IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

MISCELLANEOUS CIVIL APPLICATION NUMBER 73 OF 1997

THANDIWE OKEKE.....APPLICANT

AND

THE MINISTER OF HOME AFFAIRS.....FIRST RESPONDENT

AND

THE CONTROLLER OF IMMIGRATION.....SECOND APPLICANT

CORAM: D F MWAUNGULU(Judge)

Kasambala, Legal Practitioner, for the applicant

Chigawa, Assistant Chief State Advocate, for the respondents

Kaundama, an official contract interpreter

Mwaungulu, J

JUDGMENT

Mrs. Thandiwe Okeke is a woman, a wife and a mother. She applies as a woman, a wife and a mother about her husband, Mr. Peter John Okeke. She applies because the Ministry of Home Affairs, through officials under the Controller of Immigration, arrested, detained and later deported her husband to Nigeria, apparently for breaking our immigration laws. I think I understand the argument correctly when I say that she thinks the Home Affairs ministry through its immigration officials in the action which they took violated her rights under the Constitution as a woman, wife and mother. She thinks, these actions, if wrong, greatly undermined her rights. She wants this Court to review the immigration official's decision and, if her contention is right, restore her rights and compensate her properly for the government officials' actions. The public officials are adamant they acted

within the powers and justifiably. This court has to decide whether they acted improperly and, if improperly, whether they violated Mrs. Okeke's rights. The law and facts favour Mrs. Okeke.

Mrs. Okeke is Malawian. Her husband is Nigerian. On 10th January, 1997, at the Registrar's office in Blantyre Mrs. Okeke married Peter John Okeke. Mrs. Okeke and her husband lived in Malawi till the events leading to this application. Mr. Okeke left for Nigeria. His wife was pregnant. This judicial review bases on what happened on 3rd February, 1998 when Mr. Okeke arrival at Lilongwe International Airport.

On arrival at Lilongwe International Airport Mr. Okeke, as he should have, presented himself before immigration officials. Mrs. Okeke's affidavit contains Mr. Okeke's version. According to Mrs. Okeke, immigration officials detained her husband. They told him they were deporting him to Nigeria. The reason was given as that he was Nigerian and that Nigerians cause trouble in Malawi by bringing fake foreign currency. Mrs. Okeke herself, since his deportation, met immigration officers to understand what happened. She deposes she received little, if any, help. She therefore knows little about why and what happened to her husband when deported at Lilongwe International Airport. Immigration officials therefore never told her why her husband was refused entry to Malawi.

The Immigration Officials, having failed to disclose the precise reasons for deporting her husband, do so now in the affidavit opposing her application. The Acting Chief Immigration Officer admits he on 3rd February, 1998 refused to let Peter John Okeke, a Nigerian, enter Malawi. The reason he gives is that Mr. Peter John Okeke needed a visa. He contends that our laws require Nigerians entering Malawi to have a visa. He admits detaining and deporting Mr. Okeke after refusing him entry. He contends marriage never exempted the Nigerian from the visa requirement. He thinks therefore that the respondent's actions in refusing Mr. Okeke entry were neither unconstitutional nor oppressive.

On this factual complexion Mrs. Okeke applies for judicial review. She bases her application on eight grounds. First, she contends Mr. Okeke's arrest and detention and the whole police conduct violated her right to administrative justice enshrined in section 43 of the Constitution in that the public officials denied her an opportunity to be heard before Mr. Okeke's arrest, detention and deportation. Secondly, she thinks Mr. Okeke's arrest and detention were illegal and ultra vires the police and immigration officer's powers. Thirdly, she contends no reasonable police or immigration officer would arrest and detain Mr. Okeke on Mr. Okeke's history of entry and stay in Malawi. Fourthly, she thinks Mr. Okeke's arrest, detention and deportation violate section 21(1) of the Immigration Act. Fifthly, she thinks, since Mr. Okeke had a valid business licence, the arrest, detention and deportation violated section 24 of the Immigration Act.

