REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. 448 OF 2017

IN THE MATTER OF AN APPLICATION BY LEAVE FOR ORDERS

OF CERTIORARI, PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF ARTICLES 23, 47,48,49,50,51, 165(3)

(B) &(D) OF THE CONSTITUTION OF KENYA 2010,

AND

IN THE MATTER OF SECTIONS 33(1) AND 43(1) OF THE KENYA

CITIZENSHIP AND IMMIGRATION ACT NO 12 OF 2011

AND

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW

REFORM ACT , CAP 26 OF THE LAWS OF KENYA

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

CABINET SECRETARY: MINISTRY OF

INTERIOR AND CO-ORDINATION OF

NATIONAL GOVERNMENT.....1ST RESPONDENT

DIRECTOR OF IMMIGRATION.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

AND

RICHARD BOACK.....EX PARTE APPLICANT

JUDGMENT

The Application

1. The ex-parte Applicant herein (hereinafter "the Applicant"), is a German national currently residing in Kenya. The 1st Respondent is the office of the Cabinet secretary in charge of internal security in the executive wing of the Government. The 2nd Respondent is the Director of Immigration in the Ministry of Home affairs. The 3rd Respondent on the other hand is the principal legal adviser of Government by virtue of Article 156 of the Constitution of Kenya.

2. Through a Notice of Motion dated 18th July 2017, the Applicant seeks the following orders from the court:

> **1. An order of Certiorari do issue removing into the High Court and quashing the decision, declaration and directive of the 1st Respondent made on the 12th day of May 2017; which decision, declaration and directive of the 1st Respondent made under section 33(1)(n) of the Citizenship and Immigration Act No.12 of 2011 declared or purported to declare the Applicant a prohibited immigrant and member of the prohibited class; and ordered for the arrest, detention, removal and or deportation of the said Applicant.**
>
> **2. An order of Prohibition do issue prohibiting the 1st, 2nd and 3rd Respondents, 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 declarations or orders issued under section 33 and 43 of the Kenya Citizenship and Immigration Act, without giving the Applicant a written notification of not less seven (7) days from the date it is served upon him to enable him to access law for any redress, if necessary.**
>
> **3. An order of Prohibition do issue to the 2nd Respondent, their agents, servants and/or officers restraining from implementing the 1st Respondent's directive dated 12th May 2017.**
>
> **4. An order that the 2nd Respondent do receive and determine on its merits any application by the Applicant for extension of his visa if he does.**
>
> **5. Costs of the application be provided for.**

3. The application was supported by a statement dated 17th July 2017and the verifying affidavit of the Applicant sworn on the same date. It is the Applicant's case that he is a German citizen with a German passport bearing the number CFTZNVC7. He contended that he has been lawfully residing in Kenya with a valid visa, and spending time with his girlfriend. That on the 10th May 2017, he was arrested by the police without any lawful justification, and taken to the Nairobi County criminal investigations offices, where he was detained and later to the Central Police Station where his passport and girlfriend's belongings were confiscated.

4. Further, that through Miscellaneous Criminal Application No 1548 of 2017, filed in Milimani Chief Magistrate's Court, the police applied to further detain him beyond the stipulated time, without any charge being filed against him. He contended that he opposed the application which was dismissed on 11th May 2017, and the Court ordered that he be released immediately. He further averred that he kept on going to the criminal investigations department to collect his passport as he needed it to urgently apply for the extension of his visa or to travel, but that the police illegally refused to release it,

5. It was the Applicant's case that he filed an application for the release of the passport on the 26th May 2017,and the Court directed that the passport be released to him. That the court order was dully served on the Nairobi Criminal Investigations Office, who still declined to release the passport to him. Further, that his advocates filed contempt proceedings and the court issued a warrant of arrest against the Nairobi Criminal Investigations Officer, who subsequently brought the passport to court and released it to him.

6. According to the Applicant, the proceedings by the police were intended to deny him the opportunity to extend his visa, and to obtain an illegal deportation order. He averred that the order was unjustifiable and issued without giving him an opportunity to defend himself which is against the Constitution, and that on the 11th July 2017 he was arrested in the company of his girlfriend and has continually been detained for over 7 days by the police who are making all efforts to deport him.

7. The Applicant asked the court to stay the deportation process as the same is done without any justifiable cause, and he be given an opportunity to renew his visa or leave the country on his own accord without the stigma and the consequences of a deportation order. It was his case that his constitutional rights and fundamental freedoms have been, and are still being grossly interfered with, and it is in the interest of justice that the application be allowed.

