Malawi

IN THE MALAWI SUPREME COURT OF APPEAL

AT BLANTYRE

PRESIDENTIAL REFERENCE APPEAL

NO. 44 OF 2006

IN THE MATTER OF PRESIDENTIAL REFERENCE OF A DISPUTE OF A CONSTITUTIONAL NATURE UNDER SECTION 89(1)(h) OF THE CONSTITUTION

- and –

IN THE MATTER OF SECTION 65 OF THE CONSTITUTION

- and –

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IN THE MATTER OF THE QUESTION OF THE CROSSING THE FLOOR BY MEMBERS OF THE NATIONAL ASSEMBLY

BEFORE: **THE HONOURABLE THE CHIEF JUSTICE**
THE HONOURABLE JUSTICE KALAILE, SC., JA
THE HONOURABLE JUSTICE TAMBALA, SC., JA
THE HONOURABLE JUSTICE MTAMBO, SC., JA
THE HONOURABLE JUSTICE TEMBO, SC., JA
Mbendera & Kanyuka, Counsel for the Referral Authority
Mvalo, Kaphale, Msowoya, Mhango & Mwakhwawa,
Counsel for the Friends of the Court
Selemani, Official Interpreter

J U D G E M E N T

The Hon. Chief Justice

This is an appeal against the judgment of the High Court delivered on 7th November, 2006. Since the case substantially involved the interpretation and application of the provisions of the Constitution of the Republic of Malawi; hereinafter referred to as "the Constitution", the matter came before a panel of three High Court judges, pursuant to section 9(2) of the Courts Act, Cap. 3:02 of the Laws of Malawi. The section provides—

> "(*2) Every proceeding in the High Court and all business arising thereout, if expressly and substantively relates to, or concerns the interpretation or application of the provisions of the Constitution, shall be heard and disposed of by or before not less than three judges."*

The three judges who sat in this matter were Twea, J., Kapanda. J. and Potani, J. The material facts of the case, as garnered from learned counsel's skeleton arguments and supporting documents, are these:

Around April, 2005 all Cabinet Ministers except two who had been elected Members of Parliament (MPs) under the ticket of the United Democratic Front (UDF) became Independent MPs and joined the newly formed political party, the Democratic Progressive Party (DPP). Soon thereafter, several Independent MPs who had stood as independents during the elections also joined the DPP.

In June, 2005, Honourable J. Z. U. Tembo, the Leader of Opposition in Parliament, presented to Parliament a Private Member's Bill that sought to give power to the Speaker to declare vacant the seat of any MP who, after being elected under a particular political status, chose to alter his/her status during the life of the National Assembly to which he/she was elected. The Bill failed to obtain the required number of votes for it to pass.

The matter did not, however, end there. The UDF then wrote to the Speaker on 2nd October, 2005 requesting him to declare certain MPs' seats vacant,

following those MPs' change of their political status. The request was based on section 65(1) of the Constitution. The original text of the section, which is popularly known as "the crossing the floor" section, provides—

> *"The Speaker shall declare vacant the seat of any member of the National Assembly who was, at the time of his or her election, a member of one political party represented in the National Assembly, other than by that member alone but who has voluntarily ceased to be a member of that party and has joined another political party represented in the National Assembly."*

Perhaps we should also mention that following an amendment to the section in 2001, by Act No. 8 of 2001, section 65(1) currently provides as follows:

> *"The Speaker shall declare vacant the seat of any member of the National Assembly who was, at the time of his or her election, a member of one political party represented in the National Assembly, other than by that member alone but who has voluntarily ceased to be a member of that party or has joined another political party represented in the National Assembly, or has joined any other political party, or association or organisation whose objectives or activities are political in nature."*

The Speaker announced that he would make his ruling on the said request on 31st October, 2005. The ruling was, however, not made because the Attorney General, in the interim, applied for and obtained an order from the High Court restraining the Speaker from making the ruling, until further order.

Following these developments, the President of the Republic (hereinafter referred to as "the Referral Authority") issued a Fiat requesting the High Court to review the said section 65(1). In referring the matter to the High Court, the

Referral Authority invoked section 89(1)(h) of the Constitution which gives him power to refer disputes of a constitutional nature to the High Court. He averred that the said section 65(1) had been a source of controversy and had attracted diverse opinions regarding its interpretation on the concept and application of crossing the floor. He went on to aver that there were seeming inconsistencies between section 65(1) and other entrenched provisions contained in the Chapter on Human Rights.

According to the Amended Notice of a Presidential Reference dated 12th September, 2006, the issues which the Referral Authority specifically requested the High Court to determine were these—

"(1) whether or not section 65 of the Constitution is inconsistent with sections 32, 33, 35 and 40 of the Constitution, and is, therefore, invalid.

(2) In the alternative, if the said section 65 is valid what meaning should be attached to the words "any member of the National Assembly who was, at the time of his or her election, a member of one political party represented in the National Assembly" regard being had to the non-existence of the National Assembly at the time of a general election.

(3) In the further alternative, whether a Member of Parliament (MP) who at the time of election stood as an independent MP whilst in the National Assembly joins a political party

that already has MPs in the National Assembly elected on that party's ticket is deemed to have crossed the floor under section 65 of the Constitution, or

that has no MP in the National Assembly elected on that party's ticket is deemed to have crossed the floor under section 65 of the Constitution.

(4) Whether an MP who was elected under a party's ticket decides to resign from that party and becomes independent and later joins

another party that has no MP represented in Parliament elected on the party's ticket is deemed to have crossed the floor under section 65 of the Constitution.

