MALAWI JUDICIARY

IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

CIVIL DIVISION

JUDICIAL REVIEW CASE NO. 54 OF 2021

THE STATE ON THE APPLICATION OF

KEZZIE MSUKWA.....1ST CLAIMANT

ASKOK KUMAR SREEDHARAN

(a.k.a ASHOK NAIR).....2ND CLAIMANT

- AND-

THE DIRECTOR OF THE

ANTI-CORRUPTION BUREAU.....DEFENDANT

CORAM: HON. JUSTICE R.E. KAPINDU

Mr. C. Kalua, Mr. L. Mwabutwa, Counsel for the 1st Claimant

Mr. M. Theu, Counsel for the 2nd Claimant

Mr. Saidi, Mr. Chiwala, Mr. Likwanya, Mr. Chizungu,

Counsel for the Defendant

Mr. C. Saukila, Court Clerk

IT Officer (for Court Reporter), Ms. Maggie Chisi

JUDGMENT

KAPINDU, J

1. This is the Court's judgment in the present matter. The judgment follows an application for Judicial Review brought by the 1st Applicant, the Hon. Mr. Kezzie Msukwa MP, (hereafter referred to as the 1st Claimant), and Mr. Askok Kumar Sreedharan, otherwise known as Mr. Ashok Nair, (hereafter referred to as the 2nd Claimant), in terms of Part III of the Courts (High Court) (Civil Procedure) Rules, 2017 (CPR, 2017). The application was brought against the Director of the Anti-Corruption Bureau (ACB) (hereafter referred to as the Defendant), in respect of some decisions that she made concerning the Claimants herein, in the exercise of her powers under the Corrupt Practice Act (CPA) (Cap. 7:04 of the Laws of Malawi).

2. The present matter is one of no ordinary significance. It raises, for the Court's determination, some fundamental issues that are critical to the effective functioning of the country's criminal justice system, particularly as it relates to the fight against corruption and other financial or economic crimes.

3. Principally, the Court is called upon to determine two main issues.

4. Firstly, the Court has been invited to decide on the manner in which a person suspected of having committed an offence may be legally arrested, and where any breaches of the procedural law relating to the arrest are established, what legal consequences may ensue.

5. Secondly, the Court is called upon to deal with the issue of how Malawi's scheme for international mutual assistance in criminal matters is to be construed. Specifically on this issue, the central question is whether, pursuant to Section 5 of the Mutual Assistance in Criminal Matters Act (Cap 8:04 of the Laws of Malawi) (MACMA), the Anti-Corruption Bureau (ACB), as an agency of the Government of Malawi, may enter into mutual assistance arrangements with organizations or agencies, whether international or foreign, without the sanction of, or going through, the office of the Attorney General.

6. The background to the present matter is that in or around July 2021, the ACB received information that following almost two years of investigation in the United Kingdom (UK), the National Crime Agency (NCA) in that country had come across evidence suggesting that one Mr. Zuneth Abdul Rashid Sattar, a British National with Permanent Residence status in Malawi, has been involved in corrupt activities with public servants and private individuals in Malawi, including corruption in the procurement of goods and services in the public service.

7. According to the Sworn Statement of Mr. Isaac Nkhoma, Principal Investigations Officer at the ACB, the Defendant, on 4th October 2021, authorized an investigation into these allegations in accordance with section 11(1)(a) of the Corrupt Practices Act, and the developments that have triggered the present proceedings flow from that investigation. The Defendant alleged that one of the cases that the ACB has been investigating is the one herein.

8. The Defendant obtained a Warrants of Arrest in respect of the Claimants on the 29th of January, 2021 from the Chief Resident Magistrate Court sitting at Lilongwe. The 2nd Claimant was arrested on the 30th of December,

2021 whilst the 1st Claimant was arrested on the 31st of December, 2021 based on the said Warrants of Arrest.

9. In respect of the 1st Claimant, the Warrant of Arrest alleged that the 1st Claimant was involved in some corrupt practices in connection with the sale of land on Plot Number 46/2057 in the City of Lilongwe between the Ministry responsible for Lands on the one hand, and Mr. Zunneth Abdul Rashid Sattar on the other.

10. According to the Defendant, pursuant to the investigations that the ACB conducted, the Bureau found evidence that the 1st Claimant herein engaged in a number of acts of corruption in that, contrary to Section 25 (1) of the Corrupt Practices Act (Cap. 7:04 of the Laws of Malawi) (CPA), he solicited and obtained a Mercedes Benz C Class; obtained money in the sum of K4, 000,000.00 to pay duty for the said Mercedes Benz C - Class to the Malawi Revenue Authority; solicited and obtained money amounting to K4,000,000.00 allegedly to cool down local inhabitants who were involved in a land dispute with Mr. Sattar aforesaid, whom the Defendant referred to as the principal suspect, at Area 46 in Lilongwe District; and that he also solicited and received money in the sum of K15, 000,000.00 to buy a plot at Jambo Village, I/A Ndindi (Chipoka), Salima District.

11. On his part, the 1st Claimant, who was the Cabinet Minister responsible for Lands, Housing and Urban Development at the time of his arrest, was aggrieved by the decision of the Defendant to investigate and arrest him, and therefore decided to commence judicial review proceedings to challenge the investigation, arrest and the ensuing criminal proceedings.

12. For some reason, the 1st Claimant decided to file his initial Judicial Review application at the High Court, Zomba District Registry. Whilst I do

not wish to widely reopen the issue of the forum of commencement of the Judicial Review proceedings herein, I still wish to point out that the Hon. Justice Ntaba who was seized of the matter when it got filed at the Zomba Registry of this Court, wisely decided, in view of all the circumstances surrounding the matter, that it was proper that the matter be transferred to the High Court, Lilongwe District Registry which was clearly the most convenient and appropriate forum for commencing such proceedings.

13. I must still mention, in this regard, perhaps by way of restatement, but so as to continue sending a strong message, that these courts have spoken with spotless clarity, and several times now, against the practice by some litigants of forum shopping, or what Mkandawire J (as he then was), termed *"judicial tourism"* in the case of ***Bvalani & Kabwila vs Electoral Commission & Others***, Civil Cause No. 40 of 2020.

14. The evidence in the present matter shows that the 1st Claimant learnt that he was being sought by the Anti-Corruption Bureau whilst he was in Karonga. Notably, his residence is in the City of Lilongwe. After going through the record of the present proceedings, and indeed hearing the testimony given, including the testimony of one of the Counsel for the 1st Claimant Mr. Lugano Mwabutwa, I find that it was grossly improper that the application for judicial review herein and for the attendant stay of the Respondent's decision, had to be made at the Zomba District Registry of this Court.

15. Following the Order of transfer of proceedings of the Hon. Justice Ntaba at the High Court in Zomba, the 1st Claimant proceeded to file the application for Judicial Review at the High Court Lilongwe District Registry (Civil Division), hence to the present proceedings.

16. Through the present proceedings, the 1st Claimant is challenging the following decisions made by the Defendant:

16.1. The decision of the Defendant made on or around 29th December, 2021 seeking to arrest him in connection with Plot Number 46/2057 in Area 46 in the City of Lilongwe which was sold to one Mr. Zunneth Abdul Rashid Sattar by the Ministry of Lands, Housing and Urban Development, long before he became a Minister and when the Defendant had a less drastic avenue of instituting criminal proceedings against him by way of summons under section 84 of the Criminal Procedure and Evidence Code;

16.2. The decision of the Defendant to arrest, handcuff and chain him to a hospital bed whilst he had been taken ill without regard to the provisions of section 19(1) & (3) of the Constitution of the Republic of Malawi (the Constitution).

16.3. The decision of the Defendant to arrest him without due regard to section 42(1)(a) of the Constitution; and

16.4. The decision of the Defendant to arrest him based on information gathered from the National Crime Agency of the United Kingdom.

17. Accordingly, the 1st Claimant is seeking the following reliefs:

17.1. A declaration that the Defendant's decisions are tainted with bad faith, unconscionable and unreasonable in the *Wednesbury's* sense, meant only to embarrass him in the way of his office as a Minister (as he then was);

17.2. A declaration that the decisions of the Defendant complained of are unconstitutional, irrational, an abuse of power and unreasonable in the *Wednesbury's* sense in that they amount to a violation of the right to be treated with dignity, and that the actions of the Defendant amount to cruel, inhuman and degrading treatment and also constitute an arbitrary curtailment of the 1st Claimant's right to liberty and movement;

17.3. A declaration that the decision of the Defendant to arrest the Claimant based on information gathered from the National Crime Agency of the United Kingdom was wrongful and unlawful;

17.4. A declaration that the conduct of the Defendant in arresting the Claimant without informing the 1st Claimant of his rights when effecting the arrest was unconstitutional and unreasonable.

17.5. An Order permanently staying the execution of the Warrant of Arrest herein and based on information gathered from National Crime Agency.

17.6. A quashing Order or a like Order to certiorari quashing the decisions of the Defendant in their entirety.

17.7. An Order for costs.

17.8. All other necessary consequential directions.

18. On his part, as mentioned earlier, the 2nd Claimant, a aman of Indian nationality but with a Temporary Employment Permit in Malawi, was arrested by the Defendant on the 30th of December, 2021. He was

indicted on the 31st day of December, 2021 in the Chief Resident Magistrate's Court at Lilongwe.

19. In his indictment, the 2nd Claimant was charged with two counts of aiding procuring corrupt use of official powers contrary to section 35 of the Corrupt Practices Act as read together with section 25 (2) and section 34 of the Corrupt Practices Act.

20. On the 1st Count, the ACB alleged that the 2nd Claimant, in or around August 2021, in Lilongwe District, being an agent of Zuneth Abdul Rashid Sattar, aided the said Mr. Sattar, who being concerned with a land dispute matter in Area 46 on plot number 46/2057 in Lilongwe between himself and the local inhabitants, and which dispute was connected with the jurisdiction of the 1st Claimant herein, as Minister of Lands, Housing and Urban Development, to corruptly give the 1st Claimant an advantage in the form of money amounting to K4, 000,000.00 in order for him to pay duty to the Malawi Revenue Authority for a motor vehicle namely Mercedes Benz C Class which the said Mr. Sattar bought for the 1st Claimant.

21. On the 2nd Count, the ACB alleged that the 2nd Claimant, between May and August 2021, in Lilongwe District, being an agent of Zuneth Abdul Rashid Sattar, aided the said Mr. Sattar, who being concerned with a land dispute matter in Area 46 on plot number 46/2057 in Lilongwe between himself and the local inhabitants, connected with the jurisdiction of the 1st Claimant, Minister of Lands, Housing and Urban Development, to corruptly give the 1st Claimant an advantage in form of money amounting to K15, 000,000.00 to pay for land which the said Mr. Sattar bought for the 1st Claimant at Chipoka in Salima District.

22. According to the 2nd Claimant, when he was arrested and being cautioned, in the presence of his counsel, the investigation officers of the Defendant had planned that both the 1st Claimant and the 2nd Claimant herein were to be cautioned and taken together before the Chief Resident Magistrate's Court sitting at Lilongwe on the same day.

23. He averred that it was however not possible to do so because the 1st Claimant was yet to be cautioned. He stated that there was an attempt to wait for the 1st Claimant but later it was resolved by the Defendant that despite the indictment referring to both the 1st Claimant and one Zuneth Sattar as principal offenders, the 2nd Claimant was to be indicted and remanded alone, and this was indeed done on or about the 31st of December 2021.

24. Under these circumstances, upon the 1st Claimant commencing the present judicial review proceedings challenging his investigation, arrest and intended prosecution by the Defendant, the 2nd Claimant made an application, on the 10th of January, 2022, to join the judicial review proceedings as a party.

25. According to the 2nd Claimant, he sought to challenge the legality of his arrest and prosecution on the ground that the mutual legal assistance arrangement that the Defendant alleged to have entered into with the NCA of the UK was ultra vires the powers of the Defendant and was therefore illegal, and he noted that this was the same ground in respect of which the 1st Claimant had also sought permission to apply for judicial review in the present matter.

26. In addition, the 2nd Claimant observed that both Claimants herein were co-accused in the criminal proceedings in respect of which they had been arrested.

27. In particular, the 2nd Claimant pointed out that in counts 3 and 4 of the charges as reflected in the 1st Claimant's Warrant of Arrest, the 2nd Claimant was being co-accused with the 1st Claimant.

28. He added, in this connection, that they both intended, therefore, to challenge the legality of the Defendant's investigations, arrests and prosecutions.

29. In the circumstances, the 2nd Claimant stated that it was only proper and expedient that he be added as a party to the Judicial review proceedings herein for purposes of expediency and uniformity in the disposal of their respective challenges to the Defendant's decision.

30. The application to be added as a party was duly granted by the Court.

31. In his application for Judicial Review, filed on 10th January, 2022, the 2nd Claimant sought to impugn the decision of the Defendant to investigate, arrest and prosecute him before the Chief Resident Magistrate Court, sitting at Lilongwe, in Criminal Case Number 1482 of 2021. He also sought to challenge his remand pending the trial of that matter. He accordingly sought an order quashing the said decision of the Defendant. He also sought an Order for costs.

32. On the 14th of January 2022, after a full inter partes hearing for permission to apply for Judicial Review and also for the 2nd Claimant to be released from custody, the Hon. Justice Mdeza made the following Order:

> *"Having had occasion to carefully study all the documents on the file and having heard Counsel's arguments, I am satisfied that the two Claimants have established adequate legal grounds for the reliefs sought by the application. The Objections by the Defendant are hereby overruled. The prayer for an Order granting permission to apply for Judicial Review, an Order for stay of criminal proceedings and release from custody, an Order maintaining stay Order granted by my sister Judge Lady Ntaba are hereby granted pending determination of the Judicial Review herein or until a further Order of the Court."*

33. In the subsequent comprehensive reasoned decision following on the Order made on the 14th of January 2022, which was delivered on 24th January, 2022, Hon Justice Mdeza clarified that the order of stay he had granted related to the entire *"criminal process"* and not just the *"criminal proceedings"* as earlier stated in the Order of the 14th of January, 2022. It was at this stage that the Hon. Mdeza J recused himself from further hearing the matter.

34. Following a Scheduling Conference held on the 25th of February, 2022, the following were identified by the Court and the parties as the issues for the Court's determination in the present matter:

(a) Whether the decision of the Defendant to apply for a Warrant of the 1st Claimant's arrest, and his subsequent arrest, was an abuse of power;

(b) Whether the decision in (a) above was tainted with bad faith, unconscionable and was unreasonable in the *Wednesbury's* sense, meant only to embarrass the 1st Claimant in the way of his office as a Minister;

(c) Whether the decision to effect the arrest in the manner the Defendant did was irrational, an abuse of power, unreasonable in the *Wednesbury's* sense, and unconstitutional in that it amounted to cruel, inhuman and degrading treatment and that it was an arbitrary curtailment of the Claimant's right to liberty and movement;

(d) Whether it was unreasonable in the *Wednesbury's* sense for the Defendant to make her decision to arrest and prosecute the Claimants herein on the charges captured in the Warrant of Arrest based on information shared by the National Crime Agency of the United Kingdom contrary to the dictates of the Mutual Assistance in Criminal Matters Act of Malawi;

(e) Whether the Defendant took into account irrelevant and extraneous considerations in arriving at her decision to investigate, arrest and prosecute the Claimants when she considered information obtained unlawfully under the Mutual Assistance in Criminal Matters Act and whether, therefore, the Defendant's decision in that regard is consequently tainted with illegality.

(f) Whether or not the Defendant acted ultra vires its powers by cooperating with the National Crime Agency of the United Kingdom under the Mutual Assistance in Criminal Matters Act and the decision was therefore illegal.