8. Ongegu & Associates, the Advocates for the Applicant, filed submissions dated 19th February 2018, wherein it was urged that Article 47 of the Constitution provides that a right to fair action must be adhered to whenever an administrative decision is undertaken. Further, that a person has a right to be given written reasons for the action, and under section 4 of the Fair Administration Act, an administrative action must be expeditious, efficient and lawful, reasonable and procedurally fair. Reliance was placed on section 4(3) of the Fair Administrative Action Act on the applicable procedure .

9. The Applicant further submitted that the Respondents' actions are *ultra vires* the statutory provisions relied upon to make the deportation order dated 12th May 2017. He cited section 33 1(n) of the Citizenship and Immigration Act, which he urged in its plain reading does not grant powers to the 1st Respondent to make orders for deportation. Reliance was also placed on the case of **Republic vs Attorney General**

& 3 Others Ex-parte Tom Odoyo Oloo (2015) eKLR for the position that the judicial review orders herein are being sought to tame the Respondents' acts of arbitrariness, and their lack of respect for the law and the laid down procedures.

10. According to the Applicant, the court is not interested in the merits and demerits of the issue but rather the procedure that was followed by the Respondents in the carrying out of their duty, and he relied on the case of **Republic vs Director of Public Prosecutions & 2 others Exparte Gerald Chege Gaitho & Another (2016) eKLR** for this proposition. Further, that the Respondents failed to follow the laid down procedures and relied on the wrong provision of the law in their administrative actions.

11. In addition, that there were orders for the release of the Applicant's passport and visa but they were never complied with despite the court order being in force. The Applicant relied on the case of **Republic vs Kenya School of Law & 2 Others Exparte Juliet Wanjiru Njoroge & 5 Others (2015) eKLR** for the position that the Court cannot turn a blind eye when its orders are abrogated in the name of statutory provisions.

12. Lastly, the Applicant submitted that he was denied the opportunity to defend himself and to participate in the proceedings, which was against the rules of natural justice**.** Based on the foregoing he submitted that there was a well-orchestrated ploy to illegally and unprocedurally deport him.

The Response

13. The application was opposed by way of a replying affidavit by Alfred Omangi, a Chief Immigration Officer who works under the 2nd Respondent's office in the investigations and prosecution section. It was his case that on 12th May 2017, the 2nd Respondent received a confidential report from the police dated 11th May 2017 that the Applicant was involved in criminal activities detrimental to the nation's interests, and therefore recommended that he be deported from Kenya.

14. He contended that on the strength of the aforementioned recommendation and an advisory from the National Intelligence Service, the 1st Respondent declared the Applicant a prohibited immigrant and hence inadmissible person, and declared that he be removed from Kenya in line with the provisions of the Kenya Citizenship and Immigration Act.

15. According to the deponent, the state can through the lawful and reasonable exercise of its sovereign authority order removal of, or deny entry into its territory of any foreign national based on legitimate reasons as is the case with the Applicant. Further, that the exercise of sovereign authority rests on the Respondents as agents of the state. He averred that if the Applicant is aggrieved by the decision of the 1st Respondent, there is an administrative avenue for redress to the Cabinet Secretary for review of his status as an inadmissible immigrant, before invoking the jurisdiction of the Court.

16. Mr. Omangi further asserted that the Applicant has no locus to compel the Respondents to allow him into the jurisdiction, and the Court lacks the jurisdiction to grant such orders to allow him to be in the country, since any individual seeking entry into the country can only be allowed upon fulfilling the laid down conditions in line with safeguarding and promoting national interests, and this is a sovereign function bestowed upon the Department of Immigration.

17. It was his case that to discharge a function of the department of immigration, a discretion is allowed within the legal framework of the Act, which is applied responsibly in line with the constitutional provisions of fair administrative action. In closing, Mr. Omangi stated that the rights that the Applicant is seeking to enforce are not absolute, and have some obligatory responsibilities attached to it.

18. Mr. K. Odhiambo, a State Counsel at the Attorney General's Office, filed submissions dated 11th April 2018 on behalf of the Respondents. The above facts and arguments were reiterated therein, and reliance was placed on section 33 of the Kenya Citizenship and Immigration Act on the definition of a prohibited immigrant, and further on section 44 of the Act for the powers of the Cabinet Secretary to remove a person out of Kenya.

19. Therefore, that the actions of the Respondents are authorized by statute, and that they should be allowed to exercise the discretion and autonomy vested in them by statute without unnecessary interventions, unless such autonomy has been abused. Reliance was in this regard placed on the decision in **Ernst Young LLP vs Capital Markets Authority & Another, Nairobi H.C Petition 385 of 201*6*** where it was held that overlapping of functions authorized by statute should not be subjected to review.

