IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY

CONSTITUTIONAL CAUSE NO 5 OF 2006

BETWEEN:

THE STATE

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS ……………… 1ST RESPONDENT

AND

THE LILONGWE CHIEF RESIDENT MAGISTRATE………… 2ND RESPONDENT

AND

THE INSPECTOR GENERAL OF POLICE …………………… 3RD RESPONDENT

AND

EX-PARTE RIGHT HONOURABLE
DR. CASSIM CHILUMPHA, SC….……………………………… … APPLICANT

CORAM: HONOURABLE JUSTICE A.C. CHIPETA
HONOURABLE JUSTICE H.S.B. POTANI
HONOURABLE JUSTICE M.L. KAMWAMBE

Assani, Of Counsel for the Applicant
Nyimba, Of Counsel for the Applicant
Ching'ande, Of Counsel for the Applicant
Chokotho, Of Counsel for the Applicant
Phiri (Ms), Of Counsel for the Applicant
Professor Jeffrey Jowell QC, of counsel for the Respondent
Matenje, Solicitor General and Ag. Attorney General, of counsel for the Respondent
Kanyuka (Mrs), Senior Deputy Chief State Advocate, Of Counsel for the Respondent
Jere, Officer Interpreter

RULING

In the last General Elections that took place in this country in May 2004, the applicant, Dr. Cassim Chilumpha, SC, was paraded as a running mate to the incumbent President who emerged winner in the Presidential Elections as a result of which the applicant became the Vice President of Malawi. While serving as Vice President the applicant was on 28th April 2006 arrested on allegations of treason and conspiracy to murder contrary to sections 38 and 227 of the Penal Code respectively. Subsequently on the 9th May, 2006, he was taken before the Lilongwe Chief Resident Magistrate Court where he was committed to the High Court for trial. He later made an application for bail before the High Court which resulted in his conditional release from custody but effectively he was put under house arrest. The order for his conditional release was made on 15th May, 2006.

Unhappy with the events that befell him, the applicant on 19th May, 2006, sought the leave of the court to commence judicial review proceedings against the Director of Public Prosecutions, the Lilongwe Chief Resident Magistrate and the Inspector General of Police who are the 1st, 2nd and 3rd

Respondent herein in that order. The Judicial review proceedings were for purposes of challenging his being arrested, charged and committed. The application for leave was heard *inter-partes* and leave was granted with specific directions on the conduct of the judicial review proceedings.

As the matter stands now, there is voluminous documentation filed largely because after leave was granted, the applicant sought amendments to the reliefs and grounds thereof. Indeed the matter bears a different complexion from the original focused application presented to the court at the time leave was granted. The matter now covers extensive ground. We are now faced with the daunting task of identifying those matters which fall within the ambit of judicial review. This we have to do lest we go beyond the jurisdiction bestowed upon us by order 53 of Rules of the Supreme Court which governs judicial review under the guise of exercising unlimited jurisdiction conferred by section 108 of the Constitution. The point being made is that we fully recognize that judicial review is a specific type of remedy available only in specific instances.

Judicial review, as currently understood and accepted, is a procedure for the exercise by the High Court of its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals, or other persons or bodies which perform public duties or functions. (See Practice note 53/1-14/1 under order 53 rules 1 to 14 of the Rules of Supreme Court). As aptly put by Lord Hailsham L.C. in *Chief Constable of North Wales Police vs Evans* (1982) I WLR 1155 at 1160, judicial review is concerned with reviewing, not the merits of the decision the application relates to, but rather the decision – making process. (See: note 53/1 – 14/6). In the application before us, to avoid reviewing what the law forbids us to so review, we should really be looking for proceedings and/or decisions, conducted or made by inferior courts or tribunals or by persons or bodies performing public duties or functions, and only when we find such should we check whether the decision-making process in them calls for the proposed review.

The way judicial review has developed is such that the court can only fault the decision – making process in the qualifying proceedings and decisions if the concerned court or tribunal or public authority: -

(1) had no jurisdiction to act or acted *ultra-vires* its powers,
(2) did not follow the rules of natural justice where such rules apply, made an error of law on the face of the record and/or
(3) displayed unreasonableness in the *Wednesbury* sense in the conduct of the proceedings or the making of the decision.

Thus, our duty is to use the above tests only to those proceedings and/or decisions complained of by the applicant that undoubtedly qualify. As for complaints relating to actions or omissions that do not quite qualify into the types of proceedings or decisions the law targets, we shall leave them aside for being raised in a process that is not appropriate for them.

When one looks at the initial documents filed by applicant more especially the notice of motion for judicial review, the supporting affidavits and the reliefs prayed for and the grounds thereof, it is quite evident that the matter largely stems from the applicants belief and conviction that as a sitting Vice President he enjoys immunity from criminal prosecution.

According to the amended Form 86A which contains the proceedings and/or decisions in respect of which the applicant is seeking relief being sought and the grounds on which reliefs are being sought, the applicant's case is as follows:-

A. JUDGMENT, ORDER, DECISION OR OTHER PROCEEDINGS IN RESPECT OF WHICH RELIEF IS SOUGHT

1. ***Decision of the Inspector General of Police to arrest and continue to detain the applicant without informing or adequately informing him of the evidence or any adverse material against him.***

2. ***Decision of the Inspector General of Police to arrest and continue to detain the applicant basing on the alleged tape recordings or CDs alleged to have been recorded without the knowledge of the applicant and without prior judicial authorization.***

3. ***Decision of the Inspector General of Police to arrest and continue to detain the applicant without giving him an opportunity to the applicant to inspect the alleged transcriptions or witness statement, to hear the original tape recordings, to challenge their authenticity during pre-trial police interrogations.***

4. ***Decision of Director of Public Prosecutions to institute criminal proceedings against the applicant basing on the alleged tape recordings that were alleged to have been recorded without the knowledge of the applicant and without prior judicial authorization.***

5. ***The decision of the Lilongwe Chief Resident Magistrate to commit the applicant to the High Court of Malawi without informing the applicant with sufficient particularity of the charge or of evidence or adverse material against him; or giving opportunity to be heard on the committal proceedings.***

6. ***Decision of the Director of Public Prosecutions and the Lilongwe Chief Resident Magistrate to commit the applicant under section 290 of the Criminal Procedure and Evidence Code which is inconsistent with Sections 42 (2) (b), 42 (2) (f) (ii) and (iii), and 43 of the Constitution.***

7. ***Decisions of the Inspector General of Police to withdraw personal security from the applicant following the said arrest and detention.***

8. ***Decision of the Inspector General of Police to arrest and continue to detain the sitting Vice President of the Republic of Malawi on allegation of criminal conduct before first invoking the process of impeachment against him and without producing the tapes or disclosing the identity of the alleged assassin during pre-trial interrogation.***

