



**JUDICIARY
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY (CIVIL DIVISION)
JUDIAL REVIEW CAUSE NO 35 OF 2020**

BETWEEN:

**THE STATE (ON THE APPLICATION OF GOVID
JADHAV & 66 OTHERS CLAMANTS**

-AND-

**THE DIRECTOR GENERAL OF IMMIGRATION
AND CITIZENSHIP SERVICES DEFENDANT**

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA
Messrs. Chiume and Moyo, of Counsel, for the Claimants
Mr. Neverson Chisiza, Principal State Advocate, for the Defendant
Mr. Zulu, Court Clerk

RULING

Kenyatta Nyirenda, J.

This is my Ruling on an application for an order of stay of (a) the Defendant's decision to institute criminal proceedings against the Claimants and (b) criminal proceedings against the Claimants in Criminal Case No. 459 of 2020 at Lilongwe Magistrate's Court until the determination of the main matter in the judicial review proceedings.

The brief background to the application is as follows. On 27th July 2020, the Claimants filed with the Court an ex-parte application for permission to move for judicial review and injunctive relief

The decisions and actions of the 1st Defendant which the Applicants seek to be judicially reviewed [hereinafter referred to as the "challenged decisions"] are stated as follows:

- "1. *The decision of the Defendant to issue Visitors' Permits instead of Temporary Resident Permits or Temporary Employment Permits to the Claimants.*

2. *The Defendant's decision to criminally prosecute the Claimants on a charge of illegal entry and stay in Malawi*
3. *All proceedings leading to the said decision in (2) above."*

The following reliefs are sought by the Claimants:

- "1. *A declaration that the Defendant's decision to issue Visitors' Permits instead of Temporary Resident Permits or Temporary Resident Permits or Temporary Employment Permits to the Claimants is irrational and unreasonable in the Wednesbury sense.*
2. *A declaration that the Defendant's said decision is unlawful.*
3. *A declaration that the Defendant's said decision impinges upon the Claimants' legitimate expectations to be granted Temporary Resident Permits or Temporary Employment Permits.*
4. *A declaration that the Defendant's decision to institute criminal proceedings against the Claimants was irrational, unreasonable in the Wednesbury sense and in bad faith.*
5. *A declaration that the Defendant's said decision results in the violation of the Claimants' legitimate expectations to be granted Temporary Resident Permits or Temporary Employment Permits.*
6. *A declaration that the said violation, in so far as it was done without giving the Claimants a fair hearing and without furnishing them with reasons in writing for so violating their said legitimate expectations, violate the Claimants' right to administrative justice.*
7. *A like order to Certiorari quashing the said decisions of the Defendant.*
8. *An interlocutory order staying the proceedings in the lower court against the Claimants.*
9. *An order for leave to move for judicial review against the Defendant's said decisions.*
10. *An order for costs.*
11. *And other order the Court may deem fit in the circumstances."*

The application is also supported by the following sworn statement:

- "5. **THAT** on 27th August, 2015, the Malawi Government, through Green Belt Initiative Holdings Limited, a company wholly owned by the Malawi Government, entered into an agreement with AUM Sugar & Allied Limited for the establishment of Salima Sugar Company Limited as a joint venture. A copy of the shareholder's agreement for the joint venture is exhibited hereto and marked thereon **JCI**.
6. **THAT** the Government of Malawi, through Green Belt Initiative Holdings Limited, owns 40 percent of the shares in Salima Sugar Company Limited.