20. The Respondents further submitted that the Kenya Citizenship and Immigration Act provides for an avenue for the administrative review of decisions of the state with regard to the status of inadmissible immigrants which does not involve instituting a suit, and it is only when a party is aggrieved by the decision of the Director of Immigration or Cabinet secretary that an application for review or appeal by the High Court can be made under section 57 of the Act. The provisions of section 9(2) of the Fair Administrative Court Act were also cited for the position that internal mechanisms for appeal or review and all remedies available under any other written law should first be exhausted before an application for review is made in this Court.

21. According to the Counsel, every arm of government should be allowed to function with the autonomy conferred by the relevant statutes, and the doctrine of comity between the arms of government must not be violated by unnecessary court proceedings with the aim of dictating and influencing decisions. Further, that the court is not in the business of making decisions as regards the control of immigrants and is only required to intervene where an illegality is committed, while in the present case the Respondents are merely performing their duties. He relied on the Supreme Court case of **Speaker of Senate & another vs Attorney General & 4 others [2013] eKLR** for this position**.**

22. Lastly, the Respondents submitted that the rights that the Applicant is seeking to enforce are not absolute, and are subject to limitation by the state in line with Article 24 of the Constitution and the Kenya Citizenship and Immigration Act as regards immigration control. Mr. Omangi annexed as evidence copies of the letter dated 11th May 2017 from the Directorate of Criminal Investigations, and of the

declarations made under section 33(1) and section 43 of the Kenya Citizenship and Immigration Act of 2011 by the Cabinet Secretary, Ministry of Interior and Coordination of National Government, which were both dated 12th May 2017.

The Determination

23. I have considered the pleadings and submissions made by the parties herein, and find that the issues for determination are firstly, whether this Court has jurisdiction to hear and determine the Application herein. If this issue is answered in the affirmative, the issues that will be outstanding are whether the Respondent's action was in*tra vires*, reasonable and in compliance with the principles of natural justice; and lastly, whether the Applicant is deserved of the orders sought

24. On the issue of this Court's jurisdiction, the Applicant's position was that any contravention and/or violation of the constitutional and statutory provisions on fair administrative action invoke this Court's jurisdiction under Article 165(6) of the Constitution to intervene and protect the rights of the affected party. The Respondents on the other hand appeared to suggest that the function of control of immigrants is one which they are statutorily mandated to undertake, and Courts should not interfere with, and/or fetter their discretion and autonomy in this regard, which they claimed violates the doctrine of comity between the different arms of government.

25. Article 165 (6) of the Constitution in this regard provides that the High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function. It is notable that in judicial review proceedings such as the present proceedings, the Court is asked in exercise of this supervisory jurisdiction, to review the lawfulness of an enactment, or a decision, action or failure to act.

26. For such decisions and actions to be amenable to judicial review, they must affect an individual's interests and should arise out of the exercise of a public function, which in essence qualify them as quasi-judicial functions. It thus goes without saying 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.

27. The rationale for the Court powers in this regard was explained by Justice J. B. Ojwang (as he then was) in **Leonard Sitamze vs The Minister For Home Affairs & 2 Others Nairobi High Court Misc. Civil Application No. 430 of 2004** 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."**

28. On the arguments by the Respondents as regards the Court's interference with the sovereignty of other arms of government, this issue was addressed in the landmark decision by the United Kingdom's House of Lords in **Council of Civil Service Unions vs Minister for the Civil Service (1985) AC 374**, where it was held that it is no longer constitutionally appropriate to deny the Court supervisory jurisdiction over a governmental decision, merely because the legal authority for that decision rested on prerogative rather than statutory powers. Rather, that the Courts intervention should be governed by whether or not in the particular case the subject matter of the prerogative power is justiciable.

29. In the present application, the Applicant is challenging the exercise of the 2nd Respondent's statutory powers under the Kenya Citizenship and Immigration Act, and in particular alleging that his rights to fair administrative action have been infringed in the exercise of that power. This is thus a function and power that is not only amenable to judicial review, but is also justiciable, and therefore within the jurisdiction of this Court.