(5) Whether an MP elected on a party's ticket accepts a ministerial appointment from a President elected on another party's ticket but does not resign from his/her party is deemed to have crossed the floor under section 65 of the Constitution."

The matter attracted wide public interest. Several bodies, institutions and political parties requested the High Court, and were allowed, to join in the proceedings as "Friends of the Court." Among these were the Malawi Law Society, the Law School of the University of Malawi, the Registered Trustees of the Public Affairs Committee (PAC), the Civil Liberties Committee (CILIC), the Malawi Congress Party (MCP), the United Democratic Front (UDF) and the Alliance for Democracy (AFORD).

After hearing extensive arguments and submissions from learned counsel representing the Referral Authority and the Friends of the Court, the High Court, going by the signed judgement, held as follows—

(a) that section 65(1) of the Constitution is not inconsistent with sections 32, 33, 35 and 40 of the Constitution;

(b) That section 65(1) of the Constitution is valid; and

(c) That a Member of the National Assembly who was elected under a party's ticket decides to resign from that party and becomes independent and later joins another party that is not represented in the National Assembly elected on the party's ticket, crosses the floor.

All the three judges were unanimous in their findings on these three issues.

(d) On the issue concerning Members of Parliament who got elected as independents and whilst in the National Assembly join a political party:

(i) Twea, J. and Potani, J. held that such Members of Parliament do not cross the floor.

(ii) Kapanda, J. held that such MPs cross the floor.

(e) On the issue relating to a Member of Parliament elected on a party's ticket who accepts ministerial appointment from a President elected on another party's ticket but does not resign from his or her party—

(i) Twea, J. and Potani, J. held that whether or not such Member of Parliament crosses the floor depends on the evidence and conduct of the MP.

(ii) Kapanda, J. held that such Member of Parliament crosses the floor.

It is against these findings that the Referral Authority appeals to this Court. Seven grounds of appeal were filed. These are that—

(i) The learned Judges erred in holding that section 65(1) of the Constitution is consistent with sections 32, 33, 35 and 40 of the Constitution.

(ii) The learned Judges erred in holding that section 65(1) of the Constitution is valid.

(iii) The learned Judges erred and misdirected themselves in placing undue reliance on the decision of **The Registered Trustees of PAC vs. The Attorney General and Speaker of the National Assembly**, Civil Cause No. 1861 of 2003 (unreported), in that:

(a) the case relied on decided the effects of the amendment to section 65(1) only and not the integrity of section 65(1) itself.

(b) the case relied on expressly proceeded on the basis that the constitutionality of section 65 (1) in its original text was not being questioned.

(iv) The learned Judges erred in holding that a Member of Parliament elected as an independent crosses the floor when he joins a party not represented in the National Assembly.

(v) The learned Judges erred in holding that a Member of Parliament elected as an independent crosses the floor when he joins a party represented in the National Assembly.

(vi) The learned Judges erred in holding that a Member of Parliament crosses the floor when he accepts ministerial appointment.

(vii) The learned Judges erred in taking judicial notice of facts and issues on which it was not open for the court to take any judicial notice.

(viii) Grounds (i) and (ii) were argued together.

On these two issues, it is Kapanda, J's judgment that is attacked. Twea, J. and Potani, J. in their judgments, merely deferred to arguments put forward by Kapanda, J.

The first point taken by counsel was that Kapanda, J. erred, in relying on the two issues herein, on the principles of interpretation enunciated in **Fred Nseula v The Attorney General and Malawi Congress Party,** MSCA Civil Appeal No. 32 of 1997 (unreported).

The **Nseula** case is well known for the following oft-cited principle of constitutional interpretation:-

> "the entire Constitution must be read as a whole without one provision destroying the other but sustaining the other."

In reference to that case, Kapanda, J. stated—

> "The case of **Fred Nseula vs. Attorney General and Malawi Congress Party** is for the proposition that when a Court is interpreting any provision of the Constitution it is unacceptable for the Court to use one constitutional provision to destroy another constitutional provision or to make another constitutional stipulation irrelevant. Accordingly, whatever is contained in sections 32, 33, 35 and 40 must be read so that there is harmony with the said section 65 of the Constitution. Section 65 will, not, therefore, be treated by this court as if it is not part of the Constitution of the Republic of Malawi."

Counsel observed that the learned Judge erred in his approach to the **Nseula** case. Counsel submitted that in the first place, if taken to its logical conclusion, the statement in the **Nseula** case creates the danger that even the most absurd provision in the Constitution would be allowed to survive any required scrutiny. Counsel opines that the Supreme Court did not intend by the **Nseula** case, to go that far.

Counsel further argued that the decision in the **Nseula** case is not relevant to the issues that arise in the instant case. He argued that the **Nseula** case was about what meaning had to be ascribed to the term "*public office*" as used in section 51(2)(e) of the Constitution. The term is not defined in the Constitution and the High Court had ruled in that case that "*public office*", as used in that section, meant "*any public office of whatever description*". On appeal, the Supreme Court took the view that since this term was not defined in the Constitution itself, it was to the whole Constitution the court would look in order to discover the correct meaning to be ascribed to the said phrase. The Supreme Court concluded that the phrase bears the meaning of office in the Civil Service.

