REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Judicial Review 361 of 2012

IN THE MATTER OF: AN APPLICATION FOR REVIEW ORDERS OF CERTIORARI

AND

IN THE MATTER OF: THE KENYA CITIZENSHIP AND IMMIGRATION ACT 2011

AND

IN THE MATTER OF: THE DECISION BY THE MINISTER OF STATE FOR IMMIGRATION

AND REGISTRATION OF PERSONS MADE ON 21ST SEPTEMBER 2012

BETWEEN

REPUBLIC..APPLICANT

AND

MINISTER OF STATE FOR IMMIGRATION AND REGISTRATION OF PERSONS....RESPONDENT

PETER SESSY..INTERESTED PARTY

JUDGEMENT

INTRODUCTION

1.By a Notice of Motion dated 2nd October 2012, filed in Court on 3rd October 2012, the ex parte applicant herein, **Peter Sessy**, a Sierra Leonean Nationality, who is wrongly described in the Motion as the Interested Party seeks the following orders:

1. An order of Certiorari to bring into the High Court and quash the decision of the Minister for Immigration and Registration of persons made on 21st September, 2012 declaring the Applicant a prohibited immigrant be made.

2. An order staying the implementation of the said decision pending the hearing of the application for judicial review.

3. An order for costs.

APPLICANTS' CASE

2. The said Motion is supported by the Statement of facts filed on 3rd October 2012 and he verifying affidavit sworn by **N H Oundu**, the applicant's advocate on 1st October 2012. According to the deponent, on the 26th September 2012 on instructions of the Applicant and 4 others he filed an application under certificate of urgency under Article 49(1) of the Constitution and section 389 (1) of the Criminal procedure Act seeking the production of the Applicant who had been held incommunicado without being arraigned in court within the 24 hours required under the law in Miscellaneous Criminal Application 459 of 2012. Upon hearing the Application the court stayed any precipitated action against the Applicant and issued Summons directed to PCIO Nairobi Area requiring him to appear in person or by an Advocate on the 28th September 2012 together with the original if any warrant or order for the detention of the Applicant and to show cause why the Applicant should not be forthwith released. On the 28th of September 2012 when the state appeared, the deponent's associate, **Ms P. K. Makori**, was served with a Replying Affidavit together with the declaration of the Minister of State for Immigration and Registration of Persons dated 21st September 2012 declaring the Applicant a member of the Prohibited class and Prohibited Immigrant under section 33 of the Kenya Citizenship and immigration Act 2011. According to the deponent, the Respondents' decisions are unfair, discriminatory, arbitrary, inconsistent and capricious as the Applicant has a proper and valid visa to be in Kenya which has been reviewed severally over the last 6 years, is married to a Kenyan citizen, **Peris Waigwe**, with whom they have an issue, **Nkiruka Khotande Ebogha.**

3. According to the deponent, the Respondents' decisions are an abuse of power, oppressive, punitive and unlawful as the Applicant was never served with the order from the Minister as the Applicant only learnt about the decision by the said Minister after the he made an application for Habeas Corpus in Criminal Application no. 459 of 2012 after being arrested on the 15th of September 2012 and not being arraigned in court. It is further contended that the Applicant was never served with any notice, has never been involved in any criminal activities, has never been charged in a court of law and was never informed of the decision until he filed the case in court. It is therefore the applicant's position that the Respondents' conduct is unprocedural, inconsistent and ultra vires the provisions and procedures under Article 47 of the Constitution guaranteeing fair administrative action to every person as the decision was never communicated to the Applicant. Further, the Respondents' decision constitute an illegal exercise of discretion as the Applicant has been in Kenya for over 6 years, stays at Kileleshwa at Ngoli Court and carries out businesses in Kenya.

