123** of the Laws of Zambia, provided that:

“Any person who in the opinion of the Minister is by his presence or his conduct likely to be a danger to peace and good order in Zambia may,

be deported from Zambia pursuant to a warrant under the hand of the Minister.”

- 4.83 This provision was similar to now ***Section 39 (2) of the Immigration and Deportation Act No 18 of 2010***, except that the person who is vested with power to make the determination that a person to be deported from Zambia is one, whose presence in Zambia, or whose conduct is likely to be a danger to peace and good Order is an Immigration Officer, unlike ***Section 26 (2) of the Immigration Act*** which vested that power in the Minister.
- 4.84 The holding in the above case, shows that it is not for the Judiciary, but for the Director General of Immigration or indeed any other Immigration Officer, to decide whether in any particular case, the requirements of the duty to act fairly outweighs that of national security.
- 4.85 The Court in that matter, went further to however state that there is also a duty on the part of the public officer in whom discretionary power has been vested, to evaluate the case as a whole, in order for them to determine whether an individual is a threat to national security.
- 4.86 Similarly, in this matter, the Director General of Immigration is the person that had the power to decide whether national security, in terms of maintaining peace and good order outweighed the requirement for him to act fairly in respect of Han Ho Bae, Pang Peng and Jia Yuqi in deciding that they were a danger to peace and good Order.
- 4.87 It has been seen from the case of ***The Chief Immigration Officer, the Minister of Home Affairs and the Attorney General v John Eric Tolmay***⁽¹⁵⁾ seen above, that the

Supreme Court, stated that the public officer must point to materials on which he can reasonably and proportionately state, led them to arrive at the conclusion that the individual poses a threat to national security.

4.88 In this matter, the Director General of Immigration and the Attorney General argued that Han Ho Bae, Pang Peng and Jia Yuqi were arrested and charged with the offences of human trafficking, sexual exploitation and giving false information to a public officer. They appeared before the Subordinate Court in answer to those charges, but the Director of Public Prosecutions entered nolle prosequis in their respect, and they were discharged of the offences.

4.89 It was contended that the entry of the nolle prosequis, did not clear Han Ho Bae, Pang Peng and Jia Yuqi.

4.90 On the other hand, Han Ho Bae, Pang Peng and Jia Yuqi argued that they as they were not convicted of the criminal charges, and as the proceedings were discontinued against them, they are presumed innocent, in line with **Article 18 (1) of the Constitution of Zambia**, which states that:

“Every person who is charged with a criminal offence-

(a) Shall be presumed innocent until he is proved or has pleaded guilty.”

4.91 It is trite, that a person is presumed innocent until they are proved guilty. In this matter, the facts reveal that the DPP withdrew the criminal charges that Han Ho Bae, Pang Peng and Jia Yuqi were facing. The consequence is that although they were not found guilty of the charges, they can still be prosecuted of the said charges. However, it further follows

that they still enjoy the right to be presumed innocent of the charges until the contrary is proved.

- 4.92 Therefore, in keeping with the decision in the case of ***The Chief Immigration Officer, the Minister of Home Affairs and the Attorney General v John Eric Tolmay*** ⁽¹⁵⁾ as the exercise of the Director General of Immigration's powers' have been called into question in these proceedings, the Director General of Immigration was under a duty to state that in forming the reasonable belief that Han Ho Bae, Pang Peng and Jia Yuqi are persons whose presence in Zambia or whose conduct is likely to be danger to peace and good Order in Zambia, to point to materials which made him come to the reasonable and proportionate conclusion, that Han Ho Bae, Pang Peng and Jia Yuqi's presence in Zambia or conduct was likely to be danger to peace and good order.
- 4.93 It was not sufficient to simply allege that they were facing criminal charges for which they were discharged. Material pointing to those criminal activities needed to have been provided.
- 4.94 Having found that the warrants for the deportation of Han Ho Bae, Pang Peng and Jia Yuqi were issued pursuant to wrong provisions of the law, and the fact the Director General of Immigration failed to point to any materials that led him to form the reasonable belief that Han Ho Bae, Pang Peng and Jia Yuqi were persons whose presence in Zambia or whose conduct is likely to be danger to peace and good Order in Zambia, the decision was illegal, as the Director General of Immigration did not understand the law pursuant to which he exercised his powers.

