



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

REVENUE DIVISION

JUDICIAL REVIEW NUMBER 10 OF 2019

BETWEEN:

CHARLES JOSHI

CLAIMANT

AND

THE COMMISSIONER GENERAL OF

DEFENDANT

MALAWI REVENUE AUTHORITY

CORAM: THE HONOURABLE JUSTICE JOSEPH CHIGONA

MR. FRED CHIPEMBERE, OF COUNSEL FOR THE CLAIMANT

MR. KAMBUMWA, OF COUNSEL FOR THE DEFENDANT

MR. KAMCHIPUTU, OFFICIAL COURT INTERPRETER

CHIGONA, J.

JUDGMENT

The Claimant through counsel commenced the present judicial review proceedings following a decision made by the defendant. The claimant, through these proceedings, is contesting the decision of the defendant dated 8th November 2019

declining his application and appeal for duty free clearance of his motor vehicle BMW X5 identification number WBAFE42070LK99370 and the decision requiring the claimant to pay full duty on the said motor vehicle.

The claimant seeks the following reliefs:

- A declaration that the defendant's decision declining the Claimant's application and appeal for duty free clearance of his motor vehicle and the decision requiring the claimant to pay full duty is unconstitutional and unlawful
- A declaration that the defendant's decision is irrational and wednesbury unreasonable and has no legal basis and justification
- A like order to certiorari quashing the decision
- If permission is granted, an interim order staying the decision
- That the application be expedited
- Further or other reliefs
- Costs of the action

The facts of the case are that the claimant, a Malawi national, has been residing in South Africa since 2004. In April 2017, while in South Africa he purchased the above motor vehicle. It is said that the claimant returned to stay permanently in Malawi in August 2019. On 18th September 2019, he applied for waiver of duty payable on his motor vehicle as a returning resident having qualified for duty free importation of a motor vehicle under the minimum threshold for qualification of duty-free importation of passenger carrying vehicles. On 26th September 2019, the defendant declined the application and advised him that his application was unsuccessful in terms of the current Customs Procedure Code which allows duty waiver upon *bonafide* transfer of residence to Malawi and that his application

indicated that he had not transferred to Malawi permanently and that full duty was therefore payable.

On 10th October 2019, the claimant appealed against the decision on the grounds: that all his children are now attending schools in the city of Blantyre having permanently transferred from South Africa as exhibited in **CJ10**, that he has now permanently transferred from his Church in South Africa to Michiru CCAP in Blantyre as exhibited in **CJ6**, that he is now residing in his house in Blantyre, a house he had been building whilst in South Africa, that he has opened various businesses in Malawi including but not limited to Scallars Butchery and that he has opened several outlets in Zingwangwa and Machinjiri upon his return as exhibited in **CJ9**, that on his return the Immigration Department was satisfied that he had returned permanently and was not given any specific days to stay in Malawi, that he closed all his businesses in South Africa and that he sold all his properties in South Africa and that now he does not have any houses in South Africa.

It is the claimant's submission that the defendant on 8th November 2019 advised him that his appeal was not successful as there was no evidence that he had permanently transferred residence to Malawi as per the Customs Procedure Code 430 of the Customs and Excise (Tariffs) Order that allows returning residents to clear motor vehicles duty free upon *bonafide* transfer of residence to Malawi.

The claimant submitted that he has a right to lawful and procedurally administrative action justifiable with reasons where his rights, freedoms, legitimate expectations or interests are affected or threatened. Further the claimant submitted that he has a right to be furnished with reasons, in writing, for administrative action where his rights, freedoms, legitimate expectations or interests are affected. The claimant submitted that the defendant's action is unconstitutional, unlawful, unjustifiable, unfair and unreasonable.

In their sworn statement in opposition, the defendant admitted that the claimant applied for clearance of his motor vehicle duty free as a returning resident as shown by **CC 1**. The defendant submitted that his application was unsuccessful as he did not show *bonafide* transfer of residence. Their response is exhibited as **CC2**. The defendant admits that the claimant lodged an appeal against the decision as shown by **CC3**. In their response as shown by **CC4**, the defendant advised the claimant that his appeal was also unsuccessful as he did not show proper evidence of permanent transfer of residence to Malawi. The defendant in paragraph 10 of their sworn statement in opposition submits that for any person to benefit under Code 430, the following are the conditions: that a person must have made a *bonafide* transfer of residence to Malawi, that the motor vehicle must have been used for not less than twelve months prior to importation, that there must have been a formal letter that the person has been employed or the formal letter showing that employment must have been terminated, the visa must have shown that the residence permit showed that the person must have been in the foreign country for employment purposes and resident permit has been cancelled and that his passport must have shown that for purposes of stay or the visa issues was employment related. The defendant submits that the application by the claimant had no basis at all as all documents presented did not prove *bonafide* transfer of residence. The defendant therefore declined to clear the motor vehicle as applied under Code 430 and demanded payment of duty from the claimant.