The sixth ground is difficult to appreciate. One has to make the best of it. She contends under section 9 of the Malawi Citizenship Act one year has not expired lapsed. Alternatively, she thinks sections 9 and 16 of the Malawi Citizenship Act discriminate against women under section 22 of the Constitution in that Malawian women may not marry foreigners and obtain Malawian citizenship should the women and their husbands

choose. She contends the police and immigration officer's conduct violated section 20 of the Constitution because her husband was discriminated against purely because he is Nigerian. Finally she thinks her husband would have been treated differently if his nationality was other than Nigerian.

She seeks four reliefs. First, she wants an order similar to a certiorari quashing the police and immigration officers' decisions arresting, detaining and deporting her husband. Secondly, she wants an order restraining the respondents deporting her husband. Thirdly, she wants the respondents to compensate her for wrongfully arresting, detaining and deporting her husband. Finally, she wants further damages arising from the matters mentioned.

This application is interesting. It brings to the fore a problem which concerns many scholars and commentators on our Constitution and those interested in the promotion, protection and enforcement of human rights. It requires considering how far the Constitution goes to protect the fundamental human rights which, among other things, are the Constitution's most fundamental and revolutionary aspects. The question of standing is more than a matter of procedural or adjectival law. How courts approach the matter determines how far this, as it prides itself, unique Constitution goes to protect our fundamental rights.

The matter of locus standi has been to the Supreme Court of Appeal once in The Attorney General v the Malawi Congress Party and Others, popularly known as the Press Trust Case. The particular conclusions, which raise immense questions on locus standi, do not concern us here. It is the conclusion that our citizens have no right under our Constitution to question fundamental human rights violations unless they have a sufficient interest in the matter that future generations may find very difficult to comprehend or justify. The Supreme Court's conclusion is probably comparative. Under the American Constitution the citizen's rights must have been violated for him to have locus standi. That requirement is not critical or crucial north of the border, Canada. Much suggests our constitutional arrangements are akin to Canadian jurisprudence and constitutional theory. These are unimportant considerations, however, when dealing with the 1994 Constitution.

It is the court's duty to interpret this Constitution understanding it ascribes to itself a potency and uniqueness not to be overshadowed by general considerations in other constitutional arrangements. It is fundamental therefore to consider the Constitution's wording, drawing much one can reasonably draw from what happened around the constitutional change and what brought it out. A country's Constitution must be understood in the wider context of the country's aspirations. Courts must interpret the Malawi Constitution from the democratic ideal and its astute protection of fundamental human rights. It is characteristic that our Constitution, anticipating the problems it intended to forestall and our aspirations for promoting democracy and fundamental human rights, provides notions unheard of or unthought of in modern constitutional and political theory, conceptualisation and thought. This goes to its uniqueness.

In the Press Trust case the Supreme Court of Appeal only considered section 15 of the Constitution and concluded that standing is based on a sufficient interest as indicated in that section. The sufficient interest was not defined. The Supreme Court decided trustees had no sufficient interest in the action under discussion. The question of standing in the Constitution has to be understood from proper interpretation of sections 15(2) and 46.

The more one agonizes on understanding section 15(2) and the Supreme Court decision in the Press Trust case the more convinced one becomes that standing cannot be restricted to the person whose rights are violated. Section 15(2) provides:

"Any person or group of persons with sufficient interest in the protection and enforcement of rights under this chapter shall be entitled to the assistance of the Courts, the Ombudsman, the Human Rights Commission and other organs of government to ensure the promotion, protection and redress of grievances in respect of those rights."

The more one ponders the section, the Supreme Court of Appeal decision and what the Constitutional framers wanted to achieve the clearer it becomes on close reading of section 15(2) that this is not a standing provision. Nothing suggests that the person with standing is one whose rights are violated. Unless, of course, if the underlined words are synonymous with the suggestion that one's rights must have been violated. It is useful to examine key phrases in the section to see that restricting standing to a victim of violation is indeed a very limited and limiting interpretation of section 15(2).

