IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL DIVISION

JUDICAL REVIEW CASE NUMBER 33 OF 2022

BETWEEN:

THE STATE (On the application of

CHIKHULUPILIRO ZIDANA) CLAIMANT

AND

THE PRESIDENT OF THE REPUBLIC OF MALAWI DEFENDANT

CORAM: JUSTICE M.A. TEMBO,

L. Mbvundula, Counsel for the Claimant
G. Luzu, Counsel for the Claimant
T. Chakaka Nyirenda, The Attorney General, Counsel for the Defendant
A. Manda, Counsel for the Defendant
Makhambera, Court Clerk

JUDGMENT

1. This is the decision of this Court, made under Order 19 Rule 20 (1) of the Courts (High Court) (Civil Procedure) Rules, on the claimant's application for a judicial review of the defendant's decision, the impugned decision, to appoint Brigadier General Charles Kalumo (Retired) as Director General of the Department of Immigration and Citizenship Services.
2. A public notice from the Office of the President and Cabinet communicated the impugned decision on 5th August, 2022. The public notice indicated that the President of the Republic of Malawi made the appointment pursuant to the

powers of his office provided for in section 89 of the Constitution and section 6 of the Public Service Act. The defendant contested the application.

3. By this application for judicial review, the claimant seeks the following reliefs, namely,

    1) A declaration that the appointment of Brigadier General Charles Kalumo (Retired) as the Director General of the Department of Immigration [the decision] is non-consequential and of no effect as it is illegal and unconstitutional.
    2) An order quashing the decision.
    3) An order directing the defendant to appoint an eligible, suitable and qualified member of the Department of Immigration and Citizenship Services or in the alternative, an eligible, suitable and qualified member of the public service to the post of Director General (Chief Immigration Officer), Deputy Chief Immigration Officer and/or any other similar position.
    4) An order for costs and that all necessary and consequential directions be given.

4. The claimant indicated the three grounds upon which his application is based as follows:

    a. The impugned decision contravenes section 3 of the Immigration Act, which confers the power to appoint the Chief Immigration Officer (Director General) on the Minister of Homeland Security and not on the defendant.
    b. The impugned decision contravenes section 3 of the Immigration Act, which provides that the appointment of the Chief Immigration Officer (Director General) be made from the public service.
    c. The impugned decision contravenes section 29 of the Public Service Act under which the mandatory retirement age of 60 for members of the public service, including those in the Department of Immigration and Citizenship Services, is provided for.

5. The claimant filed a sworn statement in support of his case in which he stated as follows:

1. I am of age
2. I am the claimant in this matter and I am by reason thereof authorized to make this sworn statement.
3. Unless otherwise stated, the matters of fact deponed in this sworn statement are true to the best of my knowledge, information and belief and that unless otherwise, based on my personal knowledge.
4. I am 30 years old. A copy of my passport is now produced and shown to me, exhibited hereto and marked 'CZ1'.
5. I am an Immigration Officer in the Department of Immigration and Citizenship Services [the Department].
6. I possess great institutional memory in the Department having joined it way back in 2012. A copy of my identity card is now produced and shown to me, exhibited hereto and marked 'CZ2'.
7. I successfully completed my Bachelor of Laws (Honours) Degree from the University of Malawi, Chancellor College and graduated in 2022.
8. I believe I am of the right age, experience and qualifications to be eligible for appointment as the Director General of the Department.
9. On or around 5th August 2022, the defendant appointed Brigadier General Charles Kalumo (Retired) as the Director General (Chief Immigration Officer) of the Department of Immigration and Citizenship Services. A copy of the Public Notice communicating the appointment is now produced and shown to me, exhibited hereto and marked 'CZ3'.

10. The said Brigadier General Charles Kalumo (Retired) was born on 17th June 1952 and is thus 70 years old which is above the mandatory retirement age of 60 years for public officers. A copy of the Notice of Revision of the Mandatory Retirement Age is now produced and shown to me, exhibited hereto and marked 'CZ4'.
11. Additionally, Brigadier General Charles Kalumo (Retired) was not a member of the public service at the time of his appointment by the defendant.
12. I verily believe that the defendant's decision to appoint Brigadier General Charles Kalumo (Retired) as Director General (Chief Immigration Officer) of the Department of Immigration and Citizenship Services was illegal, irrational and procedurally improper for the said appointee was not eligible to be appointed to the position. This is on the reasons that the appointee, being at the age of 70, is above the mandatory retirement age for public officers and was not a public officer at the time of his appointment to the position of Director General (Chief Immigration Officer) of the Department.
13. By reason of the foregoing, the defendant's decision to appoint Brigadier General Charles Kalumo (Retired) who was not eligible for the appointment when there are eligible officers such as I in the Department of Immigration and Citizenship Services and the public service as a whole was illegal, procedurally improper and in breach of my right to be accorded an opportunity for career advancement and self-development.
14. I seek the following reliefs..[reliefs as already set out above by this Court].

6. It is expedient to reproduce the contents of exhibit 'CZ4' here for reasons that will become apparent later. Exhibit 'CZ4' is as follows:

16 May 2006

REVISION OF MANDATORY RETIREMENT AGE FOR CIVIL SERVANTS

I wish to inform you that Govenment has directed that the Mandatory Retirement Age of all Civil Servants be raised from 55 to 60 years with effect from 28th April, 2006.

As a result of the revised mandatory retirement age Government has further directed that:-

(a) those officers for whom approval was given to retire on a date prior to the effective date of this Circular (28th April 2006) be deemed to have retired, on the dates they reached the age of 55 years.

(b) officers who have already received their fifty (50) per cent terminal benefts pending retirement in terms of our circular letter No. PD/104/1/0/VI/6 dated 11th June 1991, be given the option whether to retire or not when their dates of retirement under the existing regulations fall due. However, they should indicate in writing their option before the retirement date that was approved.

(c) those who opt to remain in the service but have already reccived fifty (50) per cent of their terminal benefits should have their remaining terminal benefits withheld, so that they be paid when they finally retire.

(d) the 60 years mandatory retirement age shall also apply to Civil Servants engaged under the Performance Related Contract Scheme. In this regard, applications for re-engagement or renewal of contract under the scheme shall not be entertained for those who have gone beyond their 57 birthday.

(e) civil servants re-engaged on temporary month to month terms shall continue to serve under such terms up to the end of the period of such appointments.

I should be grateful if the contents of this circular letter could be brought to the attention of all officers serving in your Ministry or Department.

S.T.K. Madula
SECRETARY FOR HUMAN RESOURCE MANAGEMENT AND DEVELOPMENT

7. The defendant filed an amended defence as provided by the Rules. He stated as follows:

1. Except as set out below, and except where it contains admissions, the defendant requires the claimant to prove the matters set out in the grounds for judicial review and the supporting sworn statement.
2. The defendant pleads that the High Court lacks jurisdiction over the matter as the claims by the claimant relate to labour law rights for which the Industrial Relations Court has jurisdiction. Alternatively, the defendant pleads that the claimant failed to pursue alternative remedies before the Industrial Relations Court or through collective bargaining.
3. The defendant contends that the claimant herein has no *locus standi* to maintain this proceeding.
4. The defendant pleads that the claimant has not demonstrated harm or injury occasioned to him as a result of the appointment of Brigadier General Kalumo. As such,

there is no cause of action for commencing the present proceeding.

5. The defendant refers to paragraph 1 of the grounds on which relief is sought and states that in terms of section 6 of the Public Service Act, the powers to appoint officers above the rank of Under Secretary shall vest in the President. Further, in terms of section 189 (2) of the Constitution, the President has powers to appoint a Director General of the Department of Immigration and Citizenship Services. Accordingly, since the post of Director General of Immigration and Citizenship Services is above the rank of Under Secretary, the President has the powers to appoint Brigadier General Kalumo as Director General of Immigration and Citizenship Services.
6. Without prejudice to the foregoing, the defendant refers to paragraph 1 of the claimant's sworn statement in support of the application and makes no comment thereof.
7. The defendant refers to paragraphs 2, 3, 4 and 5 of the claimant's sworn statement in support of his application and admits the contents therein.
8. The defendant refers to paragraph 6 of the claimant's sworn statement in support of the application and makes no comment on the age of Brigadier Charles Kalumo and at trial, the claimant will be put to strict proof thereof.
9. The defendant refers to paragraph 6, 7 and 9 of the claimant's sworn statement in support of the application and contends that in the Military, any officer, even those who have retired at any age, are still considered to be in service on stand-by and therefore the appointment of Brigadier Kalumo cannot be deemed illegal, irrational and procedurally improper as the claimant wants the Court believe. At trial, the claimant will be put to strict proof of his claims.
10. Additionally, under Circular Reference No. HRM/P&G/01 dated 21st October 2013, employment of

persons above the retirement age is allowed in respect of those who have essential skills and/or experience that are still needed for service delivery as determined by Government from time to time. The said Circular requires that the officers to be re-engaged should be on fixed term contracts and only after they have retired from their normal period of service. Accordingly, the defendant pleads that the defendant considered the skills and expertise of Brigadier General Kalumo before he was appointed as Director General of Immigration and Citizenship Services on fixed term contract.

11. The defendant considered the institutionalized corruption and inefficiencies within the Department of Immigration and Citizenship Services and determined that Brigadier General Kalumo was an appropriate candidate with the requisite skills and experience to deal with the institutionalized corruption, plunder and inefficiencies with the Department of Immigration and Citizenship Services.
12. The defendant pleads that the claimant's claim has been motivated by greed and corruption in that the effect of the order sought is to maintain the status quo of institutionalized corruption, inefficiencies and plunder at the Department of Immigration and Citizenship Services.
13. The defendant further pleads that challenging the re-engagement of retires who have requisite experience and skills to resolve chronic governance challenges as is the case with Brigadier Kalumo would work against the interest of orderly and efficient government.
14. The defendant refers to paragraph 9 of the claimant's sworn statement in support of the application and makes no comment thereof.
15. The defendant refers to paragraph 10, 11 and 12 of the claimant's sworn statement in support of the application and contends that the claimant does not qualify to be

appointed a Director General of the Department of Immigration and Citizenship Services because he is a very lowly ranked officer in the Department.

16. The defendant repeats the foregoing and state that the claimant is on the rank of an Inspector (Grade I). His rank is below the following ranks:

    (a) Commissioner (Grade D)
    (b) Deputy Commissioners (Grade E, P3)
    (c) Assistant Commissioners (Grade E, P4)
    (d) Senior Superintendent (Grade F, P5)
    (e) Superintendent (Grade G, P7)
    (f) Assistant Superintended (Grade H, P8)

17. So far, there are more than two officers holding the position of a Commissioner at the Department. Some are Deputy Commissioners and other positions as shown above. The defendant contends that these are the officers and some of like grades in public service who would have *locus standi* to challenge the decision of the defendant as they are the ones who are eligible for an appointment to the office of the Director General in the Department, not the claimant.

18. The defendant refers to paragraphs 13, 14, 15 and 16 of the claimant's sworn statement in support of the application and denies the same and at trial, the claimant shall be put to strict proof thereof.

19. The defendant further refers to paragraphs1, 2, 3, 4 and 5 of the grounds for judicial review and denies the contents therein and puts the claimant to strict proof thereof.

20. The defendant refers to the reliefs sought by the claimant and states that the reliefs sought by the claimant have the effect of :

(a) transforming the court or the judiciary into an Ombudsman for general grievances of citizens;
(b) sidestepping the reliefs which are only available through collective bargaining under the Labour Relations Act;
(c) turning the court into the business of resolving political disputes;
(d) derailing effective and efficient delivery of services at the Department of Immigration and Citizenship Services;
(e) derailing orderly public administration;
(f) usurping the power of the President to appoint suitably qualified and experienced persons to occupy critical positions in Government departments for effective, efficient and orderly government.
(g) perpetuating inefficiencies, corruption and plunder at the Department of Immigration and Citizenship Services.

21. The defendant refers to paragraph 3 of the reliefs sought by the claimant and pleads that the decision to recruit Immigration and Citizenship Director General, Deputy Immigration Officer and/or any other similar position pleaded by the claimant is not justiciable. Further or in the alternative, the pleadings by the claimant do not demonstrate any decision or inaction by the defendant to recruit a Deputy Chief Immigration Officer and/or any other similar position.
22. Additionally, the defendant pleads that the present proceeding sis frivolous, vexatious and an abuse of the court process.

Particulars of abuse of court process

(a) Commencing proceeding to perpetuate corrupt and self-aggrandizement goals.
(b) Commencing proceedings to derail orderly and efficient administration.

23. Except where expressly admitted, the defendant denies each and every allegation of fact set out in the application for judicial review as if each were set forth and specially traversed *seriatim*.
24. Wherefore the defendant prays that the proceeding be dismissed with costs for being frivolous, vexatious and an abuse of the court process and/or, a finding that the claimant does not have the requisite *locus standi* to maintain this proceeding.

8. The issues for determination on this application are firstly whether the claimant has *locus standi* or sufficient interest to bring the present application for judicial review. If it is found that the claimant has no *locus standi* that will be the end of the matter. However, if it is found that the claimant has *locus standi* in this matter, then this Court has to determine three other issues raised on the claimant's application, namely, whether the impugned decision contravenes section 3 of the Immigration Act, which confers the power to appoint the Chief Immigration Officer (Director General) on the Minister of Homeland Security and not on the defendant. Whether the impugned decision contravenes section 3 of the Immigration Act, which provides that the appointment of the Chief Immigration Officer (Director General) be made from the public service. And, whether the impugned decision contravenes section 29 of the Public Service Act under which the mandatory retirement age of 60 years for members of the public service, including those in the Department of Immigration and Citizenship Services, is provided for. Beyond the foregoing, this Court will in that case also have to address other issues raised by the defendant, namely, whether the claimant suppressed material facts, whether there is a distinction between the office of Chief Immigration

officer and that of Director General of Immigration and Citizenship Services and whether that fatally impacts this application, whether the claimant has an alternative remedy to judicial review which would bar the present application, whether the claimant's application for judicial review goes beyond the purpose of judicial review as provided by law, whether the matters raised on this application are justiciable, whether this Court should decline to grant the reliefs sought by the claimant and whether the claimant's application is frivolous, vexatious and an abuse of the court process.

