IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
Misc. Civil Application No. 19 of 2006

BETWEEN

THE STATE

-and-

THE DEPARTMENT OF POVERTY AND DISASTER MANAGEMENT AFFAIRS AND THE COMMISSIONER FOR DISASTER PREPAREDNESS, RELIEF AND REHABILITATION **RESPONDENT**

EXPARTE: FRODOVARD NSABIMANA AND 83 OTHERS APPLICANTS

CORAM: HON. JUSTICE CHINANGWA

Chinoko, for Applicant
Kachule/Kahaki, for Respondent
Njirayafa, Law Clerk
Mthunzi, Court Reporter

RULING

The applicant Frodovard Nsabimana and 83 others brought this application for judicial review under Order 53 r.3 RSC. In

essence they are praying to this court to review the decision of the respondent ordering all refugees and asylum seekers who are in Malawi, but residing outside designated areas to return to the appropriate camps. The applicants challenge the decision as being unlawful and unconstitutional. They pray that the order be quashed.

On 6th February, 2006 the respondent issued an order that all refugees and asylum seekers (refugees/asylum seekers) residing outside Dzaleka and Luwani camps should return to these camps. Dzaleka camp is situated in Dowa district whereas Luwani camp is situated in Neno district. Since this order is the one which triggered this legal battle. It is important at this early stage to reproduce it:

> ' NOTICE TO ALL ASYLUM SEEKERS AND REFUGEES
>
> *All asylum seekers and refugees residing outside Dzaleka and Luwani refugees camps are being ordered to return to camp, in Dowa and Neno districts respectively, are the designated places of residence for all asylum seekers and refugees. The government of Malawi has, however, observed that*

some asylum seekers and refugees have settled elsewhere without any authorization.

All asylum seekers and refugees are therefore, ordered to return to camp by 28th February, 2006. Those that were issued with identity cards must go to Dzaleka camp and those that were not issued with the same must go to Luwani camp.

SGD Dr. M.D NOWA PHIRI.
COMMISIONER FOR REFUGEES IN MALAWI

The order is marked ex FN1.

The applicant Frodovard Nsabimana filed an affidavit on 27th February, 2006 in protest of the above mentioned order. He deponed that he is the chairman of the Urban Resident Refugees of Rwanda. That he applied to the respondent's sub-committee on Urban Residence and was granted authority and issued an identity card to be residing in urban areas. He exhibited a letter from respondent ex FN2 and identity card ex FN3.

He further deponed that FN3 is indorsed "Camp not assisted" to indicate that he is not resident in a refugees camp and does not get any assistance from the designated camp. He deponed that the permit would expire on 31st December, 2007. He and others were alarmed to learn of the order. He contends that many refugees residing outside camps have lived in Malawi up to periods of ten years. Have property and children at school. The 22 days allowed was insufficient to organize and return to camp.

Perhaps at this point I should briefly allude to the affidavit sworn by Mr Samuel Malowa a Senior Administrator in the office of the respondent. He deponed that it was in 2002 that the respondent began granting permission to refugees/asylum seekers, to reside outside camps (para 4). Such permission was/is granted on medical, educational and other related grounds which justify one to reside outside a refugees camp (para 6). On paragraph 7 he depones that only those with express permission from the respondent to reside outside refugees camps can stay in urban areas. There is a copy of a permission exhibited marked MK1.

According to Mr Malowa the order to return to camps affected only those without the requisite authority to reside outside camps. Mr Malowa further deponed that the identity cards

were issued on the insistence of the World Food Programme(WFP). It was indorsed "camp not assisted" to show that the holder was not entitled to receive basic provisions from WPF because he was not residing in a camp. By issuing the IDs the respondent did not expressly authorize the holder to reside outside camp. This is the exact position regarding the applicant. Applicant had applied for permission to reside outside camp on 25th July 2003 but it was not granted.

The starting point is to remind myself that these are judicial review proceedings. The purpose is not to examine the merits or demerits of a decision. The focus is on the decision making process. Whether rules of natural justice on fairness were observed as stated in ***Chief Constable of North Wales Police vs Evans*** (1982) 3 ALLER 141. In the present application whether the applicant(s) had an opportunity to be heard or were fairly treated considering the circumstances as a whole. Whether the order is consistent with the Constitution.