The words actually used are 'sufficient interest in the protection and enforcement of rights.' This person or group of persons must not have a sufficient interest in their own rights. If they intended the interest to be in the protection and enforcement of one's rights, the framers would have used words like 'sufficient interest in the promotion and enforcement of 'his or her', 'ones' or 'their' rights.' The words used are 'sufficient interest in the promotion of rights.' The section is not referring to the individual or group whose right has been affected. It is referring to a person or group of persons with a sufficient interest in the protection and enforcement of rights. Again there is no qualification of the word rights with 'his or her', 'ones' or 'their'. 'Rights' in section 15(2) is plural. The person or group must have an interest, a sufficient interest, in the protection and enforcement of rights generally not the particular right or rights violated.

Any person or any group of persons who establishes a sufficient interest in the protection and promotion of rights can enforce and protect rights under our Constitution. The section is salutary. It gives standing to those whose rights are violated and envisages persons or groups of persons who may be established solely for protecting and enforcing rights. Obviously a person whose right is violated has standing. She has it because of that. It is unnecessary that she should have a sufficient interest in the protection and enforcement of rights. Such a person has interest to have the rights violated to be enforced and protected. Suggesting that only the person whose rights are violated has a sufficient interest in the protection and enforcement of rights, and I emphasise, rights, is a restrictive and unjustified interpretation of section 15(2). The argument that only the person whose rights are violated has a sufficient interest in the enforcement and protection of rights under our Constitution is non sequitur. Section 15(2) of the Constitution cannot be restricted to the victim of violation.

Any person or group of persons who can demonstrate a sufficient interest in the protection and enforcement of rights can seek the assistance of the Courts, the Ombudsman, the Human Rights Commission and other government organs. This view is supported by the House of Lords decision in R v Inland Revenue Commissioners ex parte National Federation of Self Employed and Small Businesses Ltd., [1982] A C 617. There Lord Diplock said:

" It would be a grave lacuna in our system of public law that if a pressure group like the Federation, even a single spirited taxpayer was prevented by an outdated technical rule of standing from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped."

Blackburn v Attorney General, [1971] 1 W L R 1037, is the Court of Appeal's decision to the same effect. There Lord Denning, M R, said:

"A point was raised as to whether Blackburn has any standing before this Court ... He says he feels very strongly and it is a matter in which many people in this country are concerned. I would not myself rule him out on the ground that he has no standing."

The interest can be public or private. The applicant can be a person, natural or artificial, or a group of persons. A group can be a political party, a pressure group or interest group. Our Constitution allows this liberality.

This is more pronounced when one considers institutions designated to assist. A person or groups of persons have access and can be assisted by (1) the Courts, (2) the Human Rights Commission and, (3) the Ombudsman and (4) other government organs. It is curious that only those whose rights are affected can complain to these institutions. That may be correct with Courts. That the Ombudsman and Human Rights Commission have got wide investigating powers undermines the suggestion that only the affected person can have the assistance of these institutions. More specifically, the Human Rights Commission under the Constitution can investigate human rights violations. It would surprise the Human Rights Commission to learn they cannot investigate human rights violations if complaints are from people other than those whose rights are violated. Section 15 (2) encourages persons, institutions and groups of people and individuals, when they detect human right violations, to get help from courts, the Human Rights Commission, the Ombudsman and other government organs however or whatever that help.

This becomes important for human rights groups, organizations, and institutions. They should, where the case is appropriate, be assisted by institutions in section 15(2). Government organs are the most interesting of institutions mentioned in the subsection. It is helpful that an individual or group of persons should, even if not directly affected by the violation, draw government's attention to the violations if that helps protect and enforce rights.

The section requires that such people or group of persons demonstrate a sufficient interest in the protection and enforcement of rights. That interest is more conspicuous when one's rights are violated. The victim of the violation of rights however may not and need not

necessarily be the only one who can demonstrate that he has a sufficient interest in the enforcement and protection of rights. That restriction cannot be a liberal and proper interpretation of section 15(2) of the Constitution. Section 15(2) is an open constitutional provision which, given the background to the constitutional reforms, enabling another to be a brother's keeper. This is not a novation. Before this Constitution habeas corpus could be made by a person other than the prisoner. This was the only tool to a citizen to challenge unlawful detentions. It is unsurprising that in the new constitutional arrangements the constitutional framers, to protect the citizen from excessive abuses and right violation, should make every citizen or group of people human rights vigilantes.