7. ***THAT*** the project cost of establishing Salima Sugar Company Limited was/is **USD95,000,000.00 (Ninety-Five Million United States Dollars)**, being the Malawi Kwacha equivalent of around **MK70,000,000,000.00 (Seventy Billion Kwacha)**.
8. ***THAT*** the Government of Malawi transferred 4000 Hectares of land at Chikwawa, in Salima District, to Salima Sugar Company Limited, the land on which a sugar mill was constructed.
9. ***THAT*** the sugar mill is valued around **MK27,000,000,000.00 (Twenty-Seven Billion Kwacha)** and its purchase was funded by the Government of India.
10. ***THAT*** the sugar mill requires a team of about 120 expatriates from India to come to Malawi during the harvest period every year for a period of about 9 months.
11. ***THAT Under clause 6 (j) of the shareholder's agreement, exhibit JC1, the Malawi Government, through the GBI Holdings Limited, a special purpose vehicle wholly owned by the Malawi Government for purposes of executing the project, was and is responsible for facilitation and authorization for all required Visa and business permits for expatriate personnel.***
12. ***THAT*** on 17th April 2020, the Chairman of Salima Sugar Company Limited, wrote the Director General of the Immigration and Citizenship Services explaining that the Company needed to bring into this country specialized expatriate staff from India to operate the sugar mill for the sugar crushing season that spans a period of about 8 to 9 months in a year. A copy of the said letter is exhibited hereto marked thereon **JC2**.
13. ***THAT*** by the said letter, Salima Sugar Company Limited submitted to the Director General a list of expert overseas staff that they wanted to bring into this Country for the abovementioned purpose, and it clearly indicated that they were applying for an apt visa for the said purpose.
14. ***THAT*** on 22nd April 2020, Salima Sugar Company Limited wrote a similarly worded letter to the Chief Secretary to the Government, in which it asked to be permitted to bring in the expatriate staff by chartered plane, but equally indicated that it needed an apt visa for them to come and work in this country. A copy of the said letter is exhibited hereto marked thereon **JC3**.
15. ***THAT*** another similarly worded letter was sent to the Minister of Transport and Public Infrastructure on 23rd April 2020.
16. ***THAT*** by letter dated 27th April, 2020, the Government of Malawi, through the Secretary for Transport, responded to Salima Sugar Company Limited stating that as soon as visas for the expatriates were issued, the Government would facilitate the clearing of the plane it would charter, subject to the quarantining of the expatriates. A copy of the letter is exhibited hereto and marked **JC4**.

17. **THAT** on 30th April, 2020, the Chief Secretary to Government advised the Director General of Immigration that Government had approved for the Director General of Immigration to grant Visas to the expatriate staff. A copy of the letter is exhibited hereto and marked **JC5**.
18. **THAT** surprisingly, on 7th May 2020, the Director General of the Immigration wrote Salima Sugar Company Limited saying that he had granted approval for the expatriate staff to be granted single entry visas on arrival from India. A copy of the said letter is exhibited hereto marked thereon **JC6**.
19. **THAT** the Claimants now know that this was not a Temporary Residence Permit that would allow the expatriate staff to come into this country to work for the 9 months that they needed to work at the company, but that it was a Visitor's Permit valid for one month only, which prohibits the recipient thereof from working in the country.
20. **THAT** this was not the permit that the Claimants applied for, and that Salima Sugar Company Limited could never have applied for a Visitor's Permit valid for only one month when it needed the expatriate staff to come and work for a period of around 9 months.
21. **THAT** if the Director General of Immigration had clearly indicated to Salima Sugar Company Limited that he was only granting a Visitor's Permit, then it could not have allowed the expatriate staff to come into this country, by an expensive chartered plane, but could have just arranged for them to wait in India for the apt permits that would allow them to work in this country.
22. **THAT** on 12th May 2020, Salima Sugar Company Limited wrote the Chief Secretary to the Government to engage the Government of India on facilitating the chartered plane for the expatriate staff. Salima Sugar Company Limited clearly indicated, as Government well knew, that it was bringing in expert expatriates. A copy of the said letter is exhibited hereto marked thereon **JC7**.
23. **THAT** on 15th May 2020, that letter prompted the Government of Malawi, through the Office of President and Cabinet, to write to the Government of India, through the High Commission of India, to request that a team of about 120 expatriates should be permitted to come to Malawi during the harvesting period for about 9 months. A copy of a letter from the Chief Secretary to the Government to that effect is exhibited hereto and marked **JC8**.
24. **THAT** by that letter, Government clearly showed that it understood very well that the expatriates were coming into this country, not as visitors or tourists, but to work for a period of 9 months.