There are many issues which have been raised in this application. I now proceed to determine them. However I will bear in mind that I am determining the application based on affidavit evidence.

The first issue to determine is the contention by respondent that applicant lacks sufficient interest in the matter. It is observed that in the court record there is a ruling by Justice Mrs Kamanga in ***The State Vs Attorney General & Others***, ***Exparte Urban Resident Refugees of Rwanda*** Misc. Civil Application No. 19 of 2006 on locus standii and sufficient interest. She ruled among other things:

> *(ii)"The identity of applicants is ambiguous and if the proceedings are to proceed the applicants' identity should be articulated with clarity within 30 days.*
>
> (iii) *When the particulars and identity of the applicants is/are indicated, any other issue with regard to sufficient interest should be indicated during the substantive hearing."*

At first the application was made in the name of the Urban Resident Refugees of Rwanda. It was a collective group.

Following the ruling of Justice Mrs Kamanga the application was later styled Frodovard Nsabimana and 83 others. He is a Rwandan granted refugee status in Malawi. He is presently

residing outside the designated camp for refugees/asylum seekers. It appears to me that he is directly affected by the said order. Therefore I find that he has sufficient interest to be a party in these proceedings. I so find.

However, the difficulty is whether the other 83 named persons do also have sufficient interest to have a standing in this application. It is observed that apart from the names, there is no other detailed information in respect of each applicant. Are they Rwandans? Where are they residing presently? I find that the 83 purported applicants do not qualify as parties in these proceedings because of insufficient disclosure about their personal particulars. It is therefore ruled that they do not have any locus standii.

Of particular interest is that the order being challenged is not directed to Rwandan refugees/asylum seekers only. It is directed to all refugees/asylum seekers irrespective of their nationality who are in Malawi, but reside outside the designated camps. I would therefore proceed on this premises.

The second issue to determine is on applicant's claim that he has a permit authorizing him to reside outside the camp. The said permit was issued by the Malawi government in

conjunction with UNHCR. Therefore, he cannot be forced to return to camp. Counsel Chinoko submitted that the fact that respondent issued an ID to applicant who has to fend for himself meant that in a way authorized him to live outside camp. Whereas counsel Kachule submitted that the ID was issued by respondent on the insistence of WFP so that those residing outside camp should not receive free provisions.

The applicant exhibited FN3 being an ID issued to him. On the face of it are the following details:

1. Government of Malawi
2. Refugees Identity Card
3. UNHCR Logo
4. Malawi Coat of Arms
5. Surname: Nsabimana
6. First Name: Frodovard
7. Sex: Male
8. DOB: 02/10/1970
9. Nationality: Rwanda
10. Temp: Address: Camp not Assisted
11. RC NO: U000203
12. 00ML00020301

It should be noted that below the coat of arms is the holder's reduced passport size photo.

Backside:

1. *This identity document is issued by the Government of Malawi under the 1951 Convention relating to the Status of Refugees*

2. *1969 OAU Convention and 1998 Malawi Refugee Act in order to facilitate all administrative formalities in connection with the protection of refugees and asylum seekers.*

3. *Government of Malawi – Commissioner for Refugees*

4. *United Nations High Commissioner for Refugees-valid until 31st December, 2007.*

Observably there are no signatures for the Commissioner for Refugees and also UNHCR authorities to augment its authority.

On the temporary address its written "Camp Not Assisted". The applicant interprets the statement as giving him authority to reside outside camp where he fends for himself for a living. Whereas the respondent argues that the statement bars the holder to receive free provisions from WFP through UNHCR.

To strengthen its case the respondent has exhibited a letter ex MK1 to show the court the format of an official permit which it issues to refugees/asylum seekers authorized to reside outside camps.

The relevant part reads:-

Ref. No. C4/01/33/Vo.II *10th March, 2006.*

Mr Venutse Misago

Through: The Camp Administrator
Dzaleka Refugee Camp
P.O. Box 16
Dowa.

Dear Sir,

APPLICATION FOR URBAN RESIDENCE

Thank you for your application for Urban Residence dated 22nd February, 2002.
I am pleased to inform you that during its meeting held on 23rd February, 2006 the Sub-Committee on refugees urban residence approved your application.