4.95 The ground of illegality therefore succeeds.

PROCEDURAL IMPROPRIETY

4.96 On this ground, as seen above, Han Ho Bae, Pang Peng and Jia Yuqi's arguments were the same as those that were advanced on the ground of illegality.

4.97 The Director General of Immigration and the Attorney General on the other hand, relied on the case of ***Union of Civil Service and others v Minister of Civil Service*** ⁽⁷⁾ earlier cited, contending that *Lord Diplock* in that matter, stated as follows as regards procedural impropriety:

“I have described the third head as ‘procedural impropriety’ rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.”

4.98 Further reliance was placed on the case of ***North-Western Energy Company Limited v The Energy Regulation Board*** ⁽¹⁶⁾, where the *Hon Mr. Justice P. Matibini* stated that:

“Under “procedural impropriety,” the goal of achieving or securing procedural fairness

towards the person who will be affected by the administrative decision is underscored.

In keeping with the goal of procedural fairness, the Courts ensure that administrative decisions or actions conform with the procedural rules that are expressly laid down in the statute, or instrument by which the jurisdiction of the administrative body or public official is conferred.”

- 4.99 The contention was that all the procedural rules relating to Han Ho Bae, Pang Peng and Jia Yuqi’s deportation were followed, and the same did not require Han Ho Bae, Pang Peng and Jia Yuqi to make representations. It was argued that premised on the decision in the case of **North-Western Energy Company Limited v The Energy Regulation Board** ⁽¹⁶⁾, there is no procedural impropriety, where the procedural rules that are expressly laid down in the statute have been adhered to.
- 4.100 The reiteration was, citing the case of **Frederick Chiluba v The Attorney General** ⁽¹²⁾ that the remedy of judicial review is not concerned with the merits of the decision, but the decision-making process. Therefore, the prayer was that the application should fail.
- 4.101 The arguments above reveal that Han Ho Bae and Jia Yuqi’s contention was that they are resident permit holders, whose permits were unjustly confiscated and they should have been given notice in writing by the Director General of Immigration of the intention to revoke their permits, as provided in **Section 34 of the Immigration and**

Deportation Act, before their permits were revoked and their subsequent deportation.

4.102 It was stated that this would have enabled them to make representations. Therefore, by not doing so, the rules of natural justice were breached.

4.103 In opposition, reliance was placed on the cases of **Nyampala Safaris Limited and others v Zambia Wildlife Authority and others** ⁽¹³⁾ and **North-Western Energy Limited v Energy Regulation Board** ⁽¹⁶⁾. The argument citing those cases, was that there is no procedural impropriety where the procedural rules in a statute do not provide for the rules of natural justice.

4.104 Thus, in this case, as **Section 39 (2) of the Immigration and Deportation Act** pursuant to which the power to deport Han Ho Bae, Pang Peng and Jia Yuqi was exercised, does not provide for the right to be heard, prior to the deportation, upon the conditions in the Section being satisfied, there was no procedural impropriety.

4.105 In the case of **Folayinka Fobisaiye Oladipo v The Attorney General**⁽¹⁷⁾ the Appellant was Chief Executive Officer of Lafarge Zambia. He was issued with a Zambian employment permit on 14 February 2012, which was valid for Two (2) years. On 3 December 2012, the Appellant was detained by immigration officers at Kenneth Kaunda International Airport, without being given any reasons for his detention other than that the officers were under instructions to detain him.

4.106 That same night, as the Appellant was being driven to Ndola to be put on a scheduled flight to Nairobi, he was

furnished with a document revoking his permit. Upon arrival in Ndola, it was found that the flight the Appellant was supposed to board had been rescheduled to depart later, and it was decided that the Appellant be put on a South African Airways flight to South Africa.

4.107 As such, the Appellant was taken to wait at a lodge for the flight which was scheduled to leave at 13:00 hours the next day. When they went back to the airport, the Appellant was handed a Notice of Prohibited Immigrant to leave Zambia. This notice was stamped 5 December 2012 and stated that the Appellant had become a prohibited immigrant under **Section 35 (1) and (2) of the Immigration and Deportation Act No 18 of 2010**, and 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.

4.108 According to the notice, the Appellant was a prohibited immigrant because he belonged to persons named in *Class D of the Second Schedule* to the **Immigration and Deportation Act No 18 of 2010**. These were persons whose permit to remain in Zambia has expired or had 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.