The purpose of such a section is right in the section itself. It is that in the long run human rights might be promoted, protected and enforced, through a proper grievance redress system. Definitely a narrow construction is outside the spirit of this provision which, on its correct reading and understanding, wants a respect not for particular rights but a corpus of rights, the rights regime in general. No authority or individual must be allowed to meddle with the rights regime. That is why section 15(2) uses the plural 'rights.' This is underscored by section 46. Subsection 1 provides:

"Save in so far as it may be authorised to do so by the constitution, the National Assembly or any subordinate legislative authority shall not make any law and executive and agencies of government shall not make any action which abolishes, abridges the fundamental rights and freedoms conferred by the chapter and any law or action in contravention thereof shall to the extent of the contravention be invalid."

Subsection 2 reads;

"Any person who claims that a fundamental right or freedom guaranteed by this constitution has been infringed or threatened shall be entitled (a) to make application to a competent court to enforce or protect such a right of freedom and (b) to make application to the Ombudsman or a Human Rights Commission in order to secure such assistance or advice as he or she may reasonably require."

Subsection 3 says;

"Where a court referred to subsection 2 (a) finds that right or freedoms conferred by this constitution have been unlawfully denied or violated. It shall have the power to make any orders that are necessary and appropriate to secure the enjoyment of those rights and freedoms and where a court finds that a threat exists to such rights or freedoms it shall have the powers to make any orders necessary and appropriate to prevent those rights and freedoms from being unlawfully denied or violated."

Subsection 4 states;

" A court referred to in subsection 2 shall have the power to award compensation to any person whose rights or freedoms have been unlawfully denied or violated where it considers it to be appropriate in the circumstances of a particular case."

Section 46 establishes a scheme for protection of fundamental human rights. This scheme undermines the restrictive interpretation of section 15(2). The scheme is comprehensive.

It provides a better and replete scheme of insuring fundamental rights, once violated, are enjoyed fully and, through the compensation system, properly redressed and recompensed.

Only a passing comment should be made about subsection 1. The constitutional framers thought the first step to ensure enjoyment of these rights was to enjoin lawmakers by prohibiting and constraining passing of legislation that undermines constitutional rights. Equally subsection 1 circumscribes executive actions and decisions within the spirit and countenance of the fundamental rights the Constitution enshrines. The scheme comprehensively prevents legislation and executive policies and actions undermining fundamental rights the Constitution protects.

Subsection 2, in my judgment, the locus standi provision, equips the citizen with the powers and mechanisms which in the long run promote rights generally and not a particular right violated. One, therefore, has to look very carefully at the wording of subsection 2. In particular one should look at the specific words that indicate the framer's intention without first considering the policy choices or implications following from adopting a particular interpretation.

The introductory words to this subsection are significant and consequential. The introductory words in this section are 'any person who claims that the fundamental rights or freedom protected by this constitution'. 'Any' means any. The interpretation of these words can be two folds; First the wording can mean that the claimant's own right must be violated. That is possible. If the constitutional framers intended this result the apt wording instead of the word 'a' was 'Any person who claims that 'his,' 'her' or 'one's' right protected by this constitution has been violated." This is not how the constitutional framers worded the provision. They used general words, words broad enough to encompass the possibility that the claimant's rights need not necessarily be violated. The article 'a' in the subsection is significant. It pushes the focus of the provision to the importance of the right while recognising the victim of such violation. Consequently, a person who notices that a right is violated can go to court, to the Ombudsman or Human Right Commission to protect or enforce that right. On close reading of this section, it would be reading and introducing into constitutional provision a proposition that might not be justified to suggest that the section requires a claimant's rights be violated if the Court, the Ombudsman and the Human Rights Commission are to assist her.

