



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**JR CASE NO. 100 OF 2014**

**REPUBLIC.....APPLICANT**

**VERSUS**

**CABINET SECRETARY,**

**IN CHARGE OF INTERNAL SECURITY .....1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF IMMIGRATION.....2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL .....3<sup>RD</sup> RESPONDENT**

**EX-PARTE**

**NADEEM IQBAL MOHAMMAD**

**JUDGMENT**

In these judicial review proceedings the ex-parte Applicant, hereinafter simply referred to as the Applicant, is Nadeem Iqbal Mohammed. The 1<sup>st</sup> Respondent is the Cabinet Secretary in charge of Internal Security whereas the Director of Immigration and the Attorney General are the 2<sup>nd</sup> and 3<sup>rd</sup> respondents respectively. Through the notice of motion dated 17<sup>th</sup> March, 2014 and amended on 18<sup>th</sup> July, 2014 the Applicant prays for orders:

**“a) That the Applicant be granted an order of Certiorari to remove into the High Court and quash any such decision, declaration and directive of the 1<sup>st</sup> Respondent made on the 9<sup>th</sup> day of November 2013:-**

**(i) Under section 43(1) of the Citizenship and Immigration Act No. 12 of 2011 to arrest, detain and/or deport the Applicant and/or in any other manner interfere with or harass the Applicant; and**

**(ii) Under section 33(1) of the Citizenship and Immigration Act No. 12 of 2011 declaring that NADEEM IQBAL MOHAMED was a prohibited Immigrant;**

**(b) The Applicant be granted orders of Prohibition directed to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup>**

**Respondents prohibiting them, their agents, servants and/or officers or otherwise from:-**

**(i) proceeding with any arrest detention and/or deportation of the Applicant out of Kenya and from interfering with the applicant's peaceful stay in Kenya without due process; and**

**(ii) giving effect to or enforcing, in any manner or form any fresh declarations or orders issued under section 33 and 43 of the Kenya Citizenship and Immigration Act, for not less than seven (7) days from the date the same is notified in person and in writing to NADEEM IQBAL MOHAMMAD to enable him access the High Court for redress, if necessary.**

**(c) The costs of this application be provided for.”**

The application is supported by the statutory statement dated 28<sup>th</sup> January, 2014 and amended on 13<sup>th</sup> May, 2014, the verifying affidavit of the Applicant sworn on 28<sup>th</sup> January, 2014 and a supplementary affidavit sworn on 16<sup>th</sup> May, 2014 by Njoroge Wachira.

The Applicant's case is that he is a Pakistani national who has lived in Kenya since the year 1998. He averred that on 8<sup>th</sup> November, 2013 at around 3.00 p.m. he was picked from his residence in Rehema Estate, Westlands, Nairobi by seven people who identified themselves as police officers from the Crime Prevention Unit. At the time of his arrest his mobile phone and passport were confiscated from him and to date his passport has not been returned to him.

He was driven away and kept in detention at an unknown place. He was denied any communication with his family members, doctor or lawyer. He avers that he was subjected to physical and mental torture by the said officers.

In the interim, one of his brothers moved to Court on 11<sup>th</sup> November, 2013 in **Nairobi High Court Misc. Criminal Application No. 378 of 2013, In respect of NADEEM IQBAL MOHAMAD v THE ATTORNEY GENERAL & 3 OTHERS** seeking orders in the nature of *habeas corpus* for his production in Court by the respondents. Orders were indeed issued by Mbogholi Msagha, J for the production of the Applicant in Court on 14<sup>th</sup> November, 2013.

The Applicant avers that the orders were served on the date of the issuance during office hours but he was nevertheless deported at 8.00 p.m. on the same day and taken up to Dubai where he was handed over to security officers for onward escort to Pakistan. The Applicant stated that while on transit he was informed by the immigration officers that his deportation had been ordered on 9<sup>th</sup> November, 2013 by the 1<sup>st</sup> Respondent who had stated that the reason for his deportation was because his presence in Kenya was against national interest.

The Applicant averred that he is a successful business investor in Kenya with business interests in Nakuru, Nairobi and Mombasa. He has invested in the real estate and other businesses that include motor vehicle importation through limited liability companies known as Africpak Motors Limited and Geneva Motors Limited which are based in Nairobi. The Applicant asserted that he has been operating his businesses decently, faithfully and regularly paying taxes in accordance with the Kenyan laws.