Further, counsel submitted that in the same **Nseula** case the Supreme Court, earlier in the judgment, actually emphasised the notion of egalitarian treatment of constitutional provisions having a bearing upon a particular subject. Counsel referred, on this point to a passage in the **Nseula** case where the court stated—

> "It is an elementary rule of interpretation that one provision of the Constitution cannot be isolated from all others. All the provisions **bearing upon a particular subject** must be brought to bear and to be interpreted as to effectuate the greater purpose of the Constitution."

Counsel reiterated that the **Nseula** case was concerned with a search for a meaning of a phrase that was not defined in the Constitution itself and that to find that meaning it required the Supreme Court to examine related usages of the same phrase. Counsel submitted that the **Nseula** case did not set out to resolve conflicts between provisions in the Constitution, let alone conflict between Chapter IV Rights with another part of the Constitution. Counsel contended that to this extent, the principle in the **Nseula** case, to the effect that the entire Constitution must be read as a whole without one provision

destroying the other but sustaining the other, cannot be used to resolve conflicts as the instant case is about. Counsel submitted that indeed what the Supreme Court said on the appeal was only obiter dictum.

Another point taken by counsel was that it is important to always remember that in Malawi we have a unique constitutional design. That being the case, we should not look to foreign jurisdictions for example India, Canada or Zambia in order to interpret our Constitution. He cited the **PAC** case in support.

Counsel also submitted that our constitutional design has created two categories of Constitutional provisions. Counsel said that the first category covers Chapter III, on Fundamental Principles and Chapter IV, on Human Rights. He said that the second category covers the rest of the constitutional provisions. Counsel submitted that no one may trespass on the first category provisions unless otherwise permitted to do so under section 44 of the Constitution. Counsel also referred to section 11(2)(b) of the Constitution which enjoins the court in interpreting a constitutional provision to take full account of the provisions of the said Chapters III and IV. He further referred to section 12(iv) which enjoins everybody, including the Court, to afford the fullest protection to the rights and freedoms enshrined in Chapter IV.

Counsel contended that given this constitutional design it is almost impossible to subscribe to the notion that all constitutional provisions must be treated equally. On the contrary, so counsel submitted, the constitutional design prefers and is intended at all times to uphold Chapter IV Rights, which means that in the event of conflict, the category two provisions must be held to scrutiny to discover whether they measure up to the provisions on Human Rights in Chapter IV.

Still on the **Nseula** case, counsel for the Referral Authority criticised the Supreme Court for its reliance on the Indian case of **Gopalan v State of Madras** (1950) SCR 88 at 109, saying the Indian Court in that case held that the entire Constitution must be read as a whole without one provision destroying the other but sustaining the other. Counsel said that he had read the judgment in that case and did not come across such a statement. He said that, on the contrary, he understood the Supreme Court as having actually

entertained the submission that Articles 19 and 22 of the Indian Constitution were in conflict.

Finally, counsel referred to sections 9, 11, 103(2) and 108(2) of the Constitution and submitted that those sections vest in the courts in Malawi power to review laws and that this includes provisions of the Constitution since the General Interpretation Act, (Cap 1:01 of the Laws of Malawi), defines the term '*laws*' as including the Constitution.

Regarding the issue of inconsistency of section 65(1) with other provisions of the Constitution, counsel contended that the section is inconsistent with a total of eleven provisions including the Right to equality (section 20(1)), Freedom of Association (section 32(1)), Freedom of Conscience (section 33), Freedom of expression (section 35) and several political rights embodied in section 40.

Reverting to Kapanda, J's judgment, counsel referred to a passage in the judgment where the learned Judge stated that the Right in section 33 on Freedom of Conscience was derogable. Counsel cited section 44(1)(h) which expressly stipulates that this Right, in section 33, is non-derogable. Counsel submitted that the said Right being non-derogable, section 65(1) is, for this reason alone, invalid. Counsel contended that the learned Judge should, therefore, have decided the issue of invalidity of section 65 based on the unequivocal and non-derogable section 33 alone.

Proceeding further, counsel said that although the other Rights in sections 20(1), 32 and 40 are derogable and can therefore be limited or restricted, the learned Judge fell into error in that he did not follow the correct principles of constitutional interpretation contained in section 11(2) of the Constitution. That section provides that in interpreting the provisions of the Constitution, a court of law shall, among other things, "*promote the values which underlie an open and democratic society*."

Counsel submitted that some of the most important values which underlie an open and democratic society are the very ones which are contained in sections 32, 33, 35 and 40 which, so counsel argued, section 65 (1) denies to members of the National Assembly. He submitted that section 65(1) fails the test here.

Counsel also referred to section 12(1) which stipulates the principle that political authority must be exercised in accordance with the Constitution solely to serve and protect the interests of the people of Malawi. Counsel submitted that the restriction imposed by section 65 (1) on the movement of an MP from one political party to another is aimed at serving, solely or partly, the interests of political parties and not necessarily those of the people of Malawi. Counsel urged that section 65(1), on this view, fails the test because its sole aim is not to enable members of the National Assembly to serve and protect the interests of the people.

Next, counsel attacked section 65(1) for failing to meet the conditions that are set out in section 44 of the Constitution, regarding restrictions or limitations that may be placed on the exercise of the derogable rights such as those in sections 32, 35 and 40. These are that the restriction or limitation must be one that is prescribed by law, and is reasonable, necessary in an open and democratic society and recognisable by international human rights standards. Section 44 also stipulates that the law prescribing the restriction or limitation must not negate the essential content of the right or freedom and it must be of a general application.