25. **THAT** by letter dated 29th May 2020, the Secretary for Foreign Affairs informed Salima Sugar Company Limited that Government approval had been granted for a flight carrying 59 of the expatriate staff, properly referred to therein as employees, to land in Malawi. A copy of the approval from the Government is exhibited hereto and marked **JC9**.
26. **THAT** again, this shows clearly that the Government of Malawi was fully aware that the expatriates were coming, not as visitors or tourists; but as employees of Salima Sugar Company Limited to work in this country.
27. **THAT** in this time of the Covid-19 pandemic, Salima Sugar Company Limited has absolutely no business bringing into this country by chartered plane 59 Indian expatriates just to come and be quarantined for 14 days, and to tour this country as tourists for another 16 days and then go back to India without working at all.
28. **THAT** that the 59 expatriates landed in Malawi on 12th June, 2020, to operate the Sugarcane Mill in Salima, which has always been the express reason for which the Malawi Government requested their coming to Malawi.
29. **THAT** on arrival, all the expatriates were given Visitors' Permits by the Defendant contrary to Salima Sugar Company Limited's application as per **JC2** above. A copy of a passport for one of the expatriates showing the Visitor's Permit is exhibited hereto marked thereon **JC10**.
30. **THAT** the Indian High Commission and Salima Sugar Company Limited made a press statement about the arrival of the technicians that they had come to work at Malawi Sugar Company Limited as expatriates.
31. **THAT** the expatriates include a group of engineers and chemists.
32. **THAT** there has never been any other reason for the coming of the said expatriates to Malawi, either as conveyed by the Salima Sugar Company Limited to the Malawi Government, or as understood by Government itself, apart from to work at sugar mill of Salima Sugar Company Limited.
33. **THAT** upon the expatriates' arrival in Malawi, they were given single entry visitors visas instead of Temporary Residence Permits, as already alluded to above.
34. **THAT** as soon as they arrived, the expatriates were quarantined for 14 days, as per exhibit marked **JC8**.
35. **THAT** from about 3rd July, 2020, to about 10th July, 2020, the Salima sugar factory headquarters was closed due to a covid-19 scare, as one of the local workers had tested positive for Covid-19.

36. *THAT the accountant for Salima Sugar Company Limited, VIVEK GANGWAL, was on quarantine until 17th July, 2020, as his wife had tested positive for Covid-19.*
37. *THAT after the accountant resumed work, Salima Sugar Company Limited engaged the Department of Immigration in order to regularize paperwork for the Claimants so that they be issued Temporary Residence Permits.*
38. *THAT this was necessitated by the fact that it was later brought to the attention of Salima Sugar Company Limited that whereas the application on behalf of the expatriates was for permits to work at the Salima Sugar Company for a period of 9 months, the Defendant had, in error, granted them Visitors' Permits instead.*
39. *THAT we were informed by the Immigration Department that the paperwork could be regularized by payment of a fine of K23,925,000.*
40. *THAT much as the fault was not of Salima Sugar Company Limited, in order to fast-track the process of obtaining the work permits since the work at the factory needed to proceed with speed at all costs, Salima Sugar Company Limited prepared payment of the MK23,925,000.00 for regularization of paperwork, but, to its surprise, the Department of Immigration turned around and refused to accept the payment. A copy of the cheque that was issued to the Department of Immigration is exhibited hereto and marked JC11.*
41. *THAT the 59 expatriates were arrested on 22nd July, 2020, for overstaying in Malawi.*
42. *THAT at the time that the expatriates were being arrested, there was and still is sugarcane juice in the sugar mill which they were operating.*
43. *THAT the sugarcane juice in the plant, unless processed quickly to make sugar, will crystallize in the plant and end up ruining the plant, which would have to be repaired at great cost.*
44. *THAT there is now a real risk that the sugarcane juice will solidify in the machinery which will inevitably cause substantial damage to the sugar mill and would need substantial repairs of more than MK5,000,000,000.00 (Five Billion Kwacha).*
45. *THAT if the expatriates are not immediately released to operate the plant and the sugarcane juice solidifies in the sugar mill, there will be a loss of harvest and production for the whole season, apart from the breakdown of the plant.*
46. *THAT the projected season production is valued at MK16,000,000,000.00 (Sixteen Billion Kwacha).*

47. **THAT** when the sugar mill is operational, the Company employs around 2,800 Malawian workers, who now risk losing their jobs.
48. **THAT** if the expatriates are not immediately released to operate the machinery, about 180,000 tonnes of local grower's sugar cane will be wasted and lost and a lot of Malawian sugarcane farmers will suffer financial loss.
49. **THAT** as the Government of Malawi had invited the 59 expatriates to come and work in Malawi for a period of 9 months, and as the Government of Malawi undertook to facilitate and authorize their permits, the Government of Malawi, through the Defendant, should regularize the paperwork of the expatriates and issue the necessary work permits.
50. **THAT** throughout the process of their travel to Malawi, the expatriates had represented to the Government of Malawi that they were coming to work and not as tourists.
51. **THAT** there was no reason for Salima Sugar Company Limited to go to all the lengths to arrange for the expatriates to come all the way from India to Malawi on a chartered plane and to be subjected to a 14-day quarantine only to tour the country for another 16 days as visitors who could not, by virtue of the visitors' visa, do any work in Malawi.
52. **THAT** the Government of Malawi, through the Defendant, erroneously gave the expatriates Visitors' Permits instead of Temporary Residence Permits since that was the express request that was made to the Immigration Department, by reason whereof when the Malawi Government allowed them to come into Malawi and they expended huge sums of money to come by a chartered plane and immediately thereafter set to work.
53. **THAT** to buttress the fact that the Defendant fully understood that the expatriates were coming to work, he has not raised the issue of their working without work permits, only faulting them for illegal entry and overstaying.
54. **THAT** there is now produced and shown to me a copy of the charge sheet that the Immigration Department has proffered against the expatriates. The said charge sheet is exhibited hereto marked thereon **JC12**.
55. **THAT** under the Immigration (Amendment) Regulations, 2019, an individual can pay a fine for overstaying a visitors' visa and permits and it was the Department of Immigration that had told the Claimants to pay fines in order to regularize their stay.