The scheme of remedies in subsections 3 and 4 render this rendition correct. Only courts can give the orders in subsection 3 and 4. Nothing in the subsections suggests the Ombudsman or the Human Rights Commission can make the suggested orders. The rule of interpretation is what has been excluded was meant not to be included. If they intended them to make these orders the framers would have included the Ombudsman and the Human Rights Commission in subsections 3 and 4. Subsection 3, irrespective of whether the claimant is the victim of the violation or not, empowers the court to make all sorts of orders against anybody curtailing enjoyment of rights. If, as here, another citizen has not enjoyed a particular right and, for some reason has not pursued or cannot pursue a rights, a court, on application of another or the person whose rights are violated, can mete the

orders that bring full enjoyment of the rights. When we come to subsection 4, a court cannot award compensation to a claimant whose rights have not been violated. Where the applicant is a person other than one whose rights are violated, courts are empowered only to mete orders to improve and resume enjoyment of violated rights. The courts cannot compensate such a claimant. The court can only award compensation to the person whose rights are violated. This sounds tautological. The wording and scheme of remedies prove the limited interpretation of sections 15(2) and 46 unjustified.

There are two policy objections to this interpretation. First, is the fear that the interpretation could result in inundation in the court by activists and busybodies who, on any mishap by government, public bodies or private citizens in following fundamental human rights under the Constitution, would come to the courts in matters which strictly speaking are not their business. Secondly it is wonderful that strangers should be allowed to prosecute and promote rights. Both arguments are valid. There are however counter arguments.

As regards inundation, the assumption is that generally people rush and prosecutes rights for others for the fun of it. This is not true. Litigation costs, delay and backlog in the long run prevent a rush on the judicial system. More importantly, the reason presupposes that this rule produces the suggested outcome. This is not some sure premiss. Experience suggests otherwise. World over political parties(Germany in 2001 and Malawi 1995), interest groups pressure groups or individuals take this step where there is an apprehension some important issue is at stake. Allowing for such a rule in practice introduces better chances for protection of fundamental rights. This interpretation accords with the general policy direction and purpose underlying the new constitutional arrangements.

The second reason has similar countermanding arguments. It is premised on that it is a wrong policy to require others to prosecute and enforce others' rights. On the face of it the approach is not wrong. Practically history shows that, when the state machinery or powerful social institutions want to have their way, the best they do is by physical detention or other interference prevent others from pursuing rights which on the face of it public officials have withheld. More significantly the cost of litigation might prevent successful prosecution of blatant and obvious fundamental rights violations. It is from this perspective that one sees the benefits of an interpretation giving wider standing to enable others in a better and pivotal position to enforce fundamental rights that our Constitution gives and wants them carried out and protected by those called upon to give them to the citizen. Such approach existed only for one form of remedy, a habeas corpus, in the previous constitutional arrangement. The new arrangement, in my judgement, transposes this generally because of the status and respect the Constitution gives to fundamental human rights.

This approach in not new. Even in a country with strict parliamentary constitutionalism like the United Kingdom, the House of Lords is reluctant to put this kind of restriction on locus standi. There is now a growing understanding that citizens, who see serious wrongs by those given constitutional and statutory powers, are not prevented from ensuring that public officials exercised power correctly by a rule which strictly speaking is rule of

practice or adjectival law. A lot of the consequences of producing substantial justice between citizens and those who exercise power cannot be compromised by a rule that restricts the rights of citizens to address wrongs that political institutions are perpetrating against citizens. Our constitution requires an interpretation that regards international precedents. On reading sections 15(2) and 46 it is clear the constitutional framers never intended the restrictive interpretation. This is the approach in England and Wales. There is preference for the general approach against the limited approach.

Both these interpretations come to the fore in the case at hand. On the one hand is that whatever the public officials did relate to Peter Okeke. If what the applicant complains here about is strictly construed and the restrictive interpretation as locus standi is adopted it will be difficult for the applicant here to have the remedy she seeks unless, of course, if the relationship to her husband constitutes a sufficient interest for purposes of section 15(2). On the other hand, she contends that the public officials' decisions violated her own rights to marriage. If that is true, she has standing under both the restrictive and liberal approach advocated in this matter.