4.109 Process was issued in the High Court for Zambia seeking judicial review, in which Folayike Fobisaiye Oladipo Esan 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.

4.110 On the ground of procedural impropriety, Folayike Fobisaiye Oladipo Esan 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 in **Section 10 of the Immigration and Deportation Act No 18 of 2010** was not satisfied. Folayike Fobisaiye Oladipo Esan 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 Immigration and Deportation Act No 18 of 2010**.

4.111 On the ground of irrationality, Folayike Fobisaiye Oladipo Esan contended 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.

4.112 On hearing the matter, the Learned High Court Judge, in a ruling dated 19 February 2014, dismissed Folayike Fobisaiye Oladipo Esan'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, prompting an appeal to the Supreme Court.

4.113 The Supreme Court on appeal, held that:

“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 promotes the rule of 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.

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 therefore 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."

4.114 In arriving at that decision, the Supreme Court noted that there is an obligation upon those entrusted with the exercise of public power to treat persons fairly and respect their human rights. Reference was made to the case of *Nyampala Safaris (Z) Ltd and others v The Attorney General and others* ⁽¹³⁾, where they stated that 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.

4.115 Further, that 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. They went on to note that under **Section 10 of the Immigration and Deportation 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.

4.116 Therefore, in relation to that case, they noted that 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 that 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.

4.117 The position that was however taken by the Supreme Court was, that this in a way, implied that the exercise of the Minister's discretion under the Act is final and cannot be questioned. They referred to case of **Attorney-General v Roy Clarke** ⁽¹⁴⁾ where they held 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."

- 4.118 It was the Supreme Court's observation that in a situation, such as in the one in that matter, 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.
- 4.119 They further stated that 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.
- 4.120 The Supreme Court went further to note that at common law, there is no general duty to give reasons for administrative decisions, and that this position was echoed in the case of *Doody v Secretary of State for the Home Department* ⁽⁹⁾, where it was stated that:
- “the law does not, at present, recognise a general duty to give reasons for administrative decisions.”***
- 4.121 The Supreme Court nevertheless stated that 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.
- 4.122 They observed that the view is so strong that others have argued, as did *Donaldson J* in the case of *Alexander v*

Crabtree ⁽⁵⁾, that failure to give reasons for a decision amounts to a denial of justice and is, in itself, an error of law.

4.123 It was also the Supreme Court's observation that in our jurisdiction, **Section 10 of the Immigration and Deportation Act**, insulates the Minister from having to give reasons when deporting or removing a person from Zambia. They stated that 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.

4.124 It was however the holding by the Supreme Court, that they had stated above, that in doing so, Courts must be wary to protect persons against arbitrariness more so where excesses are apparent, and that there is therefore, need to construe legislation conferring such discretion strictly.

4.125 Premised on the above holding by the Supreme Court, in this matter, while the warrants of deportation for Han Ho Bae, Pang Peng and Jia Yuqi were issued pursuant to **Section 39 (1) of the Immigration and Deportation Act**, a careful reading of those warrants shows that the reasons for the deportation of Han Ho Bae, Pang Peng and Jia Yuqi as endorsed on the said warrants, was that their presence in Zambia had been declared in writing by the Minister to be inimical to the public interest, and there were prohibited immigrants in Zambia pursuant to **Section 39 (2) of the Immigration and Deportation Act No 18 of 2010**.

- 4.126 I have already highlighted that **Section 35 (2) of the Immigration and Deportation Act** is the provision that vests power in the Minister to declare persons in writing to be inimical to the public interest.
- 4.127 There is nothing on record to show that the Minister did in writing, declare Han Ho Bae, Pang Peng and Jia Yuqi to be inimical to the public interest.
- 4.128 The reasons advanced on the deportation warrants was that there were issued under **Section 39 (2) of the Immigration and Deportation Act**, which provision requires that the Minister signs the warrant, where the Immigration Officer forms the reasonable belief that any person's presence in Zambia or conduct is likely to be a danger to peace and good order in Zambia. Had that been the position, the indorsements on the warrant would have reflected that the deportation was on account of the Immigration Officer's belief.
- 4.129 As this was not reflected as such, the decision to deport Han Ho Bae, Pang Peng and Jia Yuqi was fraught with illegality, as the Director General of Immigration did not understand the law pursuant to which he exercised his powers, as I have already found. The reasons for the deportation as endorsed on the warrants, reflect that the Minister had declared Han Ho Bae, Pang Pend and Jia Yuqi, inimical to the public interest which power is exercised under **Section 35 (2) of the Immigration and Deportation Act**.
- 4.130 Therefore, as that was the position, the other procedural requirements under the **Immigration and Deportation**

Act had to be satisfied. **Section 36 of the said Act** provides that:

“36. (1) Any immigration officer shall, if so, directed by the Minister, by notice served in person on any prohibited immigrant or a person to whom subsection (2) of section thirty-five relates, require that immigrant or person to leave Zambia.

