IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

PRESIDENTIAL REFERRAL NO. 2 OF 2005

IN THE MATTER OF SECTION 65 OF THE CONSTITUTION

- AND -

IN THE MATTER OF QUESTION OF CROSSING THE FLOOR BY MEMBER OF PARLIAMENT

CORAM : HONOURABLE JUSTICE TWEA
HONOURABLE JUSTICE KAPANDA
HONOURBALE JUSTICE POTANI

Kanyuka (Mrs), Mbendera, of Counsel for the Referral

Msowoya, Mvalo, Chokoto, ***Amicus Curiae***
Jere, Official Interpreter

DETERMINATION

TWEA, J.

On 16th November, 2005, the Attorney General filed by way of originating summons a referral by the President, pursuant to the powers vested in him by Section 89(1)(h) of the Constitution. The referral raised three issues pertaining to Section 65 of the Constitution and of Crossing the Floor by Members of Parliament.

On 12th September, 2006, the referral was amended. The referral raised one issue and, in the alternative, raised two other issues. The original issue was, after the amendment, the second alternative.

The referral requested this Court to give its opinion, interpretation and determination in respect of:-

> "1. Whether or not the said Section 65 is consistent with Sections 32,33, 35 and 40 of the Constitution and is, therefore invalid:
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> 2. In the alternative, if Section 65 is valid, what meaning can be attached to the words "any member of the National Assembly who was, at the time of his or her election, a member of one political party represented in the National Assembly" regard being had to the non-existence of the National Assembly at the time of the general elections.
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> 3. In the further alternative:
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> 3.1 Whether a Member of Parliament (MP) who at the time of election stood as an independent MP whilst in the National Assembly joins a political party:
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> 3.1.1 that already has Members of Parliaments in the National Assembly elected on that party's ticket is deemed to have crossed the floor under Section 65 of the Constitution; or
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> 3.1.2 that has no Members of Parliament in the National

Assembly elected on that party's ticket is deemed to have crossed the floor under Section 65 of the Constitution.

3.2 Whether an Member of Parliament who was elected under a party ticket decides to resign from that party and becomes independent and later on joins another party that has no Member of Parliament represented in Parliament elected on the party's ticket is deemed to have crossed the floor under Section 65 of the Constitution.

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

This Court heard arguments from the Attorney General on behalf of the Referror and the Government and the friends of the Court representing political parties, the Faculty of Law of the University of Malawi, the Malawi Law Society and the Public Affairs Committee and Civil Liberties Committee representing the Civil Society. It should be noted that two political parties the **Democratic Progressive Party (DPP)** and **Peoples Progressive Movement (PPM)** declined to be heard notwithstanding that they caused an appearance. This Court also wishes to note that the Attorney General had objected to the appearance of Mr. Kasambara of Counsel, who is the immediate part Attorney General and had previously appeared in this case, appearing on behalf of the Public Affairs Committee. Further, the Court was requested to expunge the submission made by Mr. Kasambara on behalf of the Public Affairs Committee. This Court stood over the

matter to allow Mr. Kasambara to be heard. He never appeared again. It is on record however, that the Attorney General, in the supplementary arguments, referred to the submissions by the Public Affairs Committee in favour of or against issues raised. It should also be noted, for the record, that the incumbent Attorney General was a member of this Court immediately before her appointment. With these facts in mind, we are of the view that the objections raised have been waived.

I now come back to the issues raised.

On the validity of Section 65 of the Constitution in the light of Sections 32, 33, 35 and 40, thereof, I will defer the arguments by my brother Judge Kapanda. I concur with his approach to the Constitutional interpretation. However, I wish to add a different perspective to the argument. It is important to note that the freedoms of association, conscience and expression are, largely, all embodied in the political rights under Section 40 in respect of Members of Parliament who are members of a political party. This is borne out by the fact that when one decides to join a political party one exercises his right to associate. The consequencies of joining any association is that one becomes subject to the rules and regulations of that association. One will exercise ones freedom of conscience and expression in respect of matter pertaining to the objectives of the said association within the scope of the rules and regulations of that association. If one is not happy with the rules thereof one is free to exercise his or her right not to belong to that association any more in accordance with Section 32(2) of the Constitution. It cannot be heard to say that members of the National Assembly who are members of political parties are denied

their freedoms of association conscience and expression. The fact of the matter is that as members of political parties, which is a right exercise under Section 40, they have acquiesced to have the freedoms and rights limited. This notwithstanding, as submitted the rights and freedoms have not been removed. The rules and regulations of their political parties provide and limit the legitimate avenues of expression and association. It is for these reasons that, the restriction of the right of Members of Parliament in this respect has been held to be reasonable and recognized by international human rights standards and necessary in an open and democratic society: **Ex-Parte Chairperson of Constitutions Assembly: In Re Certification of Constitutions of the Republic of South Africa – 1996(4)SA. 744(1)(2).** With this in mind, I further take into account the findings of Justice Chipeta in the **Registered Trustees of The Public Affairs Committee –vs- The Attorney General Civil Cause No. 1831 of 2003** that save for the offending provisions which he struck down, Section 65 in Constitutionally valid.