Counsel submitted that section 65(1) is unreasonable because, so far as it concerns members of the National Assembly, it contravenes not just one fundamental human right or freedom but, as argued earlier on, not less than eleven rights and freedoms. Counsel also submitted that section 65(1) does not meet international human rights standards such as those stipulated in the United Nations International Covenant on Civil and Political Rights. He further submitted that anti-defection provisions in a Constitution, such as the provision in section 65(1), are not necessary in an open and democratic society. He said that in a truly open and democratic society there is no need for a constitution to concern itself with matters that should be left to political parties, such as the control of political defectors. Counsel said that most stable and mature democracies, like the United States of America or Australia, do not prohibit defection of members of the National Assembly to other parties. Counsel further submitted that section 65(1) fails the tests set under section 44 in that section 65(1) negates the essential content of several constitutional provisions such as freedom of association, freedom of expression and the right

freely to make political choices. Also that section 65(1) cannot be supported in that it is not a law of general application but one that is solely directed at members of the National Assembly.

In wrapping up, counsel submitted that the conclusion reached by Kapanda, J., namely that one provision of the Constitution cannot destroy another and that section 65 can neither be held inconsistent with other provisions nor invalid is erroneous. Counsel said that the learned Judge erred because the Constitution itself contemplates that one of its provisions can be found to be unconstitutional and thus invalid.

We now turn to the response made by counsel representing the MCP, UDF and AFORD.

Concerning section 33, counsel conceded that according to section 44(1) the right in section 33 is non-derogable and cannot therefore be limited or restricted. However, counsel argued that section 65(1) does not limit or restrict the right in section 33. Counsel stated that section 65(1) allows the free exercise of the right in section 33, but that as a result of the exercise of his or her right to freedom of conscience, belief and thought, a member of the National Assembly who came into Parliament as a member of one political party proceeds to exercise a different and separate right, namely the political right to voluntarily cease to be a member of his or her political party or to join another political party represented in the National Assembly, which is a right he or she has under section 40, but which right is derogable under section 44, and which right is further subject to the other provisions of the Constitution, in this case section 65(1), then that member of the National Assembly crosses the floor, and the Speaker shall declare his or her seat vacant.

Counsel submitted that in fact section 40(1) recognises that the right to political rights may be limited or restricted by the Constitution itself as section 65(1) does, that is why section 40(1) starts with the words "Subject to this Constitution."

Further, counsel contended that the restriction on the political right of a member of the National Assembly who, at the time of his or her election was a member of one political party represented in the National Assembly, is a restriction prescribed by law, namely section 65(1). Counsel also submitted

that the restriction is reasonable for purposes of curbing unprincipled and unethical political defections and is recognised by international human rights standards and necessary in an open and democratic society. In support of their argument counsel cited the Constitutions of India, Singapore, Ghana, Nigeria, Uganda, Kenya, Tanzania, Zambia and Zimbabwe.

Counsel referred to section 65(2) of the Constitution which provides that "Notwithstanding sub-section (1), all members of all political parties shall have the absolute right to exercise a free vote in any and all proceedings of the National Assembly, and a member shall not have his or her seat declared vacant solely on account of his or her voting in contradiction to the recommendations of a political party, represented in the National Assembly, of which he or she is a member". Counsel submitted that this provision provides an in-built safeguard in the Constitution itself that allows members of the National Assembly to exercise their right of freedom of conscience, in section 33, and the right of freedom of expression, in section 35.

Further, counsel submitted that the fact that members of the National Assembly must not change political parties willy-nilly and must be deemed to have crossed the floor if they do so also derives force from section 12(iii) and section 13(o) of the Constitution relating to guarantees for accountability and integrity. Counsel contended that there would be lack of accountability if people were allowed to stand for election on the ticket of one political party, utilise all the resources of that party and then, soon thereafter, change political parties without facing the electorate once again to renew their mandate.

The other point taken by counsel is that courts have no jurisdiction to declare as unconstitutional a provision of the Constitution which survived the twelve-month provisional period after its enactment. Counsel argued that the provisions of the Constitution that survived that period are supreme law and cannot be declared unconstitutional. They can only suffer repeal by Parliament, using the procedures set out in the Constitution. Counsel cited several provisions of the Constitution in support of their submission on this point.

First, counsel cited section 4 of the Constitution which provides that the Constitution "shall bind all executive, legislative and judicial organs of State

…". Counsel pointed out that even courts are, therefore, bound by the provisions of the Constitution.

Counsel also cited section 5 of the Constitution which provides that an act of Government or any law that is inconsistent with this Constitution shall, to the extent of the inconsistency, be invalid. Counsel submitted on this aspect that the Constitution is the grundnorm or supreme law and is therefore not to be measured against itself. It is used to test acts of Government or laws, for unconstitutionality.

Next counsel cited section 9 of the Constitution which sets out the responsibility of the Judiciary within the context of the Constitution. Counsel said that the Judiciary's duty is to "interpret", protect and enforce the Constitution and all laws in accordance with the Constitution. Counsel urged that to interpret means to construe or to seek out the meaning of words.

Finally, counsel submitted that the most clear and authoritative constitutional provision that deals with finality on the question whether the High Court has jurisdiction to declare a provision of the Constitution to be unconstitutional is section 108(2). That section provides that the High Court shall have original jurisdiction "to review any law, and any action or decision of the Government, for conformity with the Constitution". Counsel submitted that under that section, the High Court does not have jurisdiction to review or declare a provision of the Constitution to be unconstitutional. Counsel submitted that the word "law" in section 108(2) does not mean or include the Constitution, considering that both the words "law" and "the Constitution" appear in the same sentence. Counsel submitted that only statute laws can be examined or tested for constitutionality. Counsel said that for all these reasons, the Malawi Supreme Court was right in the **Nseula** case in holding that the Constitution "must be read as a whole without one provision destroying the other but sustaining the other."

