



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW APPLICATION NO. E1154 OF 2020**

**IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI AND ROHIBITION**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**MINISTRY OF INTERIOR AND**

**COORDINATION OF NATIONAL GOVERNMENT.....1<sup>ST</sup> RESPONDENT**

**DR. FRED MATIANG'I, PHD, EGH.....2<sup>ND</sup> RESPONDENT**

**EX PARTE APPLICANTS:**

**1. BAO AIWU**

**2. WANG PING**

**3. YANG YING**

**JUDGMENT**

1. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> *ex parte* Applicants herein are Chinese nationals and citizens. The 1<sup>st</sup> *ex parte* Applicant states that he is a holder of a valid work/resident permit and business partners with the 3<sup>rd</sup> *ex parte* Applicant, and have a company which imports and sell new shoes, while the 2<sup>nd</sup> *ex parte* Applicant is a mutual friend to the 3<sup>rd</sup> *ex parte* Applicant and is in Kenya on a dependents pass issued on 12<sup>th</sup> May,2020 which was applied for by her son.

2. The *ex parte* Applicants filed a Notice of Motion application on 5<sup>th</sup> January, 2021 seeking the following Orders:

**a. That the Court be and is hereby pleased to grant an order of certiorari to remove and quash the 2<sup>nd</sup> Respondent's declarations/orders against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> *ex-parte* applicants made on the 1<sup>st</sup> of December 2020, declaring that the ex-part applicant's presence in Kenya is against national interest, and that they are prohibited immigrants and that they should be put under police custody or prison pending their removal from Kenya.**

**b. That the Court be and is hereby pleased to grant an order of prohibition prohibiting the Respondents from implementing or enforcing the 2<sup>nd</sup> Respondent's declarations/orders against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> *ex parte* applicants' made on 1<sup>st</sup> December 2020 declaring that the *ex parte* applicants' presence in Kenya is against national interest and that they are prohibited immigrants and that they should be put under police custody or prison pending their removal from Kenya.**

**c. That the costs of this application be provided for.**

**d. Any other order that the Court may deem fit and expedient to grant.**

3. The application is supported by a Statutory Statement dated 14<sup>th</sup> December, 2020 and a Verifying Affidavit sworn on the same date by the 1<sup>st</sup> *ex parte* Applicant. It was deposed that the 1<sup>st</sup> and 3<sup>rd</sup> *ex parte* Applicants have been operating their company in Kenya since the year 2016 and have legal and valid passports and resident/work permits.

4. It was averred in this respect that the 1<sup>st</sup> *ex parte* Applicant entered the country legally using a valid Chinese passport of number E31700084 and after being cleared by immigration and issued with a work and resident permit on 18<sup>th</sup> August 2020 which is valid for two years. Further, that the 2<sup>nd</sup> *ex parte* Applicant is the mother and dependent to Mr. AI. Hairong who is the bearer of a valid Chinese passport and work permit and works at Oppo Kenya, and has a valid dependent's permit issued on 12<sup>th</sup> May, 2020. In addition that the 3<sup>rd</sup> *ex parte* Applicant also has a valid work permit issued on 17<sup>th</sup> August, 2020 which is valid for two years.

5. This notwithstanding, that the *ex parte* Applicants were arrested on 25<sup>th</sup> November 2020 at their company's store and booked at Shauri Moyo Police Station where they spent two (2) nights without being taken to court. It was further deposed that this amounted to more than 72 hours in custody contrary to what is provided for under the Constitution. The *ex parte* Applicants averred that their advocate was able to secure their release through an application for *habeas corpus* in **Miscellaneous Criminal Application No. E307/2020** and that while at the police station the Officer in Command of the Station (OCS) intimated that the *ex parte* Applicants were arrested because they were involved in the trade of second hand shoes at Gikomba market. Further, that upon investigations which involved police visiting the company's store and Immigration office the true position was established.

6. However, that on 9<sup>th</sup> December 2020, the *ex parte* Applicants' advocate received copies of declaration orders dated 1<sup>st</sup> December 2020 and signed by Dr. Fred Matiang'i, declaring each of the *ex parte* Applicants prohibited immigrants and ordering their removal from Kenya. Further, that the said orders contravene the provisions of the Constitution and the Kenya Citizenship and Immigration Act, 2011, since the *ex parte* Applicants are in the country legally and are operating a legal business, and should be accorded the basic rights as investors. In conclusion, it was deposed that unless immediately checked the arbitrary actions of the Respondents are foreboding to the administration of justice and law-abiding citizens.