This calls for a definition of sufficient interest in the constitution. That is really a matter of construction. In my judgment it is a question not based on any precise understanding of what the words might mean. Whatever definition is arrived at it maybe very constricted. It is because such a definition must be so encompassing as to cover and countenance factual situations incapable of precise definition. It follows therefore that the sufficient interest will not be determined as a matter of linguistic construction. It will turn out on facts of the particular case which should themselves be established on the relationship between the parties and the activity complained of. The words sufficient interest are the words used in the section 31(3) of the Supreme Court of Appeal Act 1981 in England and Wales in relation to the power of judicial review. On the actual wording of the section, the authors of the Supreme Court Practice, 1995 ed., Sweet and Maxwell say this about the purport of the section:

"The overriding rule governing the status of the applicant to apply for judicial review is that the court must consider that he has sufficient interest in the matter to which the application relatesfrac14If the applicant has a direct personal interest in the relief which he is seeking he will very rightly be considered as having the sufficient interest in the matter in which the application makes. If however the interest in the matter is not direct or personal but is a general or public interest, it will be for the court to determine whether he has the requisite standing to apply for judicial review. Clearly, the formula sufficient interest is not intended to create a class of person popularly referred to as a private attorney generals who seeks to champion public interests, in which he is not himself directly or personally concerned under the guise of applying for judicial review. "

It is clear from this comment that persons in direct connection with the matter the subject of the application has a sufficient interest depending on the circumstances of the case although the one with a direct personal interest in the matter the subject of the application is likely to be considered to have a sufficient interest. The wording of section 31(3) of the Supreme Court of Appeal Act 1881 differs from that in section 15(2) of our Constitution.

The Supreme Court of Appeal Act requires a person have a sufficient interest in the matter to which the application relates. A sufficient interest under our constitution is not in relation to the matter to which the application relates. The applicant must have a sufficient interest in the protection and enforcement of rights. The construction under our Constitution is wider than that the interest must be in the matter to which the application relates. This is what I suppose prompted Lord Justice Roskill in R v Inland Revenue Commissioners, ex parte National Federation of Self Employed and Small Businesses Ltd. [1982] A C 617, 659, to approve the suggestion that the question of what is a sufficient interest in the matter to which the application relates is a mixed question of fact and law, question of fact and degree and the relationship between the applicant and the matter to which the application relates having regard to all the circumstances of the case.

Even on Lord Roskill's construction of the words in section 31(3) of the Supreme Court of Appeal Act 1981, the applicant here is not a private attorney general enforcing a public interest issue. Obviously the decision to detain and deport her husband has a direct impact on her life. There is sufficient connection between the applicant and the matter which the application relates. It is however incorrect to transpose words in an English statute to supplant the wording in section 15(2).

For the applicant here, if the construction is as I advocate, there is no problem. Indeed, as we see shortly, Mr. Okeke's fundamental rights were violated. On the construction I advocate the applicant or indeed any person could come to court to ensure Mr. Okeke enjoyed his rights. It is to overcome the difficulties mentioned following from the restrictive construction that the applicant here resorts to her own bundle of rights to overturn the immigration Officer's decision. The consequences are that her husband would be allowed to enter the country so that she enjoys her full rights. Under the construction advocated, there is no impediment to the applicant here to come to a court of law and question the immigration officer's decision which, as we see shortly, was incorrect.

The applicant here thinks that the Immigration officer's decision apart from violating her husband's violated her own rights to marriage, her right to the husband's consortium and the right to be nurtured and taken care of her by her husband. Mr. Kasambara, appearing for the applicant. , is right that the decision here undermined the applicant's rights under the Constitution and the general law. I am indebted to Gubbey, C.J., s remarks in the Zimbabwe Supreme Court in Salem v Chief Immigration Officer Zimbabwe and another, (1995) 4 SA 280ZC. The applicant in there met her husband, a British subject, early 1992 on a working holiday in South Africa. They married in Harare on 16th April 1994. They decided they should fix their place of abode in Harare. That is where the wife's relations and kindred were. Her husband applied for a resident permit. The Chief Immigration Officer refused the application and required the applicant's husband to leave the country to wait for a resident permit. The wife applied to quash the decision based on an earlier Supreme Court of Appeal decision confirming her right to live with her husband. The Chief Justice said:

"In the recent decision Ratiggan and Others v Chief Immigration, Zimbabwe, and others SA 64/94(not yet reported) this Court declared that a female citizen of Zimbabwe,

married to an alien, being a national of another country, is entitled by virtue of the protection of freedom of movement under section 22(1)(in chapter III of the Constitution of Zimbabwe to reside permanently with her husband in any part of Zimbabwe. For to prohibit the husband of a marriage genuinely entered into with the mutual intention of establishing consortium ominis vitae, from residing in Zimbabwe would undermine and devalue the exercise of the fundamental and an unqualified right of the wife, as a citizen and member of a family unit, to live here."