Generally, counsel submitted that section 65(1) is valid and justified for several reasons. First, counsel submitted that the section has the effect of having the electorate's chosen members to remain in the parties that sponsored them to the National Assembly and also helps to realize the electorate's wish to influence the composition and policies of the Government. Counsel submitted

that section 40(2) places a duty on the State to provide funds to ensure that during the life of any National Assembly, any political party which has secured more than one-tenth of the national vote in the elections to that National Assembly has sufficient funds to continue to represent its constituency. Counsel said that this duty, cast on the State in favour of political parties, is also one which supports the continued existence in the National Assembly of political parties, and section 65(1) compliments this duty.

Further, counsel submitted that section 62(2) also supports the constitutional validity of section 65(1). The section provides that each constituency shall freely elect any person to represent it as a member of the National Assembly.

Finally, counsel argued that if section 65(1) was to be taken out the idea of political pluralism and multiparty democracy entrenched in section 40(2) of the Constitution would not survive as the party in power or any person with enough money or resources would easily be able to create a one-party state by "buying off" all members of the National Assembly of other political parties. Hence section 65(1) is an important safeguard to the existence of multiparty democracy.

In conclusion, counsel asked the court to uphold the finding of the court below, namely that section 65(1) is not inconsistent with sections 32, 33, 35 and 40 of the Constitution and that the section is valid.

We have given the submissions and the cases counsel cited most anxious consideration.

We will consider first the question raised on behalf of the Friends of the Court as to whether the High Court, or this court, has jurisdiction to declare as unconstitutional a provision of the Constitution that survived the period of provisional application of the Constitution.

It is noted that the provisional Constitution was given a span of twelve months from 1994 to 1995. The full text of the Constitution after the expiry of the twelve-month period appears in the June, 1995 edition of the Constitution of the Republic of Malawi. So, the question posed is whether the courts have jurisdiction to determine the constitutionality of a constitutional provision that survived the said twelve-month period. The court must look at the Constitution itself to find the answers to this question.

Section 9 of the Constitution is a useful starting point. The section provides as follows—

> "**the judiciary shall have the responsibility of interpreting, protecting and enforcing this Constitution and all laws in accordance with this Constitution** in an independent and impartial manner with regard only to legally relevant facts and the prescriptions of law."

We think that section 9 is clear. The constitutional duty or mandate of the courts is to interpret, protect and enforce the Constitution and laws.

This begs the question, what is to interpret? The Oxford Advanced Learner's Dictionary defines the word "interpret" as "to explain the meaning of something." Black's Law Dictionary defines "interpret" as "to construe; to seek out the meaning of language." Going by these definitions the duty of the courts in interpreting the Constitution and laws is to construe or to explain or seek out the meaning of words, of whatever provision(s) of the Constitution, or laws, the court has been asked to interpret.

As we have shown, counsel for the Referral Authority argued that the word "interpret" means more than merely to give the meaning of words and that the term includes invalidating a provision or provisions of the Constitution. With respect we are unable to join with counsel in that view. If the framers of the Constitution had intended that function they would have said so expressly in section 9. Besides to read section 9 in the manner counsel for the Referral Authority espouses would produce an absurdity.

The words "interpreting, protecting and enforcing this Constitution" as used in section 9 must be read together. Surely, to say that the court could both **invalidate and protect** the Constitution or **invalidate and enforce** the Constitution at the same time is an absurdity and a contradiction which, in our view, the framers of the Constitution could not have intended.

Another illuminating constitutional provision is section 108(2). That section provides as follows:

> "**The High Court shall have original jurisdiction to review any law, and any action or decision of the Government, for conformity with this Constitution**, save as otherwise provided by this Constitution and shall have such other jurisdiction and powers as may be conferred on it by this Constitution or any other law."

In our judgment, section 108(2) is clear. The Constitution has conferred on courts the power of review. The parameters of the said power of review are expressly set out in the section, so is the reason for conferring such power. The High Court can review **any law and any action or decision of the Government**. The power is given in order to ensure that laws and actions of Government conform with the Constitution.

As we have indicated, counsel for the Referral Authority argued that the word "law" in section 108(2) includes the Constitution since the Constitution is law, after all. With respect we beg to differ. When one reads section 108(2) as a whole, there can be no doubt that the word "law" there means, and can only mean, laws as opposed to the supreme law, namely the Constitution. The Constitution itself is the measuring rod, so to speak. Indeed this marries with section 5 of the Constitution, to which we now wish to turn. The section provides as follows—

> "Any act of Government or any law that is inconsistent with the provisions of this Constitution shall, to the extent of such inconsistency, be invalid."

Section 5 underlines the supremacy of the Constitution. As the grundnorm, or the supreme law of the land, all laws, namely Acts of Parliament or any other laws, and any acts of Government, must be consistent with the Constitution, if not then to the extent of any inconsistency such law or act of Government is without legal force, and a court of law can declare it invalid. Again here, in section 5, as we have earlier held, the word "law" excludes the Constitution or a provision of the Constitution. Put briefly, under our constitutional arrangement a court of law can only invalidate, where applicable, a law or act of Government, and not a constitutional provision.