9. It is important to state here that the standard of proof in a civil matter like the present one is on a balance of probabilities as rightly noted by the parties. Moreover, the burden of proof lies on he who asserts the affirmative, in this case the claimant. See *Nkuluzado v Malawi Housing Corporation* [1999] MLR 302 and *Miller v Minister of Pensions* [1947] All ER 372.

10. It is expedient to indicate at this point that, at the hearing of the judicial review, the defendant cross-examined the claimant on his witness statement, which he filed herein in support of this application, and whose contents are the same as set out in the sworn statement set out above. The claimant's evidence on cross-examination will be alluded to first. Then this Court will indicate the evidence of the defendant comprised in three sworn statements filed in his own defence. Thereafter, this Court considers the arguments by the parties in view of the evidence and the law and determines the issues on this application.

11. The claimant stated as follows during the said cross-examination. That he can state the job description of the Chief Immigration Officer. When he was shown a document, which he identified as a Functional Review document at the Immigration Department, he stated that it had the job description of the Chief Immigration Officer. He noted that all other officers come under the Chief Immigration Officer. And that the next officers are Commissioners. He noted further that the Chief Immigration Officer is at Grade C and the requisite qualification is a Master's Degree according to the 2018 Functional Review at the Immigration Department. He added that this was not according to the law. He indicated that one needs the stated qualifications and seven years' experience. He indicated that Brigadier General Kalumo (Retired) was appointed in 2022, which is four years after the Functional Review at the Department of Immigration and Citizenship Services. He indicated that he did

not disclose the Functional Review document at the time he sought permission from this Court to make this judicial review application as it was not necessary to do so. He also said he did not think it necessary to provide work experience requirements for the position in contention in this matter at that stage. He insisted that he had provided enough information.

12. He indicated that by the time he commenced the proceedings herein he had graduated at the University of Malawi.
13. He then stated that he was aware of Government procedures but asserted that job eligibility requirements must be subject to the law. He pointed out that neither does the law say anything on experience for the post in contention on this application nor does it provide for academic qualifications. He noted that those aspects are provided for elsewhere, such as in the Functional review documents but that those must be subject to the law. He noted that he had indicated that he had been in service for up to ten years. He accepted that he has no Master's Degree. He did not agree that he does not have seven years' experience at management level at a security institution. He asserted that he was promoted to a managerial level in 2017. He explained that he joined the Department as a Constable and later moved to Inspector. He elaborated that he was promoted once and that as an Inspector he is a supervisor and that this is a managerial level.
14. He then stated that the defendant can appoint for Grades above P4 but subject to Acts of Parliament. He indicated that if there was no Minister then the President can make appointments. He also stated that the Minister of Public Service is the President but only in certain circumstances and not all circumstances. He indicated that the Acts of Parliament that the President is subject to includes the Public Service Act.
15. He explained that in 2022 there were other Immigration Officers at the Department of Immigration and Citizenship Services with some having been there for 20 years. He explained further that at the time he commenced this application, there was a Commissioner and some Deputy Commissioners at the Department of Immigration and Citizenship Services. He indicated that all these would be eligible for appointment as Chief Immigration Officer but they were not appointed. He noted that they have not complained in this matter and indicated that it was their right not to but that he also had his own right to do so.

16. He agreed that there are also Assistant Commissioners, Senior Superintendents and Superintendents then his position of Inspector. He reiterated that his position is managerial as he manages those below him. He stated that he is in the Legal Department that is headed by Mr Chilongo who is at the position of Senior Superintendent. He added that there is himself and Mr Ng'ambi in the Legal Department. And that he is at the same post as Mr Ng'ambi. He indicated that his managerial role is not limited to his Legal Department. He explained that when going on patrol or meetings he is assigned personnel. He could not recall managing a meeting. However, he recalled doing a joint patrol with the Malawi Police Service and other security agencies in Blantyre in 2017 and that he was senior and oversaw others. He reiterated that he became an Inspector five years ago in 2017.
17. He then stated that the 2018 Functional Review Report says that for one to be appointed Chief Immigration Officer one must have seven years' experience at senior management position but that this is not according to the law. He then said he had five years' experience at the time of the impugned appointment decision herein and that according to the practice he was two years short on experience and would not qualify for appointment. He indicated that he would have to leapfrog six positions to be appointed as Chief Immigration Officer.
18. He then stated that for him to be appointed he had to do six months security training at Limbe Police Training School. He indicated that officers are recalled from retirement in the military but such is not the case at the Department of Immigration and Citizenship Services.
19. He then stated that he called the impugned appointment herein unconstitutional but that he did not cite the constitutional provision infringed. He indicated that the responsible Minister should have appointed the Chief Immigration Officer. He agreed that the responsible Minister has not complained about the impugned decision herein but that such is not his case.
20. He then stated that he had not provided proof of the age of Brigadier General Kalumo (Retired). He also said he is not questioning the Brigadier General's work experience in the United Nations or academic qualifications of Master's Degree.
21. He asserted that the Brigadier General retired and was then appointed from outside the Department of Immigration and Citizenship Services and deprived

personnel in the Department of the promotion. He elaborated that when senior officers get promoted, the juniors also move up too. But, however, that serving officers get discouraged by outside the Department appointments. He indicated that someone from the Department of Immigration and Citizenship Services should have been appointed Chief Immigration Officer.

22. He stated that before the Brigadier General was appointed Chief Immigration Officer, there was Mr. Mlotha who was from Malawi Police Service who was preceded by Mr. Medi also from Malawi Police Service. He noted that before that there was Mr. Mankhwala from the Department of Immigration and Citizenship Services who had been preceded by Mr. Thodi from Malawi Police Service. He stated that he never complained of career advancement during those appointments from outside the Department of Immigration and Citizenship Services.
23. He agreed that in 2017 during the tenure of Mr. Medi as Chief Immigration Officer, he was promoted to the position of Inspector. He indicated that he expected to be promoted to the next position and was promoted despite Mr. Medi being a Chief Immigration Officer from outside the Department of Immigration and Citizenship Services.
24. He then explained that when Mr. Mlotha left and Brigadier General Kalumo came in, one Kalimanjira was promoted to the position of Assistant Commissioner to Commissioner but that others were not promoted. He however said it is not always that there are promotions even with Chief Immigration Officers from outside the Department of Immigration and Citizenship Services.
25. He then stated that in 2021/2022, the Department of Immigration and Citizenship Services wanted to promote personnel. And that he was not aware of a court case in which it was sought to stop the interviews for the intended promotions. He indicated that he was busy at school then.
26. He asserted that he attended interviews for the position of Assistant Superintendent after 2017. He could not recall the exact date. He indicated that he never got the promotion but added that he did not fail those interviews since he never saw the results. He also said he did not dispute the results. He agreed that he did not disclose on his application herein that he had attended those promotional interviews.

27. He indicated that for positions at P5 and below promotion is by interviews. And that for positions at P4 and above promotion is by appointments. He indicated that he had never been denied a chance to attend promotional interviews.
28. He explained that he joined the Department of Immigration and Citizenship Services with a Malawi School Certificate of Education. Further, that in 2014 he went to the Staff Development Institute and finished his Diploma in 2015. He explained that by then Mr. Mankhwala was the Chief Immigration Officer. He elaborated that he then joined the University of Malawi in 2017 during the time of Mr. Medi as Chief Immigration Officer. He elaborated that being allowed further education opportunity is part of career advancement opportunity since certain positions require certain qualifications.
29. He stated that in 2015 he applied for a Diploma at the University of Malawi during the time of Mr. Mankhwala as Chief Immigration Officer and that he allowed him to go on and that he went in 2017. He reiterated that Mr. Mankhwala was a Chief Immigration Officer from within the Department of Immigration and Citizenship Services.
30. He then stated that in his statement he has not explicitly said how appointment of the Chief Immigration Officer from outside the Department of Immigration and Citizenship Services would impair his career advancement.
31. He agreed that by the third relief sought on this application he is asking that the defendant appoint a Deputy Chief Immigration Officer if this Court grants this application and not that the defendant appoint him. He agreed that he is seeking this although he also contends that the defendant does not have the power to make the appointment.
32. He then stated that he can talk of eligible persons to be appointed including himself and others like the Deputy Director General, Deputy Commissioner and other senior people at the Department of Immigration and Citizenship Services. He however said he was pursuing his own case. He also said he advises the Department of Immigration and Citizenship Services from its Legal Department but that he did not disclose this on this application, as he was not supposed to.
33. He then noted that the Public Notice herein shows that the defendant used his powers under section 89 of the Constitution and section 6 of the Public Service Act to make the impugned appointment decision in this matter.

34. He then stated that on the issue of retirement he is alluding to the Public Service Act and that Brigadier General Kalumo (Retired) is above the retirement age per the Public Service Act. He indicated that he says he has the right age, experience and qualifications to be eligible for the post of Immigration Officer though the last two aspects are not in the Public Service Act.
35. He then stated that a copy of the Notice of Revision of the Mandatory Retirement Age marked 'CZ4', is important to his application as it shows that Brigadier General Kalumo (Retired) is above the mandatory retirement age in public service. He was referred to exhibit 'BT1' produced by the defendant which is a subsequent circular to exhibit 'CZ4' and he stated that he saw this circular three months before the hearing date. Exhibit 'BT1' states as follows:

21 October 2013

MANDATORY RETIREMENT

As you are aware, the mandatory retirement age for all public servants is sixty (60) years as announced in the Government Circular No. HRM/P&G/01/65 dated 16th May, 2006.

However, despite the contents of that circular, a worrying trend has emerged whereby Controlling Officers have been submitting requests seeking Government's approval to extend the service of some of their officers beyond the mandatory retirement age of sixty (60) years. The reason given for such requests is lack of suitably qualified officers to fill gaps that would otherwise be created by retiring officers.

This practice has a deleterious effect on the performance of the civil service and indicates lack of succession planning and grooming. I therefore wish to advise that requests for extension of service beyond the mandatory retirement age of sixty (60) years for all officers regardless of rank and grade shall, with immediate effect, not be entertained. The only exception to the above shall be teachers, health workers and those who have essential skills and/or experience that are still needed for service

delivery as determined by Government from time to time. However, even in such cases the officers to be re engaged shall be on fixed term contracts and only after they have retired from their normal period of service.

Let me also take this opportunity to remind all civil servants that no civil servant is allowed to extend his/her service beyond the date of retirement indicated in his/her application where he/she has been paid an advance of his/her terminal benefits under provision MPSR1:810 (4) which states that '*a civil servant or any other employee who receives an advance of his/her terminal benefits shall not extend his/her service beyond the date of retirement specified in his /her application notwithstanding that he/she has repaid to Government the whole or any part of the advance of terminal benefits paid under this regulation".* I am therefore urging all civil servants to seriously reflect upon this provision before applying for part payment of their terminal benefits.

In order to ensure smooth transition in the operations of the civil service and maintain optimum levels of service delivery Responsible/Controlling Officers are therefore advised to ensure that officers who are due for mandatory retirement are reminded at least six (6) months in advance. In addition, Responsible/Controlling Officers are urged to have succession plans in place to enable Government have a seamless replacement system to avoid disrupting service delivery.

I should be grateful if the contents of this circular letter are brought to the attention of all officers in your Ministry/Department.

Hawa O. Ndilowe

CHIEF SECRETARY TO THE GOVERNMENT

36. He noted that exhibit 'BT1' refers to exhibit 'CZ4' on the subject of mandatory retirement. And that in paragraph 2, exhibit 'BT1' provides that officers can be recruited beyond retirement age on condition that they retire and go on a fixed term contract.
37. He then noted that exhibit 'BT2' of the defendant shows that it is a contract of employment of Brigadier General Kalumo (Retired) for a term of 36 months. He noted that the circular exhibit 'BT1' speaks of officers having extended terms after retirement having experience. And that Brigadier General Kalumo (Retired) retired at a high rank and also worked for the United Nations. He however insisted that the Brigadier General was not appointed in line with the defendant's exhibit 'BT1' because the exhibit talks about continuation of service after retirement and not that there be a gap in employment after retirement. He indicated that a contract of employment can be extended as per exhibit 'BT1'. He insisted that exhibit 'BT1' talks about continuity of service though that is not explicitly stated as such and that the Brigadier General does not qualify for appointment in accordance with exhibit 'BT1'. He elaborated that according to his interpretation, exhibit 'BT1' in paragraph 3 gives guidance on continuity of service after mandatory retirement and that it is about extension of service. He added that the paragraph 3 of exhibit 'BT1' gives qualifications criteria for recruitment of those on retirement so long as they are in service.
38. He then stated that he did not inquire why the Brigadier was appointed from outside public service in retirement. He also stated that he had exhibit 'BT1' but did not disclose it as it was not relevant as he viewed it as applicable to those wishing to continue in service after mandatory retirement. He reiterated that exhibit 'BT1' did not apply to the Brigadier General herein as he was not in public service seeking to extend his service beyond his mandatory retirement age. He agreed that he did not disclose the existence of exhibit 'BT1' in his application with an indication accompanying such a disclosure saying that exhibit 'BT1' was inapplicable to this application. He however said that exhibit 'BT1' is important as he was asked about its importance.
39. During re-examination, he stated that he found it unnecessary to exhibit the 2018 Functional Review Document on the Department of Immigration and Citizenship Services because that document cannot override section 3 of the Immigration Act on appointment. He indicated that he is eligible by noting

the theme of eligibility. He added that he is comparing himself with the Brigadier General herein. He noted that section 3 of the Immigration Act is the core. And that this section 3 provides for appointment of Director General or Chief Immigration Officer and states that the Minister may appoint any Immigration Officer or Police Officer to be Chief Immigration Officer which is now Director General per the Functional Review on the Department of Immigration and Citizenship Services. He asserted that he qualifies to be appointed as Chief Immigration Officer as he is below 60 years old. He noted that the Brigadier General herein is above 60 years old. He added that he is in public service and knows how it works but that outsiders face challenges on the job of Chief Immigration Officer.