(g) Whether or not the decision of the Defendant to cooperate and/or share evidence or information with the National Crime Agency of the United Kingdom and the investigations carried out pursuant to such decision should be quashed for being ultra vires the Defendant's powers.

35. Pausing here, the Court wishes to briefly state some of the principles that govern the process of judicial review.

36. Judicial Review of administrative action has been described as *"the most effective means by which courts control administrative actions by public functions"* See *The State vs Attorney General (Ministry of Agriculture and Food Security), Ex Parte McWilson Qongwane & Others*, Miscellaneous Civil Cause No. 36 of 2012 (HC – Mzuzu), per Madise, J. It *"is a supervisory jurisdiction which reviews administrative action rather than an appellate jurisdiction",* Ibid.

37. The grounds upon which judicial review of administrative action may lie were well-summarised by Chikopa J (as he then was) in the case of *The State v The Registrar General, Ex-Parte Msenga Mulungu & 8 Others*, Civil Cause No. 14 Of 2010 (Mzuzu), [2010] MWHC 6, where he said:

> *"a decision of a public authority may be quashed where the 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 there is an error of law on the face of the record or the decision is unreasonable. The function of the courts, including this Court, therefore is not to act as an appellate tribunal in relation to decisions complained against. It is also not to interfere in any*

way with a public officer's/office's exercise of any power or discretion conferred on it. Unless of course the same has been exercised beyond the respondent's jurisdiction or unreasonably. In other words the Courts must not to do that which the public authority whose decision is the subject of review is by law mandated to do. If the Courts did that they would under the thin guise of preventing the abuse of power be themselves guilty of exercising powers they do not have. The court's function in judicial review proceedings therefore is merely to see to it that lawful authority is not abused by unfair treatment."

38. In the case of *The State vs Council of the University of Malawi, Ex-parte University of Malawi Workers Trade Union*, Miscellaneous Civil Cause No. 1 of 2015, this Court, sitting at Zomba, in its final Judgment, observed at paragraph 2.5, that:

"Generally, the orthodox common law position is that in cases of judicial review of administrative action, the Court is largely concerned with the decision-making process rather than the substance of the decision itself (or the merits of the decision as commonly stated)."

39. The Court referred to the oft-cited case of Chief Constable of *North Wales Police vs- Evans* [1982] 1WLR 1155 at 1160 in support of this proposition.

40. Coming to the facts in the present matter, the facts in support and in opposition to the Judicial review application were presented before this Court in the form of sworn statements and also oral evidence through the cross-examination and re-examination of three witnesses.

41. The witnesses who gave oral testimony were Counsel Lugano Mwabutwa who was also representing the 1st Claimant in the matter, the 1st Claimant himself – the Hon. Kezzie Msukwa, MP, and Mr. Alfred Nkhoma, Principal Investigations Officer for the ACB.

42. In addressing the principal issues which have been highlighted earlier in this judgment, the Court will deal first with the issue of the manner of arrest, and the ensuing legal consequences where breaches are found; and will conclude by addressing the issue of the effect of section 5(1) of the Mutual Assistance in Criminal Matters Act (MACMA). The Court will also deal with other matters which are connected to these two principal issues.

43. Before getting into an analysis of these issues, the Court will first look at the relevant evidence that was presented before the Court.

44. I must mention that the Court noted that the issues for the Court to decide in the present matter are predominantly determinations on questions of law. It is therefore only where there seems to be a serious dispute as to facts that the Court will going into a more comprehensive restatement and analysis of the evidence.

45. The Court now proceeds to examine the evidence given in the present matter.

46. The Court's examination of the evidence starts with that of Ms. Stella Nkhalamba, a Patient Attendant at Partners in Hope Hospital, whose evidence came in the form of a Sworn Statement. Her sworn statement evidence went unchallenged. She was not called for cross-examination.

47. In her Sworn Statement, Stella Nkhalamba stated that she was a Patient Attendant at Partners in Hope Hospital. She told the Court that her duties at the hospital included welcoming patients, taking patients' vital signs, taking blood samples and directing patients to the right offices.

48. It was her evidence that on 31st December 2021, she was assigned to welcome a patient at the car park namely the Hon. Kezzie Msukwa. She stated that accordingly, she took a wheelchair and went to the car park.

49. Ms. Nkhalamba stated that when she came to the car park, she found a black Mercedes Benz, and behind it there was a white Land Cruiser. According to her evidence, in the Mercedes Benz, there was a driver who was slim, tall and was wearing a black suit. In front, she stated, there was a man who was seated on the passenger's seat which was tilted.

50. She stated that when she asked the driver where the patient was, he told her that the patient was the one who was seated on the tilted passenger's seat. She then opened the door, and the patient came out of the black Mercedes Benz on his own without any help and sat on the wheelchair. She then moved the wheelchair, with the patient sitting up, towards the entrance of the Hospital.

51. It was her sworn statement evidence that as she approached the entrance of the hospital, she was stopped by two officers who introduced themselves to the patient as officers from the ACB. Ms. Nkhalamba stated that they proceeded to inform the 1st Claimant that he was being

placed under arrest for corrupt use of his office. She mentioned that they further told him that he had a right to remain silent, and also warned him that whatever he would say would be taken down in writing and may be given in evidence in a court of law.

52. She further stated that the patient, the 1st Claimant herein, was shown the Warrant of Arrest and was told to sign it. According to Ms. Nkhalamba, the patient answered in such a low tone that she could not hear what he said. However, she noticed that the patient did not sign the blue papers that the ACB officers had asked him to sign.

53. It was her evidence that after that, the ACB officer who was wearing a white shirt took a handcuff and handcuffed the patient. The officer then instructed her to proceed with the patient into the hospital.

54. She emphasised in her Sworn Statement that that the patient was handcuffed outside the hospital.

55. After this, Ms. Nkhalamba stated, she went into the hospital reception and thereafter to the short stay day ward. According to her statement, the ACB officers stopped at the reception area as she proceeded with the patient to the short stay day ward. Later, she stated, she came back to the reception area to call upon the ACB officers to go and remove the handcuffs from the patient so that she could take his vital signs.

56. She proceeded to state that the ACB officer came and removed the handcuff from one hand and tied it to a drip stand. She then proceeded to take vital signs from the patient. She stated that at this point, the ACB

officers had left the room because they were called to meet Dr. Amos Mailosi.

57. Ms. Nkhalamba concluded her sworn statement evidence by stating that after taking the patient's vital signs, she went back to her workstation.

58. Another piece of evidence came in the form of the Sworn Statement of one Esther Henderson, who described herself as a Nurse at Partners in Hope Hospital, in Lilongwe. The contents of her Sworn Statement, just like those of Stella Nkhalamba's, went unchallenged. She was similarly not called for cross-examination, and her evidence was not in anyway impugned by the Claimants' Counsel.

59. Ms. Henderson deposed that she was a nurse working with Partners in Hope Hospital (PIH) in Lilongwe, and that she handled the 1st Claimant when he attended Partners in Hope Hospital on 31st December 2021.

60. She stated that she joined PIH on 31st July 2021. As a nurse, she stated that her roles and responsibilities included assisting patients after they had been seen by the Doctor, including offering counselling sessions, giving medication and providing other core nursing services to patients.

61. She stated that she recalled that on 31st December 2021, the day the 1st Claimant came to PIH, she was working at Dalitso Day Ward. She was then informed by Dr Mailosi to get prepared for a patient who was being referred to PIH from a certain hospital. He informed her to immediately check the vital signs of the patient and to collect samples once he arrived. She stated that she recalled that the 1st Claimant arrived

at the hospital at around 15:15 hours, and that he arrived on a wheelchair. He was being assisted by the hospital attendant.

62. She stated that she then got to the bedside to check the 1st Claimant's vital signs and to collect samples, and that she noticed that he had been handcuffed. She then went to Thandizo Ward to ask Dr Mailosi to liase with ACB Officers to remove the handcuffs in order for her to be able to work on the patient.

63. It was her evidence that on her way back from Thandizo Ward, along with Dr Mailosi, she found the 1st Claimant with one hand chained to a drip stand, whilst his other hand was free. She stated that she recalled very well that, when she was working in the patient treatment room, the people present were herself, her fellow nurse, the 1st Claimant's wife and a slim tall man in a black suit; and that the ACB officers were waiting outside in the hospital corridor. She mentioned that as per procedure, they only allow one guardian to be with the patient.

64. She confirmed in her statement that she did not witness the 1st Claimant's arrest, and also confirmed that the 1st Claimant had his handcuffs completely removed whilst he was in Dalitso Clinic and that he was later moved to Thandizo Clinic with no handcuffs. She further stated that the 1st Claimant's rights to privacy were not violated at any point when he was being assisted by herself and that his rights as a patient were not violated at any point during his treatment at PIH.

65. Counsel Mwabutwa, one of the 1st Claimants legal practitioners in the present matter, also decided to give oral evidence. The Defendant gave notice to have him cross-examined based on a Sworn Statement he

had made, and he expressed his willingness to take to the witness box for such cross-examination.

66. Counsel Mwabutwa testified that he received instructions from the 1st Claimant to commence the judicial review proceedings in the present matter on 30th December, 2021 and he prepared his Sworn Statement.

67. It was his testimony that he met the 1st Claimant in person on the 31st of December 2021, at about 7:00 o'clock in the morning, for a legal practitioner and client briefing before the 1st Claimant could report to the ACB for questioning.

68. He stated that after the briefing, they started-off for the ACB offices. He mentioned that on the way, they passed through a medical facility at the Lilongwe City Centre called Discovery Clinic because the 1st Claimant was not feeling well. Counsel Mwabutwa stated that he duly communicated this development to the Defendant.

69. It was Counsel Mwabutwa's testimony that at Discovery Clinic, the 1st Claimant was treated as an outpatient but was advised by the Doctor to be on bed rest. The ACB officers demanded to go to the 1st Claimant's home to appreciate his condition. He told the Court that the request by the ACB Officers was quite reasonable, and that he even offered them to use his car, but they made a decision to use their own car.

70. Counsel Mwabutwa conceded that whilst he was supposed to follow the ACB officers to the 1st Claimant's house, considering that he did not know the exact location of the house, he failed to reach the said house because he had taken a different direction from the ACB Officers at the junction near Golden Peacock and ended up getting lost. He stated that

he had decided to use another route to the 1st Claimant's house because the ACB Officers had given him directions to the said house. He was then told by the ACB officers that when they reached the 1st Claimant's house, they did not find him there. At this point, Counsel Mwabutwa made a phone call to the 1st Claimant who told him that he was not at home because he felt he was not properly assisted at Discovery Clinic, and that he had therefore decided to go to the Area 12 MASM Clinic. Counsel Mwabutwa told the Court that he then informed the ACB Officers that the 1st Claimant was going to MASM Clinic.

71. Counsel Mwabutwa further confirmed that when the ACB Officers and himself reached the said MASM Clinic, they did not find the 1st Claimant. He then called the 1st Claimant again who told him that he had gone back to Discovery Clinic. It was his evidence that when he was talking to the 1st Claimant at this stage, asking him about his whereabouts, he put him on loudspeaker in the presence of the ACB officers. He explained to the Court that he did this in order to allay any possible fears by the ACB Officers that perhaps he was deliberately misleading them.

72. It was his further evidence that when the ACB officers and himself went back to Discovery Clinic they found that the 1st Claimant's condition had deteriorated. It was Counsel Mwabutwa's evidence that the 1st Claimant could not talk and he was sleeping. Counsel Mwabutwa went further to state that the 1st Claimant was in a semi-conscious state. As such, Counsel stated, the ACB officers did not effect an arrest.

73. Answering during cross-examination however, when it was put to him that the fact that the 1st Claimant was treated as an outpatient and

told to go home, and that this was a sign that his situation was not critical, Counsel Mwabutwa conceded on the point.

74. Counsel Mwabutwa further testified that the 1st Claimant was referred to Partners in Hope Hospital by the Doctor at Discovery Clinic. He stated that the ACB officers were duly alerted, and that when the 1st Claimant got out of the Clinic into the motor vehicle, the ACB Officers were having their lunch outside. He testified that there is only one door that is used both for entry into and exit from the Clinic and that that is the very same door that the 1st Claimant used when getting out of Discovery Clinic. He disputed the Defendant's Claims both as put to him during his cross-examination and as stated in the Sworn Statement of Mr. Isaac Nkhoma, that the 1st Claimant used a back door to exit the Clinic. It was his evidence that if at all the Defendant's officers did not see the 1st Claimant exiting Discovery Clinic, it was because they were busy having lunch at the time.

75. Counsel Mwabutwa proceeded to testify that the 1st Claimant did not use an Ambulance because the Clinic did not have one. He further said that he did not see the 1st Claimant being handcuffed because at that time he was parking his car, as the 1st Claimant had disembarked from the car into the waiting wheelchair. He however stated that at the time the ACB officers wanted to serve the Warrant of Arrest on the 1st Claimant, the latter was on the hospital bed with one of his hands tied to a drip stand.

76. Counsel Mwabutwa told the Court that at the time these developments were taking place, he had not yet filed the Judicial Review application at the High Court in Zomba. The credibility of this claim however seems not entirely clear. It seems to be in sharp contrast with what Hon. Justice Ntaba observed in her decision of 1st January, 2022

in Judicial Review Case No. 16 of 2021, where, at paragraph 2.5, she observed that:

> *"This Court noted that whilst it was writing this determination, the Defendant purportedly executed the warrant of arrest on the Claimant on his hospital bed and proceeded to issue a public notice of the same."*

77. These remarks seem to be at odds with what Counsel Mwabutwa told this Court under cross-examination, that is to say that the 1st Claimant herein was arrested before the judicial review processes were filed at the High Court in Zomba.

78. Be that as it may, Counsel Mwabutwa told the Court that he was, at the material time, in Lilongwe with the 1st Claimant and that he had instructed his colleagues in Blantyre to file the court processes. He told the Court under cross-examination that although the Sworn Statement shows that he had it sworn in Blantyre, this was a simple mistake. He said that *"these things happen."* However, when he was shown a copy of his own Sworn Statement, and his attention was brought to the fact that initially the word Lilongwe had, in the jurat, been indiacted as the place where the same was sworn, and that the word Lilongwe was then crossed out and replaced with the word Blantyre in long hand, Counsel quickly changed tack and stated that he now recalled that he had in fact travelled to Blantyre on 30th December, 2021 and that he was there between 7p.m. and 8 p.m.

79. In re-examination, Counsel Mwabutwa essentially repeated his positions as stated during cross examination.

80. The testimony of the 1st Claimant himself, Hon. Kezzie Msukwa, was broadly similar to the evidence of Counsel Mwabutwa. I will only restate those aspects of his evidence that either were not covered by Counsel Mwabutwa or that differ substantially from the evidence of Counsel Mwabutwa.

81. Answering the question as to why he had decided to go to MASM Clinic after being prescribed medication and bed rest by the Doctor at Discovery Clinic, the 1st Claimant told the Court that he had decided to go to MASM hospital because he started sweating profusely, was having heart palpitations and that he therefore felt that he probably needed a drip. Asked whether he was a doctor to decide that he needed a drip under the circumstances, he responded by saying that he had been hypertensive for a very long time and therefore qualified as his own doctor because he could tell how he felt at the material time.

82. He stated that when he was referred to Partners in Hope from Discovery Clinic, it was his decision not to use an ambulance because there were enough vehicles around and he did not see the need to ask for an ambulance. He stated that if he had requested for an ambulance, he was sure one would have been provided to him.