I also benefitted from the oral submissions by counsel for the claimant who reiterated that the claimant has complied with Customs Procedure Code 430. In his submission, he exhibited **CJ 2** which is the application for duty free clearance of the said motor vehicle and household items. He also exhibited **CJ3** which is the response he got from the defendant advising him that his application was unsuccessful as he did not

adduce evidence of *bonafide* transfer of residence. The claimant lodged an appeal with the defendant as **CJ 4** shows against the decision. The claimant has also exhibited **CJ5**, which is a response to the appeal, advising him that his appeal was unsuccessful as there was no proper evidence to indicate permanent transfer of residence to Malawi. The claimant submitted that the defendant did not furnish reasons for their decision. The claimant submitted that the defendant only communicated to him that there was no proof of *bonafide* transfer of residence and did not indicate what was required for one to satisfy this requirement. Counsel further states that Code 430 does not use the word permanent. He submitted that an applicant needs only to show that he is a Malawian, returning resident, owner of a motor vehicle which he owned at least 12 months prior to importation and that the motor vehicle is not intended for sale. The claimant submitted that he has demonstrated that he is a returning resident from South Africa where he stayed for 15 years, that he used the said motor vehicle for 24 months prior to its importation into Malawi, he is a married man and that this is his first time to import a motor vehicle. Counsel states that Code 430 does not mention cancellation of visa and proof of employment as conditions for one to enjoy free duty status.

In response, the defendant through counsel had nothing to submit apart from adopting their sworn statement in opposition, skeletal arguments and supplementary skeletal arguments. Counsel prayed for dismissal of the claimant's application.

THE LAW ON JUDICIAL REVIEW AND DISPOSAL OF THE MATTER

The starting point is the Courts (High Court) (Civil Procedure) Rules, 2017. Order 19 rule 20 provides for grounds for judicial review:

- (1) Judicial review shall cover the review of—
 - (a) a law, an action or a decision of the Government or a public officer for conformity with the Constitution; or
 - (b) a decision, action or failure to act in relation to the exercise of a public function in order to determine—
 - (i) its lawfulness;
 - (ii) its procedural fairness;
 - (iii) its justification of the reasons provided, if any; or
 - (iv) bad faith, if any, where a right, freedom, interests or legitimate expectation of the applicant is affected or threatened.
- (1) A person making an application for judicial review shall have sufficient interest in the matter to which the application relates.

I remind myself that judicial review, as stated in many cases, is aimed at reviewing the decision-making process and not the merits of the decision 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 the judiciary or individual judges for that of the authority constituted by law to decide the matters in question. Thus, a decision of an inferior court or a public authority, may be quashed where the court or authority acted without jurisdiction, or exceeded its jurisdiction, or failed to comply with the rules of natural justice in a case where those rules are applicable or where the decision is unreasonable in the Wednesbury sense. The function of the court is to see that lawful authority is not abused by unfair treatment¹.

¹ JAMADAR-V-ATTORNEY GENERAL [2000-2001] 175, PP 179-180. See also BLANTYRE CITY ASSEMBLY-V-KAM'MWAMBA & 6 OTHERS [2008] MLR 21, P24; COUNCIL OF CIVIL SERVICE UNIONS-V-MINISTER OF CIVIL SERVICE [1985] AC 374.

Reverting to the present case, the claimant's argument is that the defendant did not furnish him with reasons for their decision declining him duty free status as a returning resident when he wanted to clear his motor vehicle. He submitted that both responses from the defendant did not include reasons. **CJ3**, which is a response from the defendant indicates as follows:

“...We regret to advise that your application has not been successful because the current Customs Procedure Code allows duty waiver upon bonafide transfer of residence to Malawi. Your application indicates that you have not yet transferred residence to Malawi.”

Further, the defendant advised the claimant as follows upon his appeal against the defendant's decision:

“...We write to advise that appeal has not been considered because there is no proper evidence to indicate that you permanently transferred residence to Malawi.