40. He asserted that the defendant has power to make appointments in the public service as per the Constitution and the Acts of Parliament. He opined that the appointment in this case of the Chief Immigration Officer was to be according to the Immigration Act and not the Public Service Act. He opined further that the President would be regarded as Minister of Homeland Security in a case where there was no Minister in office. He stated that, however, in the present case there was in office the Minister of Homeland Security who ought to have made the appointment of the Chief Immigration Officer.
41. He then posited that rights must be realized individually. And that the fact that the Minister of Homeland Security did not complain about the impugned appointment decision herein does not stop him from complaining as he has done especially because the law does not favour those who slumber. He added that similarly he cannot be stopped from making this application because there was a pool of officers from which the appointment herein could have been made but was never made. He insisted that he is entitled to pursue his rights without waiting for orders from his superiors.
42. He indicated that in 2021 there was an advertisement of 11 positions, which were contested by 122 candidates at the Department of Immigration and Citizenship Services. He explained that he never got the results of the interview for those positions and that he cannot say that he failed in the interview for the advertised positions. He elaborated that he did not disclose about this interview on this application knowing that one's capability cannot be determined by one interview alone.

43. He then asserted that he reflected on the future of his Department of Immigration and Citizenship Services as a person. He asserted further that he would have appreciated if personnel in the Department of Immigration and Citizenship Services were given priority for appointment as Chief Immigration Officer because they would just carry on knowing how to run the Department. He noted that in contrast, Chief Immigration Officers from outside the Department of Immigration and Citizenship Services will have to be taught about the Department by those with past experience.
44. He asserted that the impugned appointment decision herein was inexcusable because there was a pool of personnel that was available for appointment within public service. He lamented that there is a Chief Immigration Officer who was appointed after retiring in the 1990s, which is a long time ago and jeopardizes efficiency.
45. On the third relief sought, he explained that it is up to the Court to determine the matter and that if the Court agrees with the defendant then the defendant should prioritize appointing a Chief Immigration Officer from the Department of Immigration and Citizenship Services or the public service.
46. Regarding exhibit 'BT1' he reiterated that he did not disclose it in his application as his view is that the Brigadier General herein does not qualify for appointment according to the said exhibit 'BT1' as he was not continuing in service after retirement. He asserted that the experience in the exception indicated exhibit 'BT1' applies to teachers and others and not the Brigadier General herein. He added that he built up his case and had to decide what to disclose.
47. He concluded that he did not provide proof of the Brigadier General's age in this matter unless if the said age which he stated is contested by the defendant.
48. The defendant filed and relied on three sworn statements in support of his defence. The first one was made by Joseph Dzongololo and he stated as follows:

    1. I am of full age and a Deputy Director of Human Resource Management and Development in the Ministry of Homeland Security (the 'Ministry') and I am competent to swear this sworn statement on behalf of the defendant herein.

2. Unless stated otherwise, facts set out in this sworn statement are based on personal knowledge of this matter and some have passed on to me in my capacity as the Deputy Director of Human Resource Management in the Ministry and are to the best of my knowledge and belief, true and correct.
3. For matters of fact that are not within my personal knowledge, I duly disclose the source thereof and provide grounds for my belief thereof.

Factual Background

4. Our records show that the claimant completed his Malawi School Certificate of Education (MSCE) in 2011 and joined the Department of Immigration and Citizenship Services (the 'Department') in 2012 as an Immigration Assistant (Grade N).
5. On 12th December, 2016, the claimant was promoted to the position of Immigration Assistant (Sergeant) (Grade MI). I exhibit hereto a letter of promotion marked 'JD1'. On 29th June, 2017, the claimant was further promoted to the post of Assistant Immigration Officer (Grade K) I exhibit hereto a copy of the promotion letter marked 'JD2'. On 10th August, 2020, the claimant was placed to the post of Inspector (Grade 1) following a functional review that took place at the Department which in effect upgraded the post of Assistant Immigration Officer (Grade K) to the post of Inspector (Grade I). There is now shown to me and exhibited hereto a copy the said Placement marked 'JD 3'.
6. In or around 2017, the claimant commenced further studies for Bachelor of Laws Programme at the University of Malawi, Chancellor College. He graduated last year in 2022. In the same year 2022, the claimant attended interview to a senior grade, Grade H but he was not successful the same. Thus, the claimant has not been in a management position and is still a junior officer at the Department.
7. For the foregoing reasons, I believe that the claimant himself is not eligible for the appointment to the position of Director General of the Department. I have been informed by our legal representative that the claimant does not have locus standi because:

(a) The claimant is a junior officer at the Department. He is just at Grade I which is not a management position in public service. He was not successful in the promotion interviews, a clear indication that he is not mature to handle a complicated institution like the Department of Immigration and Citizenship Services. In fact, there are many qualifying officers at the Department who are Deputy Directors General, Directors and Managers at the Department who would have locus standi to pursue a judicial review proceeding challenging the appointment of the Director General.

(b) Corruption surrounding the issuance of passports is deep rooted at the Department. It was thought wise by the defendant herein to appoint an outsider to tackle corruption and other related ills at the Department. The claimant is not eligible for the appointment to the position of the Director General of the Department.

(c) The claimant just completed his Bachelor's Degree studies last year in 2022. I believe he is not eligible for the appointment, on the merit, to the post of Director General to lead a big, complicated and intelligence based institution like the Department.

8. I believe that, based on the above grounds, the claimant himself does not have the requisite *locus standi* at law to pursue this proceeding unless he is doing so on behalf of the unknown and undisclosed which I am advised by our legal representative that it is legally untenable.

9. I also believe that this is an employment matter and therefore a private matter, the same is not amenable to public law remedy like the proceeding herein. I believe the right forum is the Industrial Relations Court of Malawi which court was deliberately created to handle employment related matters like the one herein. This Court, therefore, lack jurisdiction over the matter.

10. Further, having failed on the issue of *locus standi*, I believe the claimant has not suffered any harm or injury occasioned to him as a result of the appointment of Brigadier General Kalumo. Neither has the claimant proved to Court that he has suffered any prejudice as a result of the appointment in issue.

11. For the foregoing reasons, I humbly pray to Court that this application should be dismissed in its entirety with costs.

49. The second sworn statement was made by Lickson Lipenga who stated as follows:

1. I am of full age and a Chief Human Resource Management Officer at the Office of the President and Cabinet and therefore, I am competent to make this sworn statement on behalf of the defendant herein.
2. Unless otherwise stated, all matters of fact deponed to herein have come to my knowledge in my capacity as the Chief Human Resource Management Officer and I verily believe the same to be true to the best of my knowledge and belief.
3. I state that a vacancy in the office of the Director General of the Department of Immigration and Citizenship Services (the 'Department) fell and it was incumbent on the defendant as an appointing authority to fill the said vacancy.
4. In filling such an important vacancy, the defendant has to exercise due diligence so as to make sure that the person to fill the vacancy should help in realizing the agenda set by Government.
5. I repeat the foregoing and state that the defendant considered the institutionalized corruption and inefficiencies within the Department and determined that Brigadier General Kalumo was the appropriate candidate with the requisite skills and experience to deal with the institutionalized corruption, plunder and inefficiencies within the Department.
6. I have read the claimant's claim and my reaction is that his claim has been motivated by greed in trying to maintain the status quo at the Department and resist change that would benefit all Malawians.
7. I also believe that challenging the re-engagement of retirees who have required experience and skills to resolve chronic governance challenges as is the case with Brigadier General Kalumo would work against the interest of orderly and effective Government.
8. In addition to the above, I have been advised by our legal representative that the defendant's action herein was well within the applicable law, specifically section 6 of the Public Service Act and section 189 (2) of the Constitution of Malawi which underline the prerogative powers of the defendant.

9. For the foregoing reasons, I believe that the appointment of Brigadier Kalumo cannot be faulted and this application should be dismissed with costs.
10. I understand that this sworn statement shall be used in court proceedings and that I make this sworn statement consciously acknowledging that if I have made a false statement I may commit perjury and be liable to substantial penalty.

Wherefore I humbly pray to this Court that the applications herein be dismissed with costs.

50. And the third sworn statement was made by Bernard Tembo who stated that:

1. I am of full age and a Director at the Department of Human Resources Management and evelopment (DHRMD) and therefore, I am competent to make this sworn statement on behalf of the Defendant herein.
2. Unless otherwise stated, all matters of fact deponed to herein have come to my knowledge in my capacity as Director at the DHRMD and I verily believe the same to be true to the best of my knowledge and belief.
3. Under Circular No. HRM/P&G/01, dated 21st October, 2013, which circular I exhibit hereto marked 'BTI', employment of persons above the retirement age is allowed in respect of those who have essential skills and/or experience that are still needed for service delivery as determined by Government from time to time.
4. Further, Brigadier General Kalumo was appointed for a fixed term contract of 36 months, well within the aforesaid circular. There is now shown to me a copy of the said contract exhibited hereto marked 'BT2'.
5. Based on the foregoing, I firmly believe that the appointment of Brigadier General Kalumo cannot be faulted. I therefore pray that this application should be dismissed with costs.
6. I understand that this sworn statement shall be used in court proceedings and that I make this sworn statement consciously acknowledging that if I have made a false statement I may commit perjury and be liable to substantial penalty.

Wherefore, I humbly pray to this Court that the applications herein be dismissed with costs.

51. The parties then made their submissions on the issues for which this Court is grateful. This Court deals with the first issue whether the claimant has *locus standi* or sufficient interest in the impugned decision to allow him to commence and make the present application.
52. The claimant submitted that he has *locus standi* to bring the present application for judicial review. In addition, that, in any case, the issue of *locus standi* is *res judicata* meaning that this Court already decided on that issue to finality. He opined that this is because when this Court granted permission for judicial review on February 17, 2023, it already was of the view that the claimant had *locus standi* in the matter. He noted that this Court stated as follows at paragraph 13 of its ruling granting permission to commence this judicial review application:

> This Court observes that it appears that the claimant has standing before this Court given his years of experience in the Department spanning over a decade.

53. He submitted that the issue of *locus standi* should not be entertained at this substantive hearing stage of the judicial review the same having been fully appreciated and decided on by the Court. He added that there is no new fact that arose from his cross-examination that contradicted the basis on which this Court already decided that he had *locus standi* before the Court.
54. He then asserted that if the defendant had successfully established in cross-examination that the claimant has never worked in the Department of Immigration for over a decade and that he does not hold the qualifications that he says he holds, then this Court could change its mind on his standing. He added that if the defendant wishes to contest issue of *locus standi*, then the same can be a point for appeal and not before this Court herein.
55. The claimant went on to contend that should this Court deem it necessary to reopen the issue of standing in the substantive determination of the judicial

review application, then this Court should have recourse to the recently expounded scope of *locus standi* as advanced by the Court.

56. He noted that during cross-examination, he confirmed that more immigration officers and the Minister responsible for the Department did not challenge the impugned appointment in any court. He submitted that he has his own right to challenge the impugned appointment even though officers more senior than him and the Minister responsible for Homeland Security did not challenge the same. He added that he properly approached this Court in exercise of his rights under Section 41 of the Constitution. He pointed out that the section provides that:

> 41.—(1) Every person shall have a right to recognition as a person before the law.
>
> (2) Every person shall have the right of access to any court of law or any other tribunal with jurisdiction for final settlement of legal issues.
>
> (3) Every person shall have the right to an effective remedy by a court of law or tribunal for acts violating the rights and freedoms granted to him or her by this Constitution or any other law.

57. He observed that the law does not come to the aid of those who sit and slumber on their rights. As such, that he cannot be compelled to pave way for those officers or a Minister who have neither seen any legal issue that the Court should settle and who have chosen not to pursue their right to challenge the defendant's appointment.

58. He noted that the test for whether a person can bring an action before the Courts in Malawi is whether he has sufficient interest and the same includes where such a person is so connected to the matters complained of. He indicated that, in the present case, he is an Immigration Officer of over 10 years experience and who is affected by who leads the Immigration Department. He pointed out that both during cross-examination and in re-examination, he explained extensively how appointments in the ranks higher than his in the Department actually affect his prospects for career development. He insisted that the impugned decision, therefore, affects him.

59. With regard to the current scope of *locus standi* in Malawi, the case of *The State (on Application of Henry Banda and Others) v Officer in Charge* Judicial Review Case Number 28 of 2018 refers. He indicated that the Court actually acknowledged that the standard with regard to sufficient interest is considerably low. For instance, that the Court in that case held that mere belief that one's rights have been infringed suffices for such person to actually approach the courts for redress of legal issues and for effective legal remedy. He noted that the Court stated in that case that:

> Firstly, on the question of whether the Applicants have sufficient interest to bring this claim before the court. Sections 15 (2), 41(2) and (3) as well as 46 (2) of the Constitution are very instructive in this matter. The said provisions allow that any person with a belief that a right has been violated can institute proceeds for the protection and enforcement of rights under the Bill of Rights by seeking the assistance of the courts, the Ombudsman, the Human Rights Commission and other organs of Government to ensure the promotion, protection and redress of grievance in respect of those rights. Section 41(2) of the Constitution further provides that when a person seeks redress, such person should have access to any court of law and any other tribunal with jurisdiction for final settlement of legal issues and have the right to an effective remedy by a court of law or tribunal for acts violating the rights and freedoms granted to him by this Constitution or any other law. Consequently, the Applicants have decided to seek their redress in the High Court as provided in section 46(2) of the Constitution. This Court appreciates the sentiments by Mwaungulu J (as he then was) in Thandiwe Okeke v Minister of Home Affairs, Controller of Immigration, Miscellaneous Civil Application No.73 of 1997 (HC)(PR)(Unrep) on section 15 (2) of the Constitution that it does not only refer to the individual or group whose rights have been affected. It refers to a person or group of persons with a sufficient interest in the protection and enforcement of rights. Notably, this Court agrees with the Applicants that they have the required locus standi because they were directly affected by the actions of the Respondents which are the subject of this judicial review as they are the ones who were arrested and detained as a result of the sweeping exercise. Further they are the ones with a criminal record because of the Respondents decision to prosecute them after the arrest as such they have therefore a direct personal interest in this matter. To stress the issue of constitutional sufficient interest in Malawi's rule of law, this Court adopts the enunciated principle in My Vote Counts NPC v The President of the Republic of South Africa and Others 4 All SA 840 (WCC).