83. The 1st Claimant disputed a claim, put to him during cross-examination, that he probably suggested to the Doctor that he be referred to Partners in Hope Hospital. It was his evidence that the Doctor noted that he was not stabilizing, that the situation was getting worse and therefore decided to refer him to a bigger and better hospital. He proceeded to tell the Court that when he went back to Discovery Clinic, he told the Doctor about the sweating and the heart palpitations, but he never anticipated that he would stay long, and that in fact he was fully conscious at all material times.

84. He testified that when going to Partners in Hope, he walked into Counsel Mwabutwa's vehicle by himself and also disembarked from the vehicle by himself.

85. Some quick findings should be stated here.

86. As the Court makes these findings, it reminds itself that the burden of proof lies on the Claimants to prove their grounds for judicial review in challenging the Defendant's decisions, and the burden must be discharged on the standard of a balance of probabilities. In addition, the Court also reminds itself that where a party raises a particular factual matter that requires proof to the satisfaction of the Court, the evidential burden for such proof lies on the party that asserts that particular fact.

87. It is against these evidential principles that the Court proceeds to state its findings in the present case.

88. The Court heard conflicting evidence on whether a back door or a front door was used by the 1st Claimant to exit from Discovery Clinic. Mr. Nkhoma of the ACB suggested that the 1st Claimant used a back door, whilst the 1st Claimant and Counsel Mwabutwa stated that no such door exists and he used the front door. The issue of the 1st Claimant using a backdoor is one that was brought up by the Defendant with a view to faulting the conduct of the 1st Claimant. In this regard, the evidential burden fell on the Defendant to establish this fact.

89. On analysis, it seems to this Court that on this question, the probabilities as to whether or not the Defendant's claim's or the 1st Claimant's claims were true are equal. Where the probabilities are equal

in a matter such as the present one, it means that the one upon whom the burden of proof rests has failed to establish the fact sought to be established. It follows therefore that the Defendant failed to show that the 1st Claimant was evasive by using a back exit door from Discovery Clinic.

90. As stated above, Counsel Mwabutwa, in his oral testimony, stated that he found the 1st Claimant in a semi-conscious State at Discovery Clinic. It appears that the intention was to create an impression that the 1st Claimant was gravely ill on the day he was arrested.

91. However, Counsel Mwabutwa's testimony in this regard was expressly negatived by the evidence of his own client, the 1st Claimant herein, who was emphatic and categorical that he was never in a semi-conscious state at the material time and that he was in his full senses. When asked during cross-examination as to what he would say if someone claimed that he had been semi-conscious, the 1st Claimant stated clearly that such a statement would not be true. The Court is therefore not sure how Counsel Mwabutwa came to the conclusion that his client had been in a semi-conscious state.

92. I must mention that the Court had earlier sounded a word of caution on the dangers of Counsel, having conduct of the matter, switching roles by temporarily leaving the Bar in order to testify in the same case that he is prosecuting as Counsel, including being subjected to cross-examination. This, I pointed out, poses the danger of Counsel somehow becoming personally invested in the outcome of the proceedings and ending up rendering discreditable evidence which in the end does not reflect entirely well on Counsel.

93. But well, all the Court can say at this stage is that it views Counsel Mwabutwa's evidence in this respect with great circumspection. Resultantly, it is the finding of this Court that the 1st Claimant was in his full senses at the material time.

94. Another issue where the evidence the Court heard was somehow discrepant was with regard to the issue of why the 1st Claimant did not use an ambulance after being referred from Discovery Clinic to Partners in Hope Hospital. Contrary to Counsel Mwabutwa's testimony that his client, the 1st Claimant, was not taken from Discovery Clinic to Partners in Hope Hospital because Discovery Clinic had no ambulance, the 1st Claimant testified with firm conviction that he was in fact the one who decided that an ambulance was not required at the time and that had he wished to ask for one, he was sure that the same would have been provided. Asked what he would say if someone said that he was not taken to Partners in Hope Hospital in an ambulance because there was no ambulance available at Discovery Clinic, the 1st Claimant expressed ignorance about such fact and stated categorically that if he needed an ambulance, he was sure that one would have been provided.

95. The Court reckons that the evidence of the 1st Claimant is the direct evidence of the person who took the decision himself against calling for an ambulance, rather than the evidence of Counsel who was essentially speaking on behalf of the 1st Claimant in respect of the availability or Lack thereof of an ambulance at the material time. When the evidence of the two witnesses is weighed, the Court believes the 1st Claimant's own evidence in this regard. The fact that the 1st Claimant was making firm decisions such as these on the material day again goes to lend more weight to the 1st Claimant's evidence that he was fully conscious on the material day.

96. The Court now turns to the issue of the manner in which a person suspected of having committed an offence may be legally arrested, and where any breaches of the procedural law relating to the arrest are established, what legal consequences may ensue. A number of constitutional and statutory provisions offer a useful starting point in this regard.

97. The law gives the ACB powers of arrest. Under section 15 of the CPA, the Director, the Deputy Director or any officer of the Bureau, of such category and such senior rank as the Director may determine, have the power, if authorized by warrant issued by a magistrate, to arrest any person if they reasonably suspect that the person has committed or is about to commit an offence under the CPA.

98. Section 103 of the CP & EC deals with the issue of where and when a Warrant of Arrest issued by a Court may be executed in Malawi. The provision states that:

> *"A warrant of arrest may be executed at any place in Malawi and on any day including Sunday."*

99. Section 20 of the CP & EC describes, in turn, how an arrest is to be effected under Malawian law. It states that:

> *"(1) In making an arrest a police officer or other person making the arrest shall actually touch or confine the body of the person to be arrested, and shall inform the person that he is under arrest.*

(2) Where the person to be arrested submits to the custody by word or action, the arrest shall be effected by informing the person that he is under arrest.

(3) If the person forcibly resists the endeavour to arrest him, or attempts to evade the arrest, such police officer or other person may use all means necessary to effect the arrest.

(4) This section shall not justify the use of a greater force than was reasonable in the particular circumstances in which it was employed or was necessary for the apprehension of the offender."

100. Section 101 of the CP & EC is also significant to note. It provides for the notification of the substance of a Warrant of Arrest. It states that:

"The police officer or other person executing a warrant of arrest shall notify the substance thereof to the person to be arrested and, if so required, shall show him the warrant."

101. Section 97 of the CP & EC is also imperative in informing arresting officers on what should happen when a person is placed under arrest in execution of a Warrant of Arrest. This section makes provision for the taking of security and releasing on bail of the arrested person by the arresting officer, under Court sanction. It is, regrettably, a provision that is frequently lost sight of when warrants of arrest are issued by subordinate courts. The procedure is not mandatory, but one where it is open for the Court issuing a Warrant of Arrest to exercise its discretion on the propriety of following the same. It is a procedure which would, in this Court's view, help both to give further effect to the right of detained persons under section 42(2)(e) to be released from custody with or without bail on the one hand, and also help to ease the heavy caseload burden that is cast on magistrate Courts to determine bail applications

even in the most minor of cases which could easily be dealt with using the alternative bail procedure envisaged under section 97 of the CP & EC, on the other. Section 97 of the CP & EC provides as follows:

> *"(1) Any court issuing a warrant for the arrest of any person in respect of any offence other than genocide, murder, treason or rape may in its discretion direct by endorsement on the warrant that, if such person executes a bond with sufficient sureties for his attendance before the court at a specified time and thereafter until otherwise directed by the court, the officer to whom the warrant is directed shall take such security and shall release such person from custody.*
>
> *(2) The endorsement shall state—*
>
> *(a) the number of sureties;*
>
> *(b) the amount in which they and the person for whose arrest the warrant is issued are to be respectively bound; and*
>
> *(c) the time at which he is to attend before the court.*
>
> *(3) Whenever security is taken under this section the officer to whom the warrant is directed shall forward the bond to the court."*

102. Section 102 of the CP & EC imposes an obligation on the person effecting an arrest to bring the arrested person before a Court. It provides that:

> *"The police officer or other person executing a warrant of arrest shall, subject to the provisions of section 97 as to security, without unnecessary delay bring the person arrested before the court before which he is required by law to produce such person."*

103. Section 104 of the CP & EC goes further to provide that:

> *"(1) When a warrant of arrest is executed, the person arrested shall unless the court which issued the warrant is within thirty kilometres of the place of arrest, or is nearer than any other subordinate court, or unless security is taken under section 97, be taken before the subordinate court nearest to the place of arrest.*
> *(2) The magistrate presiding over such subordinate court shall, if the person arrested appears to be the person intended by the court which issued the warrant, direct his removal in custody to such court.*
> *(3) If the person has been arrested for an offence, other than genocide, murder, treason or rape, and he is ready and willing to give bail to the satisfaction of such magistrate, or if a direction has been endorsed under section 97 on the warrant and such person is ready and willing to give the security required by such direction, the magistrate shall take such bail or security, as the case may be, and shall forward the bond to the court which issued the warrant.*
> *(4) Nothing in this section shall be deemed to prevent a police officer from taking security under section 97."*

104. These provisions clearly bear out a number of key legal positions.

105. Firstly, section 103 of the CP & EC makes it clear that an arrest can be effected at any place in Malawi and at any time. This provision must of course necessarily be subject to some legal privileges that the law might ascribe to certain persons at certain times and/or at certain places. For instance, the relevant part of section 60(1) of the Constitution provides that:

"The Speaker, every Deputy Speaker, and every member of the National Assembly shall, except in cases of treason, be privileged from arrest while going to, returning from or while in the precincts of the National Assembly…"

106. Other than the privileged situations, a warrant of arrest maybe executed anywhere and at any time as prescribed under section 103 of the CP & EC. There is no law that makes a hospital a privileged place. Thus, as along as an accused person is mentally competent, there is nothing unlawful about an arrest being effected in a hospital, provided the law is followed in effecting such an arrest.

107. Secondly, it is clear from these provisions that it is not always appropriate to handcuff accused persons. Arresting officers are to exercise proper discretion in terms of when and when not to subject an accused person to handcuffing. According to section 20(1) of the CP & EC, an arrest may be effected by simply touching or confining the body of the person to be arrested and informing him or her that he or she is under arrest. Under section 20(2) of the CP & EC:

"Where the person to be arrested submits to the custody by word or action, the arrest shall be effected by informing the person that he is under arrest."

108. These provisions show that if an arrested officer confines, or even just touches, the body of the person to be arrested, informs him or her that he or she is under arrest, and the person under arrest demonstrates, whether verbally or non-verbally that he or she submits to the custody, an arrest is effective, and the legal processes attendant to an arrest are then set in motion.

109. Whilst this is so, it must also be mentioned that section 20(3) of the CP & EC provides that where the person to be arrested forcibly resists arrest, or where he or she otherwise seeks to evade an arrest, then the person effecting the arrest "*may use all means necessary to effect the arrest."* Section 20(4) of the CP & EC however goes on to clarify that nothing in that section justifies "*the use of a greater force than was reasonable in the particular circumstances in which it was employed or was necessary for the apprehension of the offender."* The arresting officer or person therefore must exercise judicious discretion on the degree of force requisite for a particular arrest situation where the use of force is necessary.

110. The question becomes: in the circumstances of the present case, was there any need to apply force in the manner of handcuffing the accused person? The answer seems to be in the negative.

111. There is no suggestion at all that the 1st Claimant perhaps used force to resist arrest. There is also no suggestion that he perhaps posed a security risk or that there were fears that he could flee from the ACB officers after being formally placed under arrest.

112. An arrest does not necessarily mean handcuffing a person, although handcuffing a person accompanied by words informing the person that he or she is under arrest will also constitute an arrest. Black's Law Dictionary 8th Edition describes an arrest as the apprehension of someone for the purpose of securing the administration of the law. The learned authors of the dictionary proceed to state that:

"The question of what constitutes an arrest is a difficult one. On one end of the spectrum, it seems apparent that detention accompanied by handcuffing, drawn guns, or words to the effect that one is under arrest qualifies as an 'arrest' and thus requires probable cause. At the other end, a simple questioning on the street will often not rise to the level of an arrest. Somewhere in between lie investigative detentions at the station house. Charles H. Whitebread, Criminal Procedure § 3.02, at 61 (1980)"

113. Simply put, where handcuffs are used in connection with an arrest, they are used in order to ensure that a person who is being arrested, or who is already under arrest is either prevented from fleeing or posing a security threat to others or in some cases, to himself or herself.

114. Whilst there seems to be a dearth of domestic jurisprudence on the point, a number of common law authorities provide some useful guide on how the above provisions are to be understood. In the case of *Wright v Court* (1825) 6 D and R 623, the Court held that the arresting official must show that good special reasons existed for resorting to handcuffing a suspect. Bayley J. stated at 624, that:

"The defendants have also justified the handcuffing the plaintiff in order to prevent his escape; but they have not averred that it was necessary for that purpose, or that he had attempted to escape, or that there was any danger of his escaping; and such a degree of violence and restraint upon the person cannot be justified even by a constable, unless he makes it appear that there are good special reasons for his resorting to it."

115. In a subsequent case of *Leigh v Cole* (1853) 6 Cox C 329 Williams J. was more elaborate on the issue, stating at pages 331- 332 that:

> *"The other points involve questions of law of great importance. First, with respect to handcuffing, the law undoubtedly is, that police officers are not only justified, but they are bound to take all reasonably requisite measures for preventing the escape of those persons they have in custody for the purpose of taking them before the magistrates; but what those reasonable measures are must depend entirely upon circumstances, upon the temper and conduct of the person in custody, on the nature of the charge, and a variety of other circumstances which must present themselves to the mind of anyone. As to supposing that there is any general rule that everyone conveyed from the police station to the magistrates' court is to be handcuffed, seems to me to be an unjustifiable view of the law, and one on which the police officers are mistaken. In many instances a man may be conveyed before the magistrates without handcuffing him, and taking him thus publicly through the streets. On the other hand, it is necessary to take proper precautions in conveying a person in custody to be dealt with by the magistrates; and you must say whether, looking at all the circumstances of the case, the defendant used unreasonable precautions in this case, or used unnecessary measures to secure the safe custody of the plaintiff."*

116. In the decision of the European Court of Human Rights of *Henaf v France* (2005) 40 EHRR 990, the ECtHR was called upon to determine

whether there was a violation of Article 3 of the European Convention on Human Rights (1950). The Court made the following remarks:

> *"48. Handcuffing does not normally give rise to an issue under Article 3 of the Convention where the measure has been imposed in connection with a lawful detention and does not entail the use of force, or public exposure, exceeding what is reasonably considered necessary. In this regard, it is important to consider, for instance, the danger of the person's absconding or causing injury or damage (see Raninen, cited above, p. 2822, § 56), and the particular circumstances of a transfer to hospital for medical treatment (see Mouisel v. France, no. 67263/01, § 47, ECHR 2002-IX). In the instant case, having regard to the applicant's age, his state of health, the absence of any previous conduct giving serious cause to fear that he represented a security risk, the prison governor's written instructions recommending normal and not heightened supervision and the fact that he was being admitted to hospital the day before an operation, the Court considers that the use of restraints was disproportionate to the needs of security, particularly as two police officers had been specially placed on guard outside the applicant's room…*
>
> *59. In the final analysis, the Court considers that the national authorities' treatment of the applicant was not compatible with the provisions of Article 3 of the Convention. It concludes in the instant case that the use of restraints in the conditions outlined above amounted to inhuman treatment."*

117. These decisions emphasize the need for the arresting officer or person to exercise reasonable discretion on whether to handcuff the suspect or not. Among other things, the arresting person may consider the temper and conduct of the person to be arrested, the age, the nature of the charge that he or she faces, the state of health, the nature of the surroundings including how people around may be behaving or are likely to behave in connection with the arrest, and a variety of other circumstances which may lead a reasonable person to consider that handcuffing would be appropriate under the circumstances.