The Applicant informed the Court that he is married to a Kenyan citizen and they have two children who are also Kenyan citizens.

The Applicant deposed that his presence in Kenya has never been against national interest as alleged in the deportation order. He asserted that his removal was mooted out of business rivalry by his competitors who conspired with the respondents to harass, intimate and deport him so that they can benefit from his vast business investments in Kenya. In support of this allegation, he revealed that in 2012 attempts had been made to deport him and his brothers and they filed **Nairobi High Court Misc. Civil Application**

**No. 196 of 2012 NISAR AHMED & 3 OTHERS v HON. OTIENO KAJWANG, THE MINISTER FOR IMMIGRATION & REGISTRATION OF PERSONS & 2 OTHERS** which was withdrawn after the respondents admitted that their presence in Kenya was lawful. The Applicant pointed out that evidence of the respondents' bad faith is shown by the fact that his presence in Kenya was suddenly and conveniently declared to be against national interest almost immediately after the withdrawal of the above mentioned case.

The Applicant faults the respondents' decision on many grounds. Firstly, he contended that he had not done anything to warrant the exercise of the powers granted to the 1<sup>st</sup> Respondent by **Section 33 of the Kenya Citizenship and Immigration Act, 2011**. Secondly, the Applicant asserted that the 1<sup>st</sup> Respondent has no powers to arbitrarily arrest, detain, torture and/or deport innocent foreign investors without according them a fair hearing.

Thirdly, the Applicant asserted that the respondents' actions are manifestly unreasonable, illegal, unconstitutional, and a violation of the rules of natural justice thus amounting to blatant abuse of power. The Applicant averred that he did not receive any formal communication from the respondents concerning his deportation.

Fourthly, the Applicant contends that the respondents have frustrated his legitimate expectation with respect to fair treatment irrespective of race and nationality. He asserts that his rights to equality and freedom from discrimination; and equal protection of the law as provided by **Article 27(1) of the Kenyan Constitution** have been violated by the respondents. He also asserts that his detention and torture was illegal and amounted to infringement of the right to dignity under **Article 28 of the Constitution**.

Fifthly, the Applicant argues that the respondents have breached the provisions of **Articles 238(2)(b) and 239(3)(a) of the Constitution** which provide that national security shall be pursued in compliance with the law and with utmost respect for the rule of law, democracy, human rights and fundamental freedoms and that national security organs should not act in a partisan manner.

The respondents opposed the application through the replying affidavit sworn on 3<sup>rd</sup> April, 2014 by Alfred Omani Abuya the Chief Immigration Officer in the Investigations and Prosecution Section of the Department of Immigration. It is their case that the 1<sup>st</sup> Respondent has powers to declare a person a prohibited immigrant under the provisions of **Section 33 of the Kenya Citizenship and Immigration Act, 2011**. Further that under **Section 43** of the same Act the 1<sup>st</sup> Respondent has powers to order removal of a foreign national.

Accordingly, the 2<sup>nd</sup> Respondent received orders signed by the 1<sup>st</sup> Respondent on 9<sup>th</sup> November, 2013 declaring the Applicant a prohibited immigrant and directing his removal from the Kenyan jurisdiction. Acting on the said orders and in execution of its mandate the 2<sup>nd</sup> Respondent removed the Applicant from Kenya.

It is the respondents' case that the Applicant did file **Misc. Criminal Application No. 378 of 2013** and the said application was dismissed. They argue that in the said application in which he was seeking to challenge his deportation the Applicant had relied on the very same facts as in the present case. It is therefore the respondents' case that this matter is *res judicata* since the Applicant has raised the very same facts which were in issue in the previous application and which facts have already been determined by the Court.

The respondents denied subjecting the Applicant to any physical or mental torture. They term the application scandalous, frivolous, vexatious and or otherwise an abuse of the Court process and pray for the dismissal of the same with costs.

The respondents observe that the Applicant is not within the jurisdiction of the Court and it would be against the **Kenya Citizenship and Immigration Act, 2011** to compel the Kenyan Government to admit a foreign national who has been removed on grounds of national security.

The respondents wrapped up their case by urging this Court to find that an order of prohibition would not be efficacious in the circumstances of this case as the Applicant has since been deported.