60. The claimant then observed that the authoritative test for *locus standi* in judicial review applications was settled by the Courts (High Court) (Civil Procedure) Rules 2017 and is no longer governed principally by rules obtaining at Common Law. In the premises, he submitted that he has sufficient interest in the present matter.
61. On his part, the defendant submitted that the claimant has *locus standi* to bring the present application for judicial review. He first submitted on the law on *locus standi* and pleadings.
62. He noted that in *Civil Liberties Committee v Minister of Justice and another* [2004] MLR 55 (SCA), the Supreme Court of Appeal held that for an applicant for judicial review to show that he has sufficient interest in the matter, he or she must show that it is his or her right or freedom that has been violated as a basis for taking up the action. He added that courts have a duty to public bodies being harassed by irresponsible applicants for Judicial Review. see *Chaponda and another, ex parte Kajoloweka and others,* MSCA Civil Appeal No. 5 of 2017, [2019] MWSC 1 (13 February 2019)).
63. He submitted that Schiemann J in *R v Secretary of State for the Environment, ex parte Rose Theatre Trust* 1 Q.B. 504 at 520, stated that "not every member of the public can complain of every breach of statutory duty by a person empowered to come to a decision . .. ."
64. He also noted that a person who has no sufficient interest in matter has no right to ask the court of law to give him a declaratory judgment. See *President of Malawi and another v Kachere and others* [1995] 2 MLR 616).
65. The defendant observed that in *The Registered Trustees of the Women & Law (Malawi) Research & Education Trust v The Attorney General,* Constitutional Case number 3 of 2009, High Court of Malawi, Principal Registry, (Unreported), the court dismissed a constitutional referral because the Applicant lacked the requisite *locus standi*. And that delivering the unanimous opinion of the court, Chipeta, J as he then was stated as follows:

> Suing on the basis that the Trust Deed's objectives coincide with women rights in the Republican Constitution, and on the basis that women (not mentioned and involved in the case) have been complaining to the Trust, and on the basis that the Trust's research has led to the conclusion that there is a problem, is not sufficient

interest in the manner the existing authorities construe that expression under section 15(2) of the Constitution."

…in the circumstances we have no option but to dismiss the Applicant's Originating Motion herein, which we now do with costs.

66. The defendant then noted that in the case of *Australian Conservation Foundation v, The Commonwealth* (1980) 146 C.L.R. 493 it was stated as follows:

> A person is not interested within the meaning of the rules unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of some grievance or a debt for costs, if his action fails. A belief, however strongly felt, that the law generally, or a particular law should be observed, or that conduct of a particular kind should be prevented, does not suffice to give its possessor locus standi. If that were so, the rule requiring special interest would be meaningless.

67. The defendant asserted that courts in Malawi have held that to establish a standing, a party must satisfy the court that the conduct of the Defendant adversely affects his or her legal right over and above others. See *Civil Liberties Committee v Minister of Justice and another* [2004] MLR 55 (SCA); *Chaponda and another, ex parte Kajoloweka and others,* (MSCA Civil Appeal No. 5 of 2017) [2019] MWSC 1 (13 February 2019). He added that in *Civil Liberties Committee v Minister of Justice and another* [supra], the Supreme Court of Appeal held that the *locus standi* requirement:

> is so basic that we sometimes take it for granted that a person who has no legal right or interest to protect would not commence an action in a court of law. Courts exist to conduct serious business. They deal with real live issues affecting parties to an action.

68. The defendant indicated that in *Civil Liberties Committee v. Minister of Justice and another* [supra], the court observed that:

> Clearly the two cases establish that, in the field of public law, a private plaintiff can establish standing to bring an action if he can show that the conduct or decision of the defendant adversely affects his legal right or interest. **A strong belief or**

> **conviction that the law generally or a particular law should be observed, or that conduct of a particular kind should be prevented is not sufficient to ground standing.** They also establish that an ordinary member of the public who has no interest other than that which any member of the public has in upholding the law, has no standing to sue to prevent the violation of a public right or to enforce the performance of a public duty. The two cases further express the view that a strong desire to enforce public law as a matter of principle or as part of an effort to achieve the objects of a particular organisation and to uphold the values which it was formed to promote is not sufficient to establish locus standi to commence an action. Finally, the two cases from countries of the Commonwealth support the view that, in public law, locus standi is a jurisdictional issue.' [Emphasis supplied by defendant].

69. This defendant pointed out that the foregoing decision was cited with approval in *Chaponda & Anor. v Kajoloweka & Ors.* (MSCA Civil Appeal 5 of 2017) [2019] MWSC 1 (13 February 2019). He indicated that, as held in *President of Malawi and another v Kachere and others* [1995] 2 MLR 616, issues to do with *locus standi* relate to the jurisdiction of the court. He added that in *Civil Liberties Committee v. Minister of Justice and another* [supra] it was held that 'in public law, *locus standi* is a jurisdictional issue.'
70. The defendant observed that in *Attorney–General v Malawi Congress Party and others* [1997] 2 MLR 181 (SCA) Mtegha, J.A. in delivering the unanimous opinion of the Malawi Supreme Court of Appeal observed that:

> The Constitution expressly provides tests of locus standi so as to identify those persons who can, and who cannot, institute proceedings for breaches of the Constitution. The relevant sections are ss. 15(2), 41 (3) and 46 (2). Locus Standi is a jurisdictional issue. It is a rule of equity that a person cannot maintain a suit or action unless he has an interest in the subject of it, that is to say, unless he stands in a sufficient close relation to it so as to give him a right which requires protection or infringement of which he brings the action.

71. He also noted that in the case of *The State vs. The State President Ex-parte Enock Chihana and Others,* Misc. Civil Cause No. 86 of 2015, High Court of Malawi, Principal Registry (Unreported), Madise J as he then was held that:

> An applicant in a judicial review proceeding must have "sufficient interest" in the matter. The purpose is to exclude the so called busy bodies. There must be a direct and personal interest.

72. The defendant pointed out that in the case of *The President of Malawi and Another vs. Kachere and Others*, [supra] Mtegha JA (as he then was) has the following to say:

> It must be pointed out here that the powers of the court to make a binding declaratory judgment is discretionary. This being the case the plaintiff must have locus standi, that is, a real interest which he wants to protect. If he has no interest, such declaratory judgment may not be granted.

73. The defendant then submitted on the requirement of pleadings as follows. He indicated that issues, whether on points of law or fact, for the court's determination have to be specifically pleaded for them to receive the court's attention. And that according to Buckely, L.J. in *Re Robinson 's Settlements, Grant v. Hobbs* (1912) 1 Ch 717 at 728 the effect of this rule is, for reasons of practice and justice and convenience, to require the party to tell his opponent what he is coming to court to prove.
74. He further indicated that the rationale for the pleadings is that the pleadings set the court's agenda from which no single party to an action has to deviate to as much as possible avoid surprises or ambush. And that the court also does not have any business deciding on a particular point which is not before it. See *Malawi Electoral Commission and Others v Republican Party* (MSCA Civil Appeal No. 14 of 2004) [2004] MWSC 2 (18 May 2004)).
75. The defendant pointed out that in the case of *Malawi Electoral Commission and Others v Republican Party* MSCA Civil Appeal No. 14 of 2004, [2004] MWSC 2 (18 May 2004) in delivering the unanimous opinion of the court, Unyolo J. made the following observations:

> It is trite, and there is a wealth of authorities, that the issues for the determination of the court should be stated clearly and expressly in the originating summons, so too the reliefs sought. The reason for this is to inform the other side in advance of the nature of the case it has to meet and to prevent the other side being taken by surprise at the hearing. Cases are decided on issues on record.

> In making its decision on this point, the lower Court appears to have relied on sections 103(2) and 108(1) of the Constitution, which set out the jurisdiction of the Courts. Section 103(2) provides that the Judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue is within its competence. Section 108(1) provides that the High Court shall have unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law.
>
> With the greatest respect, these two sections, in our considered view, do not detract from the requirement that a party must state expressly the issues it seeks to raise and the specific reliefs sought.
>
> We wish to go further and say on this aspect that the Court must confine Counsel's arguments and submissions to those issues and reliefs as are particularised in the Originating Summons. The Court itself is as much bound by the issues on record as the parties are.
>
> The finding of this Court, on the record of the lower Court, is that the Originating Summons does not contain, as an issue or question, what must be done with the excess ballot papers. The Originating Summons also does not contain, as a relief prayed for, that the ballot papers must be manually counted and the excess lodged in the custody of the Registrar or any other third party.

76. The defendant submitted that the effect of failure to plead issues even if proved during trial is that no judgment can be entered on a question not pleaded and that particulars must define and limit issues in contention and further matters not relevant. See *Likaku v Mponda* 11 MLR 411; *Manica Freight Services (Malawi) Limited v. Butao* 11 MLR 379). The defendant indicated that in *Likaku v Mponda* 11 MLR 411 Makuta C.J. sitting on an appeal to the High Court held that the court had rightly refused to make a finding on the question of the ownership of the vehicle and said that the purpose of including particulars in a statement of claim was to inform the other party of the nature of the case against it and to allow it to prepare its own case accordingly and to limit the proceedings to the specific issues in contention. And that he went on to hold that a finding of ownership could only have been made if it had been called for in the pleadings and, having failed to raise the issue before the trial, the appellant had no ground of complaint. Further, that he also held that the dates of the alleged deprivation and trespass

before the court did not coincide with those alleged in the statement of claim and the subsequent uncertainty as to the true dates rendered calculation of any loss of income impossible and therefore the claim had been rightly dismissed stating that:

> The function of pleading is to carry into operation the overriding principle that the litigation between the parties, and particularly the trial, should be conducted fairly, openly and without surprises and to reduce costs: see Astrovanis Cia. Naviera S.A. v. Linard [1972] 2 All E.R. 647.

77. The defendant added that the Court went on to hold that:

> If the appellant wanted the court to make findings as requested, he should have applied to amend the pleadings. This he did not do, despite the fact that the amended defence threw some doubt on the ownership of the vehicle. He chose to remain silent throughout and that was an indication that he did not wish the court to make the finding being sought now. In my judgment, it is too late and cannot be entertained.

78. The defendant noted that in *Burco Electronic Systems Limited v City Motors Limited* Commercial Case No.13 of 2007, [2008] MWCommC 11 (13 March 2008), the Court said this about pleadings:

> It is trite law that pleadings define the issues between the parties. Indeed, it is common knowledge, thus I need not cite an authority for it that pleadings serve to determine which party has the onus of proving which material issue in the case. Further, it is settled law that a party to a case cannot rely on a material that has not been pleaded.

79. The defendant indicated that in the case of *Malawi Railways Ltd v P.T.K Nyasulu* [1998] MLR 195 (SCA) which was cited in *Burco Electronic Systems Limited v. City Motors Limited* [supra] the Malawi Supreme Court of Appeal dealt with a matter where the Respondent at trial sought to really on an implied term of an employment contract. The Respondent had not pleaded the implied term in the High Court. The High Court had determined the case in the Respondent's favour on the basis, inter-alia, of the implied term. On appeal in the Supreme Court, Counsel for the Appellant argued, among other things,

that the lower court had erred in deciding the case on the basis of an implied term that had not been pleaded. In its unanimous decision on the point, the Malawi Supreme Court instructed that:

> Counsel for the appellant argued, quite correctly in our opinion, that although the learned trial Judge implied into the agreement between the parties the underlined terms that he did, the respondent had not pleaded or alleged such implied terms in the statement of claim. Counsel also pointed out that Order 18, rule 7 of the Rules of the Supreme Court, 1995 Edn at page 291 makes it a duty on every party to the proceedings to plead all material facts which that party will rely upon at the trial. Counsel cited quite a multitude of authorities in supporting of his argument. We shall only refer to few of these. The first is Blay v Pollard and Morris (1930) 1KB6 28 where Scrutton LJ said at page 634 that:
>
> Cases must be decided on the issues on the record, and if it desired to raise other issues they must be placed on the record by amendment. In the present case, the issue on which the Judge decided was raised by himself without amending the pleading and in my opinion he was not entitled to take such a course. Counsel for the respondent submitted in argument that in paragraph 4 (4) of the Statement of Claim, the respondent prayed for "further or other relief". We do not believe that this satisfactorily complies with the terms of O.18r 7 paragraph 10 at page 292 which states that:
>
> > "All the materials facts- It is essential that a pleading, if it is not to be embarrassing, should state those facts which will put those against whom it is directed on the guard, and tell them what is the case which they will have to meet (per Cotton LJ in Phillips v Phillips (1878) 4 Q.B.D 127 p.139].
>
> "Material" means necessary for the purpose of formulating a complete cause of action; and if any one material statement is omitted, the statement of claim (or defence is bad (per Scott LJ in Bruce v Odhams Press Ltd [1936] 1 ALL ER 287, p.294.
> Each party must plead all the material facts on which he means to rely at the trial otherwise he is not entitled to give any evidence of them at the trial. No averment must be omitted which is essential to success. Those facts must be alleged which must, not may, amount to a cause of action (West Rand Co. v Rex [1905] 2 K.B 399. See Ayers v Hanson [1912]. W.N 193). Where the evidence at the trial establishes facts different from those pleaded e.g. by the plaintiff as constituting negligence, which are not just a variation, modification or development of what has been alleged but which constitute a radical departure from the case as pleaded, the

action will be dismissed (Waghorn v Geroge Wimpey & Co Ltd) [1969] 1 W.L.R 1764; [1970] 1 ALLER 474). Moreover, if the plaintiff succeeded on findings of fact not pleaded by him the judgment would not be allowed to stand, and the Court of Appeal would either dismiss the action (Pawding v London Brick Co (1971) 4 K.I.R 207) or in a proper case will if necessary order a new trial (Lloyd v West Midlands Gas Board [1971] 1 W.L.R 749; [1971] 1 ALLER 1240 CA).
Similarly, a defendant may be prevented from relying at the trial on a ground of defence not pleaded by him (Davie v New Merton Board Mills Ltd [1956] 1 ALLER 379; But cf Rumbold v.L.C.C (1909) 25 T.L.R 541, C.A, which was not cited in Davie's Case; for the subsequent history of Davie's Case,see [1959] A.C 604, H.L. Counsel for the appellant cited an article from the (1960) Current Legal Problems entitled "The Present Importance of Pleadings" written by Sir Jack Jacob. The author stated as follows, at page 174:

> 'As the parties are adversaries, it is left to each of them to formulate his case in his own way, subject to the basic rules of pleadings… for the sake of certainty and finally, each party is bound by his own pleadings and cannot be allowed to raise different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event; parties themselves, or at any rate one of them might well feel aggrieved for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice…. In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specified may be raised without notice'.