118. The next issue to consider is what should happen where handcuffs have been improperly used on a suspect.

119. In the case of *Kumar vs Minister for Immigration, Local Government and Ethnic Affairs* [1991] FCA 163; 28 FCR 1, Lockhart J made the following pertinent remarks on the issue:

> *"That leaves the question of whether the handcuffing of the applicant was unreasonable in all the circumstances and so unreasonable as to vitiate his arrest. It was not suggested by any witness that the applicant conducted himself or his demeanour was such as to suggest that he would be likely to escape, injure or interfere with persons or property or that he threatened violence. Indeed, the evidence points in the contrary direction. In my opinion the handcuffing of the applicant was unreasonable.* ***The unreasonable handcuffing of the applicant does not, however, vitiate the arrest of the applicant who was lawfully arrested, though not lawfully handcuffed.*** *The arrest was completed before the handcuffs were put on the*

applicant and the circumstances attending the handcuffing of the applicant did not vitiate the arrest itself. I am not persuaded that any form of relief should be granted to the applicant flowing from the fact that he was unreasonably handcuffed; nor is any suggested. It is not suggested that he suffered damage because of it, although doubtless he suffered indignity and embarrassment. ***The handcuffing was an unnecessary interference with his person and dignity."*** [The Court's emphasis].

120. Another decision that is instructive on this issue is that of *Simpson v. Chief Constable of South Yorkshire Police* [1991] 135 5J 393 The Times, 7 March 1991, where Fox L.J stated that:

"The first of those allegations is in effect an assertion of the use of undue force in effecting an arrest, making the arrest itself unlawful. No authority was cited to us which supports that proposition. Nor would it be a sensible state of the law. The circumstances of many arrests are such that errors of judgment may be made. If the arrest itself is justified in law, such errors in the mode of conducting it, though they may be the basis for other remedies, do not seem to be a good basis for invalidating the arrest itself which is necessary in the public interest. If the arrest is made with due authority, it is not a false imprisonment. Thus Blackstone, Book III, p.127 states that "unlawful or false imprisonment consists in such confinement or detention without sufficient authority". ***There was authority for this arrest. For the validity of the arrest what is crucial is the authority.***

Blackstone himself makes no suggestion that undue force will nullify an arrest. *"* [The Court's emphasis]

121. According to Blackstone's 2013 – p.1191 at para. D1.8, *"It would seem that,* ***where handcuffs are unjustifiably resorted to, their use will constitute a trespass even though the arrest itself is lawful*** *(Taylor (1895) 59 JP 393; Bibby v Chief Constable of Essex (2000) 164 JP 297)."* [the Court's emphasis]

122. The Court has carefully considered the circumstances of the present case. In particular, the Court has considered that there was medical evidence that the 1st Claimant had been diagnosed with a medical condition, namely hypertension, that needed immediate clinical attention. The Doctor who attended to the 1st Claimant at Discovery Clinic, Dr. Chitsa Banda, in his note of referral to Partners in Hope Hospital, indicated that the patients blood pressure was out of control, and that since Discovery Clinic did not have an admission place, he was being referred to Partners in Hope for Admission.

123. Regrettably, the evidence from the two Doctors at Partners in Hope Hospital who gave written evidence, namely Dr. Agnes Moses, the Executive Director of the hospital and Dr. Hitler Sigauke, Medical Director of Partners in Hope Hospital, only described the preparatory arrangements they made prior to the arrival of the patient. They say nothing about the clinical condition of the patient when he arrived at the hospital. The evidence of Ms. Stella Nkhalamba and Ms. Esther Henderson shows that the doctor who actively attended to the 1st Claimant at the hospital was one Dr. Amos Mailosi, but it would appear that Dr. Mailosi did not give any written statement in connection with the present proceedings.

124. As outlined above, the evidence of Ms. Stella Nkhalamba and Ms. Esther Henderson shows what they witnessed in relation to the arrest of the 1st Claimant at the hospital and also indicates that they took readings of his vital signs. There was no comment as regards the actual clinical condition of the patient. In other words, this Court has no evidence from Partners in Hope Hospital as regards the clinical condition of the 1st Claimant when he was received and admitted at the Hospital.

125. However, in view of the express findings by Dr. Chitsa Banda at Discovery Clinic, and the fact that Partners in Hope did proceed to admit the patient as referred from Discovery Clinic, the Court must accept that the 1st Claimant's blood pressure at the time was very high and not stable, to the extent of not requiring hospitalisation. There was no evidence led by the Defendant to negative this fact.

126. In view of this position, having regard to the 1st Claimant's state of health, the absence of any previous conduct giving serious cause to fear that he represented a security or flight risk, his station in society, his age (he was described as a middled aged man by the doctors and certainly did not give the impression to the Court that he was so youthful that he could easily physically slip from the custody of the arresting officers and quickly flee), and the fact that he was being admitted into an established and secure hospital, where appropriate security measures would easily have been organized short of a hospital be handcuffing, the Court considers that the use of handcuffing on the 1st Claimant under the circumstances was disproportionate to the needs of security.

127. It was open to the ACB officers, if they had particular apprehensions that the 1st Claimant, then a sitting Cabinet Minister, might flee from the

hospital and perhaps vanish from his national responsibilities, to ask the Malawi Police Service to provide police officers to be placed on guard outside the 1st Claimant's hospital room.

128. It is the finding of this Court that by proceeding to tie the handcuff of an unstable hypertensive patient to the drip stand, inside the hospital as he lay on a sickbed receiving medical attention, the 1st Claimant was indeed subjected to inhuman treatment contrary to sections 19(1) and 19(3) of the Constitution. It is a little comforting that the evidence overwhelmingly shows that this only lasted for a few minutes as the hospital personnel were quick to call the ACB officers out for this kind of treatment of a patient and that he was untied from the handcuffs so that medical personnel could undertake their medical responsibilities on the 1st Claimant.

129. It must be said, for the avoidance of doubt, that the Court is not suggesting that it is a general rule that criminal suspects should not be handcuffed. All that the Court is saying is that it is proper that arresting officers should recall that they have discretion on whether or not to use handcuffs, and that in any given case they should professionally apply their minds and exercise proper discretion. The necessity for such reasonable exercise of discretion must necessarily be heightened where the person being arrested is known to be a clinical patient at the time of the arrest, such as was the case in the present matter.

130. Be that as it may, the authorities are abundantly clear that this finding of fault with regard to the manner in which handcuffs were used on the 1st Claimant on the material day, does not in any way vitiate the validity of his arrest which had already been effected. The arrest was

valid. There was nothing under the circumstances that would warrant an invalidation of the arrest herein and any ensuing legal processes.

131. A related issue that the 1st Claimant raised was that he was not informed about the reasons of his arrest and about his rights as an accused person.

132. The Court's analysis however shows that there is substantial evidence that suggests, on a balance of probabilities, that in fact the 1st Claimant was informed of the reasons for his arrest and that he was also informed about his rights.

133. As shown above, witness Stella Nkhalamba from Partners in Hope hospital stated in her Sworn Statement evidence, that the 1st Claimant was told by two ACB officers, just before he was wheelchaired into the hospital building, that he was under arrest in connection with corruption concerning his office as a Minister, and that his rights were read out to him. She stated that he was told that he had the right to remain silent, and that anything that he might say would be written down and might be tendered as evidence against him in Court.

134. As I mentioned earlier, this evidence went completely unchallenged. Even in the arguments, it was never suggested that Ms. Nkhalamba or Ms. Henderson's evidence was not credible for any reason at all. The Court has therefore no reason to doubt the truthfulness of the evidence of these two witnesses. Their evidence was, after all, the independent evidence of witnesses who had no reason to be biased against any party to the proceedings. I believe their evidence as true. In addition, by his own evidence, the 1st Claimant stated that he was fully conscious and aware of what was happening on the material day.

135. In the premises, the 1st Claimant's prayer that the Court should make a quashing Order or a like Order to certiorari quashing decision of the Defendant to arrest him, on the grounds that section 42(1)(a) of the Constitution was violated, must be and is hereby dismissed.

136. Consequently, it is the finding of this Court that the 1st Claimant was competently arrested at Partners in Hope Hospital in the City of Lilongwe, and that the ACB should have been at liberty to proceed with the requisite processes that follow after an arrest has been effected.

137. It follows that if the 1st Claimant felt very strongly that his rights were violated on account of the handcuffing herein, he might have wished or might wish to pursue other available avenues for legal redress, but the criminal proceedings against him should not be and should never have been affected by that reason.

138. I am fully aware of the interlocutory decision that my sister Judge, Hon. Ntaba, J made at the High Court Zomba Registry. After going through the record, I am satisfied that my sister Judge arrived at the interlocutory decision that she made because she was not availed with the full compass of facts relating to the matter, including the evidence of the hospital personnel at Partners in Hope Hospital, and she must have felt that it was better to preserve the status quo, which entailed the general position of the liberty of the 1st Claimant, until the issues in dispute were fully and finally ventilated after a full hearing, as they have now been before this Court. The same would explain the decision of like effect that of Ntaba J, of my brother Judge, the Hon. Mdeza, J.

139. The next issue to address, as indicated above, is whether, pursuant to Section 5 of the Mutual Assistance in Criminal Matters Act (Cap 8:04

of the Laws of Malawi), the Anti-Corruption Bureau (ACB), as an agency of the Government of Malawi, may enter into mutual assistance arrangements with organisations or agencies, whether international or foreign, without the sanction of, or going through, the office of the Attorney General.

140. In dealing with this fundamental question, it is perhaps appropriate to briefly state why broad international mutual assistance and cooperation in criminal matters, especially in categories of crime such as financial or economic crimes (including corruption and money laundering), terrorism, and drug and human trafficking, among others; is increasingly being encouraged around the world.

141. In the instant case, the category in issue is that of financial and/or economic crimes. Financial or economic crimes are insidious offences that have a wide range of corrosive effects on societies including undermining democracy and the rule of law, catalysing violations of human rights, distorting markets – both in respect of real estate and personal estate, eroding the quality of life and allowing organized crime and other threats to human security to flourish.

142. Offences of this genus, including corruption, hurt the poor disproportionately by diverting funds intended for development, undermining a Government's ability to provide basic services, feeding inequality and injustice in society, and discouraging foreign aid and investment, among other vices.

143. By diverting public resources from their legitimately intended public purposes to unlawful ones, these crimes pose a serious barrier to sustainable development in society and they weaken economies.

144. Financial or economic crimes, such as corruption, have become a global problem, bedeviling both developed and developing countries, and effectively combating such crimes is a mammoth task that, time and again, requires a concerted international response.

145. The 4th preambular citation to the *UN Convention Against Corruption* states that:

> *"corruption is no longer a local matter but a transnational phenomenon that affects all societies and economies, making international cooperation to prevent and control it essential."*

146. It is against this background that States around the world are increasingly concentrating on building cooperation and networks, including enhancing mutual legal assistance, recovery of the proceeds of corruption or other financial or economic crimes, and denial of safe havens for perpetrators.

147. As the Court approaches the issue of mutual assistance in criminal matters, the Court is thus mindful of this background behind the need for such cooperation arrangements among States and the institutions of the State.

148. One factual question that we need to quickly dispose of is whether, in conducting the investigations herein, after receiving information that from the National Crime Agency of the United Kingdom, the Defendant and/or the ACB sought the sanction or approval of, or otherwise went through, the office of the Attorney General.

149. In a Supplementary Sworn Statement sworn by Mr. Isaac Nkhoma, Principal Investigations Officer at the ACB, which was sworn on the 28th

of February 2022, the Defendant expressly and unequivocally conceded that:

> *"[T]he Anti-Corruption Bureau directly, and without involving the Office of the Attorney General, received information from National Crimes Agency that following almost two years of investigation in the United Kingdom (UK), the National Crimes Agency had come across evidence suggesting that Mr. Zuneth Sattar, a British National, holding a Permanent Resident Permit in Malawi is involved in corrupt activities with public servants and private individuals in Malawi including corruption in procurement of goods and services in the public service."*

150. The position is therefore abundantly clear that the Defendant did not involve the office of the Attorney General in cooperating with the National Crime Agency of the United Kingdom. The Claimants and the Defendant fully agree on this point. There is no need for further analysis.

151. In respect of the substantive issues regarding mutual assistance on criminal matters under MACMA, on his part, Counsel for the 1st Claimant, Mr. Chimwemwe Kalua, stated that the Defendant herein investigated and subsequently arrested the Claimants herein after the ACB had received information from National Crime Agency of the United Kingdom pursuant to the cooperation agreement entered into between the Anti-Corruption Bureau and the said National Crime Agency allegedly showing that one Zuneth Sattar was involved in corrupt activities and had been offering and giving bribes to public officers for them to corruptly perform or forbear to perform their public functions.

152. Counsel for the 1st Claimant contended that at law, it is only the Attorney General that has the authority to enter into cooperation agreements concerning mutual assistance in criminal matters between Malawi and any other Commonwealth Country where there are reasonable grounds to believe that evidence or information relevant to any criminal matter may be obtained from the Commonwealth Country or a foreign entity. It was Counsel's submission that this position is very clear from section 6 of the Mutual Assistance in Criminal Matters Act as read with the Mutual Assistance in Criminal Matters (Designation of Authority) Order. Counsel did not set out the relevant provisions of that section in the written arguments, but for clarity's sake, I think it is apposite that the provisions be set out. The relevant provisions of section 6 in this regard are in the following terms:

> *"Where the appropriate authority in Malawi has reasonable grounds to believe that evidence or information relevant to any criminal matter may be obtained if in a Commonwealth country…a request may be transmitted by such authority requesting that assistance be given by the Commonwealth country concerned in obtaining the evidence or information."*

153. It was Counsel for the 1st Claimant's submission that the information that the Defendant obtained on Zuneth Sattar, which led to the investigation and subsequent arrest of the 1st Claimant, was therefore illegally obtained without being sanctioned by a cooperation arrangement duly entered into by the Attorney General on behalf of the Republic of Malawi on the one part, and a relevant authority on behalf of the United Kingdom, perhaps the same being the National Crime Agency of the UK on the other.

154. Counsel argued that the Defendant had no legal authority to enter into a cooperation agreement with the National Crime Agency of the United Kingdom for purposes of sharing information and evidence. He therefore contended that the decision of the Defendant to investigate and arrest the 1st Claimant was tainted with illegality, and that the Defendant took into account extraneous factors in arriving at that decision.

155. Counsel stated that the said extraneous factors were in the form of the information which she obtained from the National Crime Agency. Counsel thus argued, in this regard, that the Defendant acted ultra vires and outside her powers in entering into the said cooperation agreement and obtaining information from the National Crime Agency in the circumstances. To this end, he contended that her decision to use the said information in order to investigate and arrest the claimants herein was unreasonable in the *Wednesbury's sense.*

156. On his part, Counsel Manuel Theu representing the 2nd Claimant, set out on his comprehensive argument against the Defendant's cooperation with the NCA of the UK by pointing out that, in the 2nd Claimant's view, the investigations by the Defendant were and are in violation of the 2nd Claimant's and Mr. Zunneth Sattar's constitutional right to privacy in that the Defendant, acting through her officers and other cooperating partners from the United Kingdom, bugged Mr. Sattar's house and hacked into the 2nd Claimant's and Mr. Sattar's phones and extracted some information that they are now relying on in pressing those charges against the 2nd Claimant.

157. Counsel Theu submitted that all the evidence that was obtained by searches and seizures herein was in violation of the Constitution and therefore illegally obtained and inadmissible in a criminal trial. He cited in

support of this proposition the American case of *Map v Ohio* 367 U.S. 643, 656 (1961) and also the Canadian case of *R v Collins* 1987 1 SCR 265.