7. The Respondents did not file a response to the application.

### **The Determination**

8. The *ex parte* Applicants counsel filed written submissions dated 7<sup>th</sup> January 2021, while the Respondents' counsel filed written submissions dated 26<sup>th</sup> April 2021. A preliminary issue was raised in the Respondents' submissions as regards this Court's jurisdiction to hear and determine the *ex parte* Applicant's application which needs to be determined at the outset.

### **On this Court's Jurisdiction**

9. The Respondents submitted in this regard that the doctrine of comity between arms of government must not be violated by unwarranted court proceedings with the aim of dictating and or influencing decisions as far as decisions so made are rational, legal and mandated by law. Counsel cited the case of **Speaker of the Senate & Another vs. Attorney General & 4 Others, (2013) eKLR** for this position. It was thus submitted that the Court is not in the business of making decisions as regards the control of immigrants, as the said function is vested in the Director of Immigration, and that doing so would be usurping a role not vested in the courts by law. Further, that the Courts are only required to intervene where an illegality has been committed.

10. The *ex parte* Applicants on the other hand submitted that judicial review is a means to hold those who exercise power accountable to the manner of its exercise and to ensure that fundamental and enduring values that constitute the rule of law are upheld. Further, that any form of governmental authority and discretionary exercise of public power is subject to the courts' supervision, and that judicial review remedies are meant to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and to entrench the rule of law. Accordingly, that the Court's task while evaluating whether the decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power on the decision maker and requiring administration bodies to act within the "four corners" of their powers or duties.

11. Under Article 165(6) of the Constitution, this Court is expressly granted supervisory jurisdiction over decisions made by any person exercising judicial or quasi-judicial functions, such as the 2<sup>nd</sup> Respondent in the instant application. The broad grounds for the exercise of this judicial review jurisdiction were stated in the case of **Pastoli vs Kabale District Local Government Council & Others [2008] 2 EA 300** at pages 303 to 304 thus:

**"In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service [1985] AC 2*; and also *Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala, miscellaneous application number 643 of 2005 (UR)*.**

**Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality.....**

**Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club [1963] EA 478* at page 479 paragraph "E".**

Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876).”

12. After the enactment of the Constitution of 2010 and the provision of the right to fair administrative action in Article 47 thereof, **there are now established grounds for judicial review that require Courts to review the substance of a decision, quite apart from the jurisdictional and procedural aspects of decision making.** These grounds are now explicitly provided for in section 7 of the Fair Administrative Action Act, and include the grounds of relevant and irrelevant considerations in a decision, the rationality and reasonableness of a decision, its proportionality, whether legitimate expectations have been violated by the decision, and whether the decision was made for proper or improper purposes. These grounds are questions of law on which there are settled applicable principles, and which of necessity also entail a merit review of the impugned decision in the context of the adduced evidence.

13. It was however emphasized by the Court of Appeal in *Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others*, (2016) KLR that while Article 47 of the Constitution as read with the grounds for review provided by section 7 of the Fair Administrative Action Act reveals an implicit shift of judicial review to include aspects of merit review of administrative action, *the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act.*

14. This Court’s jurisdiction was confirmed in relation to immigration matters in *Republic vs Cabinet Secretary: Ministry of Interior and Co-ordination of National Government, Director of Immigration & Attorney General Ex Parte Richard Boack*, [2018] eKLR wherein *the case of Leonard Sitamze vs The Minister For Home Affairs & 2 Others*, Nairobi High Court Misc. Civil Application No. 430 of 2004 was cited, in which Justice J. B. Ojwang (as he then was) held as follows:

“Dr. Khaminwa for the Applicant submitted that the powers granted the Minister for Home Affairs under Section 3 and 8 of the Immigration Act were well and truly amenable to abuse. On this argument, I am in agreement with counsel. He then submitted that in such a situation, where powers granted under the law are open to abuse, to the detriment of the individual in the matter of fundamental rights, then intrinsically and as of the very essence of judicialism and of the well accepted principles of the rule of law in a common law system such as that applicable in Kenya, the Judicial Review jurisdiction of this Court is, perforce, applicable and is indeed mandatory. This with respect, is the correct statement of the most elemental principle of law governing the jurisdiction of the High Court, in all situations where an abuse of public powers is alleged to have come to pass. Powers of this nature are quasi-judicial. They are potentially inimical to the fundamental human rights of the individual and in civilized society, there must be an agency of State in place to protect those rights, and thus to call to order any public officer who treads rough-shod upon them. That agency of the State is this Court; it has full jurisdiction to exercise review powers over all public bodies which make decisions with impacts on the sphere of individual liberty.”