(2) Any notice served in accordance with subsection (1) shall specify in relation to the person on whom it is served—

(a) the class set out in the Second Schedule to which it is considered the person belongs, or that the person is a person to whom subsection (2) of section thirty-five relates;

(b) the period within which the person is required to leave Zambia; and

(c) the route by which the person shall travel in leaving Zambia.

(3) The period within which a person shall be required to leave Zambia shall, except in the case of a person who, within seven days of that person’s appearing before an immigration officer in accordance with this Act has been served with a notice under this section, be not less than forty-eight hours and shall commence—

(a) in the case where such person does not make representations under this Act, from the time

that person is served with such notice requiring the person to leave Zambia; or

(b) in the case where such person makes representations in accordance with this Act, from the time that person is advised that the representations have been unsuccessful.

(4) Any person having been required by notice under this section to leave Zambia within a specified period who wilfully remains in Zambia after the expiry of that period commits an offence and is liable, upon conviction, to a fine not exceeding one hundred thousand penalty units or to imprisonment for a period not exceeding twelve months, or to both.”

4.131 Once the Minister declared Han Ho Bae, Pang Peng and Jia Yuqi as inimical to the public interest, the Immigration Officer should have issue Notices to Han Ho Bae, Pang Peng and Jia Yuqi under **Section 36 (1) of the Immigration and Deportation Act**, which specified the particulars as stated under sub section (2) of that provision.

4.132 There is no evidence on record that this was done. The passports exhibited as ‘BPY7’ to the further affidavit verifying facts do not reflect the Schedule of the **Immigration and Deportation Act** pursuant to which Han Ho Bae, Pang Peng and Jia Yuqi were declared as prohibited immigrants.

4.133 Therefore, the law was not complied with, as Han Ho Bae, Pang Peng and Jia Yuqi were not heard by them being

allowed to make representations once the Minister declared them inimical to the public interest, on the requirement for them to leave the country, forty-eight hours before they were required to leave the said country.

4.134 There was therefore procedural impropriety, as they were not heard, and the argument that **Section 39 (2) of the Immigration and Deportation Act** was invoked in deporting Han Hao Bae, Pang Peng and Jia Yuqi which did not give them the right to be heard cannot stand, looking at the reasons for the deportations as indorsed on the deportation warrants.

4.135 The ground of procedural impropriety therefore succeeds.

5. CONCLUSION

5.1 Having found that there was illegality and procedural impropriety, Han Ho Bae, Pang Peng and Jia Yuqi succeed on the Two (2) grounds that were advanced in support of the Notice for judicial review. I accordingly grant the Order of certiorari quashing the decision of the Director General of Immigration and the Order declaring Han Ho Bae, Pang Peng and Jia Yuqi as prohibited Immigrants.

5.2 Pang Peng prays for an Order to compel the Director General of Immigration to renew her investors licence. Renewal of an investors licence is subject to **Section 29 (1) of the Act**. Therefore, Pang Peng having succeeded on her claim, that she is not a prohibited immigrant, she is at liberty to pursue the Director General of Immigration for renewal of her investors permit which expired in August, 2023.

- 5.3 As for Han Ho Bae and Jia Yuqi who are holders of residence permits, they have succeeded on the claim that their deportation was illegal and procedurally improper. Their deportation has been quashed. There is however no evidence on record to show that their residence permits were ever revoked. Thus, by virtue of their success on the claims, the residence permits are restored.
- 5.4 Han Ho Bae, Pang Peng and Jia Yuqi having succeeded, they are awarded costs against the Director General of Immigration and the Attorney General, which shall be taxed in default of agreement. Leave to appeal is granted.

DATED AT LUSAKA THE 3rd DAY OF MAY, 2024

S. Kaunda
S. KAUNDA NEWA
HIGH COURT JUDGE