Through the supplementary affidavit of Njoroge Wachira, the Applicant admits that the 1<sup>st</sup> Respondent does indeed have powers to declare a person a prohibited immigrant and *persona non grata* for that matter pursuant to the provisions of **Section 33 of the Kenya Citizenship and Immigration Act, 2011** but such power cannot be exercised in a whimsical and capricious manner. The mandate must be exercised with due regard to the cardinal principles of natural justice and within the parameters of the **Constitution** of Kenya. Further that the removal of any foreign national from Kenya under **Section 43 of the Kenya Citizenship and Immigration Act, 2011** can only be done for the specific reasons stated under **Section 33** of the same **Act**. It is the Applicant's case that the 1<sup>st</sup> Respondent has not indicated under what category and for what reasons he declared him a prohibited immigrant and ordered his removal from Kenya.

The Applicant asserts that the 2<sup>nd</sup> Respondent cannot be heard to say that once orders are served on him by the 1<sup>st</sup> Respondent his role becomes one of facilitation of travel since under **Section 4(2) (h) of the Kenya Citizenship and Immigration Act, 2011** he has a duty to advise the 1<sup>st</sup> Respondent on immigration matters.

The Applicant contends that the **Constitution** accords all persons within the jurisdiction of the Republic of Kenya a fair and reasonable administrative treatment and that all are entitled to fair treatment and hearing before any adverse orders are made. He asserts that the respondents have not alleged any offence and/or wrongdoing on his part and the order issued by the 1<sup>st</sup> Respondent and executed by the 2<sup>nd</sup> Respondent had no legal basis.

The Applicant argued that **Misc Criminal Application No. 378 of 2013** in which he had sought a finding that the respondents were in contempt of Court for disobeying the *habeas corpus* order was dismissed, *inter alia*, on the ground that there was no proper application before the Court. The Applicant therefore submits that the instant application is not *res judicata* as the jurisdiction of the Court has been invoked under a separate legal regime and the matter before the Court is distinct and different.

The parties bolstered their cases and positions through written submissions. From a perusal of the pleadings and submissions the core issue that emerges for the determination of this Court is whether the authority of the 1<sup>st</sup> Respondent to declare a foreign national a prohibited immigrant and *persona non grata* and consequently order the deportation of such a foreigner is subject to the supervisory jurisdiction of this Court. If this question is answered in the affirmative the question that would follow is whether the 1<sup>st</sup> Respondent's action was *intra vires*, reasonable and in compliance with the principles of natural justice.

The Applicant submitted that although 1<sup>st</sup> Respondent does indeed have powers under **Section 33 (1) and 43(1) of the Kenya Citizenship and Immigration Act** to declare a person a prohibited immigrant and order the deportation of such a person, such power must be exercised fairly and justly. The Applicant asserts that to that extent, the High Court has unfettered jurisdiction and power to review declarations and orders issued by the 1<sup>st</sup> Respondent in order to protect the rights of individuals where they are infringed by the respondents.

It is the Applicant's case that although it is for the 1<sup>st</sup> Respondent and not the Judiciary to decide what is appropriate in any particular case, such power must be exercised on reasonable grounds, and the Court can question the exercise of the power once an individual challenges the decision of the 1<sup>st</sup> Respondent. The Applicant contends that there is a duty on the part of the 1<sup>st</sup> Respondent in whom the power has been vested to evaluate each case as a whole, in order for him to establish the necessary factual foundations for his decision and it is necessary for him, if the decision is challenged, to point to material on which he can reasonably, objectively and proportionately justify his decision. In support of this argument the Applicant relied on the decision in **REPUBLIC v MINISTER FOR HOME AFFAIRS & 2 OTHERS EX-**

**PARTE SITAMZE [2008] eKLR** (hereinafter referred to as Sitamze II).

The Applicant went ahead to submit that the Court has jurisdiction to go behind a determination that a person is a prohibited immigrant or indeed a deportation order and question the decision making process as well as the validity thereof once a challenge is lodged. It is the Applicant's case that where reasons have not been given like in the instant case, then the Court has power to issue appropriate orders.

I have looked, at the respondents' replying affidavit and submissions dated 13<sup>th</sup> June, 2014 and filed on the same date and the respondents do not seem to question the supervisory jurisdiction of this Court over the powers of the 1<sup>st</sup> Respondent.