56. *THAT after their arrest, the Claimants were granted bail by the Defendant, from which the Defendant has since reneged. A copy of the bail bond is exhibited hereto marked thereon JC13.*
57. *THAT the expatriates were taken to the Magistrate's Court on 23rd July, 2020, where they appeared before Her Worship Yona.*
58. *THAT before taking plea, the expatriates applied for an adjournment in order to obtain the necessary disclosures from the State and to properly prepare for the hearing.*
59. *THAT before the matter was adjourned, the expatriates also applied to be released on bail with or without conditions.*
60. *THAT Her Worship Yona adjourned the matter to 27th July, 2020 for delivery of the bail ruling.*
61. *THAT the arrest and prosecution of the expatriates by the State is due to the failure of the State to issue the correct employment permits to the Claimants before or when they were entering Malawi.*
62. *THAT the Malawi Government had, by JC8, created a legitimate expectation on the part of the expatriates that they would be able to come and work in Malawi for 9 months."*

Having considered the application, I granted the Claimants permission to move for judicial review. However, I entertained some doubts regarding the application for a stay order and an order releasing the Claimants from custody. In this regard, I ordered the application to come by way of notice on 31st July 2020.

The Defendant is opposed to the application and he relies on a statement sworn by Mr. Masauko Medi, the Chief Immigration Officer. The sworn statement provides, in material part, as follows:

- "3. On 17th April, 2020, I received an application for visas in the form of a letter from Salima Sugar Company Limited for the Claimants herein. There is now shown to me a copy of the letter exhibited hereto marked 'AG 1'.
4. On 7th May, 2020, the Department wrote the Claimants advising them that their application had been granted. There is now shown to me a copy of the visa letter to Salima Sugar Company Limited exhibited hereto marked 'AG 2'.

Visitor's Permit

5. *Procedurally, everyone who comes into the country is firstly issued with Visitor's Permit on arrival at the port of entry.*

6. *The Claimants came in the country on 12th June, 2020. They were duly granted Visitor's Permits.*
7. *The Visitor's Permit is for an initial period of one month and can be renewed monthly for three months only.*
8. *The duty to renew the Visitor's Permit is on the visitors themselves, in this case, the Claimants.*
9. *In the instant matter, the initial Visitor's Permit expired on 12th July, 2020. The Claimants did not extend their Visitor's Permits. They were therefore staying in the country illegally. There is now shown to me some copies of the expired Visitor's Permits exhibited hereto marked 'AG 3'.*

Temporary Employment Permit (TRP) and Temporary Residence Permit with Authority to Work (TRPAW)

10. *If any visitor wants TRP or TRPAW, they have to apply while they are already in the country.*
11. *The Claimants herein have never made any application for TRP or TRPAW. They have not exhibited any evidence that they applied for the permits or extension of the expired Visitor's Permits on or before 12th July, 2020.*
12. *The Claimants made an attempt to renew the Visitor's Permits on or around 22nd July, 2020, after having been confronted by our officers for illegal stay.*
13. *Our position is that the Department cannot issue visa, TRP, TRPAW or extend a Visitor's Permit without an application by those who need the same by availing themselves to the Immigration authorities.*
14. *I should state that it is not the first time for the Claimants to come to Malawi and work at Salima Sugar Company Limited. They have been doing so for the past four years.*
15. *I repeat the foregoing that each time they came, they had been making applications for TRPAW and the Department had never, at any point, refused such applications.*
16. *Further, the Claimants had been making applications for extension of their Visitor's Permits before the same expired.*
17. *There is now shown to me copies of extended Visitor's Permits as well as TRPs exhibited hereto marked 'AG 4'.*
18. *This year, the Claimants failed/neglected to extend their Visitor's Permits. They did not even make applications for TRPs. This was a clear violation of the Immigration laws. Their prosecution cannot therefore be faulted.*