It will be recalled that the question we were called upon to answer on this aspect of the case was whether the courts have jurisdiction to declare as unconstitutional any provision of the Constitution. For the reasons we have just proferred above, in our analysis of various provisions of the Constitution, our answer to this question is in the negative. Neither the High Court nor this court has the power, to declare as invalid, or to invalidate, such a provision.

Actually, it appears to us that even provisions of subsequent amendments to the Constitution, once duly passed in the normal way by the National

Assembly and thereby becoming part of the Constitution, those provisions too cannot be invalidated or declared to be unconstitutional or inconsistent with the other provisions of the Constitution. We would therefore, with respect, query the correctness of the PAC decision on this point. The High Court had no jurisdiction to invalidate any of the provisions of the amended section after the amendment was effected following due parliamentary procedures. Therefore, the text of section 65(1) currently is as reproduced above.

We now turn to the question as to whether section 65(1) is inconsistent with sections 32, 33, 35 and 40. This is one of the issues that were referred to the High Court for determination and it is also before us in this appeal.

The starting point is section 5 of the Constitution. We have already held that the word "law" in section 5 excludes the Constitution or any of its provisions. It simply refers to other laws. According to section 5 then what may be inconsistent with the Constitution is an act or acts of Government or other laws. It appears to us that that is why this court in the **Nseula** case came up with the principle that "the entire Constitution must be read as a whole without one provision destroying the other but sustaining the other". We uphold that principle in its entirety. Put shortly, one provision of the Constitution cannot destroy another, or be held to be inconsistent with another provision.

We will go a little further to examine whether, on the face of it, one can argue that section 65(1) is inconsistent with sections 32, 33, 35 and 40.

It is accepted that of the four sections, namely sections 32, 33, 35 and 40, three are derogable but section 33 is non-derogable. It is further accepted that being non-derogable the right in section 33 cannot be limited or restricted. Under our constitutional arrangement the rights to freedom of conscience, religion, belief and thought, and to academic freedom, cannot be limited or restricted.

Upon analysis, we would agree with the submission made by counsel representing the Friends of the Court that section 65(1) has nothing to do, really, with the rights in section 33. Rather, section 65(1) is about the political right of a member of the National Assembly, like any other person, to join a political party and to freely make political choices as provided in section 40. As

we have just observed the rights in section 40 are derogable and can, therefore, be limited or restricted.

The matter does not however end there. As was argued by counsel representing the Referral Authority, in accordance with section 44(2) of the Constitution, in order to pass the test, any limitation or restriction placed on the exercise of any of the rights and freedoms guaranteed in the Constitution, must be those that are prescribed by law, which are reasonable, recognised by international human rights standards and necessary in an open and democratic society.

To start with, the limitation placed upon a member of the National Assembly who voluntarily ceases to be a member of the political party that sponsored him or her to the National Assembly and joins another political party is a limitation that is prescribed by law, namely section 65(1) itself. In our view that limitation or restriction is reasonable. It is trite that the large majority of members of the National Assembly are sponsored by political parties and voted for on political party lines. As counsel for the Friends of the court put it, if section 65(1) was abolished that would allow or promote lack of accountability and integrity as that would allow persons to stand for election on the ticket of one political party, utilise all the resources of that party, be voted into office as a member of the National Assembly representing that party and then soon thereafter change political parties. Indeed the electorate might feel cheated by such conduct on the part of the member of the National Assembly, so too would the sponsoring political party.

Commenting on anti-defection clauses, such as section 65(1), the South African Constitutional Court, in the case of **Ex-parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa**, 1996 (ii) SA 744 (cc) observed—

> "An anti-defection clause enables a political party to prevent the defection of its elected members, thus ensuring the party under whose aegis they were elected."

The court then went on to say—

> "It also prevents parties in power from enticing members of small parties to defect from the party upon whose list they were elected to join the governing party. If this were permitted it could enable the governing party to obtain

> special majority which it might not otherwise be able to muster and which is not a reflection of the views of the electorate."

We are also of the view that the limitation here in section 65(1), is recognised by international human rights standards and that it is necessary in an open and democratic society. Counsel for the Referral Authority pointed out that anti-defection provisions do not appear in the Constitutions of older democracies like the United States of America and Australia, and that as a matter of fact defections are allowed. It is however noted that several countries in Africa, including a large majority of countries in our Region; countries with similar historical backgrounds and legal systems to Malawi, have anti-defection clauses in their Constitutions.

Counsel for the Referral Authority argued the point that the situation in the Republic of South Africa under its Constitution is different from that obtaining in Malawi because Malawi follows the Westminster principle based on Burke's statement that:

> "Parliament is not a congress of ambassadors from different and hostile interests; which interests each must maintain, as an agent and advocate but Parliament is a deliberative assembly of one nation, with one interest that of the whole; where not local purposes, not local prejudices ought to guide, but the general good, resulting from the general reason of the whole. You choose a member of Bristol, but he is a Member of Parliament."

With great respect we hold the view that the South African cases and those from countries using the system of proportional representation are relevant because of the wording of their particular constitutional provisions which are similar to ours. It makes no difference whether a country uses the first-past-the-post system or the proportional representation system. What matters is the wording of the constitutional provisions relating to the anti-defection provisions. These must be construed in such a way that the clear intention of the legislature in enacting such provisions is carried out. In this case, it is very clear to us that section 65 (1) sets conditions to those MPs who leave their sponsoring party and join another during the life span of a particular National Assembly. It is equally clear to us that "*a political party represented in the National Assembly*" can only mean a political party represented in the National

Assembly after the holding of the general elections since before the holding of the general elections no political party can be represented in a non-existent National Assembly. This is because the National Assembly stands dissolved on the 20 March of the fifth year after its election in accordance with the provisions of section 67 (1) of the Constitution.