4. Accordingly, the Respondents' decisions are irrational and unreasonable considering that the applicant has never been arraigned in any court of law or faced any charges in a court of law and the Respondents' decision violates the principle of legitimate expectation made in breach of the rules of natural justice and otherwise denies the Applicant effective access to justice. In the applicant's view, order was made against the right to fair administrative action as provided under the Constitution. The detention of the Applicant, it is deposed is in contravention of the order of stay which was served on the Respondent as well as the Attorney General. Under section 43(1) of the Kenya Citizenship and Immigration Act 2011, the Minister can only make such orders where stay in Kenya by the person against whom the orders is made is unlawful under the Act or where it has been recommended to the Minister under section 26 A of the Penal Code Chapter 63 of the Laws of Kenya. However, in this case the reasons or grounds for the order made by the Minister is stated as "presence in Kenya is contrary to national interest" whereas the entire the Kenya Citizenship and immigration Act 2011 does not specify National Interest as a ground for declaring a person a prohibited immigrant hence the order is null and void. It is reiterated that the Applicant has not contravened Section 33(1) of the Act or committed any offence under the Act.

5. Apart from the foregoing, the applicant contends that the order by the Minister is required by Section 43 (2) of the Kenya Citizenship and immigration Act 2011 (hereinafter referred to as the Act) to state the country or place where a person against whom such order is made will be removed to or such a place of his choice. However, the order by the Minister does not authorize detention of the Applicant in Police Custody as where such actions is necessary Section 43 (2) (B) require that the same be specified in order and the holding of the Applicant in Police detention is without authority and unlawful.

6. It is therefore the Applicant's position that the Respondent's decision is likely to result in legal uncertainty as according to the Act for the Minster to make orders or grounds outside the Act he needs approval of parliament. By virtue of the Minister's order, it is contended that other people such as **Emmanuel Onuorah Chibueze**, **Princess Femi**, **Elkana Agbeze** and **Zemret Zeru** have already been irregularly deported. To the applicant, the Respondent's decisions are bad in law for failure to give reasons and/or sufficient reasons and is made in bad faith and made for an improper motive or purpose and his interpretation of the Law is erroneous, contrary to law and established principles of statutory interpretation and policy and unconstitutional and is therefore a nullity.

7. In the result, the Respondent's decisions are bad in law and ultra vires for failure take into account relevant factors and have been made in excess or without jurisdiction and are otherwise ultra vires.

RESPONDENT'S CASE

8. The Respondent filed neither a replying affidavit nor grounds of opposition. However, Order 53 Rule 6 of the Civil Procedure Rules provides as follows:

On the hearing of any such motion as aforesaid, any person who desires to be heard in opposition to the motion and appears to the High Court to be a proper person to be heard shall be heard, notwithstanding that he has not been served with the notice or summons, and shall be liable to costs in the discretion of the court if the order should be made.

9. Whereas the foregoing provision empowers the Court to permit any person who in the opinion f the Court ought to be heard whether or not he has been served and does not expressly provide that the said person can only be heard where he has filed papers in opposition to the application, it is clear that for one to be heard under the said Rule he must be a person who intends to oppose the Motion. Further it is my view that where a person is aware of the proceedings for the sake of orderly conduct of the proceedings and in the interest of fairness such a person ought to bring to the notice of the applicant either by way of an affidavit or grounds of opposition grounds upon which he intends to oppose the application.

EX PARTE APPLICANT'S SUBMISSIONS

10. It is submitted on behalf of the applicant that under section 33(i)(v) any declaration by the Minister that a person is a prohibited immigrant is conditioned upon approval by Parliament hence the Minister cannot without approval of Parliament declare one a prohibited immigrant. Where it is intended and expressly stated that an act is subject to approval by Parliament, it is submitted that the instrument stating the same must indicate that such approval has been sought and granted. It is therefore the applicant's case that the Minister cannot without approval by Parliament make a final declaration that the Applicant is a prohibited immigrant. Contrary to the provisions of section 43(2) of the Act, it is submitted that the declaration did not direct his removal from Kenya s directed by the law. Since his family and property are in Kenya, it is submitted that he ought to have been given time and opportunity to organise his house and carry whatever he would have wanted to depart with since depriving him of his liberty and holding him incommunicado is a violation of his fundamental rights and relying on **Republic Ex parte Mhfoudh Salim vs. The Federal Bureau of Investigations (FBI) and the Commissioner of Police through the Hon. Attorney General Misc. Criminal Appli. No. 6 of 1999**, it is submitted that such treatment of a person constituted a violation of his right to personal liberty in a manner unauthorised by law and the High Court has jurisdiction to declare the same. Since the Act does not expressly exclude application of natural justice principle especially the right to be heard, it is submitted that the provisions of Article 47 of the Constitution ought to have been adhered to. In support of this line of submission, the applicant relies on the decision of the Supreme Court of Judicature in Barbados in High Court Civil Case No. 529 of 2003 – **Alfred Sparman vs. Gilbert Greaves, and The Attorney General** and the decision of the High Court of Namibia in **Sikunda vs. Government of the Republic of Namibia [2001] NR 181 (HC)**.