We concur with Counsel for the appellant in his submission that since the respondent did not, in his statement of claim, plead that a term was to be implied in the agreement that subject to good health, good conduct and the continuance of the appellant's business; the respondent's employment could not be terminated until he

attained the retirement age of six years, the court erred in law in making such an implication. *Malawi Railways Ltd v P.T.K Nyasulu* [1998] MLR 195 (SCA).

80. The defendant stated that the Court in *Burco Electronic Systems Limited V City Motors Limited* Commercial Case No.13 of 2007 [2008] MWCommC 11 (13 March 2008), clearly stated that his court would not allow that it be allowed to go outside the pleadings and hunt for defence(s) anyhow.

81. The defendant then pointed out that the function of the pleadings is summarised as follows:

(a) to inform the other side of the nature of the case that they have to meet as distinguished from the mode in which that case is to be proved. per *Lindley L.J. in Duke v Wisden* (1897) 77 L.T. 67 at 68, per Buckley L.J. in *Young & Co. v Scottish Union Co.* (1907) 24 T.L.R. 73 at 74; *Aga Khan v. Times Publishing Co* [1924] 1 K.B. 675 at 679);
(b) to prevent the other side from being taken by surprise at the trial (per Cotton L.J., in *Spedding v. Fitzpatrick* (1888) 38 Ch.D. 410 at 413; *Thomson v. Birkley* (1882) 31 W.R. 230);
(c) to enable the other side to know with what evidence they ought to be prepared and to prepare for trial (per Cotton L.J. ibid; per Jessel M.R. in *Thorp v. Holdsworth* (1876) 3 Ch.D. 637 at 639; *Elkington v. London Association for the Protection of Trade* (1911) 27 T.L.R. 329 at 330;
(d) to limit the generality of the pleadings (per Thesiger L.J. *Saunders v. Jones* (1877) 7 Ch.D. 435) or of the claim or the evidence (*Milbank v. Milbank* [1900] 1 Ch. 376 at p. 385);
(e) to limit and define the issues to be tried, and as to which discovery is required (*Yorkshire Provident Life Assurance Co. v. Gilbert* [1895] 2 Q.B. 148, per Vaughan Williams L.J. in *Milbank v. Milbank* [1900] 1 Ch. 376 at 385);
(f) to tie the hands of the party so that he cannot without leave go into any matters not included (per Brett L.J. in *Philipps v. Philipps* (1878) 4 Q.B.D. 127 at 133; *Woolley v. Broad* [1892]2 Q.B. 317)
(g) The learned authors go on to say that the purpose of the pleadings is not to play a game at the expense of the litigants but to enable the opposing party to know the case against him.

82. The defendant then made his analysis and submission as follows. He indicated that in determining the question of *locus standi*, he submits that this Court should confine itself to what the claimant pleaded. The defendant asserted that, to show that he has *locus standi*, the claimant pleaded that he is qualified based on age, qualifications and experience to be appointed as Chief Immigration Officer. The defendant contended that the claimant cannot without amending the pleadings raise any new issue as a foundation for *locus standi* to commence these proceedings.
83. The defendant noted that the claimant claims that he is qualified to hold the position of Director General of Immigration and Citizenship Services. However, that the claimant currently holds a very junior grade, namely, Inspector, hence does not qualify to be appointed a Director General of the Department of Immigration and Citizenship Services. The defendant asserted that the claimant never disclosed that he holds the rank of Inspector at the Department of Immigration and Citizenship Services.
84. The defendant pointed out that the claimant who is on the rank of an Inspector (Grade I) is below the following ranks:

    (a) Commissioners (Grade D)
    (b) Deputy Commissioners (Grade E, P3)
    (c) Assistant Commissioners (Grade E, P4)
    (d) Senior Superintendent (Grade F, P5)
    (e) Superintendent (Grade G, P7)
    (f) Assistant Superintendent (Grade H, P8)

85. And that, so far, there are more than 2 officers holding the position of a Commissioner at the Department of Immigration and Citizenship Services. He asserted that some officers occupy the rank of Deputy Commissioners and other positions as shown above. The defendant submitted that that these are the officers and some of like grades in public service who would have *locus standi* to challenge the decision of the defendant as they are the ones who are eligible for an appointment to the office of the Director General in the Department but not the claimant.
86. The defendant noted that during his cross-examination, the claimant revealed that following a functional review that was conducted in 2018, eligibility

criteria for the appointment of Chief Immigration Officer were set. And that these include:

(a) Master's degree in Business Administration/Strategic Management/Public Administration/Law/Leadership and Management and any related fields from recognised institutions
(b) Plus, a recognised security related qualification.
(c) 7 years of experience at managerial post in a security institution.

87. The defendant asserted that, at the time the claimant commenced these proceedings on 8th September 2022, the claimant had during the previous day 7th September, 2022 just been awarded his Bachelor of Laws (Honours). And that, by his own admission, the claimant neither possessed the minimum qualification of a Master's Degree nor did he have 7 years' of experience at managerial post in a security institution. The defendant asserted that the claimant conceded during cross-examination that he was aware of these facts regarding minimum requirements for the position of Chief Immigration Officer when he applied for permission for judicial review but that he did not find it necessary to disclose these facts to this Court when he applied for permission for judicial review because he had the liberty to frame the case in the way he wanted and to disclose only those material that he considered to be necessary in building his case.
88. The defendant contended that the claimant was, therefore, very dishonest when he applied for permission for judicial review that he qualified to be appointed Chief Immigration Officer. And that, in simple terms, this is a judicial review case by a dishonest litigant who claims to be eligible to be appointed as Chief Immigration Officer. Further, that it is a sad case by a dishonest claimant who wants to turn the courts into play grounds. The defendant indicated that, as Dr. Kachale, J in *Rombani Londwa t/a Kaizwangwa Investment and General Dealers v Standard Bank Plc*, Commercial Cause No. 32 of 2022, High Court of Malawi, Lilongwe District Registry (Unreported) advises:

> Litigation should be about genuine controversy and not mere academic or frivolous or contrived disputes with no cloak of legality.

89. The defendant then submitted that, as per the claimant's own admission during cross-examination, a functional review was conducted at the Department of Immigration in 2018. And that The Functional Review Report provides for the minimum requirements a person must possess for him/ her to be eligible for appointment to the position of Director General. Further, that according to the review, a candidate is supposed to have a minimum of a Masters' Degree and 7 years' worth of experience at a managerial position.
90. The defendant observed that, during cross-examination, the claimant conceded that he does not have Masters' degree and that he has not held a managerial post for 7 years as per the functional review's requirements. And that it therefore goes without saying that the claimant is not eligible for appointment to the position of Director General. He added that, on this basis a lone it necessarily follows that the claimant does not have sufficient interest in the matter as he does not even meet the eligibility requirements. The defendant opined that the claimant is a busy body and as such this application must be dismissed with costs.
91. The defendant submitted that, in any event, even if this Court was to establish as fact that the claimant is/was eligible for appointment as Director General, which the defendant vehemently denies, it is still hereby submitted that his interest is too remote to be considered sufficient. The defendant asserted that the facts of the case show unambiguously show that the claimant is mere junior officer with no real prospects of being appointed to a complex and sophisticated position of Director General.
92. The defendant asserted that during cross-examination, the claimant conceded that there are several officers at the Department who are very senior to him including; Assistant Superintendents, Superintendents (over 60 officers), Senior Superintendents (over 30 officers), Assistant Commissioners, Deputy Commissioners and Commissioners. And that the claimant further admitted that for him to be appointed as Director General, he would have skipped the above-mentioned ranks which is absurd in its own right. It is the defendant's submission that it is these senior officers who can legitimately and realistically contest the appointment.
93. The defendant indicated that, as per the uncontroverted evidence of Joseph Dzongololo the claimant failed promotion interviews in 2022. And that Mr.

Dzongololo also explained that the claimant has never held a senior or managerial position at the Immigration Department. The defendant added that the claimant's failure is a clear indication that he is inexperienced and not ready to hold a senior position at the Immigration Department.

94. The defendant pointed out that it is also evident that the claimant is a fresh graduate having obtained his Bachelor's degree in 2022. And that it, therefore, goes without saying that a fresh graduate with no experience of working at a senior and /or management level at the Department cannot be said to have real and legitimate prospects of being appointed as Director General. The defendant reiterated that the Department of Immigration is a large and complex intelligence-based establishment which requires the person heading it to possess extensive experience which the claimant does not have.
95. The defendant noted that at ground 4 of the application for judicial review, the claimant refers to 'when there are eligible, qualified and suitable officers to fill the said vacancy...' and that, here, the claimant is not referring to himself but other people. Additionally, that those eligible officers referred to at paragraph 4 of the application for judicial review have not been listed or identified. And that the claimant has not brought any proof of those eligible, qualified and suitable officers.
96. The defendant submitted that, considering that the claimant does not have any realistic and legitimate prospects of being appointed as Director General of the Department of Immigration, there is thus no harm or injury that he can suffer from the defendant's appointment. And that pursuant to the case of *The State v. The State President Ex-parte Enock Chihana and Others*, the defendant hereby submitted that the claimant does not have a direct and personal interest in the matter.
97. The defendant indicated that, as it were, a strong belief or conviction that the law generally or a particular law should be observed, or that conduct of a particular kind should be prevented is not sufficient to ground standing. See *Chaponda and another, ex parte Kajoloweka and others [supra]; President of Malawi and another v Kachere and others* [1995] 2 MLR 616. The defendant noted that the claimant is seeking the following reliefs in his application for Judicial Review [page 8 of the Trial Bundle]:

(a) A declaration that the appointment of Brigadier General Charles Kalumo (Retired) as the Director General of the Department of Immigration [the decision] is non-consequential and of no effect as it is illegal and unconstitutional;

(b) An order quashing the Decision;

(c) An order directing the Defendant to appoint an eligible, suitable and qualified member of the Department of Immigration and Citizenship Services [the Department] or in the alternative, an eligible, suitable and qualified member of the public service to the post of Director General (Chief Immigration Officer); Deputy Chief Immigration Officer and/or any other similar position.

(d) An order for costs and that all necessary and consequential directions be given.

98. The defendant noted that the claimant is here requesting this Court to order that he should be considered for appointment. And that the claimant is requesting this Court to order the defendant to:

> 'to appoint an eligible, suitable and qualified member of the Department of Immigration and Citizenship Services [the Department] or in the alternative, an eligible, suitable and qualified member of the public service to the post of Director General (Chief Immigration Officer); Deputy Chief Immigration Officer and/or any other similar position.'

99. The defendant posited that the indication here is that the decision does not directly affect the claimant. And that per the *President of Malawi and another v Kachere and others* [1995] 2 MLR 616), a declaratory judgment may not be granted to an applicant whose claim is too indirect and insubstantial and would not give him any relief in any real sense. And that this is the case with the claimant here. The defendant added that the claimant has not located any individual right that has been violated. He asserted that the foundation of the alleged rights contained in the application for judicial review have not been identified. The defendant asserted that by stating that he has been deprived of

career advancement because of the appointment of Brigadier General Kalumo who never worked for the Department of Immigration and Citizenship Services, the claimant has sued for what may happen in future.

100. The defendant indicated that it is very ironic that the claimant who just graduated a day before he commenced these proceedings believes that he qualifies to be appointed Director General of Immigration and Citizenship Services. He added that the claimant cannot be serious when he claims that he should have been the one to be appointed as Director General of Immigration and Citizenship Services. He noted that in the case of *Civil Liberties Committee v. Minister of Justice and another* [supra], it was emphasised that courts exist to conduct serious business. And that the manner in which the claimant has approached this Court is to undermine the powers of the court to deal only with serious business.

101. The defendant stated that, considering that it has been proved that the claimant does not have *locus standi*, this Court does not have jurisdiction over the proceedings that have been commenced by the claimant on the authority of inter alia, *President of Malawi and another v Kachere and others* [supra]; *Civil Liberties Committee v. Minister of Justice and another* [supra] and *the Attorney General v. The Malawi Congress Party and Others [supra].*

102. He added that, moreover, the claimant is conflicted as his job involves representing the Department of Immigration and Citizenship Services and by extension the defendant herein. Thus, the interest of the Claimant in this matter does not meet the test as set out in *President of Malawi and another v Kachere and others* [supra]; *the Registered Trustees of the Women & Law (Malawi) Research & Education Trust v The Attorney General* [supra]; *Australian Conservation Foundation v The Commonwealth* [supra] and endorsed in the cases of *Civil Liberties Committee v The Minister of Justice and others [supra]*; *Chaponda and another, ex parte Kajoloweka and others [supra].* The defendant indicated that the claimant's claim must, therefore, be dismissed with cost.