It is however important for purposes of record to restate the law. In **Nairobi High Court Misc. Civil Application No. 430 of 2004, LEONARD SITAMZE v THE MINISTER FOR HOME AFFAIRS & 2 OTHERS** ( I will refer to this case as Sitamze I) Justice J. B. Ojwang (as he then was) stated, what is in my view, the correct legal position 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 civilised 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.”**

This position was recently restated by G. V. Odunga, J in **REPUBLIC v MINISTER OF STATE FOR IMMIGRATION AND REGISTRATION OF PERSONS EX-PARTE C.O. [2013] eKLR** where he opined at paragraph 33 of his judgment that:

**“ To hold that the Minister is the sole judge when it comes to the exercise of discretion would be to throw the rule of law out of the window. When Constitutional safeguards provided under Article 47 of the Constitution are destroyed by being whittled and judicial officers are put at the sufferance of the Executive or at the whims of the Legislature, the independence of the judiciary is the first victim. It must always be remembered that under Article 25 of the Constitution one of the rights and fundamental freedoms which cannot be limited is the right to a fair trial. Accordingly the Courts are empowered to investigate allegations of abuse of power and improper exercise of discretion. This is in tandem with the holding in Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 that judicial review stems from the doctrine of ultra vires and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three “I’s”) and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness.”**

It goes without saying therefore that where a public officer has been granted statutory powers, the exercise of such powers is subject to the supervisory jurisdiction of the Court. It is the duty of the Court to ensure that the exercise of such powers is legal, rational and compliant with the principles of natural

justice.

The question that follows is whether the respondents treated the Applicant fairly in this matter. There is also the issue of the legality of the respondents' orders. The Applicant asserts that the reason given for his declaration as a prohibited immigrant is not one of the grounds found in **Section 33 (1) of the Act**.

**Section 33(1) and (2)** is relevant to this case. The provision states:

**“33. Prohibited Immigrants and inadmissible persons**

**(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).
- (2) For purposes of this Act, an inadmissible person is a person who is not a Kenyan citizen and who—
- (a) refuses to submit for examination by a medical practitioner after being required to do so under section 48(1)(d) of this Act;
  - (b) the family and dependants of a prohibited immigrant;
  - (c) incapable of supporting himself and his dependants (if any) in Kenya;
  - (d) is adjudged bankrupt;
  - (e) anyone who has been judicially declared incompetent;
  - (f) an asylum seeker whose application for grant of refugee status has been rejected under the Refugee Act, 2006 (No. 13 of 2006); or
  - (g) is, by order of the Cabinet Secretary, declared inadmissible on grounds of national security or national interest.
- (3).....”

The **Section** creates two categories of persons who are not wanted in Kenya. **Sub-section (1)** refers to prohibited immigrants whereas **Sub-section (2)** deals with inadmissible persons, that is to say persons who are not supposed to enter Kenya in the first place.

The provision relevant to the case before me is **Sub-section (1)**. G. V. Odunga, J had the occasion to

address the powers of the 1<sup>st</sup> Respondent under that **Sub-section** in **Ex-parte C.O.** (supra). At paragraph 22 of his judgment he opined that:

**“It has been contended that the impugned decision was made pursuant to section 33(1) of the Act. It is important to note that section 33(1) employs the phrase “a prohibited immigrant is” rather than “a prohibited immigrant includes”. It is my view therefore that where the legislature uses the word “is” there is no room for extension of the circumstances enumerated thereunder. No material has been placed before the court upon which the court can find that the criteria stipulated in section 33(1) aforesaid applied to the present circumstances. Instead the respondent has hidden under the principle of national security. Where an authority decides to keep certain crucial information from the Court which information may enable the Court to form a view favourable to the authority, the said authority must take the risk that the Court may find that the decision was not warranted.”**

I agree with the learned Judge that a person can only be declared a prohibited immigrant on the grounds found in **Section 31(1)**. Those grounds cannot be enlarged at the whim of the Cabinet Secretary in charge of immigration affairs. The class of persons who can be declared prohibited immigrants is closed. This closure is emphasized by **Section 33 (1) (v)** where Parliament gives the Cabinet Secretary the power to declare a person a prohibited immigrant for any other reason subject to approval by Parliament. It is not therefore open to the 1<sup>st</sup> Respondent to go out of **Section 33(1)** and declare a person prohibited immigrant. Doing so will be *ultra vires* the clear provisions of the **Act**.