9. ***Decision of the Director of Public Prosecutions in instituting criminal proceedings against the sitting Vice President of the Republic of Malawi without first invoking the process of impeachment against him, without credible evidence against him.***

10. ***Decision of the Lilongwe Chief Resident Magistrate to commit the sitting Vice President of the Republic of Malawi for trial by the High Court of Malawi in violation of the Constitution of the Republic of Malawi, and without informing the applicant of evidence or any adverse material against him, during the pre-trial inquiry or committal proceedings.***

11. ***The decision of the 1st and 3rd Respondents to arrest and criminally prosecute the applicant on the basis of the alleged tape recording alleged to have been recorded without the knowledge of the applicant's Constitutional rights to privacy, and failing to give the applicant opportunity to inspect or hear the original tape recordings during police interrogations and subsequent committal proceedings violating the right to fair trial and the right to be heard.***

12. ***The decision of the 1st and 3rd Respondents failing to comply with Section 42 (2) (b) of the Constitution which requires them to have brought the applicant to an Independent Court as soon as reasonably possible to be charged or to be informed of the reasons for his further detention.***

13. ***Decision of the Director of Public Prosecutions in withholding the alleged tape recordings, transcripts, witness statements and identity of alleged assassin during pre-trial interrogations apparently on the basis of Section 293 of the Criminal Procedure and Evidence Code.***

B. RELIEFS SOUGHT

1. ***A declaration that the decision of the 1st and 3rd Respondents to arrest and to criminally prosecute the applicant without furnishing him with any or any sufficient particulars of the offence that he committed during the pre-trial stages is unconstitutional, unlawful and therefore void.***

2. *A declaration that the use of tape recordings by the respondents that had allegedly been obtained unconstitutionally or illegally, as a basis of arrest, detention and committal of the court process is unconstitutional, unlawful and therefore void.*

3. ***A declaration that the use by the 1st Respondent of the powers conferred on him by Section 99 of the Constitution of the Republic of Malawi***

in violation of the applicant's Constitutional rights enshrined in Sections 4, 18, 19 (6) (b), 20, 21, 32, 33, 40, 42 (2) (f) (ii) and 43 of the Constitution is unconstitutional, unlawful, unreasonable in the Wednesbury sense, actuated by bad faith and therefore void and invalid.

4. ***A declaration that the decision of the Director of Public Prosecutions in withholding evidence or adverse material against the applicant during pre-trial interrogations and committal process apparently on the basis of Section 293 of Criminal Procedure and Evidence Code is unconstitutional and invalid.***

5. ***A declaration that the decision of the Director of Public Prosecutions and the Lilongwe Chief Resident Magistrate to commit the applicant under section 290 of the Criminal Procedure and Evidence Code is an error of law inconsistent with Sections 42 (2) (f) (ii) and (iii), and 43 of the Constitution, and therefore the said Section 290 of the Criminal Procedure and Evidence Code is invalid.***

6. ***A declaration that the decision of the 2nd respondent to commit the applicant without informing him of the evidence against him or giving him the opportunity to challenge authenticity of the alleged tapes and cross examine the alleged assassin at the pre-trial stage is unconstitutional, unlawful and therefore void.***

7. ***A declaration that the decision of the 2nd respondent to commit the sitting Vice President of the Republic of Malawi for trial by the High Court (without informing the applicant with sufficient particularity of the charge***

or informing the applicant evidence against him, and without giving the applicant the right to lawful and procedural fair administrative justice) is unconstitutional, unlawful and therefore void.

8. ***A declaration that the decision of the 1st and 3rd respondents to arrest and to criminally prosecute the applicant without furnishing him with any or any sufficient particulars of the offence that he committed during the pre-trial stages is unlawful and therefore void.***

9. ***An order akin to certiorari quashing the decision of the 1st and 3rd respondents to arrest, continue to detain and prosecute the sitting Vice President of the Republic of Malawi on the ground of alleged criminal conduct in the absence of any or any credible evidence against him in violation of the Constitution of the Republic of Malawi and without first invoking the impeachment process against him as provided by section 86 of the said Constitution.***

10. ***An order akin to certiorari quashing the decision of the 1st respondent to proffer criminal charges against the sitting Vice President of the Republic of Malawi without credible evidence against him and without first invoking against him the impeachment process as provided for under section 86 of the Constitution of the Republic of Malawi.***

11. ***An order akin to certiorari quashing the decision of the 2nd respondent to commit the sitting Vice President of the Republic of Malawi for trial by the High Court in violation of the Constitution of the Republic of Malawi and in the absence of credible evidence against him.***

12. ***An order akin to mandamus compelling the 3rd respondent to immediately unconditionally release the applicant from detention.***

13. ***An order akin to mandamus compelling the 1st respondent to withdraw the said criminal charges.***

14. *An order akin to prohibition permanently staying all proceedings relating to Criminal Case No. 13 of 2006.*

15. ***An order for compensation to the applicant for the damage to his liberty, dignity, personal freedoms, privacy, reputation, humiliation, mental torture and physical pain caused by him by the actions and decisions of the respondents and their violation of his Constitutional rights since his arrest on 28th April, 2006.***

16. ***An order akin to certiorari quashing the decision of the 3rd respondent to withdraw from the applicant personal security following the said arrest and detention.***

17. ***An order akin to mandamus compelling the 1st respondent to withdraw the said criminal charges.***

18. ***A declaration that in view of sections 79, 80, 81, 83, 84, 86, 88 89 and 91 of the Constitution of the Republic of Malawi and the whole Constitution a sitting Vice President is immune to criminal prosecution while still in that office before he is indicted and convicted by impeachment by the National Assembly.***

19. ***A declaration that the decision of the 1st and 3rd respondents to arrest, continue to detain and to prosecute the sitting Vice President of the Republic of Malawi on the ground of alleged criminal conduct without first invoking the process of impeachment against him is unconstitutional, unlawful and unreasonable in the Wednesbury sense, actuated by bad faith and therefore void.***

20. ***A declaration that the decision of the 3rd respondent to arrest and continue to detain the sitting Vice president of the Republic of Malawi on the alleged criminal conduct in the absence of any credible evidence against him, and without producing the tapes or disclosing the identity of the alleged assassin(s) during the pre-trial interrogation is unconstitutional, unlawful and unreasonable in the Wednesbury sense, actuated by bad faith and therefore void.***

21. ***A declaration that the decision of the Inspector General of Police to withdraw personal security***

following the said arrest and detention of the Vice President is unconstitutional, unlawful and invalid.

