IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

MISCELLANEOUS CIVIL CAUSE NO. 313 OF 2005

In the matter of Section 10(5) of the Refugees Act (Cap 11.04) of the Laws of Malawi

BETWEEN:

KAMBININGI KHAZI JONES & 14 OTHERS..……………………….PLAINTIFFS

\- and –

THE REFUGEE COMMITTEE
(THE ATTORNEY GENERAL)……………..……………………..DEFENDANT

CORAM: CHIMASULA PHIRI J,
Mrs Kachale for the defendant
Mr Masiku of counsel (absent) for the plaintiffs
Mr Mchacha, official interpreter

O R D E R

Chimasula Phiri J,

The plaintiffs were granted leave to apply for judicial review under Order 53 of the Rules of the Supreme Court. The decisions to be reviewed were that of the Refugee Committee which had revoked the plaintiffs refugee status and also the order deporting the plaintiffs. In granting leave to the plaintiffs, the court ordered a stay of the deportation order pending the hearing of the

plaintiffs' appeal to the Minister. The court in essence granted an injunction in favour of the plaintiffs that they be allowed to continue enjoying their refugee status until the determination of their appeal by the Minister. The leave for review included an order that the hearing of such appeal be expedited. The order was made on 30th November 2005.

On 21st December 2005, the Attorney General took out a summons to set aside the injunction and leave to move for judicial review. The defendant sought several orders on the basis that there had been material non-disclosure on the part of the plaintiffs and that it was an abuse of powers of the court to commence such action by way of judicial review. The defendant further sought the dismissal of the plaintiffs action on the ground that the balance of convenience lies against the grant of the injunction. Lastly, the defendant wanted the order to be vacated because at the time the injunction was granted restraining the Refugee Committee from deporting the plaintiffs, the plaintiffs had already been deported i.e. the order had already been executed. The defendant's application is supported by several affidavits. The affidavit of Miss Sarah Nayeja who is the legal advisor to the Refugee Committee confirmed that the plaintiffs were granted refugee status by the Malawi Government. However, the plaintiffs have been of unruly behaviour and caused problems in Dzaleka Camp. The plaintiffs have been writing letters to foreign embassies, UNHCR headquarters in Geneva, Human Rights Organisations, Anti-Corruption Bureau and publishing articles in the local press accusing the Government of being corrupt and abusing human rights. These have been exhibited. The behaviour of the plaintiffs has been a topical issue in so many fora since 2001. Some of the plaintiffs were convicted of intimidation after camp management presented their complaint to court. The plaintiffs appeared before the Refugee Committee to show cause why they should not be striped off their refugee status and be deported. She stated in her affidavit that the plaintiffs are a threat to national security and public order. The plaintiffs were served with revocation letters between 4th the 8th November 2005 because they were evading service. They were handed over to Immigration officials for deportation. Exhibits relating to the revocation orders are attached to the affidavit.

There is another affidavit of McBobby Balaza, who is Repatriation Officer in the Department of Immigration. He stated that upon being handed over the revocation letters in respect of the plaintiffs status he commenced the deportation process and has exhibited

documents relating to three stages, which were done. On 20th November 2005, he assigned six immigration officers to take the plaintiffs to Mozambique Border after consultations with the plaintiffs. There is an indication that the plaintiffs had indicated that they had relatives in Mozambique and they wanted to be deported to that country. Each one of the plaintiffs was issued with a notice that they were prohibited immigrant to Malawi.

The affidavit of Winston Nawanga, who was Senior Camp Administrator at Dzaleka Camp shows that he received letters of revocation to be served on the plaintiffs. He has confirmed that some of the plaintiffs run away to avoid being served with the letters. Eventually all the plaintiffs were served with the revocation letters. This is corroborated in the affidavit evidence of Msanje Ng'oma, the Assistant Camp Administrator, Asham Abel Moyo, the Chief Security Officer and Wilson Chandema of Dowa Police Station.