In order to clearly bring out the Applicant’s argument on this issue, I will reproduce the two declarations made by the 1<sup>st</sup> Respondent on 9<sup>th</sup> November, 2013. The 1<sup>st</sup> declaration states:-

**“DECLARATION UNDER SECTION 33 OF THE KENYA CITIZENSHIP AND IMMIGRATION ACT 2011, LAWS OF KENYA**

**I, JOSEPH J. OLE LENIKU, CABINET SECRETARY, Ministry of Interior and Co-ordination of National Government in the exercise of the powers vested in me by Section 33(1) of the Kenya Citizenship and Immigration Act 2011, do hereby declare the entry or presence of :-**

**NADEEM IQBAL MOHAMMAD**

**Who is not a citizen of Kenya and whose presence in Kenya is contrary to national interest; in consequence of this declaration, the said:**

**NADEEM IQBAL MOHAMMAD**

**Is for all purposes of the Immigration Act, other than for the purposes of sub-section (1) of Section 33, a member of the Prohibited class and a Prohibited Immigrant.**

**Dated 9<sup>th</sup> day of November 2013”**

The declaration is signed by the 1<sup>st</sup> Respondent.

The second declaration states:-

**“DECLARATION UNDER SECTION 43 OF THE KENYA CITIZENSHIP AND IMMIGRATION ACT 2011 LAWS OF KENYA**

**I, JOSEPH J. OLE LENKU, CABINET SECRETARY, Ministry of Interior and Co-ordination of National government responsible for Immigration matters, in the exercise of the powers vested in me by Section 43 (1) of the Kenya Citizenship and Immigration Act 2011, do hereby declare that:**

**NADEEM IQBAL MOHAMMAD**

**Who is not a citizen of Kenya and whose presence in Kenya is contrary to national interest, be removed from Kenya to his country of origin PAKISTAN immediately, and further direct that the said:**

**NADEEM IQBAL MOHAMMAD**

**Remain in prison custody while arrangements for removal are being undertaken, and this order is sufficient warrant to keep the said NADEEM IQBAL MOHAMMAD in custody.**

**Dated 9<sup>th</sup> day of March 2013.”**

This second declaration is also signed by the 1<sup>st</sup> Respondent.

The decisions of those empowered by law to do certain things must be within the law granting such powers. The 1<sup>st</sup> Respondent can only declare any person a prohibited immigrant if the person falls under the classes created by **Section 33(1)**. 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.

Assuming that the reason given by the 1<sup>st</sup> Respondent for the removal of the Applicant is indeed a valid reason, was the 1<sup>st</sup> Respondent’s exercise of power reasonable? Did he act within the rules of natural justice? There are contradictory decisions as to the extent a Court can interrogate the executive’s exercise of power in matters of national interest or national security. In the case before me, no evidence has been adduced as to what national interest the Applicant had threatened. I would agree with J. B. Ojwang, J (as he then was) in **Sitamze I** (supra) that a judge is among the very few people who are entitled to know the reasons behind the deportation of a foreign national. In fact Odunga, J went further to assert in **Ex-parte C.O.** (supra) that the State must exhibit the evidence in support of the decision to deport a foreign national.

In my view, a deported foreign national is entitled to know the specific reason for his deportation. That is why Parliament through **Section 33(1)** listed all the reasons that can form the basis for the deportation of an immigrant. In the case before me the reason for the deportation of the Applicant has been hidden in a blanket statement called **“national interest.”** As was aptly observed G.V. Odunga, J in **Ex-parte C.O.** (supra):

**“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.”**

That should be the case in an environment where public servants exercise their powers within the law.

The State must indeed be supported in its fight against external threats. This support can only be forthcoming where it places all its cards on the table. In the present case the Applicant has submitted that the respondents acted in bad faith. This allegation is indeed supported by the evidence he has placed before the Court.

In **Misc. Civil Application No 196 of 2012** the Applicant and others had approached the Court for

judicial review orders on the ground that the respondents wanted to deport them unlawfully. The respondents filed a replying affidavit indicating that the Applicant was in Kenya lawfully. Not so many days thereafter and on a Friday, the respondents arrested the Applicant and later deported him. The other evidence of malice and ill will is the Applicant's undisputed averment that he was arrested on 8<sup>th</sup> November, 2013, a Friday and his deportation order was signed on 9<sup>th</sup> November, 2013, a Saturday. His arrest therefore came before the deportation order and the declaration that he was a prohibited immigrant. It is not difficult to agree with the Applicant that his arrest and subsequent deportation was done during the weekend so that he could not access the courts.