15. The *ex parte* Applicants have in this respect urged that the 2<sup>nd</sup> Respondent’s decision was unlawful and has impacted on their rights, and the instant application therefore properly falls within the review jurisdiction of his Court. To this extent the *ex parte* Applicants’ application is properly before this Court.

16. This Court with therefore proceed to consider the two outstanding substantive issues that have been raised by the parties in the pleadings and submissions filed herein, namely, whether the Respondents’ decision to issue the declaration orders against the *ex parte* Applicants was lawful, and whether the *ex parte* Applicants merit the relief sought.

#### **On Whether the Respondents’ Decision was Lawful**

17. The *ex parte* Applicants counsel submitted that the 2<sup>nd</sup> Respondent’s decision to issue deportation declarations/orders was malicious, unfair and contrary to the law and that the decision not only inconvenienced the *ex parte* Applicants but it was also an injustice and prejudicial to themselves, their businesses and families. Counsel cited section 43 of the Kenya Citizenship and Immigration Act for the proposition that the 2<sup>nd</sup> Respondent only has power to remove persons unlawfully present in Kenya.

18. It was the *ex parte* Applicants’ case that their entry and presence in Kenya was lawful and in line with the Constitution and Immigration Laws of Kenya and that section 33 of the Kenya Citizenship and Immigration Act does not apply to them, 2<sup>nd</sup> and 3<sup>rd</sup> *ex parte* Applicants as their continued presence is lawful and legal. Further, that the *ex parte* Applicants have not been charged or convicted of any offence in Kenya.

19. It was further submitted that the 2<sup>nd</sup> Respondent did not give any reasons as to why the *ex parte* Applicants’ presence in Kenya was declared illegal and that they were also not informed of which of her activities are against national interest, nor did they have the opportunity to address those alleged accusations in a fair and just administrative process. To buttress this argument counsel cited the case of *Republic vs. Minister of State for Immigration and Registration of Person ex parte C.O.* [2013] eKLR for the position that that the 2<sup>nd</sup> Respondent’s failure to give any reasons for his decision meant that there was no reason at all and if he had any reason it was not a good one.

20. Additionally, that the *ex parte* Applicants’ right to fair administrative action was violated and that the rules of natural justice were breached contrary to the provisions of Article 47 of the Constitution and Section 33(1) of the Kenya Citizenship and Immigration Act. In addition, that while Article 24 of the Constitution provides for circumstance when rights of individuals may be limited, under Article 25 the right to a fair trial is not one of them.

21. The Respondents on their part submitted that the *ex parte* Applicants were declared prohibited immigrants in accordance with Section 33 of the Kenya Citizenship and Immigration Act, 2011. Counsel also cited Section 43(1) of the Act and the case of *Republic vs. Judicial*

**Service Commission ex parte Pareno Nairobi HC Misc. Civil Application No.1025 of 2003** for the position that the Respondents' functions are authorized by statute, and they must therefore be allowed to exercise such functions with the discretion intended by the legislature. The decision in the case of **Ernst Young LLP vs. Capital Markets Authority & Another High Court of Kenya at Nairobi, Constitutional and Human Rights Division, Petition 385 of 2016** was also cited for this proposition .

22. This Court is guided by the circumstances when a public body shall be deemed to have made an error of law as expounded in **Halsbury's Laws of England, 4<sup>th</sup> Edition** at paragraph 77 as follows:

**“... A public body will err in law if it acts in breach of fundamental human rights; misinterprets a statute, or any other legal document, or a rule of common law, takes a decision on the basis of secondary legislation, or any other act or order, which is itself ultra vires; takes legally irrelevant consideration into account, or fails to take relevant considerations into account, admits inadmissible evidence, rejects admissible and relevant evidence, or takes a decision on no evidence, misdirects itself as to the burden of proof, fails to follow the proper procedure required by law; fails to fulfil an express or implied duty to give reasons or otherwise abuses its power.”**