103. The defendant then noted that the claimant has argued in his closing submissions that the prayer for dismissal of the matter based on *locus standi* must be dismissed as it caught by the *res judicata* principle. He asserted that the law as stated in *Carl-Zeiss-Stiftung v Rayner* [1966] 2 All ER 536 is to the effect that for *res judicata* to apply, the earlier judgment relied on must be a

final judgment on the merits and there must be an identity of the parties and of the subject matter in the former and the present litigation. The defendant submitted that there was no final judgment on the merits here. Additionally, that the hearing proceeded in the absence of the defendant. Moreover, that this Court in its ruling dated 31st May, 2023 stated that:

> It is the Court's considered view that Judicial Review matters in their very nature are supposed to be dealt with expeditiously and as such it is in the interest of justice that the matter must not be delayed any further. **The issues relating to locus standi can still be dealt with when the Court is dealing with the merits of the case.**
> [Emphasis supplied by us]

104. The defendant noted that essentially, this Court left it open for the parties to raise the issues of *locus standi.* And that the claimant did not at any point in time express his dissatisfaction with the Order nor did he appeal against this Court's decision on this point. And that as it stands the Court's direction on this aspect remains binding on both parties.

105. The defendant posited that, further, on page 5, paragraph 13 of this Court's ruling this Court noted that:

> 'This Court observes that **it appears** the that Claimant has standing before this Court given his years of experience in the Department spanning over a decade. He also holds a Bachelor of Laws (Honours) Degree.' [Emphasis supplied by us].

106. The defendant insisted that the use by this Court of the phrase *'it appears'* suggests that this Court did not conclusively decide that the claimant had *locus standi.* And that this Court sustained some doubts regarding the claimant's standing and left it open to the parties to raise the issue of *locus standi* when dealing with the merits of the case. He submitted that it is now apparent that the claimant does not have *locus standi* considering that he does not have a Master's Degree. Further, not only that, but that the claimant does not have seven years of experience in a managerial position in a security institution.

107. The defendant indicated that, moreover, issues of jurisdiction can be raised at any stage of the proceedings including on appeal *Lustania Limited v. L.B. Nkhwazi* [2009] MLR 305 (SCA); *Bhima v Bhima* [1973-74] 7 MLR 163 and *Hetherwick Mbale v Hissan Maganga* MSCA Civil Appeal Number 21 of 2013, (Unreported); *Lieutenant Colonel James Brown Njoloma v. The Republic of Malawi* MSCA Criminal Appeal No. 20 of 1995, unreported; *Phiri v. Shire Bus Lines* [2008] MLLR 259). He added that jurisdictional questions can also be raised after judgment. He noted that Mwaungulu, J as he then was in *The State v The Minister of Finance, Ex Parte Steven Majighaheni Gondwe*, Misc. Cause Number 44 of 2012, High Court of Malawi, Principal Registry (Unreported) made the following pertinent regarding the various stages at which jurisdiction questions can be raised:

> A court "generally may not rule on the merits of a case without first determining that it has jurisdiction over the category of claim in the suit.' *Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, (2007); *Toeller v. Wis. Dep't of Corrections*, 461 F.3d 871, 873 (7th Cir. 2006). The court will act on jurisdiction even if parties omit the matter and *sua ponte* (*Arbaugh v. Y & H corp.*, 546 U.S. 500 (2006) 526 U.S. 574, 583 (1999)); *Sharkey v. Quartantillo*, 541 F.3d 75, (2d Cir. 2008), *Da Silva v. Kinsho Int'l Corp.*, 229 F.3d 358, (2d Cir.2C)00)). "The objection that a federal court lacks subject-matter jurisdiction may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment"' *Arbaugh v. Y & H Corp.*, 546 U.S. 500, (2006). It can be raised at the appeal stage (*Arbaugh v. Y &H corp., Levin v. ARDC*, 74 F.3d 763, (7th Cir. 1996) *Detabali v. St. Luke's Hosp.*, 482 F.3d 1199, (9th Cir. 2007) Corp. *of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, (1982); *Galvez v. Kuhn,* 933 F.2d 773, 4 (9th Cir. 1991)).'

108. The defendant noted that the claimant is also blowing hot and cold here when in one vein he argues that the issue of *locus standi* cannot be re-opened and in another vein he contends in his closing submissions that 'there is no new fact that arose from cross-examination that contradicted the basis on which this Court already decided that the claimant had *locus standi* before this Court.' He indicated that it is the principle of law that a party to a case may not approbate and reprobate. See *Maluza v David Whitehead and Sons (Mal)*

Limited [1993] 16 (2) MLR 564 (HC), per Unyolo J citing with approval the holding of Viscount Maughan in *Lissenden v CA Bosch Ltd* [1940] 1AII ER 424 at 429. He noted that in *BM Consulting and Management Services v Geotechnical Services (1980) (PVT) Ltd* [1990] 13 MLR 29 (HC) it was held that:

> As far as I can see, the plaintiff cannot be allowed for approbate and reprobate. She is blowing hot and cold or having it both ways.

109. The defendant submitted that the short and long of it is that *locus standi* can be re-opened and this Court rightly allowed the issue to be re-opened. Additionally, that as highlighted above, several new facts arose during cross-examination showing that the claimant does not have *locus standi.*

110. The defendant noted that the claimant further implored upon this Court to have recourse to what he describes as 'the recently expounded scope of locus standi as advanced by the Court'. He posited that the claimant has not brought the cases that departed from the well-established case authorities that for one to have *locus standi* he must demonstrate that the conduct of the defendant adversely affects his or her legal right over and above others. See *Civil Liberties Committee v Minister of Justice and another* [2004] MLR 55 (SCA)*; Chaponda and another, ex parte Kajoloweka and others,* (MSCA Civil Appeal No. 5 of 2017) [2019] MWSC 1 (13 February 2019). He added that the case of *The State (on Application of Henry Banda and Others) v Officer in Charge* Judicial Review Case Number 28 of 2018 cited by the Claimant in his final submissions does not depart from *Civil Liberties Committee v Minister of Justice and another* [2004] MLR 55 (SCA) and *Chaponda and another, ex parte Kajoloweka and others,* MSCA Civil Appeal No. 5 of 2017, [2019] MWSC 1 (13 February 2019). And that if it did, then it was decided per incuriam. The defendant observed that, during oral submissions on behalf of the claimant, it was suggested that section 15(2) of the Constitution was amended in 2010 to lower the standard of the *locus standi* requirement by removing the requirement to demonstrate sufficient interest thereby broadening the right of any person to apply for judicial review whenever there is violation of rights and interests. He asserted that this is a misrepresentation of the fact and law that must be held against the claimant. And that there was

no amendment in 2010 that limited the *locus standi* requirement. Further, that in any event, *Chaponda and another, ex parte Kajoloweka and others,* (MSCA Civil Appeal No. 5 of 2017) [2019] MWSC 1 (13 February 2019) was decided after the year 2010.

111. In reply, the claimant noted that the defendant has it his final submissions alleged that the claimant's case is premised on the fact that he is 'of right age, experience and qualifications to be eligible for appointment as the Director General of the Department' as per paragraph 8 of the claimant's sworn statement. The claimant contents that it is not true that the aforestated is the 'premise' of his application for judicial review. He asserted that the statements as to his qualifications only support premises of the application. And that the premises of the applications are the grounds on which judicial review is sought. And that his qualifications are not one of the main grounds of the application for judicial review. And that to submit that the application for judicial review is 'premised' on the claimant being qualified for the impugned appointment is to misrepresent the pleadings and to mislead this Court.

112. This Court shall deal first with the question whether the issue of *locus standi* was open to argument by the parties and consideration by this Court at this stage of the substantive hearing. This Court agrees with the defendant that indeed this Court earlier ruled that instead of the defendant applying to discharge the permission to apply for judicial review on the alleged ground of lack of *locus standi,* that issue be taken up at this stage in the usual fashion. The claimant is therefore not correct in arguing that the issue of *locus standi* is *res judicata.* There was no final determination on that aspect for the reasons indicated by the defendant as contained in the ruling of this Court alluded to by the defendant. The issue of the claimant's *locus standi* is therefore properly before this Court at this stage for determination. In any event, jurisdictional issues of such a nature can be raised at any point as correctly submitted by the defendant. See *Mbale v Maganga* MSCA Civil Appeal Number 21 of 2013, (Unreported). Again, issues of *locus standi* are in some cases so closely connected with the merits of the case and hence are amenable to consideration at the substantive hearing of the judicial review even if the claimant may have shown that they may have standing at the permission stage. See *R v Inland Revenue Commissioners ex parte National Federation of Self Employed and Small Businesses* [1982] AC 617.

113. This Court now considers whether the claimant has *locus standi* to make the present application for judicial review. The law on standing is as has been stated by the defendant. The standard for measuring whether a claimant has *locus standi* to make a public law application like the instant one has never been lowered as was suggested by the claimant. That standard has remained constant as correctly indicated by the defendant. That standard is as set in the case of *Civil Liberties Committee v Minister of Justice and Another* [2004] MLR 55 (SCA) in which the Supreme Court of Appeal exhaustively dealt with the subject of *locus standi* and stated at 64-67 that:

> After conducting a survey of the current legal position and status of locus standi in the area of public law in the United States of America and some Commonwealth countries, it is now pertinent to examine the current status of the law relating to standing on the local scene. The starting point would be the Malawi Supreme Court of Appeal case of *The Attorney-General v The Malawi Congress Party and others* MSCA Civil Appeal No. 22 of 1996. In a lucid and eloquent judgment Mtegha JA stated at 39:
>
> > "The Constitution expressly provides tests of locus standi so as to identify those persons who can, and who cannot, institute proceedings for breaches of the Constitution. The relevant sections are ss. 15(2), 41 (3) and 46 (2). Locus Standi is a jurisdictional issue. It is a rule of equity that a person cannot maintain a suit or action unless he has an interest in the subject of it, that is to say, unless he stands in a sufficient close relation to it so as to give him a right which requires protection or infringement of which he brings the action."
>
> Then at page 40, the learned Justice of Appeal continued:
>
> > "Dr Ntaba and Mr Chimango cannot rely on section 15(2) of the Constitution, as they have no sufficient or any interest in the alleged violation of human rights of which complaint is made. Nor can the respondents place reliance on section 46(2) of the Constitution. Although it is true that this provision refers to a person complaining that "a" fundamental right or freedom has been infringed, this cannot mean that any person can complain about an infringement affecting other person, otherwise it would conflict with the provisions of section 15(2) of the Constitution."

The next local authority on the issue of standing is The President of Malawi and another v Kachere and others MSCA Civil Appeal No. 20 of 1995. Again, Mtegha, JA stated, at page 10 of the judgment:

> "A person who has no sufficient interest in the matter has no right to ask a court of law to give him a declaratory judgment. He must have a legal right or substantial interest in the matter in which he seeks a declaration. 'Sufficient interest" is the one which is over and above the general interest.'"

The High Court case of *United Democratic Front v The Attorney-General* Civil Cause No. 11 of 1994 also supports the view expressed in the two cases of The *Attorney-General v The Malawi Congress Party and others* (supra) and *The President v Kachere and others* (supra).

It is clear that the principles which the courts in Malawi follow in determining whether locus standi exists, as illustrated by the three cases which we have examined are very similar to those expressed in the case of Richards and another v Governor General and another (supra) and also the case of Australian Conservation Foundation v The Commonwealth (supra). But the cases of Attorney-General v Malawi Congress Party and others (supra) and The President of Malawi and another v Kachere and others (supra) stress the constitutional requirement to show sufficient interest for the purpose of establishing standing.

It may be pertinent at this stage to comment on a recent High Court decision in which Chipeta, J deliberately refused to follow local case authorities, discussed above, bearing on the issue of locus standi. The relevant case is the Registered Trustees of The Public Affairs Committee v The Attorney-General and another Civil Cause No. 1861 of 2003. The learned Judge's reasons for rejecting the local authorities are stated at page 28 of the judgment. The honourable Judge states:

> "Honestly, it seems to me that if it be the case that the Supreme Court has always held the above – quoted views on Constitutional interpretation, then I find it difficult to understand how in the Kachere and in the Press Trust cases it could have ended up with a narrow and legalistic, if not also pedantic, version of locus standi in its interpretation of sections 15(2), 41(3), and 46(2), the said sections having been coached (sic) in very open and liberal terms. To begin with, as earlier seen, the court in its interpretation appears not to have relaxed even one bit. Instead it clung so unduly hard to the strict old Common law position and did not have chance to note that even that position has somewhat changed.

> Secondly, it appears to me that no real effort was employed by the Supreme Court to first try and understand the plain wording of the provisions for what they truly stood for. Thirdly it also appears to me that undue attention was given to foreign precedents which were not after all directly interpreting this Constitution, to impose on the provisions under interpretation values it was deemed this Constitution ought to propound. It thus appears to me that warm as the embrace of the Supreme Court has appeared to be for the manner in which the Constitution ought to be interpreted so as to give full meaning to the intention of its framers and to reflect its unique character and Supreme status, from the interpretations that emerged from the Kachere and Press Trust cases it would not be far from the truth to say that the Supreme Court did not then practice what it had since then been preaching about avoiding narrow legalistic and pedantic ways of interpreting constitutional provisions."

The first observation we wish to make is that it is unclear what standard for locus standi was the learned Judge in Public Affairs Committee v Attorney-General (supra) advocating. We do not wish to believe that because of the wording of section 46(2) of the Constitution it can be said that the Malawi Constitution totally removed the requirement for a plaintiff to establish standing before commencing a suit. Does the learned Judge say that section 46(2) renders the concept of locus standi so irrelevant in Malawi, in the field of public law, that literally any person even those persons who have no legal right or interest of their own to protect can access the court and commence a legal action? Is it realistic or desirable that a person should be allowed to rush to court to commence a suit, while being carried on the wings of a claim belonging to another person?

We have pointed out that all that the Malawi Supreme Court did in the Kachere and Press Trust cases (supra) was to stress the standard of sufficient interest in determining the question whether a plaintiff has standing. In so doing the court was giving full meaning and effect to the provisions of sections 15(2) and 41(3) of the Constitution. It is the view of the court that section 41(3) requires that a person who seeks an effective remedy from a court must establish that his right or freedom has been violated. Section 41(3) provides:

> "Every person shall have the right to an effective remedy by a court of law or tribunal for acts violating the rights and freedoms granted to him by this constitution or any other law." (Emphasis supplied.)