Obligations of the Parties Under the Shareholding Agreement

19. *The Claimants claim under paragraph 7 of the Statement of Facts that it was the duty of the Defendants to facilitate the issuance of relevant permits.*
20. *Further, the Claimants claim that the Defendant ought to have known that the Claimants were coming to Malawi to work and therefore they ought to have prepared relevant documentation and permits.*
22. *My response is that the said obligations and knowledge that the Claimants were coming to Malawi for temporary work do not dispose of the Claimants' duty to make necessary applications for permit documents.*
23. *The Claimants would have an arguable case if they made applications for relevant permits and the Defendants denied them, which is not the case herein.*

Conclusion

24. *The Claimants cannot be given that which they did not apply for. In this case, they did not apply for extension of their Visitor's Permits which expired. They did not apply for TRPs. They did not apply for TRPAW. All they applied for were their visas which were granted to facilitate entry into the country only.*
25. *The Claimants have been staying and working in the country illegally since 12th July, 2020. Their Visitor's Permits expired on 12th July, 2020 and have never extend them to date.*
26. *This is a criminal offence and, in the circumstances, their prosecution cannot be deemed to be unreasonable or unlawful to warrant a suspension of the same.*
27. *It is not just the Claimants that are answering similar charges. The Department is on a country-wide campaign to rid of all foreign nationals who are staying and working in the country without proper documentation.*
28. *My humble prayer, therefore, is that the Court should not suspend the prosecution of the Claimants in the lower court."*

On 30th July 2020, Mr. Joseph Chiume sworn a supplementary sworn statement and paragraphs 5, 6, and 7 are relevant:

- “5. **THAT** on 27th July, 2020, the Defendant substituted the charge sheet that it proffered against the Claimants in the Senior Resident Magistrate's Court, under **criminal case number 459 of 2020**, before Her Worship Yona. A copy of the current charge sheet is exhibited hereto and marked **JC 13**.
6. **THAT** on 27th July, 2020, the Claimants were granted bail by the Senior Resident Magistrate's Court and are now out of State custody.
7. **THAT** the Claimants should be allowed to operate the sugar mill at Chikwawa in the District of Salima in order to prevent occasioning irreparable financial harm and loss of dignity to them.”

On 4th August 2020, the Claimants filed a sworn statement in reply by Mr. Joseph Chiume wherein he states as follows:

- “2. **THAT** the matters of fact stated herein have come to my knowledge by information passed on to me by the Claimants and the Managing Director of Salima Sugar Company Limited and I verily believe them to be true.
3. **THAT** on 3rd May, 2020, the Claimants made an application for Temporary Resident Permits to the Defendant, via email, to which the Defendant acknowledged receipt on 4th May, 2020. Copies of the emails are exhibited hereto and marked **JC14** and **JC15** respectively.
4. **THAT** On 5th May, 2020, the Claimants sent a cover letter for the application for Temporary Residence Permits to the Defendant, via email, to which the Defendant responded to on the same day. Copies of the emails are exhibited hereto and marked **JC16** and **JC17** respectively.
5. **THAT** the Claimants came to Malawi to work as expatriates and it is the only reason why they are found here.
6. **THAT** the Defendant knew that the Claimants were coming here to work and that they would immediately commence working as expatriates upon their arrival in Malawi.
7. **THAT** I make this sworn statement sincerely, solemnly and conscientiously believing the contents hereof to be true and correct to the best of my knowledge and belief.”

Counsel Chiume and Counsel Moyo passionately submitted that the interests of justice in the present case greatly favour staying proceedings in the lower court against the Claimants pending the determination of all the issues raised by the Claimants by way of judicial review. It may not be out of place to quote the relevant part of the submissions:

“3.52 It would make neither legal nor common sense to allow the proceedings in the lower court to proceed to only have them nullified by the judicial review proceedings in the higher court. Besides, their company, the Government of Malawi and the Malawi economy stand to lose if the Claimants are prosecuted and stopped from working.