11. It is therefore submitted that the Constitution of Kenya provides for procedural fairness in the making of administrative decisions which affect the rights, interests and legitimate expectations hence the Minister's order dated 21st September, 2012 declaring the applicant a member of the prohibited class and

a prohibited immigrant should be set aside and the applicant be set at liberty. The applicant also prays for the costs of this application.

RESPONDENTS' SUBMISSIONS

12. On behalf of the Respondent, it is submitted that the Respondent's actions are backed by the law specifically the Constitution and the Act more particularly section 33(1) thereof which describes a prohibited immigrant. It is submitted that the respondent was exercising the powers conferred on his office by virtue of the said section. Section 33 aforesaid, it is submitted, gives absolute power to the Minister to declare any person who is not a citizen a prohibited person and the only instance where Parliamentary approval is required is by virtue of section 33(1)(v) which issues a blanket statement not applicable to this instance. It is further submitted that due to the ex parte applicant's unruly behaviour he was not allowed on board the plane hence was detained in police custody as provided under section 43(2)(b). Thereafter the implementation of the order was stayed by the Court.

13. In the Respondent's view, nowhere in the Act or attendant regulations is there a requirement that a person declared to be a prohibited immigrant be consulted in the making of the declaration hence the Minister was within his powers in making the declaration. According to the Respondent, public interest in this case overrides individual rights and the Court in granting the orders sought would curtail and frustrate the Respondent's efforts in carrying out its functions. Citing Article 24(1) of the Constitution and **R vs. Kenya National Human Rights Commission Ex Parte Uhuru Kenyatta Nairobi Misc. 86 of 2009**, it is submitted that the Court has the task of maintaining the balance between public and individual rights and safeguarding public rights where the same outweigh private interests. Based on **Republic vs. Judicial Service Commission ex parte Pareno [2004] 1 KLR 203-209**, it is submitted that judicial review orders are discretionary and not guaranteed hence even if the case falls into one of the categories where judicial review will lie the court is not bound to grant it and what orders the court will make depends upon the circumstances of the case. The orders sought herein, it is submitted, will fetter the operations of the Respondent and will set a wrong precedent in immigration controls.

DETERMINATIONS

14. Section 33(1) of the Act provides:

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; 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).

15. Section 43 of the Act provides as follows:

43. (1) 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, 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.

(4) Any order made or directions given under this section may at any time be varied or revoked by the Cabinet Secretary by a further order, in writing.

(5) In the case of a person who arrives in Kenya illegally, the powers of the Cabinet Secretary under this section may be exercised either by the Cabinet Secretary or by an immigration officer.

(6) An order made or deemed to have been made under this section shall, for so long as it provides that the person to whom it relates shall remain out of Kenya, continue to have effect as an order for the removal from Kenya of that person whenever he is found in Kenya, and may be enforced accordingly; but nothing in this subsection shall prevent the prosecution for an offence under this Act or any other written law of any person who returns to Kenya in contravention of such an order.

(7) Where a person is brought before a court for being unlawfully present in Kenya, and the court is informed that an application, to the Cabinet Secretary, for an order under this section has been made or is about to be made, the court may order that such person be detained for a period not exceeding fourteen days or admit the person to bail, pending a decision by the Cabinet Secretary.