There has always been a reciprocal duty of support between spouses as was observed in Woodhead v Woodhead (3) SA 138 (SR) at 139H-140A, McKelvey v Cownu No. 1980 (4) SA 525 (Z), 526G and Witham v Minister of Home Affairs 1989 (1) SA 117(ZH), 131F-G. The Honourable Chief Justice observed that in practice the duty to maintain the household rests primarily on the husband. The husband has to provide the matrimonial home, fend for the family and provide nourishment and medical and dental care. Generally he cannot desist from this responsibility by insisting that the wife's relations, friends or charity are helping the wife. The Honourable Chief Justice went on to say:

"It follows in my view that unless the protection guaranteed under s 22(1) of the Constitution embraces the entitlement of a citizen wife, residing permanently with her alien husband in Zimbabwe, to look to him for partial or total support, depending upon her circumstances, the exercise of her unqualified right to remain residing in the country, as a member of a family unit, is put in jeopardy."

Apart from the general law and constitutional provisions emphasizing the rights of spouses and citizens to family, there are international instruments setting standards and aspirations which our legal system must aim to achieve. These obligations require our legal system to adopt systems of laws that accord citizens these rights and reduce likelihood of undermining these rights. These instruments require authorities of member countries not to undermine these standards and principles in decisions affecting citizens.

The Mauritian government passed a law to remove the right of residence and immunity from deportation from alien husbands married to Mauritian women. The united Nations Human Rights Committee in Aumeeruddy Cziffra and others vs Mauritius, (1981) 62 International Law Reports 255, 293-294 said:

"The committee takes the view that the common residence of husband and wife has to be considered as the normal behaviour of a family. Hence, and as the state party has admitted, the exclusion of a person from a country where close members of his family are living can amount to an interference in the meaning of article 17. In principle article 17 (1) applies also when one of the spouses is an alien. Whether the existence and application of immigration laws affecting the residence of the family member is compatible with Covenant, depends on whether such interference is 'either arbitrary or unlawful' as stated in article 17(1) or conflicts in any other way with the State party's obligation under the Covenant."

Moustaquim vs Belgium (1991) 13 EHRR 802 and Belgouri vs France 1992 14 EHRR

1802 were decisions of the European Commission on Human Rights following a charter that entrenches similar rights to ours. There the deportations based on that the applicant had an appalling criminal record. The European Court of Human Rights held that, in the particular circumstances of his close family ties in the country, the deportation likely compromised continuation of family life and accordingly amounted to an interference with the right to respect for family life.

The decisions illustrate the length the court takes to preserve the rights of spouses and others to family. In the Belgium and French references, the spouse's rights to enjoy a normal family life were trumpeted against public policy concerns of the deportees criminal record. In the Mauritian case, the United Nations Human Rights committee criticised application of arbitrary immigration laws clearly interfering with family rights. This begs the question whether the public officials acted arbitrarily to Mr. Okeke.

The reasons for arresting and deporting Mr. Okeke appear ununderstandable. If, as the applicant suggests, the only reason the applicant was arrested and detained is because Mr. Okeke is a Nigerian who, according to immigration officers, like most Nigerians, is apt for mischief, the applicant is justified, in a sense, to think that the decision discriminated against her husband. I have concluded that this was not true. I agree with the Chief Immigration Officer that he arrested and subsequent deported Mr. Okeke because Mr. Okeke never had a visa to enter Malawi. The premise of course is that Nigerians entering Malawi must have a visa.