30. Lastly, it is important, at the outset, to establish the purpose and reach of judicial review and what it entails. In the case of **Municipal Council of Mombasa vs Republic & Umoja Consultants Limited, Nairobi Civil Appeal No. 185 of 2001, [2002] eKLR** the Court of Appeal stated that in judicial review:

> **"The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review."**

31. Having settled the issue of this Court's jurisdiction, the question that follows is whether the Respondents acted legally. The Applicant asserts in this regard that the section upon which the deportation order was made does not empower the Cabinet Secretary in the Ministry of Interior and Co-ordination of National Government to make such an order. In essence the Applicant contends that the Cabinet Secretary acted *ultra vires* his powers when he made the order. The doctrine of *ultra vires* in this regard requires that the decisions of those empowered by law to do certain things must act within the law granting such powers.

32. It is not in contention that a deportation order was made in respect of the Applicant. The order was made on the 12th May 2017. However, the Respondents in this respect contend that the deportation was made lawfully in exercise of powers granted to the Cabinet Secretary and in compliance with the provisions of the Kenya Citizenship and Immigration Act and Article 24 of the Constitution.

33. It is evident from the annexures provided by the Respondents that there were two declarations made by the Cabinet Secretary in the Ministry of Interior and Co-ordination of National Government on 12th May 2017. The first read as follows:

> **"DECLARATION UNDER SECTION 33 (1) OF THE KENYA CITIZENSHIP AND IMMIGRATION ACT 2011, LAWS OF KENYA**
>
> **I, MAJ. GEN. (Rtd), JOSEPH K. NKAISSERY, CABINET SECRETARY, Ministry of Interior and Co-ordination of National Government in the exercise of the powers vested in me by Section 33(1)(n) of the Kenya Citizenship and Immigration Act 2011, do hereby declare that the entry or presence of :-**
>
> **RICHARD BOACK**
>
> **Who is not a citizen of Kenya and whose presence in Kenya is contrary to national interest; in consequence of this declaration, the said:**
>
> **RICHARD BOACK**
>
> **Is for all purposes of the Kenya Citizenship and Immigration Act 2011, other than for the purposes of sub-section (6) of Section 33, a member of the Prohibited class and a Prohibited Immigrant.**
>
> **Dated 12th day of May 2017"**

34. The second declaration stated as follows:

> **"DECLARATION UNDER SECTION 43 OF THE KENYA CITIZENSHIP AND IMMIGRATION ACT 2011, LAWS OF KENYA**
>
> **I, MAJ. GEN. (Rtd), JOSEPH K. NKAISSERY, 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 the entry or presence of :-**
>
> **RICHARD BOACK**
>
> **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 Germany immediately, and further direct that the said:**
>
> **RICHARD BOACK**
>
> **Remain in prison custody while arrangements for removal are being undertaken, and this order is sufficient warrant to keep the said RICHARD BOACK in custody.**
>
> **Dated 12th day of May 2017"**

35. Both declarations were signed by the 1st Respondent.

36. The first declaration is declaring the Applicant a prohibited Immigrant under section 33(1)(n) of the Kenya Citizenship and Immigration Act. The second declaration is the one that orders the removal of the Applicant from Kenya, and it is clearly indicated therein that it is made pursuant to section 43(1) of the Kenya Citizenship and Immigration Act 2011.

37. It is thus not the position as claimed by the Applicant that section 33(1)(n) of the Act was the provision used to deport him, and the true and correct position is that the said deportation was pursuant to section 43(1) of the Kenya Citizenship and Immigration Act 2011 which provides as follows:

> **"(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 (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."

38. In addition, the section that was relied upon by the Cabinet Secretary is section 33(1)(n) of the Kenya Citizenship and Immigration Act 2011 to declare the Applicant a prohibited immigrant. Section 33(1) of the Act provides 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."

39. The Cabinet Secretary could therefore 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."

40. I should in this regard also point out the decision by Korir J. in **Republic v Cabinet Secretary in Charge of Internal Security & 2 others Ex-parte Nadeem Iqbal Mohammad [2015] eKLR** where a similar declaration as in the present application was quashed by the Court. The learned judge held as follows in arriving at this decision:

"The words "a person whose presence in Kenya is contrary to national interest" do not appear in Section 33(1) (a)-(v). Therefore, the 1st 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 9th 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 1st 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.

41. That case is distinguishable from the present case, in that the deportation order in that case cited section 33(1) as the section under which the applicant therein was declared a prohibited immigrant. In addition, as noted by the learned Judge, the said section and the Cabinet Secretary did not indicate under what category and for what reasons he declared the said applicant a prohibited immigrant and ordered his removal from Kenya.