Accordingly, you are authorized to reside away from Dzaleka Refugee Camp on the following terms:

(a) *Acquisition of Temporary Employment Permit: Your employer UN (International Criminal Tribunal for Rwanda) to apply on your behalf to the Immigration Department for the Permit within three months.*

(b) New Location Area 49 Township, Lilongwe city.

(c) *Duration: From 24th February, 2006 to 22nd February, 2007.*

(d) Grounds for Relocation Employment with Arusha Tribunal as Defence Team Investigator required to

(e) operate from urban setting. This permit is subject to replacement and renewal at the end of the duration of its validity.

Yours faithfully

SGD:S.D Malowa

For: ***SECRETARY AND COMMISSIONER FOR POVERTY AND DISASTER***

On examination of this letter it is noted that:

(a) gives purpose for the permit holder to live outside camp- because of employment
(b) Specific location – Area 49 in Lilongwe.
(c) Advises applicant to obtain through the employer an employment permit from Immigration Department.
(d) Duration of the permit – 24th February, 2006 to 22nd February, 2007.

Further the respondent acknowledges that applicant applied for a permit to reside outside camp. The respondent did write applicant to acknowledge receipt of the application under exFN2 which reads:

Ref. No. C4/01/33A/1 *25th July, 2003*

Mr Nsabimana Frodovard

Through: The Camp Administrator
Dzaleka Refugee Camp
P.O. Box 16
Dowa

Dear Sir/Madam

APPLICATION FOR URBAN RESIDENCE

Thank you for your application for Urban Residence dated 17th June, 2003 submitted through the Camp Administrator. I write to inform you that your application is receiving attention of the sub-committee on Urban Residence whose decision will be communicated to you in due course.

Meanwhile, take note that the deadline on which all asylum seekers and refugees are required to have

returned to Dzaleka has been extended from 31st July 2003 to 31st August, 2003.

14.

By copy of this letter, members of the subcommittee on Urban Residence Committee are informed of the extension of the deadline which follows the sub-committee's resolution passed during its meeting held on the 4th July, 2003 and confirmed on 24th July, 2003.

Yours faithfully

SGD: S.D. Malowa
For: ***SECRETARY AND COMMISSIONER FOR POVERTY AND DISASTER***

This letter FN2 is proof that applicant applied for urban residence. There is no follow up to FN2 to show that permission was eventually granted to applicant to reside outside.

Comparing FN3 and MK1, I am persuaded to accept that MK1 is the format of a permit issued to a refugee/asylum seeker granted authority to reside outside camp. Indeed no favourable interpretation of FN3 (identity card) can be

construed that it is a permit for the purpose claimed by the applicant. I find that the identity card issued to applicant was

not permission for him to reside outside camp. He was not granted such permit.

The third issue to determine relates to the contention that the order was discriminatory and in breach of sections 20(1) and 44(2) of the Constitution. The provisions are reproduced:

> *"20(1) Discrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, nationality, ethnic or social origin, disability, property, birth or other status."*
>
> *44(2) without prejudice to (1), no restrictions or limitation may be placed on the exercise of any rights and freedoms provided for in this Constitution other than those prescribed by law, which are reasonable, recognized by international human rights standards and necessary in an open and democratic society."*

It has been submitted for applicant that this court should take cognizance of the judgment ***A Den Abdihaji & 63 others v Republic*** Criminal Appeal No. 74 of 2005 (Lilongwe Registry-unreported). I have carefully read the judgment. The case was in respect of illegal entry into Malawi and a consequent order of deportation. It is a well reasoned judgment in the circumstances obtaining in that case.

The order under consideration in the present application relates to refugees/asylum seekers residing outside designated camps. I am reluctant to apply the reasoning in the Den Abdihaji case to the present application.

The order being complained of applied to all refugees/asylum seekers in Malawi irrespective of their nationalities. The applicant is just one of them. Those refugees/asylum seekers who were granted official permission to reside outside camps are not affected. However, it is upon the individual refugee/asylum seeker to prove by means of documentation of the existence of such permit. I find that the order was not discriminatory and therefore not in breach of sections 20(1) and 44(2) of the Constitution.

