Malawi Judiciary

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

ADMISSION CAUSE NO. 45 OF 2016

IN THE MATTER OF THE ADMISSION IPOCHE ESTHER ITIMU

-and-

IN THE MATTER OF THE LEGAL EDUCATION AND LEGAL PRACTITIONERS (AMENDMENT) ACT 2003

CORAM : THE HONOURABLE THE CHIEF JUSTICE
Dr. Nkowani, Counsel for the Petitioner
Chisiza, Counsel for the Attorney General
Nanthulu, Counsel for the Malawi Law Society
H/H Banda, Assistant Registrar
Maluwa, Recording Officer
Mthunzi, Court Clerk
Pindani (Mrs), Chief Court Reporter
Mwafulirwa (Mrs.), Principal Personal Secretary

JUDGMENT

The Petitioner is before the Court seeking admission to the Malawi Bar to practice the profession of law before all courts in Malawi. The Petition is pursuant to sections 9(5)(a), (b)(i), (c)(ii),(d) and (e) of the Legal Education and Legal Practitioners Act (Cap 3:04) of our laws..

The Petitioner's background, which constitutes the facts relevant for the Court's consideration, will be very brief for reasons that I give soon.

The Petitioner is a citizen of this country and has always been since she was born on 29th April, 1982.

In 2004 the Petitioner obtained a Bachelor of Laws degree from the University of Northampton in England. In 2007 the Petitioner completed a Postgraduate Diploma in Legal Practice. The year following, 2008, the Petitioner enrolled for a Master of Laws which she completed in 2009 with a Master of Laws degree.

In England, to be admitted as a solicitor one needs to complete the academic stage of training. Thereafter one need to complete vocational stage of training which comprises of two parts, the Legal Practice course and then a Training Contract for two years. This is in accordance with Regulation 13 of the Solicitors Training Regulations, 2009.

All the relevant certificates of the stages in the Petitioner's education path referred to above have been exhibited and verified with the originals.

It is further in the facts that the Petitioner was admitted to sit for the Malawi Law Examinations which she did and passed in January 2016.

Going back in events, after completing her Legal Practice Course the Petitioner applied for and was admitted to do her

Training Contract with Christchurch Solicitors in 2008. She was not able to undertaken the Training Contract because she was not a citizen or permanent resident of the United Kingdom. Christchurch Solicitors wrote the Petitioner on 18th June 2008:

"Date 18th June, 2008

Apoche Esther Itimu
53 Highfield Road
Beeston
Nottingham
NG9 5GU

Dear Madam,

APPLICATION FOR THE POSITION OF TRAINEE SOLICITOR

Further to the two interviews at our office for the above position and our discussion over your ability to take up the position, we regret to inform you that although you were successful, we cannot employ you as a Trainee Solicitor on the grounds that you do not hold British Citizenship nor do you hold a work permit

We would not be able to arrange a work permit for you as we would need to demonstrate to the Home Office that there are no British Citizens that are eligible for the post before they can allow us or any firm for that matter to obtain a work permit for a potential employee and as you are aware, there are already many British Citizens looking for Training Contracts.

We wish you all the best in your endeavors

Yours sincerely,

Cyprian Amgbah
Senior Partner
CHRISTCHURCH SOLICITORS"

To these facts I should refer to the determination of this Court in the Matter of Admission of Nthembako Burtwell Banda and in the Matter of the Legal Education

and Legal Practitioners (Amendment) Act 2003, Civil Cause No. 1536 of 2008. This will be so because the overall circumstances of the Petitioner are similar to the circumstances in which the Petitioner in the Banda Case was in. The cardinal provision for interpretation is section 9(5) of the Legal Education and Legal Practitioners Act which provides, to the extent relevant:

> *"A person who holds a foreign law qualification, shall not be eligible to be admitted to practice law in Malawi, unless:*
>
> *(a) he is a citizen of Malawi;*
>
> *(c) in the jurisdiction from which the foreign law qualification was obtained, he is either-*
>
> i. *admitted to practice the profession of law and is not under and disciplinary charge for professional misconduct;*
> ii. *eligible to practice the profession of law, unless, although otherwise eligible, he is denied such eligibility sorely on the ground that he is not a citizen or a resident of, or does not owe allegiance to, or sorely to, the country or territory of that jurisdiction."*

In the Banda case my analysis of the above provision was the following and I will quote to some length to make home the fact that my position remains as was in that case:

> *"A Training Contract is the "final stage" in the process of "qualification" as a solicitor. Without completion the Training Contract therefore one is not qualified as a solicitor and can therefore not seek to be admitted as such. It is only upon completion of a*

Training Contract that one can be admitted as a solicitor. Section 14(3)(c)(iii) of the Training Regulations 1990 of the United Kingdom itself is clear. The Training Contract must be undertaken and satisfactorily completed for one to be a Solicitor.

This is where there is a distinction. Here in our jurisdiction, with a Bachelor of Laws degree from the University of Malawi, and without more, one is qualified and can be admitted, albeit with conditions. There are obviously similarities in what one goes through during a Training Contract in the United Kingdom and what one goes through during supervision upon being conditionally admitted here at home. What is obvious though is that the two schemes are designed differently. A Training Contract qualifies one to seek admission. A conditional admission is admission per se. A conditional admission, in our scheme, is therefore a stage past a Training Contract by way of comparison between the United Kingdom system and our system. One can therefore not skip a Training Contract in the United Kingdom and hope that they will instead seek conditional admission here at home. In the context of Section 9A(1)(c) of the Legal Education and Legal Practitioners Act, a Training Contract would constitute qualifying training towards eligibility for admission to practice the profession of law in the jurisdiction from which it was obtained.

On the analysis this far, the Petitioner cannot be said to be "eligible" to practice the profession of law in the United Kingdom. He still had one more stage to pass to be eligible. It would have been after that stage, that the applicant would have relied on his United Kingdom eligibility and upon passing the Malawi Law Examinations, he would then have sought admission.

There is however a dimension to section 9 (5)(c) that we should look at and carefully scrutinize in the entire context of the provision.

It occurs to me that the framers of our statute were visionary but for loss or lack of appropriate language or phraseology. Section 9(5)(c) is graduated in this way. At the top of the list are those that seek admission to practice law after they were already admitted to practice the profession of law abroad; this is in Section 9(5)(c)(i). Next on the list are those that seek admission to practice but were not admitted to practice abroad. These are persons who are "eligible" to practice but ***may*** *for example have chosen not to seek admission to practice owing to the nature or path of their legal career or other choices in life; otherwise they could have been admitted to practice had they chosen or opted to seek admission. This is in the first part of section 9(5)(c)(ii) when it says "eligible to practice the profession of law."*

For me the real issue in this Petition is about what remains of section 9(5)(c)(ii) when it says

> *".... unless although otherwise eligible, he is denied such eligibility sorely on the ground that he is not a citizen or a resident of, or does not owe allegiance to, or sorely to, the country or territory of that jurisdiction."*

It is tempting to hastily think this passage is clear in what it says. I think it is not as clear as it might seem to sound. There are those who say the passage must be read as a continuation of the first part of the section. In that sense being denied "eligibility" refers to those persons who are already eligible to practice the profession of law; but would that not be a conflict in terms.

According to "Oxford Advanced Learner's Dictionary" 4th Edition the word "eligible" means having the right or proper qualifications. According to "Oxford Advanced Learners Dictionary" 7th Edition an "eligible" person is a person who is able to do something because they have the right qualifications.

An eligible person therefore is one who has proper qualifications or the right qualifications. A person eligible to vote, for example, will already have the right or proper qualifications to vote. Where a particular voting age is prescribed, the person will have attained that age. Where a period of residence is required to qualify to vote, an eligible person will have realised the length of residence. In normal circumstances once eligibility has been attained it remains in the person. Such a person can be refused to vote, just as a qualified lawyer can be refused to practice the profession of law. The person though, remains qualified and therefore eligible It would take a change in the law or the rules of engagement for a person who is eligible to suddenly find themselves not eligible Even in such a case, I would have difficulties to imagine that such a law would apply retrospectively and affect persons who acquired the status of eligibility prior to the coming into effect of such a law or rule. The only other basis that comes to mind upon which eligibility could be lost is on account of disciplinary sanction.