23. It is notable in this respect that the 2<sup>nd</sup> Respondent is issuing the impugned declarations dated 1<sup>st</sup> December 2020 proceeded pursuant to the powers granted to him under section 43 of the with respect to the 1<sup>st</sup> ex parte Applicant, and the powers granted under section 33(1) of the said Act with respect to the 2<sup>nd</sup> and 3<sup>rd</sup> ex parte Applicants. Section 43(1) provides as follows:

**“The Cabinet Secretary may make an order in writing, directing that any person whose presence in Kenya was, immediately before the making of that order, unlawful under this Act or in respect of whom a recommendation has been made to him or her under section 26A of the Penal Code (Cap. 63), shall be removed from and remain out of Kenya either indefinitely or for such period as may be specified in the order.**

**(2) A person against whom an order has been made under this section shall:**

**(a) be returned to the place where he originated from, or with the approval of the Cabinet Secretary, to a place in the country of habitual residence, permanent residence or citizenship, or to any place to which he consents to be taken if the competent authorities or government of that place consents to admit him or her to the country; or**

**(b) if the cabinet secretary so directs, be kept and remain in police custody, prison or immigration holding facility or until his departure from Kenya, and while so kept is deemed to be in lawful custody whether or not he has commenced any legal proceedings in court challenging the Tribunals decision until the suit is finally disposed of.**

**(3) Subject to this section, an order under this section shall be carried out in such manner as the Cabinet Secretary may direct, subject to the Constitution and related laws”**

24. It is evident that there is a statutory precondition that requires to be satisfied before the exercise of that power in section 43(1), which is that the presence of the person being removed from has been established to be unlawful. Where a statutory precondition for the exercise of power exists, the repository of the power is required to firstly properly direct itself as to the meaning of the statutory precondition, and secondly be satisfied that of the existence of the relevant factual situation, before exercise of the power. Failure to do so will render any actions undertaken in the exercise of that power unlawful.

25. In the present case, the determining factors of persons whose presence is unlawful in Kenya are set out in is section 33 of the Kenya Citizenship and Immigration Act 2011 which provides for prohibited and inadmissible persons in Kenya as follows:

**“33(1) For purposes of this Act, a prohibited immigrant is a person who is not a citizen of Kenya and who is—**

**(a) not having received a pardon—**

**(i) has been convicted in Kenya or any country of an offence created under a statute for which a sentence of imprisonment is for a minimum term of three years;**

**(ii) has been acquitted by a court of any offence and who at the time of acquittal has no valid immigration status;**

**(iii) has committed or is suspected of having committed an offence provided for under international treaties and conventions ratified by Kenya;**

**(b) a person engaged in human trafficking, human smuggling, sexual exploitation and sex crimes;**

**(c) a person who procures or attempts engage in trafficking or smuggling into and out of Kenya any person for the purpose of engaging in sexual offenses;**

**(d) a person who is reasonably suspected to be engaged in or facilitates the trafficking of narcotics, prohibited, controlled or banned substances;**

- (e) a person who there is reasonable cause to believe that he is engaged in or facilitates trafficking in persons;
- (f) a person whose presence in or entry into Kenya is unlawful under any written law;
- (g) a person in respect of whom there is in force an order made or deemed to be made under section 43 directing that such person must be removed from and remain out of Kenya;
- (h) a person in respect of whom there is reasonable cause to believe that he or she is engaged in, facilitates any activity detrimental to the security of Kenya or any other state;
- (i) a person in respect of whom there is reasonable cause to believe that he or she is engaged in, facilitates or is sympathetic to acts of terrorism or terrorist activities directed against Kenya or detrimental to the security of Kenya or any other state;
- (j) a person involved in or is reasonably suspected to be engaged in money laundering;
- (k) a person convicted of war crimes or crimes against humanity, genocide, murder, torture, kidnapping or in respect of whom there are reasonable grounds for believing they have financed or facilitated any such acts;
- (l) a person engaged in or suspected to be engaged in illicit arms trade; (m) a person engaged in or suspected to be engaged in illegal human body organs trade;
- (n) a person involved or reasonably suspected to be involved in crimes related to patents, copyrights, intellectual property rights, cyber- crimes and related crimes;
- (o) a person involved in or reasonably suspected to be involved in piracy or has been convicted of piracy and served his sentence;
- (p) a person who is or has been at any time a member of group or adherent or advocate of an association or organization advocating the practice of racial, ethnic, regional hatred or social violence or any form of violation of fundamental rights;
- (q) a person whose conduct offends public morality;
- (r) a person who knowingly or for profit aids, encourages or procures other persons who are not citizens to enter into Kenya illegally;
- (s) a person who is seeking to enter Kenya illegally; (t) a person who is a fugitive from justice;
- (u) a person whose refugee status in Kenya has been revoked under the Refugee Act, 2006 (No. 13 of 2006); and
- (v) any other person who is declared a prohibited immigrant by the order of Cabinet Secretary subject to the approval of parliament or who was, immediately before the commencement of this Act, a prohibited immigrant within the meaning of the Immigration Act (now repealed);
- (w) a person who has been repatriated and or removed from Kenya under any lawful order.”