158. The question this Court asks itself is whether these propositions indeed represent the law in Malawi.

159. I observe, with interest, that in asserting this general principle on the issue of the admissibility of illegally obtained evidence as representing the position of the law in Malawi, whilst Counsel Theu cited foreign jurisprudence, he did not cite the decision of the Supreme Court of Appeal in the case of *Mike Appel & Gatto Limited v Chilima* [2016] MWSC 138. In that case, the Supreme Court of Appeal stated that:

> *"[W]e want to observe that trial is a principal method of resolving disputes, the overriding purpose being to ascertain the truth. Whether to admit or exclude evidence in a trial remains a matter of discretion for the Court. Where evidence is obtained illegally, improperly or unfairly two opposing views exist, one in favour of admitting the evidence as long as it is relevant and necessary, and the other view is to exclude it regardless of its relevance and whether it is necessary. The former position represents English common law while the latter represents the view that rejects the fruit of the poisonous tree in some jurisdictions. There has been a plethora of academic discourse on the subject. Sometimes this is considered to be the battle between search for truth and the need to observe the due process of the law. Malawi has over time followed the English common law position that a Court will exercise discretion to admit relevant evidence if in its view the probative value outweighs the prejudicial effect. That*

remains the position under Malawi law. We think that this position is supported by Order 16 of the High Court (Commercial Division) Rules. This position tends to set the essentials of justice above technical rules, if strict application of the latter would operate unfairly and unjustly against the opposing party.]"

160. Indeed, this position is consistent with the decision of the Judicial Committee of the Privy Council in the case of *Kuruma, Son of Kaniu v The Queen* [1955] AC 197, where Lord Goddard CJ, on behalf of the Court, said at page 203, that:

"the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained. While this proposition may not have been stated in so many words in any English case, there are decisions which support it, and in their Lordships' opinion it is plainly right in principle."

161. The Lord Chief Justice went on to say that:

"There can be no difference in principle for this purpose between a civil and a criminal case. No doubt in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused . . . If, for instance, some admission of some piece of evidence, e.g., a document, had been obtained from a defendant by a trick, no doubt the judge might properly rule it out."

162. In another English decision of *R v. Sang* [1979] 3 WLR 263 (HL) Lord Diplock said (at p. 271):

> *It is no part of a judge's function to exercise disciplinary powers over the police or prosecution as respects the way in which evidence to be used at the trial is obtained by them. If it was obtained illegally there will be a remedy in civil law; if it was obtained legally but in breach of the rules of conduct for the police, this is a matter for the appropriate disciplinary authority to deal with.*

163. *Blackstones Criminal Practice*, (2013), commenting on this passage, states at page 2375, that:

> *"Referring to this pronouncement in **Jeffrey v Black** [1978] QB 490, Lord Widgery CJ said (at p. 497): 'I have not the least doubt that we must firmly accept the proposition that an irregularity in obtaining evidence does not render the evidence inadmissible'. Evidence is admissible, therefore, if it has been obtained by any of the following means:*
>
> *(a) Theft (**Leatham** (1861) 8 Cox CC 498 per Crompton J at p. 501).*
>
> *(b) Unlawful search of persons (**Jones v Owen** (1870) 34 JP 759 and **Kuruma, Son of Kaniu v The Queen** [1955] AC 197).*
>
> *(c) Unlawful search of premises (**Jeffrey v Black** [1978] QB 490).*
>
> *(d) The use of agents provocateurs (**Sang** [1980] AC 402).*

(e) *Eavesdropping (**Stewart** [1970] 1 WLR 907, **Keeton** (1970) 54 Cr App R 267, **Maqsud Ali** [1966] 1 QB 688 and **Senat** (1968) 52 Cr App R 282).*

(f) *Invasion of privacy (**Khan** [1997] AC 558, in which evidence of an incriminating conversation was obtained by means of a secret electronic surveillance device).*

164. Another instructive decision is that of the Supreme Court of Zambia in the case of *Liwaniso v The People* 1976 Z.R. 277, where the Court held that:

> *"...evidence illegally obtained, e.g. as a result of an illegal search and seizure or as a result of an inadmissible confession is, if relevant, admissible on the ground that such evidence is a fact (i.e. true) regardless of whether or not it violates a provision of the Constitution (or some other law)."*

165. Silungwe C.J. went on to sum up, in *Liwaniso v The People* , the tension in this area of the law. At page 286, he stated as follows:

> *"On an examination of the authorities on the subject with which we are here concerned two opposing views emerge. The first one is that it is important in a democratic society to control police methods and activities in order to secure a satisfactory assurance of respect for the law. It is argued that this can be achieved by denying to the police the right to use evidence that has been illegally obtained on the basis that it is better that guilty men should go free than that the prosecution should be able to avail itself of such evidence. The second is that it is not desirable to allow the guilty to escape by rejecting evidence*

illegally procured and that what is discovered in consequence on an illegal act should, if relevant, be admissible in evidence but that the policeman, or anyone else, who violates the law should be criminally punished and or made civilly liable for his illegal act. Although the law must strive to balance the interests of the individual to be protected from illegal invasions of his liberties by the authorities on one hand and the interests of the State to bring to justice persons guilty of criminal conduct on the other, is seems to us that the answer does not lie in the exclusion of evidence of a relevant fact."

166. Ultimately, Silungwe C.J. concluded as follows, at page 287:

"On the authorities, it is our considered view that (the rule of law relating to involuntary confessions apart) evidence illegally obtained e.g. as a result of an illegal search and seizure or as a result of an inadmissible confession is, if relevant, admissible on the ground that such evidence is a fact (i.e true) regardless of whether or not it violates a provision of the Constitution or some other law".

167. Another Zambia decision of *The People v Chipawa and Another* (HP 222 of 2010) [2011] ZMHC 59, followed on the decision in *Liwaniso v The People*. The learned Judge in the *Chipawa case* stated that:

"The issue as I see it, is not whether or not it is lawful to conduct a search of a person or his property without a search warrant – it is incontrovertible that a search conducted without a warrant is illegal and may be visited by an action for damages. The issue is rather whether the evidence obtained

as a result of the illegal search of a person or property, should, if factual (i.e. true), and relevant be admissible in evidence. This question represents and manifests a tension between two competing public interests. On one hand there is need to protect persons from illegal or irregular invasions of their liberties by, especially, investigating authorities. On the other hand, it is also in the interest of the public for the investigative authorities to obtain evidence that may be vital to ensure that justice is done. This is therefore a question of broad legal policy. This legal policy was categorically resolved by the Supreme Court in the ***Liwaniso case****, when it was held that apart from involuntary confessions, evidence illegally obtained, is, if relevant, admissible regardless that it violates a provision of the Constitution, or some other law.*

168. The Supreme Court of Ghana, another Commonwealth country with a legal tradition very similar to ours, also had occasion to pronounce itself on this issue. In the case of *Cubagee vs Asare and Othe*rs (J6 4 of 2017) [2018] GHASC 14, the Ghanaian Supreme Court had the following words to say:

"The second leg of the question referred to us is whether the recording which we have held to have been obtained in violation of the constitutional rights of the Superintendent Minister ought to be excluded from the evidence being led in the case despite the fact that its contents are relevant to the matters in contention…The question whether courts ought to exclude evidence obtained in violation of the rights of the person against whom the evidence is offered is a fertile litigation field, particularly in criminal cases. In Ghana and many other countries, there are statutes that disallow

evidence obtained in specific circumstances that also amount to violation of certain rights guaranteed by the Constitution. An example is confession statements procured through the use of torture which are not admissible on account of Section 120 of the Evidence Act but torture is equally forbidden by Article 15(2)(a) of the Constitution. There is also privileged communications between lawyer and client and doctor and patient which are not admissible in evidence by virtue of Sections 100 and 103 of the Evidence Act respectively and which really are intended to protect the privacy rights of the party claiming the privilege. However, beside these specific instances which are covered by Section 51(1) of the Evidence Act, the wider question of [whether] evidence obtained in violation of any human right guaranteed in the Constitution [should] be excluded from evidence is different and calls for close scrutiny."

169. The Court then proceeded to state that:

"Our Constitution, unlike some foreign enactments, does not contain a provision that specifically provides for the circumstances in which a court is required to exclude evidence obtained in violation of any of the human rights provisions…]The] practice that gives discretion to the court to determine whether or not to exclude evidence obtained in breach of rights is referred to as the discretionary exclusionary rule. There is the other practice whereby any evidence obtained involving any infraction of human rights must be excluded by the court. That is called the automatic exclusionary rule. It evolved from decisions of the United States Supreme Court that involved

interpretation and enforcement of the human rights provisions of their Constitution which, like the case of Ghana, did not have a specific provision on exclusion of evidence obtained in violation of the constitutional rights. Therefore, in order to answer the second part of the question presented by this reference, we need to critically examine the relevant provisions of our Constitution and chart a path consistent with the Constitution… [E]nforcement of human rights is not a one way street since no human right is absolute. There are other policy considerations that have to be taken into account when a court in the course of proceedings is called upon to enforce human rights by excluding evidence, and that explains why more jurisdictions have now adopted the discretionary rule approach…The exercise of discretion in the determination of whether to exclude evidence obtained in breach of human rights appears inevitable under our Constitution."

170. The Court therefore concluded that:

"In our understanding, the framework of our Constitution does not admit of an inflexible exclusionary rule in respect of evidence obtained in violation of human rights. With the rudimentary facilities available to our police to fight crime it would be unrealistic to exclude damning evidence of a serious crime on the sole ground that it was obtained in circumstances involving a violation of the human rights of the perpetrator of the crime. The public interest, to which all constitutional rights are subject by the provisions of Article 12(2), in having persons who commit crimes apprehended and punished would require the court to balance that against the claim of rights of the perpetrator of the crime. Similarly, civil proceedings always

involve competing rights of the parties such that relevant evidence that was obtained in violation of the constitutional rights of one party is usually offered in a bid to protect the rights of the other party or parties in the action. It therefore seems to us that the framework of our Constitution anticipates that where evidence obtained in violation of human rights is sought to be tendered in proceedings, whether criminal or civil, and objection is taken, the court has to exercise a discretion as to whether on the facts of the case the evidence ought to be excluded or admitted. We therefore adopt for Ghana the discretionary rule for the exclusion of evidence obtained in violation of human rights guaranteed under the 1992 Constitution."

171. International or regional tribunals that have had occasion to consider the consistency of the rule regarding the use of illegal evidence in a trial have refused to trump the domestic margin of appreciation of member States on this issue. Thus, for instance, the European Court of Human Rights has held that, the question of admissibility of evidence is primarily a matter for regulation under national law and that it will therefore not, as a matter of principle and in the abstract, regard evidence as inadmissible merely on the ground that it was obtained unlawfully. The Court held that its role in this respect is limited to ascertaining whether the particular applicant's proceedings as whole were fair. See the decision of the European Court of Human Rights in the case of *Schenk v. Switzerland* (1988) 13 EHRR 242 at pp. 265 -266). Also see Raymond Emson, Evidence, (2nd Edition, 2004, Palgrave), at page 283.

172. Raymond Emson, Evidence (above) proceed to state, at page 284, that:

"Confessions aside, relevant evidence obtained in consequence of breaches of the civil and/or criminal law remains prima facie admissible in England and Wales, even if there has also been a breach of Article 8 of the European Convention (R v. Khan [1996] 3 WLR 162 (HL), R v. Sargent [2000] 3 WLR 992 (HL), R v. P [2001] 2 WLR 463 (HL))."

173. An exploration and critical examination of this panoply of jurisprudence from various commonwealth jurisdictions, support the conclusion that the Supreme Court of Appeal reached in *Mike Appel & Gatto Limited v Chilima* (above), that there is no rule of law in Malawi to the effect that all illegally obtained evidence is inadmissible as Counsel Theu sought to suggest. It is my conclusion that the position in Malawi mirrors very closely that which was articulated by the Supreme Court of Ghana, which is that save for instances where the law as prescribed expressly disallows evidence obtained in specific circumstances amounting to violation of certain rights guaranteed by the Constitution or other law, the framework of our Constitution and indeed our broader legal system anticipates that where evidence obtained in violation of human rights is sought to be tendered in proceedings, whether criminal or civil, and objection is taken, the court has to exercise its discretion and decide, on a case by case basis, whether on the facts of the case, the evidence ought to be excluded or admitted.

174. I need to observe that whilst the above jurisprudence and other legal literature shows that as a general rule courts have the discretion on whether or not to admit illegally obtained evidence based on the specific circumstances of a case, there seems to be emerging consensus that an exception is in relation to confessions obtained by means of torture or other forms of compulsion. I share the view. However, in Malawi, the

Supreme Court of appeal has not made an exception even in relation to this species of evidence under the 1994 constitutional dispensation. The Supreme Court of Appeal made its position clear in the case of *Kara v The Republic* [2002–2003] MLR 122 (SCA). In that case, the question for the determination of the Court was on the effect of sections 19(3), 42(2)(c) and 42(2)(f)(iii) of the Constitution on the admissibility of involuntarily obtained confessions. The relevant provisions of section 176 of the CP & EC that was in issue were, and are, in the following terms.

> *"(1) Evidence of a confession by the accused shall, if otherwise relevant and admissible, be admitted by the court notwithstanding any objection to such admission upon any one or more of the following grounds (however expressed) that such confession was not made by the accused or, if made by him, was not freely and voluntarily made and without his having been unduly influenced thereto.*
>
> *(2) No confession made by any person shall be admissible as evidence against any other person except to such extent as that other person may adopt it as his own.*
>
> *(3) Evidence of a confession admitted under subsection (1) may be taken into account by a court, or jury, as the case may be, if such court or jury is satisfied beyond reasonable doubt that the confession was made by the accused and that its contents are materially true. If it is not so satisfied, the court or the jury shall give no weight whatsoever to such evidence. It shall be the duty of the judge in summing up the case specifically to direct the jury as to the weight to be given to any such confession."*

175. The Court in *Kara v The Republic* begun by stating, at page 125, that:

> *"We turn to the second application. The effect of this application is a challenge against section 176 of Criminal Procedure and Evidence Code and the cases which explained and established this statutory provision as a mechanism for the acceptance and treatment of confession statements during a criminal trial. The application also highlights certain chapter four constitutional provisions notably section 19(3), 42(2)(c) and 42(2)(f)(iii)."*

176. The Court continued to state, at page 126, that:

> *"It is…contended that section 176 of Criminal Procedure and Evidence Code and the cases of* ***Rep v Nalivata and others*** *6 ALR (M) 101 and* ***Chiphaka v Rep*** *6 ALR (M) 214 which govern the interpretation and application of the said section 176 are now invalid and inapplicable in the light of our new Constitution."*

177. Finally, the Court concluded by stating, at page 127, that:

> *"It must be appreciated that* ***Rep v Nalivata and others*** *was the decision of the learned Chief Justice of the land.* ***Chiphaka v Rep*** *was the decision of the Malawi Supreme Court of Appeal. These cases and others which are to the same effect have recently been confirmed in the recent Malawi Supreme Court of Appeal case of* ***Bokhobokho and another v Rep****. It must therefore be stated with abundant clearness*

that insofar as the Malawi Supreme Court of Appeal, the final arbiter in judicial proceedings, is concerned, the law relating to the reception and treatment of confessions in criminal trials is as provided in section 176(1) and (2) and (3) of Criminal Procedure and Evidence Code as interpreted and applied by such cases as ***Rep v Nalivata and others*** *and* ***Chiphaka v Rep****."*

178. It therefore emerges from *Kara v Republic*, that the Supreme Court of Appeal upheld the admissibility of illegally obtained confessions notwithstanding the provisions of section 42(2)(c) of the Constitution which expressly provides that:

"Every person arrested for, or accused of, the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right not to be compelled to make a confession or admission which could be used in evidence against him or her."