22. *Further order or relief as the Court deems just and equitable to grant.*

23. *All costs ancillary to these proceedings.*

C. GROUNDS ON WHICH RELIEF IS SOUGHT.

1. ***The decision of the 1st and 3rd respondents to arrest, detain or institute criminal proceedings against the applicant basing on alleged tape recordings that were alleged to have been recorded without knowledge of the applicant and without prior judicial authorization do constitute breach of right to privacy, and therefore the arrest, detention or committal proceedings were unconstitutional and invalid.***

2. ***Failure by both 1st and 3rd respondents to comply with the Constitutional requirements of natural justice and fair trial in their decisions to arrest, detain, institute criminal proceedings and the committal process against the applicant.***

3. ***Violation by both the 1st and 3rd respondents of the duty to act fairly and of the applicant's right to be heard, that the abuse of Court process by the 1st and 3rd Respondents in arresting, detaining and commencing criminal prosecution without furnishing the committing court or the applicant with any tangible evidence.***

4. ***The 2nd respondent acted unconstitutionally in ordering the committal for trial by the High Court of the applicant without complying with the right to fair trial and inform him of***

adequate evidence against him, and the right to rules of natural justice.

5. ***The decisions by the 1st and 3rd respondents to arrest, detain and institute criminal proceedings against the applicant are unreasonable or irrational in the Wednesbury sense and are actuated by bad faith.***

6. ***Error of law by the respondents in their decisions to arrest, detain and institute criminal proceedings and commit the applicant to High Court without complying with Constitutional rights to fair trial which include the right to be informed with sufficient particularity of the charge, and the right to lawful and procedurally fair administrative action.***

7. ***Error of law by the Director of Public Prosecutions and the Lilongwe Chief Resident Magistrate to commit the applicant under section 290 of the Criminal Procedure and Evidence Code which is inconsistent with sections 42 (2) (f) (ii) and (iii) and 43 of the Constitution.***

8. ***Error of law by the Director of Public Prosecutions to withhold evidence or adverse material against the applicant during pre-trial stages apparently under section 293 of the Criminal Procedure and Evidence Code is inconsistent with sections 12 (iii), 42 (2) (f) (ii) and 43 of the Constitution.***

9. ***Want or excess of jurisdiction and violation by the respondent of the Constitution of the Republic of Malawi in their decision to institute criminal proceedings against the applicant and in ordering his committal for trial by the High Court.***

10. ***The use of surreptitious tape recordings whose authenticity has not been verified and infringes the Constitutional right to privacy, as a basis for arrest, and instituting criminal proceedings and committal process, is unconstitutional and invalid and an abuse of Court process.***

11. ***The withdrawal of personal security by Inspector General of Police from the applicant violates section 82 of the Constitution and the President (Salaries and Benefits) Act.***

12. The whole application is based on sections 5, 12 (iii), 15, 46 and 108 (2) as read with section 42 (1) (e) of the Constitution upon which the applicant has the right to challenge the lawfulness of his detention.

As can be seen there are thirteen proceedings or decisions the applicant is complaining about and seeking relief in respect of by way of judicial review. We must state, at this juncture, that we take cognizance and judicial notice of other proceedings in which the applicant is challenging his alleged constructive resignation as Vice President and also proceedings in which he was pursuing the issue of bail. We find it necessary to mention this as it may so happen that matters complained of in the present proceedings may as well be addressed in those other proceedings. Should that be the case, we would be compelled not to deal with them.

We note that there are three public authorities whose decisions are being challenged. We propose that we deal with the decisions of each public authority at a time in the sequence of events as they unfolded, and not necessarily in the order the respondents appear. We should mention, though, that where there are overlapping complaints, they shall be addressed together for purposes of convenience.

The Inspector General of Police who is the 3rd respondent ranks first in the sequence of events as he is believed to be the one who caused the arrest and detention of the applicant. Seven complaints are directed at him, two of which have also been directed at the 1st respondent, the Director of Public Prosecutions. These complaints are numbered under decisions complained of in the statement (Form 86A) as 1, 2, 3, 7, 8, 11 and 12.

We wish to state at the outset that as regards complaint number 7 which relates to the decision of Inspector General to withdraw security detail from the applicant following his arrest and detention, we note that that was already addressed by the court in dealing with the application for bail. Our brother judge, Mkandawire J, had said therein that the Inspector General was to determine on the issue of security detail of the Vice President. What the Inspector General did was to follow this order of the court. We construe the thinking of Mkandawire J. as being that a fully functional Vice President

deserves the whole security detail, and if not functional due to arrest or detention in prison or even at his own house, a practical approach should be taken in considering the necessary numbers required as security detail. We have no intentions to review our brother judge's decision, in any case his decision is not a matter before us for review.

Regarding the decision of the Inspector General to arrest and continue to detain the applicant without promptly and/or adequately informing him of adverse material against him, the applicant is contending that much as section 28 (a) of the Criminal Procedure and Evidence Code gives the police power to arrest without warrant any person suspected on reasonable grounds to have committed a cognizable offence, the section does not conform and augur well with the general spirit of the Constitution more especially section 42(1) (a) and (2) (f) (ii) and also section 43 of the Constitution. The applicant therefore argues that section 28 unconstitutionally abridges the constitutional right to personal liberty, right to be informed with sufficient particularity of the charge and right to lawful and procedural fair administrative action. Stemming from this argument, it is plaintiff's submission that section 28(a) of Criminal Procedure and Evidence Code is unconstitutional and invalid; so too any acts done under it including the arrest and detention herein.

We would first wish to consider whether the manner of arrest and detention of the applicant was done in violation of section 42(1) and (2) (f) (ii) and also section 43 of the Constitution regardless of whether section 28(a) of the Criminal Procedure and Evidence Code is Constitutional or not. We note that section 42 (1) (a) is about the need to inform an arrested person the reasons for his or her detention promptly and in a language that he or she understands. In the affidavit of Inspector Stain Bamusi Chaima, there is exhibited as "SBC" a report by one of the arresting officers that he, the arresting officer, duly informed the applicant right at Mudi house where he was arrested that he was being arrested on allegations of treason and conspiracy to murder. We note, however, that the arresting officer's report clearly states that at that time he did not have full details of the allegations. It is obvious therefore that the applicant was not told details of the allegations. A plain reading of section 42 (1) (a) would show that what is required is to inform the arrested person the reason for his arrest and not necessarily details of the reasons of his arrest. This should be contrasted with section 42(2) (f) (ii) of the Constitution which requires an arrested person to be informed with sufficient particularity of the charge against him during trial. We therefore take the view that on arrest, it is enough to tell the arrested person the nature of the allegations against him and not

necessarily the particulars thereof. It is, though, necessary to give those details and particulars during trial. We therefore find that section 42 (1) (a) was not violated since the applicant was promptly informed the reason of his arrest.