The Applicant also submitted that he was deported albeit the fact that an order for his production in Court had been issued in **Misc. Criminal Application No. 378 of 2013**. Although the Applicant has asked this Court to find that his deportation was done in contempt of a Court order, I will not address the issue as the same was the subject of the ruling delivered on 29<sup>th</sup> January, 2014 in **Misc. Application No. 378 of 2014** by L.A. Achode, J.

Another issue raised for the consideration of the Court is whether these proceedings are *res judicata*. The respondents think so. In **Misc. Criminal Application No. 378 of 2013** the order sought was the production of the Applicant in Court. There is no evidence that at that time the Applicant or his relatives were aware that the 1<sup>st</sup> Respondent had made the two declarations dated 9<sup>th</sup> November, 2013. The two declarations were therefore not the subject of litigation in **Misc. Criminal Application No. 378 of 2013** and the issues surrounding the declarations were never addressed by the Court. The question of the validity of the declarations is therefore not *res judicata*. I therefore find that this application is properly before this Court.

The respondents have urged the Court not to issue the orders sought. They submit that as the Applicant is already deported, an order of prohibition is no longer a viable remedy. They rely on the decisions in **KENYA NATION EXAMINATION COUNCIL v REPUBLIC EX-PARTE GEOFFREY GATHENJI NJOROGE AND 9 OTHERS [1997] eKLR** and **KELVIN LUNANI KWENA v SULEIMAN SHABHAL AND 3 OTHERS [2013] eKLR**.

The cited decisions correctly capture the essence of a prohibition order. It looks into the future and stops any illegal action before it is done. The Applicant has indeed been deported. However, what I get the Applicant to be saying is that if the declarations of the 1<sup>st</sup> Respondent are quashed then an order of prohibition should issue so that the 1<sup>st</sup> Respondent can, in the future, only deport him after he has been given an opportunity to access the Court. His apprehension is indeed justified considering the past behaviour of the respondents. I, however, doubt whether the Court can create specific protection for the Applicant by way of such an order. Such an order is also speculative in nature and seeks to stop acts that are not reasonably foreseeable. I am of the view that issuing an order of prohibition in the manner proposed by the Applicant would amount to interfering with the exercise of the statutory powers of the 1<sup>st</sup> Respondent. The Court would thus be overstepping its boundaries and I decline to issue such an order.

Should orders of *certiorari* issue? I have clearly demonstrated in this judgement that the 1<sup>st</sup> Respondent's decision was illegal, irrational and contrary to the principles of natural justice. The Applicant who has extensively invested in this country was entitled to a hearing. He had a valid permit and as observed by Lord Denning MR in **SCHMIDT v SECRETARY OF STATE FOR HOME AFFAIRS [1969] 1 ALL ER 904,CA**:

**'If his permit is revoked before the time limit expires he ought then to be given an opportunity of making representations: for he would have a legitimate expectation of being allowed to stay for the permitted time.'**

It is not like he would have caused havoc if he had been given a little more time to explain himself and if necessary, put his affairs in order.

An illegality cannot be allowed to stand on the ground that it has been executed. It is only fair that such

an illegality be reversed. In the circumstances, an order of *certiorari* will issue quashing the decision of the 1<sup>st</sup> Respondent dated 9<sup>th</sup> November, 2013 declaring the Applicant a prohibited immigrant and deporting him from Kenya. The Applicant's passport which was confiscated by the respondents' agents should be returned to him or his authorised agent forthwith. He is therefore free to enter Kenya unless otherwise lawfully ejected. Owing to the fact that he had a valid permit he should be given an opportunity to be heard if the respondents desire to deport him.

For clarity, this decision means that the Applicant reverts back to the position he was in prior to the issuance by the 1<sup>st</sup> Respondent of the orders dated 9<sup>th</sup> November, 2013.

As for costs, I find that this is one case in which the Applicant is entitled to costs. He was treated unfairly by the respondents who have not given any reasons for treating him in such a manner. The Applicant will therefore get the costs of the application and it is so ordered.

Dated, signed and delivered at Nairobi this 13<sup>th</sup> day of February , 2015

**W. KORIR,**

**JUDGE OF THE HIGH COURT**