We find it unacceptable that the wording of section 46(2) takes away the requirement for a plaintiff to demonstrate that the conduct of the defendant violates a right or freedom granted to him by the Constitution or some other law. We also

find it unacceptable that section 46(2) has the effect of destroying the test of sufficient interest for determining locus standi. To so hold would be allowing one section to operate to destroy the provisions of another section of the Constitution and that cannot be, in our view, the intention of those eminent men and women who drafted our Constitution. The Malawi Supreme Court of Appeal was clearly aware that if section 46(2) is literally and casually interpreted it would have the effect of destroying the full meaning and impact of sections 15(2) and 41(3) of the Constitution. That is why that court said at page 40 of the Press Trust case (supra):

> "Although it is true that this provision refers to a person complaining that a fundamental right or freedom has been infringed, this cannot mean that any person can complain about an infringement affecting other persons, otherwise it would conflict with the provisions of s.15(2) of the Constitution."

We take the view that Chipeta, J's interpretation of section 46(2) of the Constitution in the Public Affairs Committee's case (supra) was too simplistic and casual that it could not be correct. By destroying the concept of locus standi and rendering it totally irrelevant the learned Judge's construction of the section produced a result which, we strongly believe, was not intended by the distinguished women and men who drafted our Constitution.

We wish to make it very clear that there is no reason to make apology for affirming the standard of sufficient interest for determining locus standi, in the field of public law. It is the standard which the eminent Lord Justices in England use: see *Regina v Secretary for Foreign and Commonwealth Affairs ex parte World Development Movement* (supra). It is true that the concept has undergone some reform and what constitutes sufficient interest is liberally interpreted. Nevertheless, according to the World Development Movement case a plaintiff is still required to establish locus standi by meeting the criteria laid down in that case; that criterion includes the absence of another responsible challenger and the role of the plaintiff in relation to the subject matter of the action. We take the view that that is fundamentally different from the total abandonment of the concept of locus standi, a result which has been achieved by Chipeta J's literal interpretation of the words any person contained in section 46(2).

The concept of locus standi, expressed in terms of sufficient interest, special or substantial interest or existence of a legal right or interest in the outcome of a suit should not be misunderstood as failure to promote or respect human rights. Respectable democracies renowned for their respect of human rights such as United States of America, some Commonwealth countries including Australia and a number of countries which are parties to the European Convention on Human

> Rights and Fundamental Freedoms require locus standi expressed in the standard as earlier discussed. Would it be sensible to suggest as Chipeta, J does that the judiciaries in these countries cling hard to a narrow, legalistic and pedantic version of locus standi? The Americans are so proud of their version of locus standi that they entrenched it in their Constitution. There is no justification for us to be too shy to express frankly the idea of sufficient interest as a standard for locus standi which our Constitution provides.

114. This Court observes the claimant is an Immigration Officer. The Brigadier General Kalumo (Retired) is the head of the Department where the claimant works, namely, the Department of Immigration and Citizenship Services. The law governing whom the head of that Immigration Department shall be is the Immigration Act. As correctly submitted by the claimant, section 3 of the Immigration Act is clear on appointment of the Chief Immigration Officer who heads the Immigration Department. Section 3 of the Immigration Act provides that the Minister may appoint any person in the public service to be a Chief Immigration Officer.

115. It is true that, as submitted by the defendant, the claimant is a junior officer in the Department of Immigration and Citizenship Services compared to a number of officers that are holding more senior positions than him who would stand a better chance of being appointed as Chief Immigration Officer. However, the Immigration Act provides that the Minister may appoint any person within the public service to be a Chief Immigration Officer. There is no qualification. The claimant therefore fits in the category of any person amenable to be appointed as Chief Immigration Officer. The claimant is therefore closely connected to the impugned decision herein as he was amenable to be appointed a Chief Immigration Officer given the unqualified provision on those who are candidates for appointment as Chief Immigration Officer. Moreover, he has served in the same Department of Immigration and Citizenship Services for over 10 years and is an Inspector. The claimant cannot be equated to a mere busy body from amongst the general populace geared at harassing the defendant. He is a serious minded officer who is truly aggrieved and is genuinely concerned about the vindication of the rule of law herein. There is no evidence that he is making this application for political or other nefarious reasons as alleged by the defendant in its defence.

116. This Court is alive to the fact the defendant confronted the claimant during cross examination with a 2018 Functional Review Report on the Department of Immigration and Citizenship Services which has certain prescriptions in terms of who qualifies for appointment as Chief Immigration Officer. However, as contended by the claimant, the defendant never made any effort to show what the legal status of the said Functional Review is in relation to the Immigration Act, which is an Act of Parliament. This Court cannot therefore speculate as to the weight to be attached to that 2018 Functional Review Report in terms of its ranking when taken side by side with the statutory instrument on appointment of a Chief Immigration Officer. It appears that the defendant assumed that the 2018 Functional Review Report has some legal status that stands above or at par with the Immigration Act. That is not the case.

117. In the final analysis, this Court is persuaded by the claimant that he has sufficient interest in this matter having been amongst the pool of public servants that are emenable to appointment as Chief Immigration Officer on a reading of section 3 of the Immigration Act. He can competently apply before this Court for a review of the legality or lawfulness of the appointment of the Retired Brigadier General Kalumo as head of the Department of Immigration and Citizenship Services the immigration aspect of which is to be headed by a Chief Immigration Officer. The claimant has *locus standi* as understood in the sense expounded in the case of *Civil Liberties Committee v Minister of Justice and Another* [2004] MLR 55 (SCA). His right under the Immigration Act as a potential appointee is in question as having been implicated by the alleged illegal appointment herein.

118. The finding that the claimant has *locus standi* entails that this Court will now consider the three other issues, namely grounds for the present application, as outlined earlier starting with the issue whether the impugned decision contravenes section 3 of the Immigration Act, which confers the power to appoint the Chief Immigration Officer (Director General) on the Minister of Homeland Security and not on the defendant.

119. This Court agrees with the claimant that the power to appoint a Chief Immigration Officer is specifically vested in the Minister of Homeland Security and not the defendant as President. This is according to section 3 of the Immigration Act to which the claimant correctly alluded as the specific

law on appointment of a Chief Immigration Officer. The defendant contended that he has power to make the impugned appointment under section 6 of the Public Service Act which vests power in his office to appoint any person in public service to a post above the rank of under secretary. There is no doubt that the impugned appointment is to a post above the rank of Under Secretary. However, the position taken by the defendant is untenable. As correctly submitted by the claimant, the views of Prof. Justice Redson Kapindu are instructive on the matter of how general statutory provisions and specific statutory provisions rank on any issue provided for by such statutes as he explained in the case of *In the Matter of a Request by the Government of the Republic of South Africa to the Government of the Republic of Malawi for the Extradition of Mr. Shepherd Bushiri And Mrs Mary Bushiri – and – In The Matter of Section 9 and 13 of the Extradition Act Cap. 8:03 of the Laws of Malawi; and in the Matter Of Section 25 And 26 of the Courts Act; and in the Matter of Section 360 of the Criminal Procedure and Evidence Code* Criminal Review Case No: 11 OF 2021 (Being Extradition Application No. 1137 of 2020 in the Chief Resident Magistrate Court sitting at Lilongwe)] where he stated that:

> It is therefore clear that the Extradition Act has its own specific provisions on authentication. There is no need for a general process under the Authentication of Documents Act because a specific authentication process is provided for under the specific Act, namely, the Extradition Act. The legal interpretive maxim here is that of generalia specialibus non derogant which means that general laws do not prevail over specific laws. In the Canadian case of R vs Greenwood [1992] 7 O.R. (3d) 1, Griffiths J stated that:
>
> > "The maxim generalia specialibus non derogant means that, for the purposes of interpretation of two statutes in apparent conflict, the provisions of a general statute must yield to those of a special one." [159] Again in another Canadian case of Lalonde vs Sun Life [1992] 3 SCR 261, the remarks of Gonthier J lend weight to this proposition. He stated that:
> >
> > "The principle is, therefore, that where there are provisions in a special Act and in a general Act on the same subject which are inconsistent, if the special gives a complete rule on the subject, the expression of the rule acts as an exception to the subject-matter of the rule from the general Act."

120. In the present case, the claimant correctly submitted that the Immigration Act must prevails over the Public Service Act in relation to appointment of a Chief Immigration Officer because the former is a specific Act whereas the latter is a general Act on appointments in public service. This is the correct position contrary to the submission by the defendant that he had power to make the impugned appointment herein pursuant to section 6 of the Public Service Act as indicated in the Public Notice advising of the appointment. In any event, as submitted by the claimant, the defendant's power under section 89 (d) of the Constitution to make appointments is according to the Constitution or an Act of Parliament. In the circumstances of this case, the relevant Act of Parliament is the Immigration Act. The impugned appointment is therefore contrary to the law as provided for in section 3 of the Immigration Act as correctly submitted by the claimant. That ground of judicial review is therefore successful.

121. This Court considers the next issue whether the impugned decision contravenes section 3 of the Immigration Act, which provides that the appointment of the Chief Immigration Officer (Director General) be made from the public service. This matter generated much disagreement between the claimant and the defendant. The claimant contended that the Brigadier General Kalumo (Retired) was appointed from outside the public service and that therefore his appointment was made in contravention of section 3 of the Immigration Act. The defendant took the view that the Retired Brigadier General herein was appointed from within the public service because as a member of the military he is always on stand by and can be called back to active military service at any moment and therefore remains within the public service. The defendant even put it to the claimant and he confirmed that military personnel who are retired can be recalled to service. The claimant however said that was not the case with the Immigration service.

122. This Court is unable to agree with the position taken by the defendant on the issue that the Retired Brigadier General herein was appointed from within public service on account of the Brigadier General being amenable to recall to military service. The fact of the matter is that the Brigadier General left military service in the mid 90s. He has been out of service since then. Apart from making the bare assertion that the Brigadier General was still in public service, whilst retired, the defendant did not bring any evidence or cite

any law to back up that assertion. In such circumstances, this Court is compelled to agree with the claimant that the Brigadier General herein was appointed from outside the public service in contravention of section 3 of the Immigration Act which dictates that a Chief Immigration Officer be appointed from public service.

123. This Court now considers the issue whether the impugned decision contravenes section 29 of the Public Service Act under which the mandatory retirement age of 60 years for members of the public service, including those in the Department of Immigration and Citizenship Services, is provided for. Section 29 of the Public Service Act provides as follows:

> (1) Subject to subsection (2) no officer shall continue in service after attaining the mandatory retirement age of 55 years.
> (2) The Minister, may, from time to time, by order published in the *Gazette,* revise the mandatory retirement age prescribed under subsection (1).

124. The mandatory retirement age was revised from 55 years to 60 years as advised by a memo dated 16th May 2006. The contention of the claimant is that the Brigadier General herein was appointed in public service when he was over the age of 60 years, which is the mandatory retirement age in public service. He contends that this is in contravention of section 29 of the Public Service Act.

125. In response, the defendant produced and relied on exhibit marked 'BT1' which is a Government Circular reproduced above and dated 21 October 2013 to justify the appointment of the Brigadier General herein beyond the mandatory retirement age of 60 years prescribed under the law.

126. As correctly submitted by the claimant, section 29 of the Public Service Act is about mandatory retirement from public service. Under that said section the only power that the Minister has is to revise the said mandatory retirement age as was done by adjusting the said age from 55 years to 60 years. This Court does not see any power given to the Minister to be giving individual officers extensions of service beyond the mandatory retirement age as is indicated in the Government Circular exhibit 'BT1'. Section 29 of the Public Service Act is clear and unambiguous that no officer shall continue in service beyond the prescribed mandatory retirement age. There are no exceptions. It

is therefore not lawful for the defendant to provide for extension of service for officers contrary to section 29 of the Public Service Act. Where the law fixes a retirement age and allows for an extension the same is provided for in the law in terms of who has the power to grant the extension and under what circumstances that is done. For instance, section 119 (1) of the Constitution provides power to the President to allow a judge serve beyond the prescribed age of retirement for such a period as is necessary to deliver judgment or do anything in relation to proceedings that were commenced before such a judge before the judge reached the prescribed retirement age.

127. The claimant is right to observe that exhibit 'BT1' cannot override section 29 of the Public Service Act which is expressed in clear terms that no person shall continue in service beyond the mandatory retirement age. Given that no power to extend service beyond the mandatory retirement is provided in the Public Service Act, this Court is constrained to consider exhibit 'BT1' as a legal basis for contending that the Retired Brigadier General herein was engaged lawfully when he was over the mandatory retirement age of 60 years.

128. Even if exhibit 'BT1' were to be held as lawful, which is not the case, in relation to extension of service beyond the mandatory retirement age, it would be stretching matters to argue that it applies to the Retired Brigadier General herein. This Court agrees with the contention of the claimant that this exhibit 'BT1' cannot apply to the Retired Brigadier General herein.