As regards the alleged violation of section 42 (2) (f) (ii), we would wish to note that time has not yet arisen for the applicant to be informed with sufficient particularity of the charge, the charge not having been read out to him yet. This is supposed to happen when trial has commenced as portrayed from that provision's subsection (f) which in part reads: -

> ***"(2) Every person arrested for, or accused of ,the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right- (f) as an accused person, to a fair trial (emphasis supplied), which shall include the right-…"***

All that follows thereunder relates to actual trial period. We find it necessary at this stage to recollect that in his arguments counsel for the applicant sought to move the court to declare section 28 of the Criminal Procedure and Evidence Code unconstitutional and invalid as it does not conform and augur well with the general spirit of the Republican Constitution. We wish to pause for a moment and ask the question whether or not in judicial review proceedings the court should be engaged in the determination of the constitutionality or unconstitutionality of a statutory provision or indeed a statute. We wish to first admit and acknowledge that this question has caused a lot of anxiety in us. However, we have braved to give a stand on it. To begin with, we are guided by the principles that have evolved as regards grounds on which judicial review can be available as well illustrated in Order 53/14/28, namely: -

1. Want or excess of jurisdiction

Where there is an error of law on the face of the record

Failure to comply with the rules of natural justice where they apply and

The Wednesbury principle of unreasonableness.

We have been grappling with the question as how the constitutionality of a statutory provision would fall in any one of the four principles elicited above. To avoid being misunderstood, we are not saying that judicial review cannot lie in a matter bearing on a decision or

proceedings arising from or relating to a constitutional provision or indeed the interpretation of a constitutional provision. Thus, where an applicant believes he has a case for judicial review arising from the exercise of powers conferred by the Constitution, it is a matter which can perfectly be pursued through the judicial review machinery. What we do not accept is that a person who thinks proceedings or a decision made under powers conferred by statute is unconstitutional on account of the statute being in conflict with the constitution can resort to the remedy of judicial review, because, in that scenario he is not necessarily challenging the proceedings or the decision but the statute itself. In that case, the proper recourse, in our view, would be to commence an action through originating summons procedure challenging the constitutionality of the statutory provision. This was the recourse taken in the case of *Jumbe and Mvula v Attorney General* Constitutional Cases numbers 1 and 2 of 2005 in which the applicants successfully challenged the constitutionality of section 25 (b) of the Corrupt Practices Act by way of originating summons. We are therefore persuaded and inclined to hold that we cannot be engaged in the exercise of determining the constitutionality of any statutory provision like section 28 (a) of Criminal Procedure and Evidence Code. By the same token, we cannot entertain the prayers revolving on the constitutionality of sections 289 and 290 of the Criminal Procedure and Evidence Code. Let the applicant and indeed those others agitating to challenge the constitutionality of these sections move by originating summons.

We now have to deal with the complaint relating to the decision of the Inspector General to arrest and continue to detain the applicant basing on the alleged tape recordings or compact discs alleged to have been recorded without the knowledge of the applicant and without prior judicial authorization as outlined in complain number 2. We note that this complaint is exactly the same as that in complaint number 4 in which it is the decision of the Director of Public Prosecutions to institute criminal proceedings based on the tapes that is being challenged. Further, the

complaint is also embedded in complaints number 4 and 11 in which it is the decisions of the Inspector General and the Director of Public Prosecution that are being challenged on the use of the tapes to arrest and institute criminal proceedings. We shall therefore conveniently deal with these three complaints together. It is very apparent on the material before the court that the decisions to arrest and institute criminal proceedings against the applicant were largely based on the alleged tape or compact disc recordings. Exhibit “DCC 2” to the affidavit of the applicant in support of his application, being a government press release on the arrest of the applicant, bears testimony to this fact. The tape recordings, it is the plaintiff’s assertion, were recorded without his prior knowledge or consent whatsoever. He infact denies any knowledge of such tape recordings. The respondents have not in anyway countered the applicant’s allegations. Indeed the respondents have not even attempted to explain how the tape recordings were procured. We would therefore agree with the applicant’s contention that the use of the tape recordings amounted to a violation of the applicant’s constitutional right to privacy as enshrined in section 21 of the constitution, which reads as follows:

“Every person shall have the right to personal privacy which shall include the right not to be subject to: -

(a) ***Searches of his or her person, home or property;***
The seizure of private possessions; or
Interference with private communications, including mail and all forms of communications.”

The question we however need to ask ourselves is whether this violation is amenable to judicial review. To the extent that the decisions to arrest and initiate criminal proceedings against the applicant were based on evidence obtained in breach of applicant’s right under section 21 aforesaid, we are of the conviction that it raises the question of reasonableness, in the Wednesbury sense, of those decisions. The Wednesbury principle explains that decisions of persons or bodies which perform public duties or functions will be quashed or <u>otherwise dealt with</u> *(emphasis supplied)* by an appropriate order in judicial review proceedings where the court concludes that the decision is such that no such person or body <u>properly directing itself on the relevant law</u>

(emphasis supplied) **and acting reasonably could have reached that decision (See *Associated Provincial Picture House Limited v Wednesbury Corporation* (1948) 1 K.B. 223). In the case at hand, we take the view that had the respondents directed their minds to the manner in which the tape recordings were obtained and the law as stipulated in section 21 of the Constitution, they could not have reached the decisions to arrest and institute criminal proceedings. We therefore find that the respondents did not only violate the applicants constitutional right to privacy but also acted unreasonably.**

The issue now begs the question as what would be the appropriate remedy. Much as the applicant's rights were violated, we take the view that, that in itself, would not justify quashing the decision to arrest and initiate criminal proceedings against him for there might be some evidence other than the tape recordings that might substantiate the allegations against the applicant. In any case, the issue of the tape and compact disc recordings is really a matter to do with admissibility or inadmissibility of evidence which can be properly dealt with during trial. Indeed should it so happen that the tapes would not be admitted in evidence, it would just, go to vindicate the applicant's innocence. We therefore consider it appropriate to order that without quashing the decision of the respondents to arrest and initiate criminal proceedings against the applicant, be awarded damages to be assessed by the Registrar of the High Court for violation of his constitutional rights under section 21 of the Constitution.