I now come to the first alternative.

To begin with the gist of Section 65(1) of the Constitution is that the Speaker shall declare vacant the seat of any Member of the National Assembly who voluntarily ceases to be a member of his party or joins another political party in the National Assembly. I will look at the qualifications later.

It must be recognized that this derives from Section 40(1)(d) of the Constitution: the right of every person to make political choices. This right must be read together with Section 62(2) of the Constitution. This reads:

> (2) Each Constituency shall freely elect any person, subject to this Constitution and an Act of Parliament, to represent it as a member of the National Assembly in such manner as may be prescribed by this Constitution or an Act of Parliament.

The right of Constituents to **freely elect any person,** as I said, derives from Section 40(1)(d). However, any one who exercises his or her right to vote under Section 40(3) will have done so by his or her rights in respect of Section 40(1)(a)(b) and (c) of the Constitution and in this regard, taken into account Section 32(2) of the Parliamentary and Presidential elections Act; that is to choose a candidate that represents a political party or is independent.

When the voting has been completed and votes counted, the Electoral Commission will declare the composition of the National Assembly. The National Assembly consists of such members as the Electoral Commission shall determine in accordance with Section 62(1) of the Constitution and the Parliamentary and Presidential election Acts. The membership of the National Assembly consists, elected members who are members of political parties or independents. Our laws do not permit any other categories, notably nominated members. The composition of the National Assembly therefore determined by the Parliamentary elections.

As has been pointed out by my brother judges, the Constitution further, in Section 40(2), provided that:

> "(2) The State shall provide funds so as to ensure that, during the life of any Parliament, any political party which has secured more than one tenth

> of the national vote in elections to that Parliament has sufficient funds to continue to represent its Constituency."

The financial protection of political parties that secure more than one-tenth of the national vote during elections guarantees political pluralism of any Parliament. This relates directly to the protection of the membership of political parties in the National Assembly under Section 65(1) of the Constitution. It is in the interest of democracy that the Constitution protects and provides for financial funding for political party pluralism in the National Assembly. This insulates smaller parties against poaching from bigger and political prostitution by their members.

Further to this, it is clear that voters will exercise their right to vote depending on the election manifesto of the independent candidate or the political party of their choice. Where a candidate secures a Parliamentary seat, it is signified that the majority of the Constituents prefer his or her election manifesto. That manifesto has to be pursued and achieved during the life of that Parliament. A member of the National Assembly therefore is accountable to the electorate to fulfill the manifesto on which he or she was elected.

Once the Constituents have made a choice it would be a betrayal by the member of the National Assembly to unilaterally abandon the manifesto, upon which he or she was elected: whether as a member of a political party or an independent. I agree with the submission of the friends of the Court representing the Malawi Congress Party, United Democratic Front and Alliance for Democracy, that allowing a Member of Parliament to freely change from one political party to another would

render the freedom of political choice of the electorate meaningless. The Member of Parliament would, in effect, be representing himself and not the electorate.

Lastly, on this issue, let me consider the **free-mandate** provided for in Section 65(2) of the Constitution. Section 65(2) reads:

> "(2) Notwithstanding Subsection(1), all members of all parties shall have the absolute right to exercise a free vote in any and all proceedings of the National Assembly and a member shall not have his or her seat declared vacant solely on account of his or her voting in contradiction to the recommendation of a political party, represented in the National Assembly, of which he or she is a member."

I am aware that the Attorney General has attacked this provision as contradictory and irreconcilable amounting to irrationality on that part of Parliament. Unfortunately, I do not share that view. This section is consistent and rational.

To begin with, I adopt the views expressed by the Attorney General when quoting the **Halsbury's Laws of England: Constitutional Law and Human Rights**, more so when expressing the views of Burke:

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

> whole. You choose a member indeed; but when you have chosen him, he is not a member of Bristol, but he is a Member of Parliament."