In any event, the English system which Burke is making reference to relates to a country with an unwritten constitution which does not have provisions prescribing for anti-defection situations. We therefore do not agree with counsel for the Referral Authority on this point.

In short, we are in full agreement with the court below in its finding that section 65(1) is not inconsistent with sections 32, 33, 35 and 40, and that it is valid.

The appeal on grounds one and two therefore fails.

We now turn to the third ground of appeal. As we have shown above the averment here is that the learned Judges in the court below erred and misdirected themselves in placing undue reliance on the decision in the PAC case in that:

(a) the PAC case decided the effects of the amendment to section 65(1) only and not the integrity of section 65(1) itself; and

the PAC case expressly proceeded on the basis that the constitutionality of section 65(1) in its original text was not being questioned.

Counsel for the Referral Authority cited passages from the lower court's judgment, specifically the lead judgment of Kapanda, J. and passages from Chipeta, J's judgment in the PAC case, as evidence of the alleged undue reliance by the lower court on the decision in the PAC case.

Referring to the judgment of Kapanda, J., this is what the learned Judge, at page 9 of his judgment, stated—

> "It is therefore important to observe that this is not the first time section 65, as read with sections 32 and 40 has been brought before this court. In point of fact, it is abundantly clear that the High Court was asked to decide on the validity of section 65 of the said Republic of Malawi."

And later in the said judgment, at page 14, the learned Judge stated—

> "If what we have quoted above is not clear manifestation of the fact that the High Court dealt with the validity of section 65 of the Constitution then we do not know what proof to offer to the President."

In both these passages the learned Judge was indeed referring to the decision of Chipeta, J., in the **PAC** case. Reading the said passages, indeed the whole of Kapanda, J's judgment, it is clear beyond doubt that the learned Judge placed reliance on the decision in the **PAC** case.

We have read the judgment of Chipeta, J., in the **PAC** case, carefully to find out what the case decided. The following passages from the judgment are illuminating.

At page 17 of the judgment the learned Judge stated—

> "It appears to me that it is very clear that the attack the plaintiff has launched is directed at the **amendment** to section 65 of the Constitution. In other words, it is directed at the amended version of section 65 of the Constitution."

Then at page 18 the learned Judge stated—

> "It (the originating summons) is seeking a declaratory order from this court to the effect that the **amendment** to section 65 to the Constitution is unconstitutional and invalid."

The other relevant passage is at page 19 where the learned Judge stated—

> "the plaintiff began its arguments by making it plain that its attack in this originating summons has nothing to do with section 65 **as it originally stood** when the Constitution came into force … The plaintiff's attack is specifically targeted at the Act **that amended section 65 of the Constitution** and it is this that in particular the plaintiff would like to have declared unconstitutional and invalid."

It is plain from the above-quoted passages that the **PAC** case was not about section 65(1) in its original text. It was about the amendment that had subsequently been made to that section and the effect thereof.

Consequently, we agree with counsel for the Referral Authority that the reliance the court below placed on the **PAC** decision was flawed. The third ground of appeal therefore succeeds.

We now turn to the fourth and fifth grounds of appeal. We will deal with these together. As earlier indicated, these two grounds are that—

(a) The learned Judges erred in holding that a member of Parliament elected as an independent crosses the floor when he joins a Party not represented in the National Assembly.

(b) The learned Judges erred in holding that a member of Parliament elected as an independent crosses the floor when he joins a party represented in the National Assembly.

Counsel for the Referral Authority said that what he understood from the judgments that were delivered in open court on 7th November, 2006 was that Twea, J. had agreed with Kapanda, J. that section 65(1) also applied to independents such as those referred to in both (a) and (b) above. Counsel did not agree with this decision and since the practice is that the majority decision carries the day, he decided to appeal against the lower Court's decision on these two points.

Counsel stated that when however he received and read the perfected judgment he noticed that Twea, J. in his judgment, had said on this aspect, that his view was that as section 65(1) presently stands, it did not apply to a member of the National Assembly who was elected as an independent or was a sole representative of a political party in the National Assembly. That decision, by Twea, J., agreed with the decision of Potani, J. Going by the perfected judgment, then, this meant that the majority decision concerning the position of independents was that section 65(1) did not apply to them. Counsel for the Referral Authority was pleased with this majority decision. Accordingly, he told the court at the hearing of this appeal that he was withdrawing the appeal on both grounds four and five. Counsel for the Friends of the Court stated that he too was in agreement with the majority decision herein.

The appeal on this aspect having been withdrawn, this court must defer to counsel's decision; except to say simply that we concur in the majority decision of Twea, J. and Potani, J. In our judgment, an independent candidate ceases, at least for purposes of an election, to be a member of any party; otherwise a party would be seen as fielding more than one candidate, which is not permissible.

Indeed it is noted that the Constitutions of those countries like, Ghana, Uganda and Zambia, where crossing the floor affects independent members of parliament, expressly mentions them in the crossing the floor provisions.