16. According to the letter dated 21st September 2012 from the Minister of State for Immigration and Registration in which the impugned declaration was made, the Minister expressly stated that he was exercising the powers vested in him under section 33(1) of the Act. According to him, the Applicant's presence in Kenya was contrary to national interest. As rightly submitted on behalf of the Applicant presence in Kenya contrary to National interest is not one of the grounds specified in section 33(1) under which the Minister purported to make the said declaration. 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. To do so would give more powers to the executive than the ones contemplated by the Legislature. As was held by **Warsame, J** (as he then was) in **Re: Kisumu Muslim Association Kisumu HCMISC. Application No. 280 of 2003,** where an officer is exercising statutory power he must direct himself properly in law and procedure and must consider all matters which are relevant and avoid extraneous matters. The learned Judge further held that the High Court has powers to keep the administrative excess on check and supervise public bodies through the control and restrain abuse of powers. Concerning irrelevant considerations, where a body takes account of irrelevant considerations, any decision arrived at becomes unlawful. Unlawful behaviour might be constituted by (i) an outright refusal to consider the relevant matter; (ii) a misdirection on a point of law; (iii) taking into account some wholly irrelevant or extraneous consideration; and (iv) wholly omitting to take into account a relevant consideration. See **Padfield Vs. Minister of Agriculture and Fisheries [1968] HL.**

17. In **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090,** the Court expressed itself as follows:

"The Minister for agriculture has the duty to ensure that all arable land is properly utilised for the

public benefit in the production of foodstuffs to feed the population and earn foreign exchange required for the development of the country. Section 187 of the Agriculture Act is designed to empower the Minister to take steps for preventing or delaying the deterioration of a holding due to mismanagement. Such steps are in the words of section 75 of the Constitution "in the interests of the development or utilisation of any property in such manner as to promote the public benefit. The necessity of such provision is such as to afford reasonable justification for the causing of any hardship that may result to any person having an interest in or right over the property…….The court can therefore interfere with the decision of a Minister if the Minister does not act in good faith, or if he acts on extraneous considerations which ought not to influence him, or if he plainly misdirects himself in fact or in law…….. The management order is based on mismanagement and correctly follows the wording of section 187(1) of the Agriculture Act. In order of sale, however, the reason given is inability to develop the holding. It is an extraneous consideration, which ought not to have influenced the Minister, and it amounts to a misdirection in law. The facts, which induced the Minister to find that the holding was mismanaged and that the applicants were unable to develop it, were disclosed neither to the applicants nor later to the court. 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. The Minister has given no reasons while the applicants have shown that there was no inadequate management or supervision and that, in the circumstances prevailing in Nyanza, the holding is fully developed. The conclusion is therefore that the Minister misdirected himself on the facts……… The provisions of section 187 of the Act, being aimed at depriving the owner of his holding (even for good reason), should be construed strictly. Orders made must comply with the Act, and if they do not so comply in important aspects, they will be null and void……. The courts would be no rubber stamp of the executive and if Parliament gives great powers to the Minister, the courts must allow them to him: but, at the same time, they must be vigilant to see that he exercises them in accordance with the law. He must act within his lawful authority…….. An act, whether it be of a judicial, quasi-judicial or administrative nature, is subject to the review of the courts on certain grounds. The Minister must act in good faith; extraneous considerations ought not influence him; and he must not direct himself in fact or law… It is clear that both sections 187(1) and (4) require the Minister to be "satisfied". It gives him a discretion; and it is his discretion to act upon the facts before him, and not for the court to sit on appeal so as to impose its judgement on the facts upon the Minister. There is no doubt that the Minister acted in good faith. But the Minister had to have certain facts before him. The farms had to be managed and supervised; that had to be done so inadequately that the result was necessity to prevent or delay deterioration. The Minister did not give evidence but he swore an affidavit. From it the minister was concerned with development and referred to his national concern relating to sugar production. In his order for sale he said that the owners were not able to develop the farm. The true test is whether the farm should be leased or sold to save it from deteriorating; the purpose of showing the cause is to allow the Minister to decide whether, in view of the deterioration, the farm had better be leased or sold. In either case, the owners are not going to be considered able to develop the farm or to continue as they have been. They are indeed, nolonger in occupation. It is clear that the reasons given in the order for sale illustrate that the Minister had asked himself the wrong question; it being a question not enjoined upon him by the Act. He had therefore misdirected himself in law and that order is null and void."