179. It seems to this Court that when the Supreme Court decision in *Kara v Republic* is read together with the subsequent decision of the same Court in *Mike Appel & Gatto Limited v Chilima*, whose language, albeit being a civil matter was couched in general terms are regards the rules of evidence on admissibility of illegally obtained evidence, that involuntarily obtained confessions, whilst *prima facie* admissible in terms of section 176 of the CP & EC , may still be excluded in the discretion of the Court as held in *Mike Appel & Gatto Limited v Chilima*.

180. A Court, when exercising such discretion, might in this Court's view, readily decide to exclude evidence if its admission would be antithetical to,

and would seriously damage, the integrity of the Court's proceedings; or if the evidence was obtained by methods which cast substantial doubt on the reliability of the evidence. These, to restate the point, are matters to be determined on a case-by-case basis in exercise of the Court's discretion. The rules on admissibility of evidence, by giving the Court's such judicious flexibility, allow them to ensure that both the fairness of process and substantial justice to all parties involved are dispensed in the process of judicial adjudication.

181. Counsel Theu launched another attack on the Defendant's case. He invited the Court to observe that the Defendant had chosen not to testify in this case. He stated that one could surmise that this was because she was not comfortable to be cross examined. He argued that courts have emphasized on the effect of failure to call a material witness. He cited, among other authorities, the case of *Maonga v Blantyre Print and Publishing Company Limited* [1991] 14 MLR 240 where Unyolo J (as he then was), held that if a witness who is available is not called, it may be presumed that his evidence would be contrary to the case of the party who failed to call him.

182. It was his contention that even when Mr. Nkhoma orally testified on behalf of the Defendant, it was apparent that that there were certain things that he was not competent to testify on and he actually conceded to this during cross-examination. For instance, he made it very clear that he was unable to speak to the contents of the agreement or arrangement entered into between the ACB and the NCA of the UK because these were handled at the level of the Defendant as the Director of the ACB.

183. Counsel Theu submitted that in fact, when one examines the scheme of the Courts (High Court)(Civil Procedure) Rules, 2017, it was

mandatory that the ACB Director, as the Defendant herein, had to swear the sworn statement in opposition to the Judicial Review application herein personally.

184. I wish to start with the last point made, namely that under the CPR, 2017, it was mandatory that the Defendant herein had to personally swear the Sworn Statement in opposition.

185. Sworn Statements under the CPR, 2017 are governed by the provisions of Order 18 thereof.

186. Under Order 18 rule 2(1) of the CPR, 2017, it is provided that:

> *"The following documents shall be verified by a sworn statement*
>
> *(a) a claim;*
>
> *(b) a defence;*
>
> *(c) a response ;*
>
> *(d) a witness statement ;*
>
> *(e) a certificate of service; and*
>
> *(f) any document where a rule or practice direction so requires."*

187. Order 18 rule 2(6) then goes on to provide that:

> *"The sworn statement shall be signed by–*
>
> *(a) in the case of a claim, a defence or an application–*
>
> *(i) the party or litigation friend; or*
>
> *(ii) the legal practitioner on behalf of the party or litigation friend; and*

(b) in the case of a witness statement, the maker of the statement.

(7) A sworn statement which is not contained in the document which it verifies, shall clearly identify that document."

188. Order 18 rule 2(7) of the CPR, 2017 shows that a sworn statement and the document it verifies may actually be creatively weaved together as a single document. It is also very clear from Order 18 rule 2(6)(a)(ii) of the CPR, 2017 that a sworn statement verifying facts in a defence may be sworn by Counsel. Further, as already stated, the defence may be contained in the sworn statement where these are fused under Order 18(2)(7). This is more so in instances such as judicial review where there is no prescribed form that the defence must take under the Rules. It therefore follows that the suggestion that it was mandatory for the Defendant to personally swear the Sworn Statement in opposition has no legal foundation.

189. What must be borne in mind however, are the provisions of Order 18 Rule 6 which states that:

"(1) Subject to sub rule (2), a sworn statement shall only contain facts that the deponent is able to prove with his own knowledge.

(2) A sworn statement may contain a statement of information and belief provided the sources of the information or the basis for the belief are also set out in the statement."

190. The rules here envisaged, under Order 18 Rule 6(1), that there would be certain situations where the deponent could be incompetent to assert the truth of the facts sought to be established. These are typically

instances where such evidence would constitute inadmissible hearsay evidence.

191. What one observes however is that this position is stated to be subject to what is provided for under Order 18 Rule 6(2), which is that the deponent may, instead of directly asserting the truth of a statement, include in the sworn statement, a statement of information and belief as long as the sources of the information or the basis for the belief are also set out in the statement. Unlike under Order 41 rule 5(2) of the erstwhile Rules of the Supreme Court, 1965 (RSC), where it was provided that

> *"An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof."*

192. In the case of *Gilbert vs Endean* (1878) 9 Ch.D. 259, the Court stated at page 269 that:

> *"For the purpose of this rule those applications only are considered interlocutory which do not decide the rights of parties, but are made for the purpose of keeping things in statu quo till the rights can be decided, or for the purpose of obtaining some direction of the court as to how the cause is to be conducted, as to what is to be done in the progress of the cause of the purpose of enabling the court ultimately to decide upon the rights of the parties."*

193. By contrast, under Order 18 Rule 6(2) of the CPR, 2017, there is no qualifier to the effect that this can only be done in interlocutory matters. It is not clear what the qualifier under Order 41 rule 5(2) of the RSC was dropped from the language of Order 18 Rule 6(2) of the CPR, 2017. Be that

as it may, presently, the law is as laid down under Order 18 Rule 6(2) of the CPR, 2017.

194. It was therefore competent, even where the deponents might not have been competent to testify from their direct knowledge, state in the sworn statement evidence, the sources of their information and the grounds thereof. Of course, the problem is that once they agreed to being subjected to cross-examination, the weight of the evidence might then be diminished due to their failure to answer questions that were relevant to the issues. I must however also mention that on analysis of the evidence, it seems the domain where Mr. Nkhoma did not have direct knowledge is probably confined to the issue of the contents of, or the nature of the cooperation arrangement that was agreed between the Defendant and the NCA of UK.

195. Having disposed of the claim made by Counsel Theu that it was mandatory for the Defendant to swear the sworn statement in opposition personally, I turn to Counsel Theu's contention that the Court should make an adverse inference against the Defendant's decision not to come to Court to provide direct evidence in defence in a matter filed against her, and where her own decisions are being impugned.

196. The Court wishes to quickly observe that best practice would indeed have demanded that the Defendant should have filed a statement explaining her own decision-making process in respect of the issues raised in the present matter. Indeed, in addition to the authorities cited by Counsel Theu, there is the oft-cited subsequent case of *Mpungulira Trading Limited vs Marketing Authority and Attorney General* [1993] 16(1) MLR 346, albeit the decision of a Registrar (Mwaungulu, R (as he then was)), where

it was held that failure on the part of a party to bring material witnesses before the Court may be adversely inferred against such party.

197. In *Maonga v Blantyre Print and Publishing Company Limited* (above), Unyolo J, stated as follows:

> *"it has been held, quite correctly in my view, that if a witness who is available is not called, it may be presumed that his evidence would be contrary to the case of the party who failed to call him. See* ***Kamlangila v Kamlangila*** *(1966-68) 4 ALR (Mal) 301. Banda J, as he was then was, put it this way in* ***Leyland Motors Corporation Malawi Ltd v Mohamed*** *Civil Cause No. 240 of 1983 (unreported):*
>
> *"Failure to call a material witness to testify on a material point may damage the case of the party who fails to do so as that failure may be construed that the story is fictitious."*
>
> *And in* ***Attorney General v Chirambo*** *Civil Cause No. 444 of 1985 (unreported) Makuta CJ, as he then was, put it thus:*
>
> *"Such failure (that is to call a material witness) may raise suspicion and although suspicion is not enough proof of guilt, but it has the effect of reducing the weight of the evidence of a party.""*

198. Ordinarily therefore, this Court would be quick to make such a negative inference against the failure by the ACB Director, as the Defendant in the present case, to bring her own direct evidence in defence, and only relying on the evidence of her officers.

199. This Court observes that the principle stated in cases such as *Maonga v Blantyre Print and Publishing Company Limited,* among others, is of the essence in cases where the issues to be determined rest on factual issues. It is not of much significance where the issues to be determined principally rest on answering legal questions. There is no point in making a negative inference on the failure of a witness to come and testify on matters of fact that may not affect the Court's interpretation on the content and scope of the law on a particular issue. Likewise, the Court must look at the circumstances of the whole case in order to establish whether a negative inference on the failure of a particular crucial witness to testify in a particular matter serves the ends of justice.

200. The present matter is a judicial review application. Evidently, the principal reason the 2nd Claimant would have wished for the Defendant to have made herself available was to testify in respect of issues around the MACMA. But the questions related to MACMA are questions of law. There was no dispute that the Defendant cooperated with the NCA of the UK. There was likewise no dispute that the Defendant did not involve the Hon. The Attorney General. These were the two principal issues of fact raised by the both Claimants as regards the Defendant. They were both answered and settled well before the actual hearing. What remained were legal questions. I do not see the essence of a negative inference on the Defendant's failure to avail herself to testify in such circumstances.

201. Even if, in a worst-case scenario for the Defendant, the evidence of Mr. Nkhoma were to be ignored, this being a judicial review matter, the legal burden of proof would have remained on the Claimants to satisfy the Court that their arguments in relation to MACMA were correct. The Court would still have assessed the evidence and determined the legal position as it appreciated it. In fact it will be observed that the Court did not adopt

the Defendant's arguments on MACMA. Ultimately, whilst noting the Defendant's arguments, the Court depended on its own assessment of the position at law.

202. In the result, when the proceeding is considered as a whole, the Court does not see the need to make an adverse inference against the Defendant, and even if an adverse inference were made, the Court's decision would remain unaffected.

203. Counsel Theu for the 2nd Claimant released yet another sword of argument from his arsenal of arguments. He contended that the proceedings against the 2nd Claimant must be vitiated because they were commenced without the consent of the Director of Public Prosecutions (DPP), contrary to section 42 of the Corrupt Practices Act.

204. The Court does not think that this is an issue which should so much belabour its mind. With respect, the Court does not agree with Counsel Theu's argument. In order to appreciate why this argument cannot be sustained, section 42 of the CPA is set out herebelow:

> *(1) No prosecution for an offence under Part IV shall be instituted except by or with the written consent of the Director of Public Prosecutions.*
> *(2) Where under subsection (1) the Director of Public Prosecutions withholds consent to any prosecution under this Act, he shall—*
> *(a) provide to the Director reasons in writing, devoid of any consideration other than those of fact and the law, for the withholding of consent; and*

(b) in addition to providing reasons to the Director, inform the Legal Affairs Committee of Parliament of his decision within thirty days of the decision.

(3) The Director of Public Prosecutions shall give consent under subsection (1), or reasons in writing under subsection (2) (a), as the case may be, within thirty days, failing which the Director shall be entitled to proceed as if consent to prosecute had been given under subsection (1).

(4) Notwithstanding the provisions of subsection (1), a person may be arrested and charged with an offence under Part IV or a warrant for his arrest may be issued and executed, and any such person may be remanded in custody or on bail, notwithstanding that the written consent of the Director of Public Prosecutions to the institution of a prosecution for the offence with which he is charged has not been obtained, but no such person shall continue to be remanded in custody or on bail for a period longer than fourteen days on such charge unless in the meantime the written consent of the Director of Public Prosecutions aforesaid has been obtained.

(5) When a person is brought before a court before the written consent of the Director of Public Prosecutions to the institution of a prosecution against him is obtained, the charge shall be explained to the person accused but he shall not be called upon to plead.

(6) No proceedings for an offence under Part IV shall be commenced after the expiry of twelve months from the date the written consent of the Director of Public Prosecutions is given.

205. It is clear from these provisions that under section 42(4) of the CPA, the ACB is legally permitted to arrest any person and charge him or her with an offence under Part IV of the Act, or obtain a warrant for his or her

arrest and have it executed, and that any such person may be remanded in custody or on bail, even where the written consent of the Director of Public Prosecutions to the institution of a prosecution for the offence with which he or she is charged has not been obtained.

206. The provision goes on to state, however, that no such person shall continue to be remanded in custody or on bail for a period longer than fourteen days on such a charge unless in the meantime the written consent of the Director of Public Prosecutions has been obtained. Further, under section 42(5) of the CPA, even where the DPP's consent has not yet been granted, the ACB remains at liberty to bring such a person before a Court of law where the charges would be explained to the accused person but he or she would not be called upon to enter plea.

207. What therefore emerges before this Court is that there is nothing in the language of the entire text of section 42 of the CPA, or indeed the entirety of the CPA, that suggests that the ACB may not proceed to formally lay charges against, or to arrest and remand in custody, a suspect prior to the grant of consent to prosecute by the DPP. This argument is therefore dismissed.

208. The Court now turns to the issue of the scope of section 5(1) of the Mutual Assistance in Criminal Matters Act, Cap. 8:04 of the Laws of Malawi (MACMA).

209. Counsel Theu for the 2nd Claimant, just like Counsel Kalua for the 1st Claimant, stated that matters of mutual assistance in criminal matters are governed by MACMA; and that the Defendant herein failed to follow its relevant provisions in the circumstances of the present case.

210. One of the sections mentioned was section 2 of the MACMA which, in relation to an appropriate authority, provides that:

> *"In this Act, unless the context otherwise requires, "appropriate authority" (a) in relation to Malawi, means the person or authority designated pursuant to section (4); (b) in relation to any Commonwealth country, means the person or authority designated by that country for the purpose of transmitting and receiving requests under the Scheme."*

211. In this connection, Counsel also cited section 4 of the MACMA which provides that:

> *"The Minister may, by order published in the Gazette, designate any person or authority as the appropriate authority in Malawi for the purpose of this Act."*

212. Counsel also referred to the Mutual Assistance in Criminal Matters (Designation of Authority) Order, made under section 4 of MACMA, where, under section 2 thereof, it is provided that:

> *"The Attorney General is hereby designated as the appropriate authority for purposes of implementing the provisions of the Act."*

213. Counsel for the Claimants submitted that the decision of the ACB to cooperate with the United Kingdom in investigating suspected crimes in Malawi, and sharing evidence with the United Kingdom, without the sanction of the Attorney General acted beyond its powers.

214. It was their joint argument that in acting without regard to the provisions of the Mutual Assistance in Criminal Matters Act, the Mutual Assistance in Criminal Matters (Designation of Authority) Order and the Financial Crimes Act, the Defendant's decision to do so was unreasonable in the *Wednesbury sense* in that she thereby failed to take into account the relevant considerations stipulated in those statutes. Counsel Theu cited the decision of Hon Justice Tembo in The State (On the application of *Zunneth Sattar vs ACB and AG*, Justice Tembo, quoting the following remarks from the decision of the learned Judge:

> *"In the present matter, this Court agrees with the claimant on the statement of the law. Whenever assistance of the Malawi Government is sought by Commonwealth countries in criminal matters by way of obtaining evidence or information from Malawi regarding criminal investigations for offences in those countries, the Attorney General is the appropriate authority to receive requests for such assistance and to deal accordingly as per the provisions of the Mutual Assistance in Criminal Matters Act. See Regulation 2 of the Mutual Assistance in Criminal Matters (Designation of Authority) Order."*

215. He pointed out that there was no dispute that the Attorney General was not involved in the dealings between the ACB and the NCA. It was his submission that it would appear that the Defendant was proceeding under the mistaken belief that section 5 of MACMA permitted her to go into formal or informal arrangements with any outside enforcement agency.