On this analysis, even with the word "such" before the word "eligibility" I am loath to think the second part of section 9(5)(c)(ii) could be construed to refer to a person who is ***already*** *eligible What is therefore equivocal about Section 9(5)(c)(ii) is when it refers to a person being denied* ***eligibility****. The section does not talk about being denied practicing the*

profession of law; it talks about being denied eligibility. This is only to admit that the section is not as clear as we might consider it to be. It is to admit to the possibility that the true implication of the provision was lost in the language.

As reasoned earlier the scheme under section 9 is graduated. It starts with those who are admitted abroad. It then refers to those who are eligible abroad in the context of what I analyse. We are therefore left with a third category of persons that must have been envisaged in the second part of section 9(5)(c)(ii).

The next question then should be, which is this third category but before we go to that question we must remind ourselves about canons of statutory interpretation.

In "R. Cross, Statutory Interpretation" 1st Ed, p1 Cross says:

"The essential rule is that words should generally be given the meaning which the normal speaker of the English language would understand them to bear in their context at the time when they are used. ... If it were not a known fact that, in the ordinary case in which the normal user of the English language would have no doubt about the meaning of the statutory words, the courts will give those words their ordinary meaning, it would be impossible for lawyers and other experts to act and advise on the statute in question with confidence."

Lord Reid, in ***Pinner v Everett*** *[1969] 1WLR 1266 at 1273 put it yet simpler and said:*

"In determining the meaning of any words or phrase in a statute the first question to ask always is what is the natural or ordinary meaning of that word or phrase in its context in the statute. It is only when the meaning leads to some result which cannot reasonably be supposed to have been the

intention of the legislature that it is proper to look for some other possible meaning of the words or phrase."

The first port of call in statutory interpretation is therefore to follow the literal and ordinary meaning of the words in the statute.

While adhering to the literal interpretation of a statute, courts will however seek to avoid a construction that produces an absurd result, a result that is out of harmony with reason or propriety or illogical; since this is unlikely to have been the intention of the legislature. Lord Millet has said:

"The courts will presume that Parliament did not intend a statute to have consequences which are objectionable or undesirable; or absurd; or unworkable or impracticable, or merely inconceivable; or anomalous or illogical, or futile or pointless. But the strength of these presumptions depends on the degree to which a particular construction produces unreasonable result ... ***R (on the application of Edison First Power Ltd) v Central Valuation Officer and another*** *[2003] 4 ALL ER 208 at 116:*

Francis Bennion, a professional legislative drafter and renown author on statutory interpretation, in his book entitled "Statutory Interpretation" Fifth Edition at page 545 points out that there are more than just three rules of statutory interpretation as we commonly understand there to be. He says:

"If (which is doubtful) there ever were, there certainly are not now, just three rules of statutory interpretation. The so-called literal rule dissolves into a presumption that the text is the primary indication of intention and that the enactment is to be given a literal meaning where this is not outweighed by other factors. The so-called golden rule dissolves into one of the criteria that may outweigh the literal meaning, namely, the presumption that an absurd result is not intended. The so-called mischief rule dissolves into the presumption that

Parliament intended to provide a remedy for a particular mischief and that a purposive construction is desirable ... there are other many considerations to be borne in mind So it is a pity that despite the years that have passed since the first edition of this work pointed out the truth of the matter, writers of students' text books still trot out the three so-called 'rules' as if they were the whole story."

And later he says that the court does not 'select' any one of the guides, and then apply it to the exclusion of the others. What the court does (or should do) is take an overall view, weigh all the relevant interpret active factors, and arrive at a balanced conclusion, taking all the factors into account for what they are worth.