42. In the present case, the category under which the Applicant was declared a prohibited immigrant is clearly stated as being pursuant to section 33(1)(n) of the Act, which states that a person who is involved or reasonably suspected to be involved in crimes related to patents, copyrights, intellectual property rights, cyber- crimes and related crimes can be declared a prohibited immigrant. The Respondents in this respect annexed a letter and signal from the Director of Criminal Prosecutions addressed to the 2nd Respondent, which indicated that the Applicant was arrested after having been suspected of defrauding various individuals through fake gold sales, and that eight kilograms of yellow nuggets were recovered in his possession.

43. It is thus my finding from the foregoing that in the present case, the Cabinet Secretary in the Ministry of Interior and Co-ordination of National Government did not act *ultra vires*, as he acted within his statutory mandate, and has also demonstrated a good reason to place the Applicant under a recognized category of prohibited immigrants.

44. The Applicant also alleges that his right to fair administrative action was violated, and that the rules of natural justice were breached by the Respondents. 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."

45. At the core of fair administrative action and the duty to act fairly is the need to ensure that a person affected by a decision has an effective opportunity to make representations before it is taken, so that he or she has a chance to influence it. As 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.

46. Furthermore, the where a statutory procedure is insufficient to ensure that the requirements of fairness are satisfied, it has been held in **Lloyd vs McMahon (1987) AC 625** that courts will imply procedural steps to ensure the requirements are met. 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.

47. In the present application, no evidence was provided by the Respondents to show the procedural steps taken to ensure fair action before the issue of the deportation order. This Court also notes that the Applicant stated in his verifying affidavit that he was arrested on 10th May 2017, and the deportation order issued on 12th May 2018 , which was only two days after his initial arrest. This Court finds that there was as a result non-observance of fair procedure on the part of the Respondents in the issuance of the deportation order against the Applicant.

48. The obvious impact of the deportation order on the Applicant is his removal from Kenya. This Court in this regard perused the pleadings filed by the Applicant in order to gauge the prejudice he is likely to suffer as a result of this removal. The Applicant stated in the verifying affidavit he filed in support of his application that he swore on 17th July 2017 that he had been lawfully in Kenya, having a valid visa, and spending time with his girlfriend who is a Kenya citizen. He also further stated that he was unlawfully arrested on 10th May 2017 and his passport confiscated, and was only released upon orders of this Court. In addition that the refusal to release his passport was intended to deny him the opportunity to extend his visa, and he sought an opportunity to extend his visa.

49. No evidence was however provided by the Applicant of the said visa, the duration of his stay in Kenya, his occupation, or of any accrued rights or interests that will be prejudiced by his removal from Kenya, to assist this Court in reaching a finding that he was indeed prejudiced by the failure to accord him a fair hearing. This observation by the Court will be particularly relevant as this Court proceeds to determine the final issue as to whether the Applicant merits the remedies he seeks.

50. The Court of Appeal in the case in **Kenya National Examination Council vs Republic, Exparte Geoffrey Gathenji & 9 Others, Nairobi Civil Appeal No. 266 of 1996** observed as follows when it came to the remedies issued in judicial review:

> **"That now brings us to the question we started with, namely, the efficacy and scope of mandamus, prohibition and certiorari. These remedies are only available against public bodies such as the Council in this case. What does an ORDER OF PROHIBITION do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See HALSBURY'S LAW OF ENGLAND, 4th Edition, Vol. 1 at pg.37 paragraph 128…….**
>
> **Only an order of CERTIORARI can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons."**

51. The above explanation captures the core, essence and the efficacy of judicial review orders. The court will therefore intervene depending on the circumstances in which a particular decision and action is made or undertaken, and has a discretion as to whether or not to grant or refuse a final remedy, and if it grants a final remedy, the nature of the remedy that should be granted.

52. This Court has found that the actions of the 1st Respondent were not *ultra vires*, although it did not act fairly to the Applicant. However, in light of the fact that the Applicant did not bring any evidence to show the prejudice or hardship he has suffered or likely to suffer in this regard, this Court finds this omission to be material in exercising its discretion to refuse to grant the orders of certiorari sought to quash the 1st Respondent's decision to deport the Applicant.

53. Likewise, I am of the view that the orders of prohibition sought are not merited for the same reasons, and that issuing the said orders in the manner proposed by the Applicant would amount to interfering with the exercise of the statutory powers of the 1st and 2nd Respondents. I accordingly decline to issue the remedies sought by the Applicant.

54. In the premises, I find that the Applicant's Notice of Motion dated 18th July 2018 is not merited, and it is accordingly dismissed with no order as to costs.

55. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 3rd DAY OF JULY 2018

P. NYAMWEYA

JUDGE