129. The import of exhibit 'BT1' is that it is meant to cover, albeit illegally, officers that are in service and due to retire who seek to carry on working in public service beyond the mandatory retirement age. The exhibit 'BT1' clearly shows that it is addressing a worrying trend that has emerged whereby Controlling Officers have been submitting requests seeking Government's approval to extend the service of some of their officers beyond the mandatory retirement age of sixty (60) years. The reason given for such requests is lack of suitably qualified officers to fill gaps that would otherwise be created by retiring officers. As correctly argued by the claimant, such a circular cannot, as the defendant contends, apply to people like the Retired Brigadier General herein who was forced out of and left public service in 1995. This Court is aware that the Retired Brigadier General sought reliefs from this Court on a judicial review application after being forcibly retired in 1995. In the case of *Kalumo v Attorney General* [1995] 2 MLR 669 (HC) it is recorded that:

> Brigadier CDE Kalumo had been employed by the Malawi Army for 23 years until 4 April 1995, when he was forcibly retired on the direction of the Army Commander. Brigadier Kalumo has applied to the court for the judicial review of the decision of the Army Commander to forcibly retire him or terminate his career in the Malawi Army. Brigadier Kalumo, among other things, contends that in forcibly retiring him, the Army Commander had acted without jurisdiction or in excess of his jurisdiction and in contravention of the rules of natural justice. On the date of his forced retirement, Brigadier Kalumo was aged 42 years. He, therefore, argues that had he not been forcibly retired, he would have worked for a further 13 years before being due for normal retirement. Brigadier Kalumo, therefore, claims damages for loss of his legitimate income expectations and costs for the hearing of this application. On behalf of the Army Commander, the Attorney–General opposes the application of Brigadier Kalumo by contending that the Army Commander had the requisite authority for forcibly retiring Brigadier Kalumo in the public interest. Brigadier Kalumo has made his application under Order 53 of the Rules of the Supreme Court. I am satisfied that leave of the court for judicial review had been obtained by him on 10 May 1995.

130. This Court found for Brigadier Kalumo as follows:

> In assessing damages the Registrar should take into account the following factors: At the time of his forced retirement the plaintiff was aged 42 years. Normal retirement age is 55 years. He should have continued in service for a further 13 years. Ignoring all possibilities of promotion during the 13 years before he would have been due for normal retirement, Brigadier Kalumo would have received a salary at the rank he held on the date of his forced retirement. He would also, for the duration of that period, have received any professional or duty allowances which are payable to officers at the rank which Brigadier Kalumo had held on the date of his forced retirement. Further consideration should be given to the fact that if Brigadier Kalumo had been allowed to have worked up to the age of 55 years he should have received enhanced terminal benefits. The total benefits which would then have been received should be reduced by the total sum of the terminal benefits which Brigadier Kalumo received on the date of his forced retirement. And his pension should, therefore, be recalculated. Costs are for the plaintiff.

131. If it were not for the forced retirement, Brigadier General Kalumo (Retired) would have served up to mandatory retirement in 2008 which is 16 years ago. This Court is persuaded by the claimant's contention that exhibit

'BT 1' cannot be read to justify re-engagement after a period of 16 years after mandatory retirement. In the end, this Court agrees with the claimant that Brigadier General Kalumo (Retired) was appointed by the defendant in contravention of section 29 of the Public Service Act which prescribes the mandatory retirement age of 60 years in public service.

132. The foregoing findings entail that the claimant has proved the three grounds on which he based the present application for judicial review.

133. This Court now considers the other issues raised by the defendant starting with the issue whether the claimant suppressed material facts when seeking permission to apply for judicial review. This Court notes that the application for permission to apply for judicial review was made to this Court by the claimant on notice to the defendant. The defendant therefore had an opportunity to file papers and raise any issues in opposition to the facts on which the claimant was relying to apply for the permission to apply for judicial review. However, the defendant never appeared at the hearing of the application for permission to apply for judicial review for reasons to do with the unavailability of the Attorney General. This Court decided to proceed given that this was not the first time the matter had failed for similar reasons and the application had been long outstanding.

134. Now, the issue of suppression of material facts arises where the putative defendant is not given notice of the application for permission to apply for judicial review. In the present case, it is conceptually and logically, not correct for the rules on suppression of material facts to be brought up by the defendant because the defendant had an opportunity to make representations on the application for permission to apply for judicial review but did not utilize that opportunity for reasons that had nothing to do with the claimant.

135. Assuming that the permission to apply for judicial review was obtained by the claimant without notice to the defendant in the usual fashion, this Court would consider if the claimant could be held to have suppressed material facts as alleged by the defendant? The facts alleged to have been suppressed by the claimant are, namely, the existence of the 2018 Functional Review. The defendant contends that the Functional Review Report is material in the sense that it is this document which spells out the minimum requirements for one's eligibility for appointment as Director General. The other fact is that the claimant has in the past, been promoted despite the Immigration department

being headed by a Director General who was not working with the department before his appointment as such. Then there is the fact that he was allowed to go for further studies in a bid to facilitate his career advancement at a time when the Department was being headed by Mr. Masauko Medi, a Director General who like Brigadier General Kalumo, was not working for the Immigration Department before the appointment. Then there is Circular Reference No. HRM/P&G/01 dated 21st October 2013 marked exhibit 'BT1' which shows that employment of persons above the retirement age is permissible in respect of those who have essential skills and/or experience that are still needed for service delivery as determined by the Government from time to time. And that the claimant holds the rank of Inspector which is a very junior rank in the Department of Immigration and Citizenship Services.

136. The law on suppression of material facts is as correctly stated by the defendant citing the case of *Mchungula Amani v Stanbic Bank Limited and Another* HC (PR) Civil Cause Number 558 of 2007, (Unreported) in which at page 4 Potani J observed:

> It becomes imperative to bear in mind that material facts are facts which if known to the court would have led the court to arrive at a conclusion or order different from the one it arrived at. Therefore, for the conclusion to be reached that the applicant suppressed or misrepresented facts, the alleged suppressed facts must be facts which if it were laid before the court the ex-parte injunction could not have been granted.

137. The claimant contended that he never supressed material facts. He contended in the main that the facts he is alleged not to have disclosed he deemed not relevant and necessary to his case herein.

138. This Court has considered the facts alleged to be material and not to have been disclosed. In view of the findings of this Court on the three grounds for the judicial review that have all been successfully argued by the claimant, this Court agrees with the claimant that the facts that the defendant insists were fatally not disclosed are actually not material facts. The 2018 Functional Review Report has questionable legal weight compared to the Immigration Act. The fact that the claimant is an Inspector does not change the state of affairs in this matter. And so too the rest of the issues alluded to as material

facts, like the Government Circular exhibit 'BT1' would not have swayed the mind of this Court against the claimant's application for permission to apply for judicial review. The short of it is that this Court agrees with the claimant that he never suppressed material facts in this matter as defined in the case of *Mchungula Amani v Stanbic Bank Limited and Another* HC (PR) Civil Cause Number 558 of 2007, (Unreported).

139. The next issue for consideration is whether there is a distinction between the office of Chief Immigration officer and that of Director General of Immigration and Citizenship Services and whether that fatally impacts this application. The defendant essentially contends that he appointed a Director General of Immigration and Citizenship Services and not a Chief Immigration Officer. Further, that the said Director General administers both the Immigration Act and the Citizenship Act. And that as such the current application whereby the claimant seeks to impeach the appointment of the Chief Immigration Officer is misdirected.

140. On the contrary, the claimant contended that the effect of the wording of Section 3 of the Immigration Act is that the appointing authority may appoint a person to hold the office of Chief Immigration Officer without limitation as to the title by which such a person may be called.

141. This Court agrees with the claimant and finds the defendant's approach problematic. As far as the law is concerned, the head of the Immigration Services is the Chief Immigration Officer or whatever other designation. The said post was re-designated to be Director General for Immigration and Citizenship Services. This re-designation of the post of the Chief Immigration Officer cannot be a basis for the defendant to avoid complying with the law in section 3 of the Immigration Act which requires the Minister to appoint the head of the Immigration Services. As such, the defendant cannot contend that the claimant's application is misconceived given that the impugned appointment of a Director General of Immigration and Citizenship Services implicates the post of Chief Immigration officer which is governed by section 3 of the Immigration Act. The claimant therefore properly took up this application to vindicate the dictates of the law in section 3 of the Immigration Act.

142. This Court next considers whether the claimant has an alternative remedy to judicial review which would bar the present application. In essence

the defendant asserted that the issues herein are labour issues over which this Court has no jurisdiction and that the Industrial Relations Court is the one to deal with such matters and offer an alternative remedy to judicial review. See *State v The Commissioner General of the Malawi Revenue Authority Ex-Parte Airtel Malawi Limited*, Judicial Review Cause No. 33 of 2015, High Court of Malawi, Principal Registry (Unreported).

143. The point however is that matters like the instant one, that relate to the exercise of public power and which are regulated by statute, fall within public law and are amenable to judicial review even if they implicate labour or employment issues. See the discussion by Professor Danwood Chirwa in Human Rights under the Malawian Constitution (2011) at page 470 to 472 discussing cases like that of *Kalumo v Attorney General* [1995] 2 MLR 669 (HC) that implicated labour issues, statutory provisions governing the employment and exercise of public power which rendered the matter amenable to judicial review as a public law matter. The point that the claimant had an alternative remedy in the Industrial Relations Court because the application herein is labour-related is therefore not well taken by the defendant.

144. This Court next considers the issue that the claimant's application for judicial review goes beyond the purpose of judicial review as provided by law. In essence, the defendant contended that judicial review is concerned with the court's scrutiny of procedural propriety of administrative action and not questioning the merits of the decision. He charged that the claimant is seeking that this Court consider the merits of the impugned decision. The claimant asserted the contrary that all he is seeking on this application is to review the legality or lawfulness of the impugned decision in terms of compliance with the prevailing law. This Court found the defendant's contention on this point curious. The ambit of judicial review is by now, well known to cover issues to do with lawfulness of administrative action. See Order 19 rule 20 (1) of the Courts (High Court) (Civil Procedure) Rules, 2017 which is now conclusive on this point. It expressly provides that judicial review shall cover the review of:

> (a) a law, an action or a decision of the Government or a public officer for conformity with the Constitution; or

(b) A decision, action, failure to act in relation to the exercise of a public function in order to determine:

(i) Its lawfulness;
(ii) Its procedural fairness;
(iii) Its justification of the reasons provided, if any; and
(iv) Bad faith, if any,

where a right, freedom, interests or legitimate expectation of the applicant is affected or threatened.

145. The point that the present application does go beyond the purpose of judicial review is therefore not well made by the defendant.

146. The next issues raised by the defendant and considered simultaneously are whether the matters raised on this application are justiciable, whether this Court should decline to grant the reliefs sought by the claimant and whether the claimant's application is frivolous, vexatious and abuse of the court process. It is clear in this Court's mind that given the preceding findings it cannot be the case that the claimant's application is not justiciable. The defendant contended that the impugned appointment is an exercise of a presidential prerogative and not subject to judicial review. See *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374. The claimant contended to the contrary that such is not the case because the impugned appointment is specifically regulated by law. This Court is persuaded by the claimant that, given that the impugned appointment is indeed regulated by a specific law, it cannot be correct that the appointment is a matter of presidential prerogative. Therefore, the issues raised on this application are justiciable as contended by the claimant.

147. This Court is aware that granting of remedies on a successful application for judicial review is in its discretion as submitted by the defendant. On this point, the defendant submitted that judicial review is a discretionary remedy. See *R v Foreign Secretary, Ex Parte Everret* [1989] 1 Q.B. 11). Moreover, the defendant submitted that even in a case where an applicant for judicial review succeeds on the substantive points raised, the court still retains its discretion to refuse to grant the reliefs sought as was the

case in *Mhango and others v University Council of Malawi* [1993] 16(2) MLR 605 (HC). The defendant alluded to the case of *R v Foreign Secretary, Ex Parte Everret* [1989] 1 Q.B. 11 in which a decision taken under the royal prerogative whether or not to issue a passport was subject to judicial review because it affected individual rights, although relief was refused on the facts of the particular case. The defendant indicated that the Court in *R v. Foreign Secretary, Ex Parte Everret* [1989] 1 Q.B. 11; [1989] 2 WLR 224; [1988] EWCA Civ 7 observed that 'where the court finds itself in that position, namely that the applicant has suffered no injustice and that to grant the remedy would produce a barren result there are no grounds for granting relief.' The defendant added that detriment to good administration or inconvenience is a good ground for refusing to grant the relief sought by an applicant in a judicial review application. see *Mhango and others v University Council of Malawi* [supra].

148. The claimant took a contrary view, that granting the reliefs herein will not be detrimental to good administration but will vindicate the law that the impugned appointment was unlawful.

149. This Court is persuaded by the claimant's view that the granting of reliefs herein on the claimant's successful application for judicial will not be detrimental to good administration. Good administration requires that personnel are appointed according to law and not otherwise and that the expectations of officers like the claimant are not stifled as that is unlawful and harmful. Therefore, no valid grounds exist for refusing to grant the reliefs that the claimant is seeking on this successful application for judicial review.

150. Given the preceding findings, namely, that the grounds for judicial review are successful, this Court is not persuaded by the defendant's contention that the present application is frivolous, vexatious and an abuse of the court process.

151. In terms of the reliefs, this Court notes that the claimant sought the following reliefs:

1) A declaration that the appointment of Brigadier General Charles Kalumo (Retired) as the Director General of the Department of Immigration [the decision] is non-consequential and of no effect as it is illegal and unconstitutional.
2) An order quashing the decision.

3) An order directing the defendant to appoint an eligible, suitable and qualified member of the Department of Immigration and Citizenship Services or in the alternative, an eligible, suitable and qualified member of the public service to the post of Director General (Chief Immigration Officer), Deputy Chief Immigration Officer and/or any other similar position.
4) An order for costs and that all necessary and consequential directions be given.

152. Following the findings of this Court on this application, this Court grants the claimant a declaration that the defendant's impugned decision appointing Brigadier General Charles Kalumo (Retired) as the Director General of the Department of Immigration is non-consequential and of no effect as it is illegal and unconstitutional. The finding of unconstitutionality relates to the defendant's failure to make appointments as provided in the Constitution or Acts of Parliament as indicated in section 89 (d) of the Constitution. This Court also grants an order quashing the impugned decision by which the defendant appointed the Retired Brigadier General herein.

153. This Court also orders the Minister of Homeland Security, in line with the relevant law, to consider to fill the position of Director General of Immigration and Citizenship Services as that is within the purview of the said Minister.

154. Consequentially, it is ordered that Brigadier General Charles Kalumo (Retired) cease to hold the position of Director General of Immigration and Citizenship Services having been appointed by the defendant in contravention of the relevant law.

155. Since costs normally follow the event, the claimant shall get the costs of this successful judicial review application.

Made in open court at Blantyre this 6th June, 2024

M.A. Tembo
JUDGE