We now move on to consider complaint number 3 which is against the decision of the Inspector General to arrest and continue to detain the applicant without giving him an opportunity to inspect the alleged transcriptions or witness statements, to hear the original tape recordings and to challenge their authenticity during pre-trial police interrogations. We note that the applicant's complaint number 13 against the decision of Director of Public Prosecutions in withholding the alleged tape recordings, transcripts, witness statements and the identity of the alleged assassins during pre-trial interrogations is similar to complaint number 3 stated above. They shall therefore be disposed of together. The

applicant has presented lengthy and erudite arguments and submissions, and has cited various authorities on the matters raised by these two complaints. The State has not denied that during interrogations, the police did not give him the opportunity to know the nature of the evidence against him so as to enable him to properly respond to the interrogations. Similarly, it is not denied that the Director of Public Prosecutions has also not made available to the applicant the material to be used in evidence against him during trial. Regarding the query against the Inspector General the applicant has cited the case of *Larry Scott Parker and Steven Joseph Stark and 6 Others v Joseph Miller QC for Anti Corruption Commission of Western Australia, Robert Faulkner, Commissioner of Police and Anti Corruption Commission,* Case No. Civil 2345 of 1997. The gist of the applicant's argument is essentially that by failing to disclose to the applicant the nature of the evidence against him, including the identity of the alleged assassins, these two respondents made it impossible for the applicant to effectively respond to the allegations, and thereby denied him the opportunity to be heard in breach of rules of natural justice. This argument seems to be backed by the *Larry Scots Pauker case* in which it was held, among others, that it is a breach of the rules of natural justice and thus a denial to a person of an opportunity to be heard, where information or the nature of the evidence and other adverse material is not provided to an accused by an investigator. This position was also reaffirmed in *Huvig v France* 11105/84 [1990] ECHR 9 at page 20 where it was stated as follows:

> ***"The defence must be able to inspect the reports containing transcription, to hear the original tape recordings, to challenge their authenticity during investigations and subsequent trial and to apply for any necessary investigative measures – such as an expert opinion relating to their contents and circumstances in which they were made.."***

We find these cases highly persuasive and to be in tandem with principles

underlying an open and democratic society, which our constitution seeks to achieve. The applicant has therefore submitted that the police breached sections 42 (2) (f) (ii) and 43 of the Constitution. As we observed earlier, section 42 (2) (f) (ii), strictly speaking, applies to trial stage and not to pre-trial stage. We would however agree with the applicant that the conduct of the police herein amounted to a breach of his right to fair procedural and administrative action, as provided for in section 43 of the Constitution. Nevertheless, despite such violation we wish to observe that the applicant has so far not suffered any prejudice, as what came out in the interrogations has not yet been used in his trial. This being the position, it is our considered view that it would not be appropriate to order any compensation as provided for in section 46 (4) of the Constitution. Rather we find that the appropriate remedy is to nullify the interrogations, which we now do, and to order, which we also now do, that within 14 days from the date hereof the police do give to the applicant the opportunity to see the alleged transcriptions, witness statement(s), and to hear the original tape recordings so as to be in a position to challenge their authenticity, should he be so inclined.

As regards the withholding of material to be used in evidence and the identity of the alleged assassin by the Director of Public Prosecutions, we find it necessary to deal first with the issue of the identity of the assassin. We have directed our minds to policy considerations and practice that allows protection of witnesses in criminal matters in certain instances. This protection may be necessary say for example due to the sensitivity of a given case. It would be pretentious for anyone not to appreciate the sensitivity of the allegations against the applicant. We also wish to state that the non-disclosure of the identity of the alleged assassin, in itself, would not be prejudicial to the applicant in view of our earlier order that the applicant be given an opportunity to listen to the conversation with the alleged assassin. Through hearing such tapes the mind of the applicant would be clear, or it would be open to him whether or not he knows the alleged assassin(s) and/or the circumstances surrounding the conversation(s), if any at all. We therefore find no compelling reason for ordering the disclosure of the identity of the alleged assassin.

Moving on to the withholding of evidential material by the Director of Public Prosecutions, it is acknowledged by the applicant that in terms of section 293 of the Criminal Procedure and Evidence Code, the Director of Public Prosecutions is only obliged to disclose such material at least 21 days before trial. It follows therefore that the Director of Public Prosecutions would only be on his toes to comply with section 293 after a date of trial has

been fixed. Since no date of trial has been fixed and therefore not known, we see no bone of contention.

We propose to combine complaints numbers 5, 6 and 10 which are being made against the decisions of the Chief Resident Magistrate and the Director of Public Prosecutions regarding the committal proceedings the applicant was subjected to. In essence, the applicant is arguing that he was committed without being given sufficient particulars of the charge or evidence against him or without being given an opportunity to be heard in the committal proceedings. Further the applicant contends that section 290 of the Criminal Procedure and Evidence Code under which he was committed is inconsistent with sections 42 (2) (f) (ii) of the Constitution and that therefore section 290 should be declared as invalid.

We have already taken a stand that it is not within our jurisdiction in judicial review proceedings to review the Constitutionality of statutory provisions. That as we have said can be pursued through originating summons procedure.

Regarding the query against the Chief Resident Magistrate's decision to commit the applicant to the High Court the complaint is that the applicant was committed without being given sufficient particulars of the charge, evidence, or adverse material against him and without being given an opportunity to be heard. It is to be observed that under section 290 of the Criminal procedure and Evidence Code, committal is done by way of a certificate issued by the Director of Public Prosecutions under section 289 of the Act. Such a certificate would normally indicate the charges to which it relates. The certificate in this case has not been exhibited so as to enable the court assess whether sufficient particulars were given or not. By their very nature, committal proceedings are such that the production of evidence or adverse material is not a necessity. This is so, we must note, because committal proceedings are a transitory process to trial stage. It is at trial when evidence or adverse material is supposed to be produced. This leads to the complaint that the applicant was not heard during committal proceedings. As we have noted earlier, committal proceedings are transitory in nature. They are a vehicle taking the accused to his trial at which the accused would be given an opportunity to be heard on the charges against him. The point we are making is that during committal proceedings the issue of the accused's guilt or innocence is irrelevant so much so that there is really nothing to be heard on. We thus find no merit in complaints 5, 6 and 10 challenging the committal process.

This far, we have considered decisions or proceedings in respect of which the applicant is seeking relief under all the thirteen heads set out in his statement except those under paragraphs 8, 9 and 12. It will be noted that in some instances we have combined two or more complaints. If we were to follow a logical numerical sequence of the complaints, we would have now moved on to complaint 8 which we note has a close bearing to complaint 9. We however consider it appropriate to first consider complaint number 12 for convenience's sake.

In complaint number 12, the applicant is attacking the decision of the 1st and 3rd respondents' failure to comply with section 42 (2) (b) of the Constitution which requires them to have brought the applicant to an independent court as soon as possible to be charged or to be informed of the reasons of his further detention. What the applicant is complaining of is that the respondents flouted what has become to be known as the 48 hour rule. The rule derives its name from the requirement or stipulation in section 42 (2) (b) of the Constitution that an arrested or detained person should be brought before an independent and impartial court of law in no later than 48 hours after his arrest for him to be charged or to be informed of the reasons for his further detention, failing which he or she must be released.