26. In addition, the Cabinet Secretary can only declare any person a prohibited immigrant if the person falls under the classes created by Section 33(1). It was in this regard aptly observed by Odunga J. in **Republic vs Minister of State For Immigration And Registration Of Persons Ex-Parte C.O.** [2013] eKLR as follows:

“The law is that in the ordinary way and particularly in cases, which affect life, liberty or property, a Minister should give reasons and if he gives none the court may infer that he had no good reasons. Similarly where the reason given by the Minister is not one of the reasons upon which the Minister is legally entitled to act, the Court is entitled to intervene since the action by the Minister would then be based on irrelevant matter.”

27. The reasons given with respect to the removal of the *ex parte* Applicants was that their presence in Kenya was contrary to national interest. It is notable that this is not one of the grounds for refusing entry and residence under section 33 of the Kenya and as pointed out by Korir J. in **Republic v Cabinet Secretary in Charge of Internal Security & 2 others Ex-parte Nadeem Iqbal Mohammad** [2015] eKLR as follows:

“The words “a person whose presence in Kenya is contrary to national interest” do not appear in Section 33(1) (a)-(v). Therefore, the 1<sup>st</sup> Respondent could not declare the Applicant a prohibited immigrant on the ground that his presence in Kenya was contrary to national interest as alleged in the declaration dated 9<sup>th</sup> November, 2013. Consequently, he had no power to order his removal from Kenya under Section 43 (1) of Kenya Citizenship and Immigration Act, 2011. The 1<sup>st</sup> Respondent’s actions were not based on the powers granted to him by Section 33(1). He could only do that which the statute allowed him to do.”

28. I am in this respect also guided by the holding of the Supreme Court of the United Kingdom in **R(A) vs Croydon LBC (2009) 1 WLR 2557**, that where a statutory provisions gives rise to an issue of precedent fact, the determining factor is the intention of Parliament, and in particular whether Parliament intended to place a limit on the exercise of the relevant power by the public body. The Courts will in this respect have regard to the legislative and administrative context in order to divine the intention of Parliament, including the relevant legislative scheme as a whole, and the nature and importance of the power to which the factual precondition relates.

29. It is notable that section 43(3) of the Kenya Citizenship and Immigration Act 2011 in this regard subjects the 2<sup>nd</sup> Respondent to the Constitution and the law in exercising the powers under section 43 and 33 of Act. In addition, the factual situations that can give rise to an interference with an immigrants' rights and liberties are detailed and specified with great particularity in section 33. The applicable principles of statutory interpretation in this regard prohibits doubtful penalization, and hence the reasons for removal of a person from Kenya must be placed within the legal categories provided in section 33.

30. It is thus my finding from the foregoing reasons and observations, that the present case, the Respondents acted unlawfully in the present case in issuing the impugned declarations dated 1<sup>st</sup> December 2020 against the *ex parte* Applicants, as they have not established the existence of the statutory preconditions that are required by sections 33 and 43 of the Kenya Citizenship and Immigration Act 2011 for the exercise of the power to remove a person from Kenya, nor demonstrated any legal reason to place the *ex parte* Applicants under a recognized category of prohibited or inadmissible immigrants.

31. The *ex parte* Applicants also allege that their right to fair administrative action was violated. Article 47 of the Constitution provides as follows in this regard:

**“ (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.**

**(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”**

It is indicated in Article 47, the situations where a duty to act fairly will apply is where the decision maker is taking a decision that will have a direct and specific impact on an individual.