17.

The fourth issue to determine relates to Article 26 of the **Convention and Protocol on Status of Refugees** to which Malawi is a signatory. Article 26 states:

"FREEDOM OF MOVEMENT

Each contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence to move within its territory, subject to

any regulations applicable to aliens generally in the same circumstance"

It is argued that applicant having been granted refugee status, he has freedom of choice of where to go or place to live. To limit or control his movement or designate a place of residence for him is in breach of this Convention.

Malawi as a State did register its reservation on article 26 as follows:

"the Government of the Republic of Malawi reserves its right to designate the place or places of residence of the refugees and to restrict their movements

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whenever consideration of national security or public order so require."

It has been further argued that it has not been shown that applicant has compromised national security or public order to require him to return to camp. Further, that the reservation does not apply because the current Constitution embraces human rights.

To resolve this issue is first to allude to section 9 of the Refugees Act cap 15:04 which states:

> *"Any person granted refugee status under this Act shall be subject to the laws of Malawi, jurisdiction of courts in Malawi and to all measures taken for the maintenance of public order"* Underlining Supplied.

In my view to require refugees/asylum seekers to reside at designated camps is a sound administrative measure to ensure certainty of their population, provision of basic

necessities, communication of information, protection of their persons and property, facilitation of repatriation etc.

The State does not have to wait until there is an actual breakdown of national security or public order. It is prudent

upon the State to set up appropriate security structures and measures, than to be overtaken by events. It is my view that the reservation is still applicable until Malawi expressly rescinds it. As a matter of fact section 9 of the Refugees Act in a way augments its validity than otherwise. The reservation is conformity with the Constitution. I so find.

The fifth issue to determine relates to the principle of natural justice that a person should not be condemned without being given an opportunity to be heard. It is contended by applicant that he was not given an opportunity to be heard when the decision was made. Moreover 22 days within which he was required to return to camp from date of order was a short period. It was further contended that respondent was in breach of section 43 of the constitution. In support of this contention several case authorities were cited among them ***Mchawi v Ministry of Education, Science & Technology***, Misc civil cause No. 82 of 1997. ***Hodges Muhammed vs Lilongwe City Assembly*** Misc Civil Cause No 548 of 2004.

It is appropriate to reproduce section 43 of the Constitution:

"43Every person shall have the right to:

(a) *lawful and procedurally fair administrative action, which is justifiable in relation to reasons given while his or her rights,*

(b) freedoms, legitimate expectations or interest are affected or threatened, and

(c) *be furnished with reasons in writing for administrative action where his or her rights, freedoms, legitimate expectations or interest if these interests are known"*

This provision received judicial interpretation in the case of ***Mchawi vs Ministry of Education, Science & Technology***. In that case late Kumitsonyo J, as he then was said:

"It is a fundamental rule of natural justice and therefore procedural fairness within the meaning of section 43 of the Constitution that every person should be accorded an opportunity to be heard by an

unbiased tribunal in matters where his legitimate expectations or interest are affected or threatened".

In the *Mchawi* case the State terminated his services without explaining to him the reason such drastic action was taken.

22.

The State's action was condemned. In the ***Hodges Muhammed*** case the applicants who were members of the executive committee of Lilongwe City Assembly Workers Union were dismissed prior to an intended industrial strike. Court quashed the dismissals because applicants were not given an opportunity to be heard.

What is the position in the present application? ***The Mchawi and Hodges Muhammed*** cases were in respect to contracts of employment. The present application it is a matter of refugees settlement. The question to be answered is whether applicant had no opportunity to be heard or was treated unfairly. In search of the answer is to examine a letter ex FN2 in particular paragraphs 2-3. It reads:

"I write to inform you that your application is receiving attention of the subcommittee on Urban Residence whose decision will be communicated to you in due course. Meanwhile, take note that the deadline on

which all asylum seekers and refugees are required to have returned to Dzaleka has been extended from 31st July to 31st August, 2003.

23.