One thing never happened here which, for reasons appearing later, is significant. The Immigration Act itself requires immigration authorities to give the deportee in writing the reasons for deportation. The Chief Immigration Officer does not suggest this was the case. In view of the applicant's assertions I am reluctant to presume regularity on by public officials. Apart from the constitutional requirement that reasons for administrative action must be in writing, it was important here to give a written notice to Mr. Okeke. This written notice sets out the Appeal procedures under the Immigration Act. The immigration official's failure to give a written notice might have and did in fact jeopardise Mr. Okeke's and the applicant's right to utilise the appeal process the Act created. The written notice of the reasons for deportation should have indicated to the deportee the presence and process of the appeal procedure. This omission is crucial for another important reason.

As Sir John Donaldson, M R says in R v Epping and Harlow General Commissioners, ex parte Goldstraw [1983] 3 All ER 257, 262 says, "It is a cardinal principle that, save in the most exceptional circumstances [the jurisdiction to grant judicial review] will not be exercised where other remedies were available and have not been used." In R v Chief Constable of Merseyside Police, ex p. Calveley, [1986] 1 All E R 257, however, the Court of Appeal showed willingness to proceed by judicial review where there were special circumstances. There the procedure omitted was a serious breach of the regulations that the Court was willing to proceed though the applicant did not exhaust the alternative under the regulations. In this matter failure to give notice in writing to a deportee, the result of which is that the deportee is unaware of the reasons and, more importantly, the existence of an appeal procedure, is reason enough for this Court, in spite that the appeal

procedure was not followed, to grant relief by judicial review.

Here, even for the reason the Chief Immigration Officer suggests, Mr. Okeke's deportation was beyond the powers of the Chief Immigration Officer, and unreasonable according to Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1947] 2 All E R, 680. The Chief Immigration Officer's decision to deport Mr. Okeke for not having a visa for entry into Malawi was erroneous. It has not been suggested that the schedule to the Immigration Act has been amended. Curiously both counsel never raised this aspect.

The schedule to the Act lists Nigeria as one country whose national's entry into Malawi does not require a visa. It might be that Nigeria under its laws requires Malawians entering Nigeria to have a visa. On reciprocity Malawi should have similar limitations on Nigerian nationals. That however requires amending the law. The Chief Immigration Officer therefore could not properly deport Mr. Okeke because Mr. Okeke required a visa to enter Malawi. That decision was beyond the law and unreasonable on the Associated Provincial Picture Houses Ltd vs Wednesbury Corporation principle. Associated Provincial Picture Houses Ltd vs Wednesbury Corporation was a Court of Appeal decision approved by the House of Lords in R vs Hillingdon London Borough Council ex p. Puhlohofer [1986] a C 484. In the House of Lords the Lord Brightman, in a speech in which the other members of the House agreed, said:

"The ground on which the courts will review the exercise of an administrative discretion is abuse of power, e.g., bad faith, a mistake in construing the limits of the power, a procedural irregularity or unreasonableness in the Wednesbury sense frac14 ie unreasonableness verging on absurdity frac14"

As Lord Green, M R, himself observed in Associated Provincial Picture Houses Ltd vs Wednesbury Corporation, decisions of persons of or bodies performing public duties or functions will be quashed or dealt with under judicial review proceedings where the court concludes that the decision is such that no such person or body properly directing itself on the relevant law and acting reasonably could have decided.

On the law as it was, no reasonable Chief Immigration Officer would have deported the applicant. Regardless, given the family ties just mentioned, the Chief Immigration Officer could have considered the applicant's rights mentioned before deporting Mr. Okeke. The immigration officials in deporting never considered Mr. Okeke family connections to Malawi. A court will quash a decision if a body or authority performing public functions fails to consider matters pertinent to the decision. On the principles indicated, the Chief Immigration Officer should have leaned toward preserving rights the applicant complains, correctly in my view, were violated by the public officials' actions.

Mr. Kasambala raises a line of argument based on section 9 of the Malawi Citizenship Act. He submits that section 9 discriminates against women and is therefore unconstitutional. The matter does not arise on the facts before me. It is unnecessary to decide it.

I therefore quash the order of the Chief Immigration Officer refusing Mr. Okeke entry into Malawi. The claim for damages is reserved for evidence and argument.

Made in open court this 8th Day of July 2001

D F Mwaungulu
JUDGE