18. In **Republic vs. Institute of Certified Public Accountants of Kenya Ex Parte Vipichandra Bhatt T/A J V Bhatt & Company Nairobi HCMA No. 285 of 2006,** the Court held:

"The Disciplinary Committee as a statutory body can only do that which it is expressly or by necessary implication authorised to do by statute….. Secondly, the Disciplinary Committee has no authority to expand its ambit beyond what has been referred to it by the Council. The terms of section 30(1) say that where the Council has reason to believe that a member has been guilty of professional misconduct it shall refer the matter to the Disciplinary Committee, which shall inquire unto the matter. Under section 31(1), on the completion of an inquiry under section 30 into the alleged professional misconduct of a member of the Institute, the Disciplinary Committee shall submit to the Council a report of the inquiry put the matters beyond question or doubt. The Disciplinary Committee can only conduct an inquiry into the actual matters referred to it for

inquiry by the Council. In unilaterally expanding the said inquiry into something called "conduct short of expected standards of professionalism", and thereby expanding the said inquiry beyond its terms of reference, the Disciplinary Committee acted unlawfully………Thirdly, there is nothing in either the Act, or the Fifth Schedule or any known subsidiary legislation under the Act which empowers Disciplinary Committee or indeed the Respondent, to delegate its Ad-judicatory functions to unnamed under Section 28(1) of the Accountants Act. The Committee's findings of the Applicant guilty of such offence showed clearly that the Disciplinary Committee failed to appreciate the limits of its own jurisdiction, and also failed to apply the law as it is. It is akin to the tribunal asking itself the wrong questions, and taking into account wrong considerations. If a tribunal whose jurisdiction was limited by statute or subsidiary legislation mistook the law applicable to the facts as it had found then it must have asked itself the wrong question, i.e. one into which it was not empowered to inquire and so had no jurisdiction to determine. Its purported determination not being a 'determination' within the meaning of empowering legislation was accordingly a nullity….. Error of law by a public body is a good ground for judicial review. An administrative or executive authority entrusted with the exercise of a discretion must direct itself properly in law……. It is axiomatic that that statutory power can only be exercised validly if they are exercised reasonably. No statute can ever allow anyone on whom it confers a power to exercise such power arbitrarily and capriciously or in bad faith."

19. The Respondent, however, submitted that the there is no requirement under the Act for affording the applicant hearing before the Minister made his decision. That may be so. However, as was held by the Court of Appeal in **Onyango Oloo vs. Attorney General [1986-1989] EA 456**:

"The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice...To "consider" is to look at attentively or carefully, to think or deliberate on, to take into account, to attend to, to regard as, to think, hold the opinion... "Consider" implies looking at the whole matter before reaching a conclusion...A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided...In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings...It is not to be implied that the rules of natural justice are excluded unless Parliament expressly so provides and that involves following the rules of natural justice to the degree indicated...Courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or of an internal disciplinary character. It is a loan, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone's advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair...Denial of the right to be heard renders any decision made null and void ab initio."

20. 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 an irrelevant matter. 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. Illegality is when the decision-making authority commits an error of law in the process of taking 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. Procedural Impropriety is when there is a 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. See **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**, **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478** at **479.**

21. 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 like the Biblical mustard seed which a man took and sowed in his field and which is the smallest of all seeds but when it grew up it became the biggest shrub of all and became a tree so that the birds of the air came and sheltered in its branches, 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 has been said that the growth of judicial review can only be compared to the never-ending categories of negligence after the celebrated case of **Donoghue vs. Stephenson** in the last century.

22. It is therefore clear that the Minister not only took into account matters which he was not expressly permitted to consider but also failed to adhere to the rules of natural justice hence the exercise of his discretion was based on no reason or on improper reasons. Accordingly his action was tainted with illegality, irrationality and procedural impropriety.

ORDER

23. Having so found, I have no hesitation in directing that an order of certiorari do issue removing the decision of the Minister for Immigration and Registration of Persons made on 21st September, 2012 declaring the Applicant a prohibited immigrant to this Court for the purposes of being quashed and the same is hereby quashed.

24. The applicant will have the costs of this application.

Dated at Nairobi this day 15th day of April 2013

G V ODUNGA
JUDGE

Delivered in the presence of Ms Mbevi for Mr Oundu for the Applicant.