3.53 Circumstances to take into account include the following:

- (a) the fact that they are expert expatriates in the field of sugar production who were specifically brought into the country by chartered plane to manage the process of sugar manufacturing;
- (b) the fact that, as the Claimants are incarcerated, there is currently sugarcane juice in the plant at Salima Sugar Company Limited that is in danger of solidifying and ruining the plant, causing untold economic

damage to the Company, the sugarcane farmers and the Malawian economy;

- (c) the fact that the Claimants could be subjected to irreversible criminal sanctions in the court below and later be told in this court that the decision to prosecute them must be quashed, too little too late;*
- (d) the fact that it is only the Claimants that stand to lose from their continued prosecution when the Defendant has nothing to lose if the prosecution is stayed. After all, if at the hearing of the judicial review proceedings it is determined that the Claimants should be prosecuted, the law will take its course without problems;*
- (f) the unfairness and injustice of Government inviting the Claimants through the High Commissioner of the Government of India to come to Malawi by chartered plane to work for 9 months, and subjecting them to a 14 day quarantine, only for the Defendant to grant them a 1 month Visitor's Permit, and to then arrest and prosecute them for illegal entry and stay when the Defendant was otherwise mandated to process work permits for them and when the Claimants never applied for Visitors' Permits but for work permits;*
- (g) the need to protect the Claimants from the highhandedness, bad faith and abuse of authority by the Defendant in unsolicitedly granting the Claimants 1 month Visitors' Permits contrary to Sections 24 and 26 of the Immigration Act when they applied for work permits, and then to prosecute them for illegal entry and stay in the country;*
- (h) the fact that if the stay is granted, interests of justice will not be prejudiced and the Defendant will not suffer any loss or detriment.*

3.54 *The above factors all militate in favour of granting the stay order applied for by the Claimants.*

3.55 *The facts submitted above show that there are serious questions to be determined. Damages may not be an adequate remedy as the Defendant's action essentially infringes on the Claimants' constitutional right to fair administrative action under Section 43 of the Constitution, and their legitimate expectations have been clearly violated. Thus all the circumstances of the present case and the interests of justice demand that the stay order being sought herein be granted. The right to administrative justice is not for sale to whoever can pay damages. Courts are enjoined to protect it and to prevent further violations of it."*

It is the case of the Defendant that the stay order should not be granted because (a) the Claimants committed a criminal offence as they were staying and working in Malawi illegally and (b) the decision by the Defendants to prosecute the Claimants

is not amenable to judicial review. The relevant part of the Defendant's Skeleton Arguments state as follows:

"4.0 The Law and Analysis

4.1 Section 24 of the Immigration Act provides:

24 (1) *An immigration officer may, **on the application of a person who has complied with all the prescribed requirements**, issue to such person a temporary residence permit which shall be subject to such conditions as the Minister may prescribe and shall be valid for such period as may be stated therein but which shall not in any event exceed six months.*

(2) *A person to whom a temporary residence permit is issued in terms of subsection (1) and who is accompanied by his wife and any of his children under the age of eighteen years, may be issued with a single permit in respect of himself, his wife and such children.*

(3) *A person who is refused a temporary residence permit by an immigration officer shall have the right to the Minister, and the Minister in his discretion may issue or refuse such permit, and the Minister's decision in such circumstances shall be final and conclusive.*

4.2 *My Lord, the issuance of a Temporary Residence Permit (TRP) is **on application by a person who needs it**. It has been shown in the sworn statement of Dr Masauko Medi that the Claimants **have never applied for TRP to the Department**.*

4.3 *The Claimants have never led evidence in this Court to show that they applied for TRP and were refused. If they did and were denied, they would have an arguable case.*

4.4 Section 26 of the Immigration Act states:

*"An immigration officer may, **on application of a person who wishes to enter Malawi as a bonafide tourist or visitor**, issue to such a person a visitor's permit which shall be in such form and subject to such conditions as the Minister may prescribe and which shall be valid for a period not exceeding three months."*

4.5 *My Lord, we have shown in the sworn statement of Masauko Medi that the Claimants only applied for visas which were duly granted. The Department cannot grant the Claimants TRP when they didn't apply for the same. The Department could only grant them TRP if they had applied for the same.*