216. I must quickly state that I have read the decision of my brother Judge Tembo, J in *Zunneth Sattar vs ACB and AG,* Judicial Review Case No. 68 of 2021 (HC, PR). I have noted that further to the statement above,

the learned Judge proceeded to make a specific observation on the effect of section 5(1) of MACMA. At paragraph 25, the learned Judge stated that:

> *By way of obiter, this Court wishes to state that on the face of it, section 5 (1) of the Mutual Assistance in Criminal Matters Act appears to allow other forms of cooperation and this may well allow the Anti-Corruption Bureau to legally cooperate with the United Kingdom Government officers with regard to sharing of evidence and other related matters. It is not a closed matter that only the Attorney General is to be involved in international cooperation in the fight against transnational crime through sharing of evidence and other cooperation. These are issues on which a decision would have to be made after hearing full arguments in a proper matter. That is not possible to determine definitively in this matter especially since the application herein is determined on the facts, namely, lack of evidence on assertions made by the claimant.*

217. Tellingly, the learned Judge envisaged the possibility that the scope of section 5(1) of MACMA might well be that the ACB may legally cooperate with the United Kingdom Government officers. He was however clear that "*These are issues on which a decision would have to be made after hearing full arguments in a proper matter."* The present matter has been such matter as the learned Judge clearly envisaged in *Zunneth Sattar vs ACB and AG.*

218. It is evident from a reading of the 2nd Claimant's arguments that much reliance was placed by his Counsel on the case of *Supervisory Authority vs Cresswell Overseas S.A. et al,* Case No. ANUHCVAP2017/0003, a case from Antigua and Barbuda, a decision of

the Eastern Caribbean Supreme Court. The Court in that case was interpreting section 6 of the Mutual Assistance in Criminal Matters Act of Antigua and Barbuda, Act No. 2 of 1993.

219. Counsel observed, quite correctly in my view, that the Mutual Assistance in Criminal Matters Acts of the two countries are strikingly similar. The striking similarity of the two pieces of legislation in these two jurisdictions starts with the respective long titles to the Acts.

220. The Long title of MACMA states that MACMA is:

> *"An Act to make provision with respect to the scheme relating to mutual assistance in criminal matters within the Commonwealth, to facilitate the operation of that scheme in Malawi and to make provision concerning mutual assistance in criminal matters between Malawi and countries other than Commonwealth countries, and to provide for matters connected therewith or incidental thereto."*

221. In comparison, the long title to that MACMA of Antigua and Barbuda states that it is:

> *"An Act to make provision with respect to the Scheme relating to Mutual Assistance in Criminal Matters within the Commonwealth, and to facilitate its operation in Antigua and Barbuda and to make provision concerning Mutual Assistance in Criminal Matters between Antigua and Barbuda and other countries other than Commonwealth Countries."*

222. It is clear that with the exception of the last phrase "*and to provide for matters connected therewith or incidental thereto"* which appears in the Malawian Act, and of course the different names of the two countries, the two provisions are a replica of each other.

223. Coming to the two sections in issue, namely section 5(1) of the Malawian MACMA and section 6 of the Antigua and Barbudan MACMA, one observes that Section, 5(1)of the Malawian MACMA provides that:

> *"Nothing in this Act shall derogate from existing forms or prevent the development of other forms of cooperation (whether formal or informal) in respect of criminal matters between Malawi and any Commonwealth country, or between Malawi, or any enforcement agencies or prosecuting authorities in Malawi, and the International Criminal Police Organization or any such agencies or authorities outside Malawi."*

224. On the other hand, section 6(1) of the corresponding Antigua and Barbuda Act states that:

> *"Nothing in this Act derogates from existing forms or prevents the development of other forms of cooperation (whether formal or informal) in respect of criminal matters between Antigua and Barbuda and any Commonwealth country, or between Antigua and Barbuda, or any enforcement agencies or prosecuting authorities in Antigua and Barbuda, and the International Criminal Police Organization or any such agencies or authorities outside Antigua and Barbuda."*

225. Again, with a very minor and obviously inconsequential difference in the first line, namely that the Malawian provision begins with the words *"Nothing in this Act shall derogate from"* whilst the one from Antigua and Barbuda starts with the words *"Nothing in this Act derogates from"*. Apart from this minor difference, and obviously the differences in the names of the respective countries mentioned in the two provisions, the two provisions are a replica of each other.

226. It is therefore true, as Counsel for the 2nd Claimant submitted, that section 5(1) of the Mutual Assistance in Criminal Matters Act (of Malawi) is *in pari materia* with section 6 of the Mutual Assistance in Criminal Matters Act (of Antigua and Barbuda).

227. Counsel Theu contended that the case of *Supervisory Authority vs Cresswell Overseas S.A. et al* (above), was on all fours with the present proceedings. The Court has carefully read that authority, and also paid particular attention to the passage upon which Counsel Theu placed much reliance. I, herebelow, set out, *in extenso*, the relevant passage from the Court's decision as follows:

> *"A careful examination of section 6 will reveal that it intends to recognise and preserve the use or development of existing or future forms of co-operation in criminal matters, in the context of two categories of relationships:*
> *(i)Antigua and Barbuda (on one hand) and any Commonwealth country (on the other hand); and*
> *(ii)Antigua and Barbuda or any enforcement agencies or prosecuting authorities in Antigua and Barbuda (on the one hand) and, the International Criminal Police Organization*

("INTERPOL") or any such agencies or authorities outside of Antigua and Barbuda (on the other hand).

The first category of relationship mentioned clearly does not support the Authority's argument, because there is no mention of non-Commonwealth countries. The second category of relationship mentioned, however, warrants some examination. The question arises as to whether the expression "or any such agencies or authorities outside of Antigua and Barbuda" includes non-Commonwealth countries. This question of construction is resolved with reference to the ejusdem generis rule of statutory interpretation. The ejusdem generis rule of interpretation was defined by Professor E.A. Driedger in Construction of Statutes as:

"Where general words are found following an enumeration of persons or things all susceptible of being regarded as specimens of a single genus or category, but not exhaustive thereof, the construction should be restricted to things of that class or category unless it is reasonably clear from the context or the general scope and purview of the Act that Parliament intended that they should be given a broader signification."

The ejusdem generis rule was further explained by Lord Diplock in ***Quazi v Quazi*** *[1979] 3 WLR 833 in the following way:*

"The presumption then is that the draftsman's mind was directed only to the [genus of things indicated by the specific words] and that he did not, by his addition of the word "other" to the list, intend to stray beyond its boundaries, but merely to bring within the ambit of the enacting words, those species which complete the genus but have been omitted from the preceding list either inadvertently or in the interests of brevity."

The applicability of this rule of statutory interpretation has been doubted in cases where one attempts to deduce a genus or class of items from a single item mentioned in a legislative provision (as is the case with section 6 of MACMA). However, as Lord Wilberforce noted in ***DPP v Jordan****:*

"Even if this is not strictly a case for applying a rule of ejusdem generis... the structure of the section makes it clear that the other objects, or, which is the same argument, the nature of the general concern, fall within the same area, [the other matters to which the statute is intended to apply] cannot fall in the totally different area...".

In accordance with the principles set out in ***Quazi and Jordan****, it is my view that the second category of relationship mentioned in section 6, contemplates arrangements for legal assistance between Antigua and Barbuda (on the one hand) and INTERPOL, or other multi-jurisdictional agencies that are similar in nature and purpose to INTERPOL (on the other hand). The request from the government of Brazil therefore would not fall within either of the categories of relationships addressed in section 6."*

228. I am mindful of the persuasive character of superior Court decisions from Commonwealth jurisdictions in the Caribbean. However, with respect, I am unable to agree with the Court's interpretation herein, in so far as Counsel Theu's proposition is that this Court should adopt the same reasoning on the sole basis that the MACMA provisions in Malawi and Antigua and Barbuda are in *pari materia*.

229. It seems to this Court that in *Supervisory Authority vs Cresswell Overseas S.A. et al* their Lordships' import of the phrase *"or any such*

agencies or authorities outside Antigua and Barbuda" was not entirely correct. I will explain.

230. When one examines the language used in the provision, it seems clear to this Court that by using the term *or "any such"*, the provision makes a comparative reference to the agencies or authorities mentioned earlier in the text which are the *"enforcement agencies or prosecuting authorities in Antigua and Barbuda."* The same would apply in the Malawian context, where, as earlier observed, the corresponding provision is in *pari materia* and the only difference lies in the different names of the two countries. It is this Court's opinion that the language of *"agencies"* and *"authorities"* is correspondingly used in the same sentence to reflect the corresponding capacities of the entities envisaged in the provision. The analysis below demonstrates why this should be the interpretation ascribed to the language in section 5(1) of MACMA.

231. It must be noted that the International Criminal Police Organization referred to in that section is expressly referred to as an *"organization"*. It is my considered view that if the use of the words *"any such"* were intended by the legislature to refer to organizations similar to the International Criminal Police Organization, then the language used by Parliament could have been *"any such organizations"* rather than using the terms *"agencies"* and *"authorities"* which terms had just been stated in the same sentence with reference to domestic agencies and authorities in Malawi.

232. It is the strong view of this Court that the *ejusdem generis* rule is not applicable in reference to the International Criminal Police Organization. The authorities are clear that in order for the *ejusdem generis* rule to apply, there must be a genus of terms established, and that one cannot establish a genus of terms by citing only one example.

233. Furthermore, it actually seems to this Court that if at all the *ejusdem generis* rule is to be applicable in the present case, then it may only apply to the terms *"agencies"* and *"authorities"* as used in section 5(1) of MACMA. In this regard, one would be looking at entities that correspond to the *"enforcement agencies or prosecuting authorities in Malawi"*, and such corresponding entities are clearly "*such agencies or authorities outside Malawi."*

234. I wish to add that the passage in the *Quazi* case, upon which the Court in *Supervisory Authority vs Cresswell Overseas S.A. et al* substantially relied, is rather unhelpful. It is unhelpful because the passage represents only a small part of Lord Diplock's remarks on the subject of the application of the *ejusdem generis* rule, as he explained the rule in that case. The passage as cited in *Supervisory Authority vs Cresswell Overseas S.A. et al* is so truncated that it might not entirely reflect the full context in which those words were used by Lord Diplock. The Court has taken its time to read the full text of the *Quazi* decision [as reported in [1979] 3 All ER 897]. Laid out here below is a fuller text of Lord Diplock's speech on the point, at pages 901-902:

> *"[T]he Court of Appeal [held] that the procedure for which the ordinance and rules provide does not make a divorce by talaq obtained in Pakistan a divorce that has 'been obtained by means of judicial or other proceedings' within the meaning of s 2 of the Recognition Act. It was not the husband's case that the divorce by talaq was obtained in Pakistan by proceedings that were 'judicial'; it is the reference in the section to 'other proceedings' on which he relied. The argument for the wife is that these words, which on the face of them would include any*

proceedings that were not judicial, are to be read as limited to proceedings that are quasi-judicial, by application of the ejusdem generis rule. This involves reading 'other' as if it meant 'similar' and, as it seems to me, is based on a misunderstanding of that well-known rule of construction that is regrettably common. As the Latin words of the label attached to it suggest, the rule applies to cut down the generality of the expression 'other' only where it is preceded by a list of two or more expressions having more specific meanings and sharing some common characteristics from which it is possible to recognise them as being species belonging to a single genus and to identify what the essential characteristics of that genus are. The presumption then is that the draftsman's mind was directed only to that genus and that he did not, by his addition of the word 'other' to the list, intend to stray beyond its boundaries, but merely to bring within the ambit of the enacting words those species which complete the genus but have been omitted from the preceding list either inadvertently or in the interests of brevity. Where, however, as in s 2 of the Recognition Act, the word 'other' as descriptive of proceedings is preceded by one expression only that has a more specific meaning, viz 'judicial', there is no room for the application of any ejusdem generis rule; for unless the draftsman has indicated at the very least two different species to which the enacting words apply there is no material on which to base an inference that there was some particular genus of proceedings to which alone his mind was directed when he used the word 'other', which on the face of it, would embrace all proceedings that were not judicial, irrespective of how much or little they resembled judicial proceedings. The fact that the ejusdem generis rule is not applicable does not,

however, necessarily mean that where the expression 'other' appears in a statute preceded by only one expression of greater specificity its generality may not be cut down if to give it its wide prima facie meaning would lead to results that would be contrary to the manifest policy of the Act looked at as a whole, or would conflict with the evident purpose for which it was enacted. In the instant case, however, this does not help the respondent wife; it helps the appellant husband. The purpose for which the Recognition Act was passed is declared by the preamble to be with a view to the ratification by the United Kingdom of the Recognition Convention and for other purposes. Where Parliament passes an Act amending the domestic law of the United Kingdom in order to enable this country to ratify an international treaty and thereby assume towards other states that are parties to the treaty an obligation in international law to observe its terms, it is a legitimate aid to the construction of any provisions of the Act that are ambiguous or vague to have recourse to the terms of the treaty in order to see what was the obligation in international law that Parliament intended that this country should be enabled to assume. The ambiguity or obscurity is to be resolved in favour of that meaning that is consistent with the provisions of the treaty."

235. I must also be noted that the decision of the Court in *Supervisory Authority vs Cresswell Overseas S.A. et al* (above) was, in any event, not concerned with the question as to whether under section 6(1) of the MACMA of Antigua and Barbuda, another State law enforcement agency or authority other than the Attorney General of Barbuda, could proceed to enter into formal or informal arrangements with the International Criminal Police Organisation or other agencies or authorities outside that country

as in the case in the present case. The concern of the Court was on whether section 6(1) of the MACMA of that country could be interpreted to justify formal or informal arrangements with authorities in Brazil, Brazil not being a Commonwealth country, and the Brazilian authorities envisaged not being multijurisdictional entities.

236. In the instant case, it should be recalled that the central issue is whether, in terms of section 5(1) of MACMA, the Defendant, as the Director of the ACB, could proceed to enter into formal or informal arrangements with an agency or authority in the United Kingdom without the sanction of the Attorney General. The other issue as to whether the words "*such agencies or authorities outside Malawi"* as used in the section should be read, *ejusdem generis*, as being narrowed down only to entities that have the multi-jurisdictional characteristics of an intergovernmental organization such as the International Criminal Police Organization is rather secondary. Be that as it may, it remains the definitive position of this Court that this latter position would represent a misreading of section 5(1) of MACMA. The words used in that section do not have the effect of narrowing down the scope of entities in respect of whom such cooperation arrangements may be made to only multijurisdictional (intergovernmental) bodies. By contrast, the words expand the scope of cooperation to *any enforcement agencies or prosecuting authorities outside Malawi.*

237. Whilst still addressing our minds to the issue of the application of the *ejusdem generis* rule, or indeed any other intended interpretive device that might seek to suggest that the words "*any enforcement agencies or prosecuting authorities outside Malawi"* are meant to refer to organisations similar to the International Criminal Police Organization, the Court wishes to add that it is very important to appreciated the international juridical status of the International Criminal Police Organization and whether it

may properly be described as an organization outside Malawi in legal discourse. The International Criminal Police Organization referred to in section 5(1) of MACMA is an international organization established in 1956, presently comprising 195 member States, and to which Malawi is a party. This is, therefore, not the type of organization that can easily be described as an organization outside Malawi. That description or understanding could only easily hold if the International Criminal Police Organization were, for instance, an international Non-Governmental Organization registered in a specific country, for instance if it were registered in neighbouring Zambia. This is not the case with inter-Governmental organizations. The fact that the International Criminal Police Organization has its seat at Paris, in France, does not mean that it is a French organization, just like the United Nations Organization is not an American Organization. Each member State forms part of the organization and an interpretation that suggests that the International Criminal Police Organization is to be interpreted, *ejusdem generis*, as being akin to such other "*agencies or authorities outside Malawi"* does not have legal foundation under public international law discourse. Such interpretation would bring a conceptual clash to the language of section 5(1) of MACMA that would produce an absurd result in law.