Section 65(2) of the Constitution reflects this view. Parliament is a deliberative assembly of the Nation and not an extension of political parties. Unlike the other Constitutions that we have been referred to, our Constitution respects political party integrity and accountability of the members of the National Assembly to their political parties, but frees them from political party bondage. They are free to follow their conscience when voting and not to toe party line to the detriment of their constituencies and the Nation. The Constitution has freed the business of the National Assembly from being transacted on basis on numerical numbers. It has allowed members of the National Assembly to transact business in basis of National interest and good conscious. If one appreciates the value of this freedom of the members of the National Assembly in the House, one will appreciate why a Member of Parliament who involuntarily ceases or is expelled from a political party cannot be deemed to have crossed the floor under Section 65(1) of the Constitution. The position of members of the National Assembly who belong to political parties is therefore fortified and protected. This subsection enjoins political parties to proceed with greatest caution when dealing with their members who are members of the National Assembly. It also prescribes political parties from using expulsion from the party as a means of forcing their views on the National Assembly. This is invaluable regard being had to our experience during the one party state when the party was mightier than the Government. It is also important to point out, as was pointed out during submissions, that this provision enables a minority Government to push policies in national interest, in the National Assembly. It is important to note

however, that the Attorney General may have viewed this provision negatively because, ever since the advert of the multiparty, all Governments have been obsessed with numerical members in the National assembly. This is also a contributing factor to this referral.

I now come to the qualifier

Clearly, the issue before the Speaker will be a member of the National Assembly voluntarily ceasing to be a member of a political party, or joining another political party that is represented in the National Assembly. This will trigger the qualifier; to discover the status of that member at the time that he or she was elected. This will apply whether the elections were general or by elections. It is clear that crossing the floor is subsequent to the election and not simultaneous. It is only after one has been elected to the National Assembly that change of loyalty becomes an issue. It is therefore difficult to appreciate the interpretation of the said section by the Attorney General.

In my view if the qualifier were taken out the provision, it would read as follows:-

> "The Speaker shall declare vacant the seat of any member of the National Assembly who was a member of one political party represented in the National assembly but who has voluntarily ceased to be a member of that party or has joined another political party represented in the National Party."

On the literal reading of this provision as paraphrased, it would apply

to a member of a National Assembly who is a member of one political party represented in the National Assembly, who has ceased to be a member of that party or has joined another political party represented in the National Assembly. However, when we read in the qualifier, it would only apply to one who was also a member of the political party at the time of election. The question is, is it possible to be a member of one political party represented in the National Assembly and not to have been a member of that political party at the time of elections? The answer is “yes” and the only possibility is that of an independent member. An independent member of the National Assembly cannot cease to be a member of a political party because he does not belong to any, but is capable of joining a political party during the life time of that Parliament.

The second qualifier is where one was a member of one political party represented in the National Assembly, that is represented by him or her alone. Such a member may cease to be a member of that political party or may join another party represented in the National Assembly.

The net result is that one who was elected into the National Assembly as an independent candidate or a sole Parliamentary member of a political party may join another political party represented in the National Assembly during the life time of a Parliament and not “vice versa.”

This however, is not the end of the matter. It is clear that members of the electorate who vote in independents or a sole member

of a political party are not protected from defection of their representative. This, clearly, is discriminatory and I agree with the submissions by the Attorney General and my Brother Judge Kapanda on this. However, I totally disagree with the Attorney General that this should licence an interpretation that would allow members of the National Assembly who were members of a political party at the time of elections to equally change political parties. Again, I disagree with my Brother Judge Kapanda, that applying the principle in the Zambian case of **Attorney General and Others vs Kasonde and Others 1994 LRC 144**, this provision must be read to extend to members of the National Assembly elected as Independents or sole representatives of political parties.

In view of the clear provisions, of the Constitution, I would be slow to import into the provision the equality of treatment. I agree and accept the views submitted by *amicus curiae* from the Law Faculty, that this provision should be amended. In order to promote integrity accountability of members of the National Assembly and to protect the wishes of electorate and democratic values, once elected members should not be allowed change political parties or abandon the manifestoes on which they were elected. Those who wish to do so must submit to re-elections.

I will now look at this last alternative, as I said earlier, this is what was before us, the amendment.

On the first part, which is in respect of a member of the National Assembly elected as an independent candidate. I have already alluded

to it. I only wish to add, in view of the arguments on record, that in this case, an independent candidate means one who presented his or her own manifesto on which he/she sought to be elected. Reference, has been made to "independent" candidate who, after loosing primaries in their own political parties go it alone while still members of their political parties and without an independent manifesto. This is an abuse and undemocratic, and is not, in my view, what the Constitution seeks to protect.

The other two issues will depend on the interpretation of "voluntarily ceasing to be a member of that party, or joining another political party."

In the case of **Fred Nseula vs The Attorney General and Malawi Congress Party Civil Cause No. 63 of 1996** Mwaungulu, J. differentiated vacancies occurring as a result of the operation of the law under Section 63(1) of the Constitution, which fall under the jurisdiction of the National Assembly, and declaration of vacancy by the Speaker under Section 65(1) of the Constitution, which are within the jurisdiction of the Speaker.