- 4.6 *The fact that there was clear information as to their purpose of coming to Malawi does not dispose of their duty to make relevant applications for relevant documentation.*
- 4.7 *It has also been shown in the sworn statement of Masauko Medi that the Claimants were issued visitor's permits on arrival on 12th June, 2020. The permits were for an initial period of one month which meant that they expired on 12th July, 2020.*
- 4.8 *The Claimants did not extend the visitor's permits on or by 12th July, 2020. They were staying in the country illegally.*
- 4.9 *Section 21 of the Immigration Act provides as follows:*
 - (1) *Notwithstanding anything contained in Part I and subject to the exemptions provided in subsection (2), and to the powers to exempt conferred by section 23, **no person shall enter, be or remain in Malawi unless he is in possession of a current permanent residence permit or a current temporary residence permit, a current business permit or a current temporary employment permit.** (our emphasis).*
 - (2) *Subsection (1) shall not apply to a person who*
 - (i) ***Is in possession of a valid visitor's permit issued to him under section 26;***
- 4.10 *My Lord, the Claimants do not have permanent residence permit, temporary residence permit, business permit or temporary employment permit as required by section 21 (1) of the Immigration Act.*
- 4.11 *The Claimants' visitor's permits expired on 12th July, 2020 and have not been extended. The attempt to extend was when they were apprehended on 21st July, 2020.*
- 4.12 *My Lord, under section 21 (3), any person who contravenes subsection (1) may, whether he is prosecuted for such contravention or not, **be treated as a prohibited immigrant.***
- 4.13 *Under section 21 (4), any person who is convicted of a contravention of subsection (1) and is not treated as a prohibited immigrant shall leave Malawi within fourteen days of the conviction or, if he undergoes imprisonment in respect of such contravention, within fourteen days of his release. Any person who by failing to leave Malawi fails to comply with this subsection shall, if such failure be due to his own neglect, omission, refusal or default, be liable to further prosecution for contravention of subsection (1).*
- 4.14 *My Lord, what comes out clear is that the Claimants committed a criminal offence as they were staying and working illegally. The Department is*

prosecuting them for the offences. Our submission is that there is nothing unreasonable or unlawful in this to warrant a stay of the decision to prosecute them.

Amenability of Prosecutorial discretion to Judicial Review proceedings.

- 4.15 *My Lord, while we are alive to section 108 of the Constitution, we submit that certain exercises of power may not be reviewable by the Courts because they do not raise justiciable issues. Underlying the concept of justiciability is the idea that certain issues raise questions with which the judicial process is not equipped to deal.*
- 4.16 *In the case of **R. v. General Council of the Bar, ex p. Percival** (1990) 3 W.L.R. 323 it was held that prosecutorial decisions were in principle reviewable, although the precise limits of the review would depend upon the powers of the body subject to judicial review, the procedure which it was required to follow and the manner in which it had dealt with the particular complaint.*
- 4.17 *In the case of **R. v. Inland Revenue Commissioners, ex p. Mead** (1993) 1 All E.R. 772 it was held that although a decision to prosecute an adult is amenable to judicial review, the circumstances in which such a challenge is amenable are rare and extreme.*
- 4.18 *In the Fijian case of **Matalulu v Director of Public Prosecutions** [2003] FJSC 2; [2003] 4 LRC 712 (17 April 2003) It was held that such grounds included where the DPP acted: “(1) in excess of the DPP's constitutional or statutory powers; (2) contrary to the provisions of the Constitution, the DPP could be shown to have acted under the direction or control of another person or authority and to have failed to exercise his or her own independent discretion; (3) in bad faith; (4) in abuse of the process of the court in which it was instituted, although the proper forum for review of that action would ordinarily be the court involved, and (5) where the DPP had fettered his or her discretion by a rigid policy”*
- 4.19 *The Alberta Court of Appeal in **Kostach v A-G of Alberta** [1995] 128 DLR (4th) 440 at 451 said that:*
- “The test for review of prosecutorial discretion remains that of **flagrant impropriety and it is not unreasonableness ...**”*
- 4.20 *Examples of what might constitute flagrant impropriety were suggested in a decision of the Quebec Court of Appeal in **Quebec (A-G) v Chartrand** [1987] 40 CCC (3d) 270 at 271. These included breach of the law, abuse of power through corruption in favour of the accused or prejudice against the victim or the law creating the offence. Obvious unreasonableness in the decision was also suggested as amounting to such impropriety.*

4.21 *In the instant matter, our submission is that there is nothing that would pass the test of 'fragrant impropriety' in the Defendant's decision to prosecute the Claimants.*

It is therefore our humble prayer that the application herein be dismissed with costs."

I have considered the sworn statements and the submissions by both parties. The case of **Mobil Producing Nigeria Unlimited v. His Royal Highness Oba Yinusa A. A, CA/L/255/05** is for the proposition that it would be futile to allow proceedings in a lower court to continue while there are proceedings in a higher court challenging proceedings in the lower court, because at the end of the day, if the proceedings in the higher court succeed, the lower court's proceedings will be a nullity however well the proceedings in the lower court may have been conducted. To avoid such an undesirable result, it is convenient to order a stay of the lower court's proceedings.