Lastly, the affidavit of Hastings Ndewele of Immigration states that he took the plaintiffs on 20th November 2005 from Maula Prison to Mozambique Border, which is situated between Lizulu and Biriwiri, deported the plaintiffs into Mozambique, and left them into that territory.

The plaintiffs' counsel did not file any affidavit in opposition. There were no skeleton arguments from the plaintiffs. The defendant was represented by Mrs Kachale at the hearing. The defendant filed skeleton arguments. At the hearing, the court was informed that counsel for the plaintiffs had communicated with the defendant's counsel that the matter could be proceeded with in his absence. I can only guess that counsel for the plaintiffs did not want to embarrass himself for a number of reasons. In the absence of affidavit in opposition and skeleton arguments, it would be against the practice to allow him to be heard. Even if he was to be heard, it was quite clear from the affidavit in support of this application that the plaintiffs had given misleading information bordering on a lie to their counsel.

The issues to be determined in this mater are whether this court ought to strike out these proceedings. Secondly, whether this court ought to vacate the injunction.

The application for leave for judicial review, being made *ex-parte*, must disclose all material facts i.e. demonstrate **uberrima fides** and if leave is obtained on false statements of material facts in the affidavit, the court may refuse an order on that ground alone. See **R v Kensington Commissioners** *ex-parte* Poling [1917] 1 K.B. 406; **R v Barn ex-parte Vernon** [1990] 102 LT 860 and also **The State v Speaker of the National Assembly ex-parte Mpinganjira etc,** Civil Cause Number 3140 of 2001(unreported). In **Rep v Jockey Club Licensing Committee ex-parte Wright** [1991] COD 306 QBD the grant of leave to move for judicial review was set aside on the grounds of material non disclosure on the part of the applicant.

The plaintiffs did not disclose to the court that the defendant had already deported them and declared them illegal immigrants by 20th November 2005. Indeed the plaintiffs illegally came back into the country and then applied to the court for an order restraining the defendant from carrying out a decision that had already been carried out.

However, the court could have been assisted if counsel for the defendant had considered and submitted on the 1951 Geneva Convention relating to the Status of Refugees and its 1967 New York Protocol. Malawi signed and ratified this Convention in 1989 in the wake of an influx of refugees from Mozambique. The Convention is a tool for the administration of refugees and the protection of rights.

Article 32 of the Convention, 1951 makes provision for expulsion of a refugee. It states that the contracting States shall not expel a refugee lawfully in their territory save on ground of national security or public order. In the affidavit evidence of Sarah Nayeja it is abundantly clear that the plaintiffs posed a great threat to national security and public order in Malawi. I will not go into detail because even the first citizen was threatened by some of these plaintiffs in writing. The assumption I make is that the plaintiffs were properly striped off their refugee status and repatriated to Mozambique.

The issue of injunction staying implementation of deportation order seems to have been made in circumstances whose implementation was impossible. The order was made on 30th

November 2005 when actually the deportation had been done on 20th November 2005. The plaintiffs were declared prohibited immigrants. This means that they were not supposed to come back to Malawi. In their own way they returned to Malawi and instructed their counsel to challenge the deportation order. With respect, these plaintiffs were no longer refugees but illegal immigrants and had no **locus standi** to make the application for leave to proceed on judicial review as well as the interlocutory injunctive relief. At the time the plaintiffs applied for leave for judicial review, they failed to disclose this material fact. Indeed this material non-disclosure by the plaintiffs is so grave that it renders the order of the court **void ab initio.**

I have carefully considered the principles governing the grant or refusal of interim injunction set out in the leading case of **American Cynamid vs Ethicon Limited** [1957] AC 396. I hold the view that the plaintiffs as illegal immigrants did not have any right to protect. Therefore there was no serious legal question to be determined by the court.

In the circumstances I allow the defendants application as prayed for in the summons.

The issue of costs has exercised my mind. Normally costs follow the event. However, the court has wide discretion in such matters. I do not consider these plaintiffs to be men of substance at all. Therefore I order that each party shall pay its own costs.

MADE in chambers this 29th day of December 2005 at Blantyre

Chimasula Phiri
JUDGE