On the latter case, firstly the Speaker has to decide whether one has voluntarily ceased to be a member of "that political party." How does one voluntarily cease to be a member of a political party. Obviously if one resigns, one ceases to be a member of a political party. Howerver, one can also cease to be a member of a political party by conduct. If one abandons his political party, or conducts oneself in a manner that is inconsistent and incompatible with being a

member of that political party; for example joining another political party, one will be deemed to have ceased or resigned from the party. Numerous cases have been cited in the submissions by the friends of the Court to illustrate this**:** **Thomas L. Fekete, JR –vs- The City of East St. Louis Supreme Court of Illinois 315 Ill.58:** where one accepted a new office which was incompatible with the one that he occupied it was held to be constructive resignation or abandonment. **The people ex. rel. mm. Stephen –vs- Thomas Hamifan 1880 WI 10 125 (ILL)** where one consistently failed to attend meetings and became hostile to the Government plat form on which he was elected, it was held that he had abandoned his office and hence resigned by implication. Clearly, all this will depend on the evidence. This was recognized by Mwaungulu, J. in the Fred Nseula's case (Supra), when he said –

> "This leads to the consideration of the evidence that was before the Speaker that formed the basis of the decision. I think there was none. The onus was upon The Attorney General to satisfy the Court that the decision of the speaker was justified on the material which the Speaker had before him."

The Speaker therefore will have to decide whether on the facts before him one has ceased to be a member of ones party and then make the declaration. Once one voluntarily ceases to be a member, he cannot constitute himself, from within the National Assembly, an independent member.

The second limb requires the Speaker to decide whether, one has "joined another party represented in the National Assembly." How

does one join another party? Obviously if one registers or declares membership of another political party one will be deemed to have joined that other political party. Again, it is possible for one to be deemed to have joined another political party by conduct. By conduct, explicit or implicit, that is inconsistent and incompatible with being or remaining a member of a party one would be deemed to have constructively joined the other party. It will be a matter of evidence, whether one explicitly or implicitly joined another political party. The duty of the Speaker will be to decide on the facts before whether or not one has joined another political party. The arguments in respect of one ceasing to be a member of a political party would apply equally in this respect. I must also mention here, that joining another party is evidence of ceasing to be a member of ones former party. Thus, if by conduct explicit or implied one subscribes to the other party one will be deemed to have joined that party.

On the issue before this Court therefore, it is clear that a member of the National Assembly who resigns from a party which is represented in the National assembly will have ceased to be a member of that party and will be subject to provision of Section 65(1) of the Constitution. There is no room for one to cease being a member of a party and become independent in the National Assembly.

The last point is on ministerial appointments.

It has been acknowledged that the President, in our system of Government, is elected directly by popular vote. It is also accepted that it is the President and not the political party with majority in the National Assembly that forms Government: the political side of the

Executive Arm of Government. This is, and remains the position whether the President is a member of a political party or not, or whether his political party has majority or not.

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

As I stated earlier, Section 65(2) gives a **free-mandate** to members of the National Assembly. Be, this as it may the free-mandate is only exercisable in the National Assembly in respect of voting other than that inter political party relations would be subject to the rules, regulations, agreements or alliances, made between them and the political party to which the President, if any, belongs. The ministerial appointee will therefore subject to such rules, regulations, agreements or alliances. He or she is not free to accept appointments as he or she pleases. The determinant therefore, is whether the ministerial appointee has voluntarily ceased to be a member of his political party or has joined another political party represented in the National Assembly, if any: regard must still be had to the fact that joining another political party is evidence of ceasing to be a member of ones former party. In this regard therefore the position of a ministerial appointee is no different form that of any other member of the National Assembly. In both respect therefore the Court will observe the maxim ***animus ad se omne jus ducit***: law always regards the intention.

It is my finding therefore, that Section 65(1) of the Constitution, as saved by Justice Chipeta, is in tandem with other provisions of the Constitution and therefore valid. Further, that there is no contradiction in terms in Section 65(1) so as to justify the reading imported by the Referror. I also find that the said, Section as it now stands, only applies to members of the National Assembly who were members of a political party represented in the National Assembly who voluntarily cease to be a member of that party or join another political party represented in the National Assembly. Further, I endorse the view that the section as it stand does not apply to a member of the National Assembly who was elected as independents or is a sole representative of a political party in the National Assembly. I agree with my Brother Judge Kapanda and the friends of the Court that this is discriminatory and consequently, does not protect the interest of the electorate in respect of such members of the National Assembly. I call the Attorney General and the Law Commission to amend it accordingly. Finally, I find that ministerial appointments, in respect of members of the National Assembly, can only be made within the confines of the application of Section 65(1) of the Constitution.

Pronounced in Open Court this 7th day of November, 2006 at Blantyre.

E.B. Twea

JUDGE