By copies of this letter, members of the subcommittee on Urban Residence Committee are informed of the extension of the deadline which follows the subcommittee's resolution passed during its meeting held on 4th July, 2003 and confirmed on 24th July, 2003"

From the extract above it shows that the issue of refugees/ asylum seekers being required to return to camp existed much earlier than 4th July, 2003. A deadline of 31st July, 2003 was setdown. For whatever reason the deadline was extended to 31st August, 2003.

It is not in the affidavits either of applicant or Mr Malowa whether there were further official extensions after 31st August, 2003. The fact is that applicant still continued to reside outside camp. Yet in all these years 2003 to 2006 applicant expressly knew or was fully aware that it was respondent's intention that all refugees/asylum seekers have to return to camps. He also knew that his application to

reside outside camp was not approved. He cannot now turn round to blame respondent that he was not afforded an opportunity to be heard. He had more than sufficient time (3 years) to know that he had to pack up and return to camp. That he was residing outside camp unlawfully. There was no

need for respondent to give him extra time or enter into negotiations because extensions were already granted. The applicant ignored with impunity to make use of them. If anything the respondent is at fault for being unnecessarily lenient to implement the order. I so find.

On applicant's school going children. If the camp does not provide the type of education, ie secondary or university education, he may apply through the Camp Administrator to the Chief Immigration Officer for student permits. But he cannot be allowed to illegally reside out of camp on the pretext that his children are at school.

Before I conclude, I wish to put on record my observations regarding the Refugee Committee established under section 3 of the Refugees Act. Its functions and powers are provided in section 6 of the Act. The said section provides:

> *"6(1) The Committee shall receive and hear applications for refugee status and may-*

(a) grant refugee status

(b) deny the grant of refugee status; and

© cancel or revoke its decision granting status.

24.

(2) The Committee may, subject to sections 8 and 12, review cases of persons granted refugee status under this Act."

On careful examination of the Act it is my observation that there is no provision that creates a subcommittee to the Refugee Committee. Of particular importance is the fact that there is no provision which empowers the Refugee Committee to delegate its functions and powers to a subcommittee or other body. Therefore it was/is unlawful for a subcommittee to busy itself to grant permits to refugees/asylum seekers authorizing them to reside outside camps. Because the purported subcommittee was/is a non existent entity. If the subcommittee was a mere internal administrative arrangement for purposes of efficiency in the discharge of the Refugee Committee's duties, that was in order, but only the name of the Refugee Committee has to stand out.

Continuing with the examination of the Act it is further observed that there is no provision that mandates the Refugee

Committee to grant permits to refugees/asylum seekers to reside outside camps. Unless such additional powers are contained in another legal instrument not available to this court, the exercise of such powers of granting out of camp resident permits was/is ultra vires.

25.

It is my better view that the only competent authority to issue permits of residence of any nature to refugee/ asylum seekers or any other person who is not an indigenous or naturalized Malawian is the Immigration Department or the Minister responsible for immigration matters under the Immigration Act Cap 15:03 Laws of Malawi.

To clarify this point is to examine the Immigration Act for such authority. The provisions are listed for easy reference as follows:

1. *The responsible Minister is mandated to issue Permanent Residence Permits under section 22.*

2. *An immigration officer is mandated to issue Temporary Residence Permits under section 24.*

3. *The Chief Immigration Officer or such other immigration officer, authorized by the Chief*

Immigration Officer or Minister, may issue Business Residence Permits under section 24A.

4. *The Chief Immigration Officer or such other authorized Immigration Officer may issue Temporary Employment Permits under section 25.*

26.

5. *An Immigration Officer may issue Visitors' Permits under section 26.*
6. *The Chief Immigration Officer may issue Student Permits under section 31.*

7. *The Minister may under section 3(2) confer or section 32 delegate immigration functions and powers upon any public officer or police officer.*

Therefore, no public officer, government office, statutory body or private body can exercise any authority on immigration matters of any nature unless expressly conferred or delegated under the Immigration Act or any other written law.

I now revert to the substantive matter. In conclusion the application to quash the order for being unlawful or declare it unconstitutional has no merit. It is accordingly dismissed. The injunction(s) against the respondent is/are vacated forthwith. The respondent be at liberty to enforce the order.

Pronounced in Chambers of this 17th day of April, 2008 at Lilongwe.

R.R. CHINANGWA
JUDGE