32. Section 4 (3) and (4) of the Fair Administrative Action Act lays down the procedure to be adopted by decision makers as follows in this regard:

**“(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-**

**(a) prior and adequate notice of the nature and reasons for the proposed administrative action;**

**(b) an opportunity to be heard and to make representations in that regard;**

**(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;**

**(d) a statement of reasons pursuant to section 6;**

**(e) notice of the right to legal representation, where applicable;**

**(f) notice of the right to cross-examine or where applicable; or**

**(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.**

**(4) The administrator shall accord the person against whom administrative action is taken an opportunity to-**

**(a) attend proceedings, in person or in the company of an expert of his choice;**

**(b) be heard;**

**(c) cross-examine persons who give adverse evidence against him; and**

**(d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.”**

33. The core of the duty to act fairly therefore is the need to ensure that a person affected by a decision has an effective opportunity to make representations, before it is made and by an impartial decision maker. The Court of Appeal in this respect held as follows in **Judicial Service Commission vs Mbalu Mutava & Another** [2015] eKLR:

**“The term “procedurally fair” used in Article 47(1) by a proper construction, imports and subsumes to a certain degree, the common law including rules of natural justice which means that common law is complementary to right to fair**

**administrative action.**

34. Furthermore, it was been held in **Lloyd vs McMahon (1987) AC 625** that courts will imply procedural steps to ensure the requirements of fairness are met where a statutory procedure is insufficient. It is also notable in this regard that while Article 24 of the Constitution does provide for circumstances when rights of individuals may be limited, under Article 25 it is categorically provided that the right to fair trial is one of the rights that cannot be so limited.

35. In the present application, the obvious impact of the said declaration on the *ex parte* Applicants is their removal from Kenya. The *ex parte* Applicants in this respect provided evidence of their residence permits and work permits, and of their businesses and family in Kenya, which are accrued rights or interests that will be prejudiced by their removal from Kenya, without being given a hearing. Additionally, no evidence was provided by the Respondents to show the procedural steps taken to ensure fair action before the issue of the impugned declaration. To this extent this Court finds that the Respondents acted unfairly in issuing the impugned declarations dated 1<sup>st</sup> December 2020.

**On the Relief Sought**

36. The *ex parte* Applicants have sought the remedies of certiorari and prohibition. An order certiorari nullifies an unlawful decision or enactment, while an order of prohibition restrains a public body from acting in the manner specified in the order to restrain a threatened or impending unlawful conduct.

37. The Court of Appeal in the case of **Republic v Kenya National Examinations Council ex parte Gathenji & Others, (1997) e KLR** explained the circumstances under which these orders can issue, and they are available where unlawful conduct or a breach of duty has been demonstrated on the party of a public body or official. Section 11 (1) of the Fair Administrative Action Act also provides for additional orders that this Court can make in judicial review proceedings, which have now been greatly expanded.

38. In the present case, the decision and actions of the Respondents to issue s declaration for removal of the *ex parte* Applicants from Kenya has been found to have been made in an unlawful exercise of their powers, and was procedurally unfair. To this extent, the remedy of certiorari and prohibition are merited. However, care should be taken not unreasonably prohibit the Respondents from exercising their statutory powers and duties under the Kenya Citizenship and Immigration Act 2011 if there is good reason, subject to the proper procedure and due process being followed.

**The Disposition**

39. In light of the foregoing observations and findings, the *ex parte* Applicants' Notice of Motion application dated 5<sup>th</sup> January 2021 is found to be merited to the extent of the following orders:

**i. An order of Certiorari be and is hereby issued to remove into this Court for purposes of quashing, the 2<sup>nd</sup> Respondent's declarations/orders against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> *ex-parte* Applicants made on the 1<sup>st</sup> December 2020, declaring that the *ex-parte* applicant's presence in Kenya is against national interest, and that they are prohibited immigrants and that they should be put under police custody or prison pending their removal from Kenya.**

**ii. An order of Prohibition be and is hereby issued, prohibiting the Respondents from implementing or enforcing the 2<sup>nd</sup> Respondent's declarations/orders against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> *ex parte* Applicants' made on 1<sup>st</sup> December 2020.**

**iii. The Respondents shall bear the costs of the *ex parte* Applicants' Notice of Motion dated 5th January 2021.**

40. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 21<sup>ST</sup> DAY OF JUNE 2021**

**P. NYAMWEYA**

**JUDGE**

**DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF JUNE 2021**

**J. NGAAH**

**JUDGE**