The facts clearly show that the applicant was not brought before an independent and impartial court of law within 48 hours from the time of his arrest. This undoubtedly contravened section 42 (2) (b) of the Constitution. We also find that since the arresting authority is mandated by section 42 (2) (b) aforesaid to keep an arrested person for not more than 48 hours before taking him to court, by keeping the applicant in detention for more than 48 hours without taking him to court, the 1st and 3rd respondents acted ***ultra-vires.*** Also we find that had the 1st and 3rd respondents properly addressed their minds to the law, that is, section 42 (2) (b) of the Constitution which has become notorious, they could not have acted unreasonably as they did. In other words we find the decision to keep the applicant for more than 48 hours before taking him to court to be unreasonable in the ***Wednesbury*** sense.

However, we note that there were and are still other avenues available to the applicant to seek redress, such as, an application for ***habeas corpus***. In this regard, we take cognisance of the cardinal principle that except in most exceptional circumstances, the jurisdiction to grant judicial review would not be exercised where other remedies were available and have not been used (See ***R v Epping and Harlow General Commissioners, ex p.***

Goldstraw [1983] 3 All E.R. 257. The applicant has not demonstrated in any way that his case is one of those exceptional ones to justify proceeding by way of judicial review when there are other remedies available. We therefore decline to grant judicial review so too the reliefs prayed for.

Finally we move on to consider complaints 8 and 9 which, as we have earlier noted, are interrelated and therefore should be dealt with together. In these two complaints the applicant is complaining against the decisions of the 1st and 3rd respondents to arrest, continue to detain, and instituting criminal proceedings against him, a sitting Vice President of the Republic of Malawi, before first invoking the process of impeachment. Observably, these were the initial complaints the applicant had at the time of commencing the judicial review proceedings. The other complaints, which we have already dealt with, came in later by way of amendments. It is worth noting, at this point in time, that as Counsel for both parties were arguing on these two complaints the issue as to whether or not the applicant, as sitting Vice President, enjoys immunity arose. Indeed it will be noted that although the immunity issue is not specifically raised in any of the thirteen proceedings/decisions against which reliefs are being sought in this matter, it provoked lengthy, spirited, and formidable arguments from both sides in the case, to the extent that an impression has been created that the case is all about the issue of immunity.

We do appreciate that the question of immunity arises because the applicant's stand, as we understand it, is that since section 86 of the Constitution provides for the impeachment process as a means of removing a President or Vice President who violates the Constitution or written laws, the applicant having not been so removed he cannot be amenable to criminal proceedings as he enjoys immunity by virtue of his office. In other words, the applicant's view is that he can only face criminal prosecution after being impeached. The applicant, in his submission, however, acknowledges that whether or not a Vice President enjoys immunity is a matter of constitutional interpretation. Section 91 of the Constitution happens to be the provision that provides for Presidential Immunity. We find it necessary to reproduce the section in its entirety.

> ***"91. (1) No person holding the office of President or performing the functions of President may be sued in any civil proceedings but the office of President shall not be immune to orders of the courts concerning rights and duties under this Constitution.***

(2) No person holding the office of President shall be charged with any criminal offence in any court during his or her term of office, except where he or she has been charged with an offence on impeachment.

(3) After a person has vacated the office of President, he or she shall not be personally liable for acts done in an official capacity during his or her term of office but shall not otherwise be immune.

Comparing and contrasting subsections (1) and (2) of this provision, it becomes obvious that the section caters for two different types of immunity. The first immunity it makes provision for is one against civil suits. On this immunity a plain reading of the material subsection makes it obvious that the immunity conferred is of, and was clearly meant to be of, wide application. The language employed, while first capturing the President, also openly extends to any other person "performing the functions of President". Since this provision categorically states that the President and any such person as performs his functions may not be sued in any civil proceedings, it appears to be beyond debate or dispute that a Vice President, or even for that matter a Minister, whenever "performing the functions of the President" benefits from this provision and enjoys immunity from civil suits.

The second immunity the provision addresses, we note, is one against criminal proceedings. What becomes immediately clear when one reads the material subsection is that it has been couched in a markedly different manner from the way the subsection preceding it has been couched. There is certainly, on the face of it, no immediate or direct hint from the way the subsection comes out that this particular immunity is of or was meant to be of as wide application as the immunity from civil suits just discussed. The language employed unambiguously and specifically captures the President. Unlike in the civil immunity scenario, it makes no attempt, minor or major, to bring within the realm of this immunity, any extra person or persons, whether on basis of performing the President's functions, or on basis of any other criterion. This immunity, provided for as it is, in the subsection following immediately next after the more widely couched civil immunity subsection, it is liable to make one wonder whether it is at all likely that the restricted application it, so prima-facie, projects was incorporated in it by sheer accident of poor draftsmanship, forgetfulness, or omission on the part of the framers of the Constitution. What is and remains plain, however, is that a reading of the section clearly indicates that its subsection on immunity from criminal proceedings only mentions one office, to wit that of the President, as the one upon which this immunity has been conferred, and no other office. Specifically this subsection makes no mention of, or reference

to, the Vice president as a beneficiary of the immunity accorded by it.

The prima facie position notwithstanding, we have been invited by counsel for the applicant to interpret section 91(2) not in isolation, but together with other relevant Constitutional provisions. We shall make specific reference to these other provisions later in this ruling. We have, to start with, been directed to the principles of Constitutional interpretation, and in this regard reference has been made to section 11 of the Constitution and to the case of *Nseula v the Attorney General MSCA Civil Appeal No 32 of 1997*. Section 11 of the Constitution reads as follows:

11. (1) Appropriate principles of interpretation of this Constitution shall be developed and employed by the courts to reflect the unique character and supreme status of this Constitution.

(2) In interpreting the provisions of this Constitution a court of law shall -

(a) *promote the values which underlie an open and democratic society*

take full account of the provisions of Chapter III and Chapter IV; and where applicable, have regard to current norms of public international law and comparable foreign case law.

(3) Where a court of law declares an act of executive or a law to be invalid, that court may apply such interpretation of that act or law as is consistent with this Constitution.

(4) Any law that ousts or purports to oust the jurisdiction of the courts to entertain matters pertaining to this Constitution shall be invalid.