238. To put this into better perspective, it needs to be appreciated that public international law is not a body of foreign law. Foreign law refers to the law of another country as a separate jurisdiction. For instance, the law of Tanzania is foreign law. But the International Covenant on Civil and Political Rights, 1966 is not foreign law. It other words, it is not a body of law outside Malawi. Public international law is a *sui generis* corpus of law which applies to States in various ways.

239. Similarly, since an international organization, such as the International Criminal Police Organization is governed by public international law, such an organization is not, in law, a foreign organization. In other words, it is not an organization outside of the State Party, such as Malawi in the instant case. It likewise occupies a *sui generis* legal space within each State party, just like the public international law norms that govern its operations.

240. In this regard, the *ejusdem generis* rule may not be applied to suggest that the words *any enforcement agencies or prosecuting authorities* ***outside Malawi*** *(with emphasis on the words "outside Malawi")* are in fact meant to refer to organisations which are similar in character to an intergovernmental organization such as International Criminal Police Organization (Interpol). This is so because, according to the law that applies to Interpol, and according to Malawi's domestic law, Interpol may not, in proper conceptual context, be referred to as an organization *"outside Malawi".*

241. In the final analysis, in order to best explain this Court's position on the contours of Section 5(1) of MACMA, I herebelow break the salient provisions of the section down into clearly observable component parts.

242. First, it is clear that by stating that *"Nothing in this Act shall derogate from existing forms or prevent the development of other forms of cooperation (whether formal or informal)"*, the legislature meant what it said. This means nothing in the Act should be read as preventing the execution of forms of cooperation existing at the time when the Act was enacted, and again nothing in the Act is to be understood as preventing the development of other forms of cooperation, whether formal or informal.

243. Secondly, the section conveys the clear message that the subject matter scope for the mutual cooperation envisaged in the section is in respect of criminal matters.

244. The next question arising from the section is: whose cooperation is being envisaged?

245. In this regard, it should be observed that first, the section draws two major categories of cooperation relationships. The first type of relationship is between Malawi and any Commonwealth country. The second is broader. It opens up the actors of such cooperation to include both Malawi (at the national Government level) as well as enforcement agencies or prosecuting authorities in Malawi on the one hand, and the International Criminal Police Organization, or enforcement or prosecuting authorities outside Malawi on the other. When the provision is carefully further broken down, it shows that the cooperation arrangements may take any of the following forms:

(a) Between Malawi and any Commonwealth country;

(b) Between Malawi and the International Criminal Police Organization;

(c) Between any enforcement agencies or prosecuting authorities in Malawi and the International Criminal Police Organization;

(d) Between Malawi and any enforcement agencies or prosecuting authorities [the clear contextual grammatical import of the words “such agencies or authorities”] outside Malawi; and

(e) Between any enforcement agencies or prosecuting authorities in Malawi and any such agencies or authorities outside Malawi.

246. Reference was made to the fact that under the Mutual Assistance in Criminal Matters (Designation Of Authority) Order, made under section 4 of MACMA, the Attorney General has been designated as the appropriate authority for purposes of implementing the provisions of the Act. This is clearly true. What is also true however is that section 4 of MACMA, just like the rest of the provisions in in MACMA, does not derogate from the the provisions of section 5(1) of MACMA which allow for enforcement agencies and prosecuting authorities in Malawi to enter into formal or informal forms of cooperation with the International Police Organization or any such enforcement agencies or authorities outside Malawi. There is nothing in that section that suggests that it is mandatory that, in doing this, they must get the Attorney General's prior sanction or consent, or that they should otherwise involve the Attorney General in this regard.

247. The language of section 5(1) of MACMA clearly suggests that the fact that the Attorney General has been designated as the Appropriate Authority under the Act, in terms of section 4 of MACMA as read with Regulation 2 under the Mutual Assistance in Criminal Matters (Designation Of Authority) Order, does not derogate from the fact that under section 5(1) of the Act, other forms of cooperation, both formal and informal may be developed between any enforcement agencies or prosecuting authorities in Malawi and similar entities outside Malawi.

248. The Court understands that of how Malawi's international relations should be organized, and whether perhaps it is necessary for the country to have a more centralized arrangement where enforcement agencies such

as the ACB or prosecuting authorities, being the DPP in Malawi's context, should not operate in isolation when having dealings with international organizations or agencies or authorities outside Malawi on criminal matters, is a policy issue for the Government, and if perhaps the relevant authorities are unhappy with the provisions of the law, they might wish to review the provisions of section 5(1) of the MACMA or any other provisions of the law that might be of concern. As the law is presently couched however, the reading of this Court as regards section 5(1) of MACMA, read together with the entire Act as a whole, is clear that the ACB is at liberty to enter into formal or informal arrangements without the prior sanction or consent, or other form of involvement, of the Attorney General.

249. The cooperation envisaged under section 5(1) of MACMA is really meant to enhance the fight against organized crime in the respective countries involved, and this Court holds the view that all democratic countries that are committed to the rule of law and fighting organized crime would encourage their law enforcement agencies within their respective jurisdictions to actively and readily cooperate and share information with similar law enforcement agencies in other countries, which cooperation and information sharing is requisite for the fight against such crimes.

250. I must add however, that even in the current state of the law, perhaps at the pain of stating the obvious, the Court expects that such agencies or authorities as the ACB, when they get into mutual cooperation arrangements with similar agencies or authorities outside Malawi pursuant to the provisions of section 5(1) of MACMA, will always act with the greatest sensitivity, prudence, care, and diplomatic decorum associated with the normal course of dealings, whether formal or informal, between the State agencies of different countries.

251. Considering that the Honourable the Attorney General is, in terms of section 4 of MCMA, and subject to the provisions of section 5(1) of the Act, the Appropriate Authority in terms of the implementation of the provisions of the MACMA, it would, in this Court's view, be best practice though not legally mandatory, for the agencies and authorities envisaged under section 5(1) of MACMA, to keep the office of the Attorney General informed about the nature of and scope of cooperation, whether formal or informal, that they are engaging in under MACMA from time to time.

252. Moving on, I recall that another issue that was raised by the Claimants was that the Defendant had not produced the agreement that the ACB concluded with the NCA in Court, and that because of such failure alone, the Court should quash the decisions *"purportedly"* made based on information which was obtained through what was described as the *"purported"* cooperation agreement. I reckon that this is a question of fact. However, the point of law that this Court has just affirmed is that the ACB, as a State enforcement agency in Malawi, is at liberty to enter into formal or informal cooperation arrangements with corresponding entities in other jurisdictions. Thus even in the absence of a formal agreement being provided, such failure may not invalidate any cooperation arrangement which might have proceeded informally by the ACB and an agency of similar character outside Malawi. That is the position of the law.

253. I must point out, at this juncture, that throughout these proceedings, it has been the Defendant's case that that whilst the ACB did receive information from the NCA of the UK, the information that it received was not in the form of evidence which would be admissible in Court. Rather, the Defendant stated, it only received such information in the form of intelligence.

254. The Defendant has contended that the ACB received such information, like it receives complaints from any other person under section 10(1)(b) of the CPA. The Defendant has further submitted that there is nothing under the law that states that the ACB may only receive complaints from persons or entities within Malawi. Section 10(1)(b) of the CPA upon which the Defendant places reliance is in the following terms:

> *"The functions of the Bureau shall be to receive any complaints, report or other information of any alleged or suspected corrupt practice or offence under this Act."*

255. Section 10(1)(c) of the CPA goes on to provide that:

> *"The functions of the Bureau shall be to investigate any complaint, report or other information received under paragraph (b)."*

256. The Defendant argues, essentially, that these provisions must be interpreted as excluding the scheme of mutual assistance in criminal matters as envisaged under MACMA, and that where the ACB receives information from a foreign agency, such as the NCA of the UK, such information should just be treated as an ordinary piece of information that maybe availed to the ACB by any person, whether domestic or foreign.

257. With respect, the Court does not agree with the Defendant. If this were so, it would defeat the whole essence of the MACMA. Looking at all the arguments that the Defendant has advanced on the record, it seems to this Court that all that the Defendant has really been saying is that the ACB regarded the sharing of information by the NCA of the UK as an

informal form of cooperation under section 5(1) of MACMA, and then proceeded to conduct their own investigations.

258. I must also observe that, on their part, none of the Claimants herein has brought any evidence to negative the assertions of the Defendant that the arrests effected herein were based on investigations conducted by the ACB after receiving intelligence information from the NCA of the UK.

259. The Court therefore concludes that the failure by the Defendant to exhibit any document as proof of the cooperation agreement between the ACB and the NCA of the UK was, in the premises, neither here nor there considering that the cooperation arrangement could, under the law be formal or informal.

260. All in all, the Court makes the following final determinations:

244.1 From the analysis of the evidence and issues above, the Court finds and holds that both Claimants have failed to establish, on a balance of probabilities, that the decision of the Defendant to apply to the Court of the Chief Resident Magistrate at Lilongwe for warrants for their respective arrests, and the decision to effect their subsequent arrests, amounted to an abuse of power; or that such decisions were tainted with bad faith, or that they were unconscionable and unreasonable in the *Wednesbury's* sense, meant only to embarrass the Claimants, and in particular in the case of the 1st Claimant embarrassing him in the way of his office as a Minister, which he was at the time of his arrest.

244.2 The Court has found no legal basis for finding in favour of a general proposition that a person may not be legally arrested whilst in hospital for purposes of treatment. There is no law that makes a

hospital a place of privilege with regard to arrests. In cases where an arrest has to be effected on a patient at or in a hospital or other medical facility, each case is to be determined on its own peculiar facts in determining whether the arrest was lawful and fair or not. For instance, where it is in evidence that the nature of the illness is such that the suspect might not fully appreciate the nature of the allegations being made against him or her at the moment of arrest, it would not be proper to proceed to effect an arrest. In the Circumstances of the present case, where the 1st Claimant clearly stated that he was in his full mental faculties, although there was evidence that he had a medical condition that required his hospitalization, the Court has found no legal basis for faulting the decision of the Defendant to have him arrested at Partners in Hope Hospital.

244.3 However, the Court has found that the conduct of the Defendant's officers in using handcuffs on the 1st Claimant, as he was on a wheelchair and in the course of being admitted into Partners in Hope hospital, and subsequently tying his hand to a dripstand as he laid on a hospital bed receiving medical attention, when there was no discernible risk that he was a flight or security risk, amounted to inhuman and degrading treatment. By reason of the handcuffing in the specific circumstances of the 1st Claimant in the present case, his rights under section 19(1), 19(3) and 42(1)(b) of the Constitution were violated under the circumstances.

244.4 Be that as it may, still with regard to the 1st Claimant, the authorities are clear, and the Court finds, that the improper use of handcuffs on the 1st Claimant herein was no basis for staying, let alone

invalidating the arrest and the related legal processes to ensue thereafter.

244.5 In respect of the 2nd Claimant, the Court has not found any factual basis for the claim that arresting him on a Friday, the 31st of December, 2021, which was the start of a long weekend, followed by the Defendant's objection to his bail application, which objections the Magistrate Court seized of the matter upheld, was only aimed at embarrassing, humiliating and torturing him. The burden of proof lay on the 2nd Claimant to demonstrate that being arrested on a Friday which was followed by a long weekend amounted to an improper and unlawful arrest and detention. With respect, the Court has heard no plausible arguments and indeed facts to back up that claim. In any event, Courts have the discretion to hear, in exceptional cases, urgent applications outside the Court's normal working days and times where proper justification is provided. On the opposition to bail on account of the 2nd Claimant being a flight risk, the fact that the learned Magistrate agreed with the Defendant shows that the objection raised was not based on flimsy reasons. It was not suggested or indeed argued before this Court that the decision of the learned Magistrate was patently wrong. This Court will therefore not go into an analysis of that decision.

244.6 This Court has found no basis for the 2nd Claimant's argument that his constitutional rights, including the right to personal liberty, human dignity, fair trial and privacy were violated in the circumstances. No evidence was led to show that the Defendant did not have probable cause to have him arrested, and the burden was on the 2nd Claimant to show that his Warrant of Arrest was not based on any credible information of possible criminality at all.

244.7 The Court does not agree with the 2nd Claimant's argument that he faces a great risk of serious violation of his rights in this country unless, *"at the very minimum",* the investigations and/or prosecution in the present matter are permanently prohibited. This Court finds the whole idea of inviting the Court to impose a permanent prohibition on an investigation by a law enforcement agency, thus foreclosing any opportunity by the State's investigative agencies to uncover crimes or possible crimes, and then pre-empting any possible prosecution that might ensue as a result of the findings of such an investigations, to be generally at odds with a democratic system which is based on justice and the rule of law, and indeed contrary to the general public interest. It should be in the rarest of cases, if at all, and based very exceptional grounds, founded on constitutional imperatives, that a Court should ever be invited to, let alone make an Order of permanent stay of investigations in particular.

244.8 The Court's analysis of the issues above has shown that the Claimants have failed to demonstrate, on a balance of probabilities, that the Defendant's decision to arrest and prosecute the Claimants herein on the charges captured in the Warrant of Arrest, was actually based on information shared by the National Crime Agency of the United Kingdom, rather than based on the ACB's own investigations after receiving triggering information from the NCA of the UK.

244.9 With regard to the Claimants' claim that the Defendant herein took into account irrelevant and extraneous considerations in arriving at her decision to investigate, arrest and prosecute the Claimants when

she considered information obtained unlawfully under the Mutual Assistance in Criminal Matters Act and that, therefore, her decision in that regard was consequently tainted with illegality, this has not been satisfactorily shown on a balance of probabilities.

244.10 The Court's analysis of the law shows that the Defendant did not act ultra vires her powers by cooperating with the National Crime Agency of the United Kingdom under the Mutual Assistance in Criminal Matters Act, by not involving the Attorney General. The Court has found that the text of section 5(1) of the MACMA, when read in the broad context of the Act as a whole, suggests that an enforcement agency such as the ACB can enter into formal or informal cooperation arrangements with such other agents or authorities outside Malawi, such as the NCA of the UK. Further, it is the decision of this Court that section 5(1) of MACMA does not restrict the scope of the Act to entering into cooperation arrangements only with the International Criminal Police Organization and organizations of the like character to this organization.

261. All in all, save for this Court agreeing with the 1st Claimant that it was wrongful for the Defendant's officers to have used handcuffs on him in the specific circumstances in which he found himself in the present case, the judicial review application by both Claimants herein is dismissed in its entirety with costs.

262. Consequently, the respective Orders of stay of proceedings which were granted by this Court to both the 1st Claimant and the 2nd Claimant in respect of the present proceedings are respectively hereby vacated.

263. The costs awarded to the Defendant are to be assessed by the Assistant Registrar if not agreed between the parties within 14 days from the date hereof.

264. To the extent that the 1st Claimant has succeeded on the narrow issue of the use of handcuffs on him in the specific circumstances in which he found himself in on the day of his arrest, he is also awarded costs on that score and to that limited extent, to be assessed by the Assistant Registrar if not agreed between the parties within 14 days from the date hereof.

265. It is so ordered.

Made at Lilongwe in Open Court this 30th Day of May, 2022.

RE Kapindu, PhD
JUDGE