Before we leave this part, there is an observation we wish to make. It is noted that one of the questions that were referred to the High Court for determination was whether a member of the National Assembly who was elected under a party's ticket and decides to resign from that party thereby becoming independent and later joins another party that is not represented in the National Assembly, crosses the floor. All the learned Judges in the court below answered this question in the positive, and found that a member of the National Assembly in this scenario would be deemed to have crossed the floor. It is further noted that this finding was not included in the issues brought on appeal to this Court.

We can only surmise that the reason for not appealing against the finding on this aspect is because the Referral Authority agrees with the finding herein. On our part, we are also of the view that the finding by the court below on this question cannot be faulted. For the avoidance of doubt, in our view, a member of the National Assembly who was elected under a party's ticket and voluntarily decides to resign from that party thereby becoming independent or declaring himself or herself independent and later joins another party, whether that party is represented in the National Assembly or not, crosses the floor.

Lastly, we turn to the sixth ground of appeal, namely that the learned judges in the court below erred in holding that a member of Parliament crosses the floor when he or she accepts ministerial appointment.

On this issue all the three Judges in the court below were agreed. Kapanda, J., at page 17 of the judgment, stated—

> "A member of Parliament crosses the floor if, after being elected on a party ticket, he or she accepts a ministerial appointment from a President elected on another party's ticket. It does not matter that he/she does not resign from the party on whose ticket he/she was elected. If your party's blessing is not given or sought then surely that MP should be deemed to have crossed the floor."

On his part, Twea, J., at page 28, stated—

> "Consequently, the President has the power to appoint Ministers. The President may appoint Ministers from among the membership of the National Assembly or without. If, however, the President decides to appoint Ministers from within the National Assembly, he or she must have regard to the application of section 65(1) of the Constitution."

The learned Judge expressed similar sentiments, at page 29, where he stated—

> "Finally, I find that ministerial appointments, in respect of members of the National Assembly, can only be made within the confines of the application of section 65(1) of the Constitution."

Potani, J., echoed these sentiments at page 36 of the judgment where he stated—

> "Flowing from the argument that section 65(1) is aimed at protecting party alliance, if the ministerial appointment has the endorsement of the appointee's party, then there can be no crossing of the floor. The answer to the question should therefore be that whether or not the appointee would be deemed to have crossed the floor would depend on whether or not his appointment was made with the approval of his party."

The appointment of ministers is made under section 94(1) of the Constitution. It reads—

> "The President shall have the power to appoint Ministers or Deputy Ministers and to fill vacancies in the Cabinet."

Counsel for the Referral Authority submitted that this section has not restricted the power of the President to fill vacancies in his Cabinet. Counsel stated that indeed that was the holding in the case of **Dr. J. B. Mponda Mkandawire and Others vs. the Attorney General**: Civil Cause number 49 of 1996. Counsel said that a ministerial job is, in a sense, a national service and that the suggestion that one cannot serve as a minister and remain true to his party is a misconception. Counsel also discounted the view that before making an appointment, the President must obtain the consent of the appointee's party.

Counsel representing the Friends of the Court agreed that the **Mponda Mkandawire** case already settled the question that where a President who belongs to one political party appoints, as cabinet minister, a member of the National Assembly from another party, that ***per se*** does not render the member

of the National Assembly liable to be removed from the National Assembly for having crossed the floor.

Counsel submitted that although this is the case, the conduct of the member of the National Assembly, post appointment is decisive. Counsel argued that if, for example, a member of the National Assembly who had been appointed cabinet minister under these circumstances stopped attending meetings including caucuses of the party under whose ticket he/she was elected and instead attended meetings and caucuses of the party to which the President who appointed him/her belongs, and does things or makes utterances that are compatible with the conclusion that he/she has left the party under whose ticket he/she was elected, then a finding of constructive resignation from the party under whose ticket he/she was elected ought to be made and hence that he/she has crossed the floor. Counsel emphasized that voluntary ceasing to be a member of a party need not only be by an overt act, such as writing a letter of resignation. It should, in appropriate cases, be construed from the conduct of the member of the National Assembly concerned.

With respect, we are in full agreement with the sentiments expressed by counsel for the Friends of the Court. We agree that the mere acceptance of a ministerial position does not render the appointee member of the National Assembly to have crossed the floor. Having said this, we also agree that the conduct of the concerned member of the National Assembly, after his or her said appointment, is relevant to determine whether he/she has voluntarily ceased to be a member of the party under whose ticket he/she was elected to the National Assembly. The Speaker would have to make his decision based on the facts before him in each individual case.

To sum up, the appeal is unsuccessful on ground one, on the question of the alleged inconsistency of section 65 (1) with sections 32, 33, 35 and 40 of the Constitution. The appeal is also unsuccessful on ground two, on the question of the validity of section 65(1) of the Constitution. The appeal is successful on ground three relating to the undue reliance the court below placed on **PAC** case. Grounds four and five having not been pursued the decision of the court below is upheld, meaning that members of the National Assembly elected as independents do not cross the floor when they join a party, represented or not

represented, in the National Assembly. Finally, the appeal on ground six partly succeeds and partly fails, the position being that a member of the National Assembly does not cross the floor merely because he or she has accepted ministerial appointment. He or she may however be deemed to have done so depending on his or her conduct after being appointed. It all depends on the facts of each case.

DELIVERED in Open Court this 15th day of June, 2007, at Blantyre.

Sgd: .....
L E Unyolo, SC., CJ.

Sgd: .....
J B Kalaile, SC., JA.

Sgd: .....
D G Tambala, SC., JA.

Sgd: .....
I J Mtambo, SC., JA

Sgd: .....
A K Tembo, SC., JA.