Counsel for the applicant placed particular emphasis on section 11 (1) which he said, rightly so, enjoins courts in the interpretation of the Constitution to develop and employ appropriate principles of interpretation to reflect the unique character and supreme status of the Constitution. He went on to

observe that in pursuance of this provision Banda, C J in the *Nseula* case stated as follows:

> ***A Constitution is a special document which requires special rules for its interpretation. It calls for principles of interpretation suitable to its nature and character. The rules and presumptions which are applicable to the interpretation of other pieces of legislation are not necessarily applicable to the interpretation of the Constitution."***

We are in full agreement with the sentiments quoted above as they augur quite well with section 11 of the Constitution. In any case we are bound by decisions made by the Malawi Supreme Court of Appeal. Thus, we would also agree with the applicant that the Constitution should not be interpreted in a legalistic or pedantic manner, but broadly and purposively, with the aim of fulfilling the intention of its framers. Indeed this was the holding in the *Nseula* case. The point the applicant is driving at is, as stated earlier, that section 91 of the Constitution should not be isolated from other relevant sections of the Constitution, namely sections 79, 80, 81, 83, 84, 86 and 89. Again the *Nseula case* is his point of reference on this aspect, and the words of Banda, C J have been quoted as follows: -

> ***It is an elementary rule of Constitutional interpretation that one provision of the Constitution form all others. All the provisions bearing upon a particular subject must be brought to bear and to be so interpreted as to effectuate the great purpose of the Constitution. Such a construction is imperative because the true meaning of the words used and the intention of Parliament in any statute particularly on a Constitution can best be properly understood if the Constitution is understood as a whole. It is a single document and every part of it must be considered as far as it is relevant in order to get the true meaning and intent of any part of the Constitution. The entire Constitution must be read as a whole without one provision destroying but sustaining the other."***

It has been argued by the applicant that the mere fact that section 91 does not mention the Vice

President is, in itself, not conclusive that he is not entitled to immunity from criminal prosecution while he holds office. To demonstrate the viability of this argument counsel observed that section 84 of the Constitution expressly provides that the office of the Vice President shall become vacant on the death or resignation of the incumbent, yet there is no corresponding provision for the President, and pointed out that that does not mean that the President cannot resign or that when he resigns or dies no vacancy arises. The point being made is that the omission of Vice President in section 91(2) should be looked at as a mere gap which this court can legitimately fill, as was held in *Seaford Estate v Asher* [1949] 2 K B 481, in which Lord Denning stated as follows:

> ***"We sit here to find out the intention of Parliament and of Ministers and carry it out, and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis."***

The argument that the omission of the Vice President in section 91(2) is a mere gap deserving filling, by way of analogy with section 84 of the Constitution which omits the President, sounds very attractive. We are, therefore, duty bound to carefully consider whether indeed the omission of the Vice President in that provision is indeed such mere gap. Should we so find, we will not hesitate to fill it. In this exercise, we must say, we shall look at the Constitution in its entirety, and apply the principles laid down in section 11 of the Constitution and indeed the *Nseula* case.

On the authorities and submissions presented to us by both sides we find that the principle upon which the President is endowed with immunity is not based on any idea that, as is the case in United Kingdom, the King or Queen can do no wrong. Rather it is there to enable the executive head of Government and State to discharge the fundamental powers and duties of running government without having to look

over his shoulders, otherwise the smooth and efficient running of government would not be achieved. In turn this has made it necessary for us to look at the functions and duties of the President and Vice President as stipulated in the Constitution. We note that sections 88 and 89 provide for clearly defined responsibilities and powers of the President. Regarding the Vice President his duties are not specific. They are generally spelt out in section 79 as assisting the President. The Vice President as can be seen has no specific executive functions and powers. His powers are derived principally from the President and they are mutable. Thus, bearing in mind the rationale behind Presidential immunity, the Vice president does not need immunity, as he does not normally directly exercise duties and powers of running the government. The President, as opposed to the Vice President, needs immunity because as was stated in *Nixon v Fitzgerald*: 475 US 731:

> ***"The President's unique status under the Constitution distinguishes him from other executive officials. Because of the singular importance of the President's duties diversion of his energies by concern with private law suits would raise unique risks to the effective functioning of government." (At 751)***

"Nor can the sheer prominence of the President's office be ignored. In view of the visibility of his office and the effect of his actions on countless people, the President would be an easily identifiable target for suits for civil damages. Cognizance of this personal vulnerability frequently could distract a President from his public duties, to the detriment of not only the President and his office but also the nation that the Presidency was designed to serve." (At 752 –3)

Although the quoted passages dwell on private law suits or civil vulnerability, we believe they apply with equal, if not greater, force *vis-à-vis* the risks criminal prosecution of a President would pose against the effective functioning of government.

In our determination of the matter, within the spirit of section 11 of the Constitution and the *Nseula case,*

we note that Chapter III of the Constitution lays down fundamental principles on which the Constitution is founded. Section 12 (vi) provides as follows: -

> ***"All institutions and persons shall uphold the Constitution under the rule of law and no person or institution shall stand above the law."***

From the reading of this provision, it comes out clearly that no person, not even the President and his Vice President, are above the law. The immunity provision should therefore be looked at as a mere exemption to this fundamental principle. In our view therefore section 91(2) should be looked at and interpreted bearing in mind this fundamental principle. We tend therefore to think that any limitation to this fundamental principle must be by express provision. In our view it would amount to the destruction of this very principle in section 12 (vi) of the Constitution, that no person is above the law, if we were to read into section 91(2) the inclusion of the Vice President, as a beneficiary of the immunity it creates, merely under the guise that we are broadly and purposively interpreting that provision. Thus in our view, had the framers of the Constitution intended to depart from the fundamental principle of the Constitution, surely they would have made express provision. It is accordingly our finding on the argument that the omission of the Vice President in section 91(2), on immunity from criminal proceedings, is a mere gap that deserves filling, that the correct legal position is that it is not, and that this omission and the specific mention of only the President in the subsection in question, was a deliberate move on the part of the framers of the Constitution. Our view, therefore, is that the intention of the framers should be respected and given effect.