It is also trite that this Court has a discretion whether or not to grant a stay. Whether the Court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if the Court grants or refuses a stay. As was aptly put in **Matupa v. Matupa, Matrimonial Appeal No. 23 of 2013 (unreported)**:

"As the Supreme Court repeatedly states, stay of execution is, indeed, in a court's discretion. It is in the nature of discretion that it must be unfettered and, consequently, meet the ends of justice... If the circumstances are relevant, their exclusion, without reason, may be a wrong exercise of discretion. For the discretion must be exercised judicially, comporting that the power exercising jurisdiction must regard all relevant factors.

Moreover, the power exercising discretion must give proper weight or consideration to a factor. Underrating, exaggerating or overlooking a material factor is a wrong exercise of discretion. In a sense, requiring special circumstances is tantamount to fettering the discretion."

I have considered the respective submissions by Counsel and I am very much persuaded by the arguments advanced by Counsel Chiume and Moyo. Firstly, it is clear that there are serious issues in dispute. For example, while the Defendant claims that the Claimants neither applied for extension of their Visitor's Permits nor applied for TRPs or TRPAW, the Claimants contend that they submitted applications for TRPs to the Defendant and the Defendant acknowledged receipt thereof: see the sworn statement in reply by Mr. Joseph Chiume.

Secondly, I do not understand how it can be determined at this stage, without critically delving into the facts as can only be done at the full trial, whether or not on the facts in the present case, the decision to prosecute the Claimants is amenable

to judicial review. Further, even if for the sake of argument it were to be accepted that it is only in “*rare and extreme*” circumstances in which a challenge against a decision to prosecute an adult will be allowed, there is the question whether or not the facts in this case are such as to fall within the “*rare and extreme*” category. Both the Claimants and the Defendant have cited a host of case authorities in support of their respective legal positions. Clearly, the answer to the question whether or not prosecutorial decisions are amenable to judicial review cannot be had at this stage.

Thirdly, as was aptly observed in the case of the **State (On the application of Lin Xiaoxiao & Others) v. The Director General – Immigration and Citizenship Services and Attorney General, Judicial Review Cause No. 9 of 2020 (unreported)**, the High Court should be very slow to hold that certain decisions, acts or omissions on the part of the executive are not amenable to judicial review. The following paragraphs therein are relevant:

- “8.83 *It is not difficult to understand why the threshold for showing that a matter is not amenable to judicial review has to be that high. A comparative analysis of the Independence (1964) Constitution, the Republican (1966) Constitution and the new dispensation (1994) Constitution will show, among other notable things, that the first two Constitutions did not contain an express provision on judicial review. The absence of such a provision is thought to have contributed to obstructing access to justice, particularly access to effective remedies.*
- 8.84 *In this regard, the framers of our Constitution ... felt the need or necessity for having an explicit provision on the matter.*
- 8.85 *The framers of our Constitution were also very much alive to the danger of having a provision on judicial review that could easily be watered down or rendered useless through Parliament enacting statutes that would exempt actions or decisions of certain public offices from judicial scrutiny. It is for this reason that the provisions of section 108(2) of the Constitution were made robust enough to ensure that almost no action or decision by a public body escapes inquiry by the judiciary.*
- 8.86 *Developments within the last few years have shown a growing trend of claims being made left, right and centre to the effect that actions or decisions of certain constitutional or statutory bodies are not amenable to judicial review. Fortunately or unfortunately, they have been unable to find a provision in the Constitution to sustain their respective claims. With due respect, please stop wasting the Court's time by citing loads and loads of cases from foreign jurisdictions that do not have in their constitutions provisions on judicial review that are worded in the same or similar terms as section 108(2) of the Constitution. In terms of section 11(2) (c) of the Constitution, a court is enjoined, when interpreting the provisions of the Constitution to have regard, where applicable, to “current norms of public international law and comparable foreign case law” As already mentioned, our*

Constitution is unique in expressly stating the test to be met for an action or decision to be not amenable to judicial review."

In the circumstances and by reason of the foregoing, the Claimants have succeeded in this application. As such, I order that:

- (a) criminal proceedings against the Claimants in Criminal Case No. 459 of 2020 at Lilongwe Magistrate's Court be stayed; and
- (b) the Claimants should be allowed to offer their services in operating the sugar mill at Chikwawa in the Salima District,

until the determination of the main matter in the judicial review proceedings.

Pronounced in Court this 7th day of August 2020 at Lilongwe in the Republic of Malawi.



Kenyatta Nyirenda
JUDGE