In ***Blantyre Water Board and Others v Malawi Housing Corporation*** *[2008] MLR, 28 at 31 the Supreme Court said:*

".... statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in the particular context – ***R v Secretary of State for Environment, Transport and the Regions and Another, Ex Parte Path Holme Limited*** *[2001) All ER 195. That is to say that the task of the court is to try and ascertain the intention of Parliament expressed in the language under consideration. And this is what we will bear in mind throughout this judgment and that when we say that any particular meaning cannot be what Parliament intended, we will only be saying that the words under consideration cannot reasonably be taken as used by Parliament with that meaning."*

Beyond these canons of interpretation is the principle against penalisation under a doubtful law. It is a principle of legal policy that a person should not be prejudiced except under clear law, Simon Brown LJ in ***R v Bristol Magistrate's Court, exp E*** *[1998] ALL ER 798 at 804. Under this principle a person is not ordinarily to be put in peril under an ambiguity;* ***Tuck***

and Son v Priester *(1887) 19 QBD 629 AT 638 This principle is applicable whether the ambiguity arises under criminal law or civil law;* ***ESS Production Ltd (in administration) v Sully [2005] E WCA Civ 554****. A law that inflicts hardship or deprivation of any kind is in essence penal and must come out clear in what is intended to be deprived.*

I am alive to the fact that Section 9 of the Legal Education and Legal Practitioners Act as a whole is intended to safeguard the sanctity and quality of the profession of law in our jurisdiction and not to, without more, weaken that fabric. But I must also understand the same statute as requiring that we must accommodate foreign qualified persons under certain conditions. Section 9(5)(c)(ii), in particular has our own citizens in mind and the possibility that they might just fall victim of stringent citizenship or residential requirements of other jurisdictions.

Bearing in mind the canons of interpretation and the principle against penalisation under a doubtful law, bearing in mind further the graduated scheme in Section 9(5)(c) and leaving aside the first two categories for the reasons that are advanced earlier in this judgment, the second part of Section 9(5)(c)(ii) could only, in my most considered view, refer to those of our colleagues who are on the verge of becoming eligible. 'Being denied eligibility' must mean just that. It must mean being denied from becoming eligible. That part of the section must therefore have been meant for those persons who are not yet eligible as opposed to those who are already eligible Those who are just behind the door to eligibility but are blocked from becoming eligible; those of our colleagues who are not yet eligible but everything is there to

demonstrate that they had every potential to becoming eligible but that the opportunity was taken away or denied of them solely on account of their citizenship and the rest of the circumstances set out in the second part of Section 9(5)(c)(ii).

In that regard, no doubt, the circumstances of each case would be evaluated in determining how close to eligibility the person might have been. It would not be expected that an aspirant to read law at first degree, who is denied access to a law school abroad on account of his or her citizenship would successfully petition for admission on the argument that they were denied eligibility.

There comes a point at which the only stage remaining in ones learning of law is to be accepted to practice the profession of law. We should read in Section 9(5)(c)(ii) as accommodating persons at that stage than to read it as excluding them thereby entirely depriving them the opportunity to practice law.

This could only be the meaningful, practical and logical framework of the provision. A framework that is devoid of sanctions, that which will not be prejudicial and inflict hardship or deprivation except if it were clear."

The Petitioner in the instant case, as demonstrated earlier , has gone through all stages of training and in some instances passed her examinations with exceptional results. She got stuck towards the final end of her training in the United Kingdom all because she is not a citizen of the United Kingdom. Similarly to what I

said in the Banda case, the Petitioner was prevented from continuing and completing her training to become eligible to practice the profession of law because she is not a citizen of the United Kingdom.

On the entire observations and analysis of the facts and the relevant law, I would admit the Petitioner to practice the professions of law before the Supreme Court of Appeal the High Court and all courts subordinate thereto. Her admission is with conditions on the usual terms as to supervision.

MADE this 15th day of September 2016 at Blantyre.

A. K. C. Nyirenda, SC
CHIEF JUSTICE