The second contention by the applicant in aid of his belief and conviction that he enjoys immunity from criminal prosecution, unless impeached, is based on section 83 (4) of the Constitution which reads as follows: -

> ***"(4) Whenever there is a vacancy in the office of President, the First Vice President shall assume that office for the remainder of the term and shall appoint another person to serve as First Vice President for the remainder of the term."***

In brief the applicant is contending that since his conviction and/or imprisonment, if it occurred after a criminal trial, would not, *per se,* remove him from

office, it would mean that in the event of the office of the President falling vacant, while he was so convicted and imprisoned he would end up assuming that office whilst a convict and prisoner, which admittedly would be an absurdity. In other words what the applicant is arguing is that there must first be impeachment proceedings before he, as Vice President, can undergo criminal proceedings. With due respect we find this argument to be naive. We say so because in our view, a responsible and sane National Assembly would, in event of the Vice President being convicted and imprisoned, be expected to at the earliest opportunity initiate impeachment proceedings, considering that serious violation of the written laws of the Republic, per section 86(2) (a) of the Constitution, clearly amounts to a ground for the Vice President's impeachment, among other reasons. Furthermore, in event of conviction of serious crime, on moral grounds, the Vice President would be expected to resign pursuant to section 84 of the Constitution, if for some reason impeachment did not immediately follow. So long as the constitutional answers of impeachment and resignation are available, it would be idle and speculative for the court to dwell on questions such as what if the National Assembly chose to be irresponsible by not initiating impeachment in event of conviction, or what if it declined to impeach the Vice President upon criminal conviction even if impeachment proceedings were commenced. Even if the law does not apply in a vacuum and it is therefore possible to have an irresponsible National Assembly, the court need not be overly imaginative to the extent of drawing itself into dealing with a naïve situation before it has occurred. There should be other ways of dealing with the problem posed, if it arose, than coming up with speculative and advance judgments just in case what is imagined indeed occurs. We therefore find that the absurdity argument that has been advanced before us is merely a creature of imagination, and that it is therefore illusory. We cannot accept it as a basis for finding

that the Constitutional arrangement is such that the Vice President must first be impeached before he can become amenable to criminal proceedings, or that he has immunity from criminal proceedings.

The third argument advanced by the applicant in his quest to demonstrate that he is covered by the immunity covered in section 91 (2) leans on section 80 (7) of the Constitution which reads as follows: -

> ***(7) No person shall be eligible for nomination as a candidate for election as President or First Vice-President or for appointment as first Vice President or second Vice President if that person-***

(a) ***has been adjudged or declared to be unsound mind;***

(b) ***is an undischarged bankrupt having been declared bankrupt under a law of the Republic;***

(c) ***has, within the last seven years, been convicted by a competent court of a crime involving dishonesty or moral turpitude;***

(d) ***owes allegiance to a foreign country;***

(e) ***is the holder of a public office or a member of Parliament, unless that person first resigns***

(f) ***is a serving Member of the Defence Forces or Malawi Police Force; or***

(g) ***has, within the last seven years, been convicted by a competent court of any violation of any law relating to election of the President or election of the members of Parliament.***

We have considered this argument, but we fail to appreciate what bearing section 80 (7) has on the issue of immunity, as the section relates to disqualifications for contesting as President and Vice President.

The other argument canvassed in support of the view that section 91 (2) covers the Vice President is what has been described as the "sameness" in

the treatment of the offices of the President and the Vice President. In this regard the applicant has singled out various aspects pertaining to the offices of the President and the Vice President, which under the Constitution are treated in the same way. These are: -

1. Concurrent election by popular vote under section 80 (4)

Qualification for office under section 80 (6)
Disqualification for office under section 80 (7)
Oath of office under section 81 (1)
Swearing in under section 81 (3)
Remuneration under section 82
Tenure of office under sections 81 (4) and 83 (1), (2) and (3)
Removal from office under section 86

2. Definition of incapacity under section 87 (1), (2), (3), (4) and (6)

3. Immunity from civil suits under section 91 (1) and

Presiding over cabinet meetings under section 92 (3)

We acknowledge the extent of the "sameness" in the offices of the President and the Vice President as exposed by the above scenarios and sections. It was argued by the applicant at some point that omission of the Vice President is section 91 (2) is not conclusive of the fact that the provision does not cover him. By the same token, we would counter that it would not be conclusive that just because there is "sameness" in several aspects of the two offices then everything else in the two offices should be the same. As we have said earlier, the Vice President is there substantially to assist the President. In our view, the "sameness" in the respects pointed out notwithstanding, it is the President, and not the Vice President, who normally directly performs the executive functions and duties by virtue of which he derives the benefit to immunity. The "sameness" in other aspects of the two offices does not, in our view, override the very important consideration of the duties and functions of the executive head. The "sameness" argument therefore does not persuade us to view it as a basis for finding that section 91 (2) was intended to incorporate and cover the Vice President in the immunity of the President from criminal proceedings during his term of office.

In conclusion we find that the Inspector General and the Director of Public Prosecutions did not act ultra vires their powers or act unreasonably when they, respectively, arrested and instituted criminal proceedings against the applicant, a sitting Vice President, without first subjecting him to

impeachment proceedings, as complained about in complaints numbers 8 and 9.

By way of summing up, it will be recalled that having noted that through multiple amendments of his form 86A Statement, the applicant had managed to raise for our determination in this matter, under the banner of judicial review, almost every conceivable question his mind could, under the sun, have possibly pondered on we, at the earliest convenience in this ruling, refreshed our minds on the elementary qualities of Judicial Review Proceedings as captured by Order 53 of the Rules of Supreme Court. This we did in order to ensure that we do not just get carried away by the sheer volume of the complaints the applicant was placing before us, but that we remain cautious throughout not to overstep the boundaries the law has set down for this type of remedy. In consequence, as will have been seen, of the thirteen judgments, orders, decisions, or other proceedings in respect of which the applicant sought relief, the majority of them have not fitted into the judicial review pigeon hole, and have accordingly been discarded by us. It follows that we cannot grant the applicant the declarations, orders, or compensations he has attached to those complaints as the reliefs sought by him, and we have indeed already thrown out those complaints. The applicant has, however, made his case, as our ruling has equally already shown, on his complaint against the 3rd respondent's violation of his constitutional right to privacy under section 21 in the manner the police obtained the tape recordings that led to the arrest and institution of criminal proceedings herein, and in regard to the 3rd respondent's breach of right to fair procedural and administrative action during the initial interrogations. In this regard the relief we have accorded the applicant, as already pronounced, is an order for the award of damages for this violation, to be assessed by the Registrar of the High Court, as in part claimed under paragraph 15 of the reliefs listed by him in

form 86A, and the nullification of the said interrogations with an order for the police within the forthcoming 14 days to expose the applicant to the adverse material they claim to have against him before re-interrogating him.

Finally, considering that the net effect of this ruling is that the applicant will have to face the criminal proceedings the Republic preferred against him in Criminal case No. 13 of 2006, now that we have concluded the constitutional case that order was dependent upon, we issue an order vacating the stay the Honourable Justice Potani granted on 2nd April, 2006, on issue of leave for judicial review, against the further prosecution of that case. The applicant having succeeded on only two out of his numerous complaints in this matter, we only award him costs on those two items. We otherwise condemn him in costs on the rest of the claims he made, on which he has failed to establish his complaints.

Pronounced in Open Court the 9th day of November, 2006 at Blantyre

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A.C. Chipeta
JUDGE

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H.S.B. Potani
JUDGE

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M.L. Kamwambe
JUDGE