Kindly note that Customs Procedure Code 430 of the Customs and Excise (Tariffs) Order allows returning residents to clear motor vehicles duty free upon bona fide transfer of residence to Malawi”

The defendant submitted that the claimant was communicated as to what was needed for him to prove *bonafide* transfer of residence. The defendant stated that the claimant was to show that his employment visa was cancelled. This is also contained in paragraph 10 (d) of the sworn statement in opposition.

I have to mention that I spent more time in perusing the responses from the defendant. What the defendant is claiming in their sworn statement is not contained in their responses as cited above. The defendant did not communicate to the claimant

that he was supposed to show that his employment visa was cancelled for him to benefit under Code 430. Even in their response to the appeal, this information is not part of that communication. What the defendant communicated in both responses is that the claimant failed to show proper evidence of *bonafide* transfer of residence. The defendant did not communicate in detail the requirements under Code 430 to the claimant as explained in their sworn statement in opposition. I find the assertion from the defendant that the claimant was communicated all requirements for him to benefit under Code 430 as misleading. In their responses, there is no mention of visa requirements. I agree with the claimant that failure by the defendant to furnish him with justifiable detailed reasons for their refusal to clear the motor vehicle under Code 430 is an affront to administrative justice contrary to Section 43 of the Constitution. It is therefore my finding that the defendant's actions are unconstitutional as they breached Section 43 of the Constitution.

Let me deal with Customs Procedure Code 430, which provides as follows:

“ The following goods when imported by person on his arrival in Malawi or within six months of that date or within such further period as the Commissioner General may allow, on a bonafide transfer of residence to Malawi when such goods are not intended for sale, commercial use or disposal to any other person in Malawi, and are in such quantities and as the Commissioner General considers reasonable;

(c) Motor vehicles or caravans not exceeding two for each family or not exceeding one for an unmarried adult person who is employed, which has been owned and used by the person for not less than one year prior to importation or to the arrival of the person, whichever is the earlier, but so, however, that if the person lends, hires, gives away or otherwise

disposes of such motor vehicle or caravan, he may be required to pay such duty as he would have paid at importation.”

My reading of Code 430 shows the following prerequisites for one to benefit²:

- One must show bonafide transfer of residence
- Motor vehicle used for not less than 12 months prior to importation into Malawi
- The motor vehicle is not intended for sale, commercial use or for the disposal to any other person in Malawi
- The motor vehicles and caravans do not exceed two for each family or not exceeding one for unmarried adult person who is employed
- Importation allowed once in every five years

Reverting to the present case, the argument is on proof of *bonafide* transfer of residence by the claimant. The rest of the conditions are not in dispute in this court. The claimant submitted that he has transferred residence to Malawi as outlined above. The defendant submitted that there is no proof of *bonafide* transfer of residence as the claimant did not show that his employment visa was cancelled in South Africa. Let me mention that my perusal of Code 430 does not show how one proves *bonafide* transfer of residence. There is no mention of employment visa or any other type of visa and its subsequent cancellation for one to show bonafide transfer of residence. To impute anything in legislation that the framers did not intend to is improper and illegal in my considered view. If the defendant so wishes, they can amend Code 430 to include proof of *bonafide* transfer of residence using cancellation of employment visas or any other method. I am of the considered view, that as it is, proof of *bonafide* transfer of residence is a question of circumstances

² Elisha Vitsitsi V Malawi Revenue Authority, Civil Cause Number 633 of 2011.

and that each case is to be treated as such. The defendant is to conduct thorough enquiries before making any decision. I am not convinced that the defendant thoroughly conducted those enquiries herein to ascertain *bonafide* transfer of residence despite the claimant adducing evidence of the same. The decision of the defendant declining the claimant's application for duty free status of his motor vehicle under Code 430 for failure to show cancellation of employment visa is *ultravires* and cannot be allowed to stand.

CONCLUSION

It is therefore the finding of this court that the defendant's failure to furnish the claimant with justifiable detailed reasons for their decision infringed his right to administrative justice as enshrined in Section 43 of the Constitution. Further, it is my finding that the defendant's actions of declining the claimant's application on the ground that he failed to show *bonafide* transfer of residence based on employment visa and its subsequent cancellation is *ultravires* as this is not contained Under Code 430. I therefore quash the defendant's decision and order that the motor vehicle be cleared under Code 430 within the next 30 days unless there are other valid reasons for not doing so.

Costs are in the discretion of the court. I therefore order that each party should bear its own costs.

**MADE IN OPEN COURT THIS 30TH DAY OF MARCH 2020 AT PRINCIPAL
REGISTRY, REVENUE DIVISION, BLANTYRE.**


JOSEPH CHIGONA

JUDGE