REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NUMBER 266 OF 2014

REPUBLIC .....APPLICANT

VERSUS

CABINET SECRETARY FOR MINISTRY OF INTERIOR

AND CO-ORDINATION OF NATIONAL GOVERNMENT..1ST RESPONDENT

DIRECTOR OF IMMIGRATION SERVICE.....2ND RESPONDENT

EX-PARTE LEAH OWITI DE CARO

JUDGEMENT

Introduction

1. By a Notice of Motion dated 3rd July, 2014, ex parte applicant herein, **Leah Owiti De Caro**, seeks the following orders:

1. **CERTIORARI to remove into this Honourable Court and quash the decision of the first Respondent issued on the 9th May, 2014 declaring the Applicant's husband, Giovanni De Caro, a prohibited immigrant and his removal out of Kenya.**
2. **PROHIBITION to prohibit the Respondents from declaring the Applicant's husband, Giovanni De Caro, a prohibited immigrant within the definition of Section 33 of the Kenya Citizenship and Immigration Act.**
3. **PROHIBITION to prohibit the Respondents from removing the Applicant's husband out of Kenya without adducing evidence in support of any grounds provided for under section 33 of the Kenya Citizenship and Immigration Act.**
4. **COSTS be awarded to the ex parte applicant.**

Applicants' Case

2. The said Motion is supported by affidavits sworn by **Leah Owiti De Caro**, the applicant herein on 3rd July, 2014, 7th November, 2014 and 14th November, 2014.
3. According to the deponent, she got married to **Giovanni De Caro** (hereinafter referred to as "**De Caro**"), in Nakuru on the 21st December 2001 and they have three children **Rita Nadwa**, **Kevin Dale** and **Talia Dale**, who are all under the age of majority.
4. According to her, her said husband has been residing in Kenya for many years as a result of which

he has made substantial investments in the coastal town of Malindi through his companies Naywa Investments and Cosimo Teresa Limited which companies have delved several hotel apartments known as Oasis Village on L. R. No. 1862 Malindi. On the 17th may 2014, the applicant received a telephone call from her husband informing her that he had been arrested by the Second Respondent's officers and detained at the Kenya Ports Authority Police Station in Embakasi. Upon receiving this information, she contacted her advocates on record to visit the said police station and find out why my husband had been arrested and was informed by **Mr. Oyomba** Advocate that he went to the said police station and was informed that her husband had been arrested for being a prohibited immigrant in Kenya.

5. She deposed that she was further informed by the said advocate that her husband would be arraigned in Court on Monday the 19th May 2014 to answer to any alleged charges against him as is prescribed by both the Constitution and the ***Kenya Citizenship and Immigration Act, 2011*** (hereinafter referred to as "the Act"). However, on the 19th May 2014, her husband was never arraigned in Court to answer to any charges of the alleged offence that he was arrested for.
6. Upon visiting the Kenya Ports Authority Police Station on Tuesday the 20th May 2014, the applicant was informed by the Officer In-charge of the Police Station that her husband had been transferred from that station in the presence of the Second Respondent's officers to an undisclosed location. She then instructed her advocates on record to file the relevant court pleadings to have her husband produced in Court, but no sooner had they filed the application than her husband called her from Italy on the 21st May 2014 informing her that he had been served with a declaration from the 1st Respondent dated 9th May 2014 declaring him a member of a prohibited class and a prohibited immigrant.
7. The applicant averred that she was informed by her Advocates on record that for the First Respondent's declaration and as such the enforcement of that declaration by the Second Respondent was unlawful and since there was no approval by Parliament of the First Respondent's declaration the enforcement of that declaration by the Second Respondent was unlawful. In any event, the First Respondent did not attempt to arraign her husband in Court to answer to any charges of an alleged act or omission which was contrary to national interest. To take the most draconian measure of having him removed out of the country without a trial, in her view is evidence that the Respondents acted in bad faith, maliciously and without due regard to fair administration of justice.
8. To her, it was on the strength of that unlawful declaration that her husband was removed out of this country, leaving her with their three children who are all under the age of majority, yet she cannot properly fend for them and has no capacity to manage his investments at the coast which are now being improperly administered by other third parties.
9. It as contended that before the applicant's husband was deported the reasons for the deportation were not given either to the applicant or the husband.
10. It was deposed that by the time of the decision of 9th May, 2014, the respondent was aware of the existence of Judicial Review No. 73 of 2014 in which the applicants were challenging the respondent's decision to blacklist her husband from entering Kenya on account of the decision in the Magistrate's Court and the respondent was aware that the said decision had been stayed.
11. It was contended that at the time of the arrest of the applicant's arrest the husband had a valid visa allowing him to be in the country. Since the Court did not declare the applicant's husband a prohibited immigrant, it was contended that the respondent's action was illegal. She however denied that her husband was a fugitive running from the law and averred that the said allegation had been denied by the Italian authorities.
12. According to her, the genesis of her husband's and family woes is the business and properties he has in this country that some people are out to grab. It was further alleged that during the time when her husband was in police custody, he was seriously tortured.
13. The applicant therefore averred that the Respondent's decision was made in breach of the law, the Constitution and in bad faith and unreasonably as well as in breach of the rules of natural justice and ought to be reversed by the Court.
14. She averred that her husband, having not been arraigned in Court for a fair hearing on any alleged actions being carried out contrary to national interest; was unlawfully and indefinitely removed out of Kenya hence this application. To her, the only chance she stands in getting her husband an

opportunity to come back home and be with his children, is if the Honourable Court would grant her application. She asserted that her children and herself stand to suffer grave loss and prejudice, if the orders sought for herein are not allowed as prayed.

Respondent's Case

15. In opposition to the application, the Respondents filed a replying affidavit sworn by **Samuel Gathecha Kariuki**, a Chief Immigration officer in the Investigations and Prosecution section of the Department of Immigration within the Ministry of Interior and Coordination of National Government on 17th October, 2014.
16. According to him, **De Caro** previously stayed in Kenya on the strength of a work permit and fell out of lawful immigration status hence immigration case which necessitated his removal from Kenya. According to him, like all immigration case unless a contrary order is made by the Court the accused person has to be removed from Kenya for being an offender which was the case with the 1st applicant.
17. It was deposed that the *ex parte* applicant's husband was not acquitted but was found guilty in Immigration Case number 92 of 2011 and fined Kshs 33,000/= and was ordered to be repatriated to Italy until such a time that he had obtained proper documentation allowing him to come into and/or stay in Kenya. It was therefore deposed that he was ordered out of the country by a competent Court in uncontested proceedings and no appeal was preferred therefrom.
18. It was further averred that **De Caro** was discovered to be a fugitive running away from his country of origin for an offence which he committed and convicted hence there were reasons for his arrest and declaration as a prohibited immigrant.
19. It was therefore contended that an order of prohibition cannot issue where the act has already taken pace. According to the deponent, to contend that a declaration that **De Caro** was a prohibited immigrant required parliamentary approval is a shallow interpretation of section 33 of the Act.

Determinations

20. I have considered the application, the affidavits both in support of and in opposition to the application, the submissions made and the authorities cited in support thereof.
21. 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).

22.Section 43 of the Act 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, 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.

23. According to the letter dated 9th May, 2014 from the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government, the Cabinet Secretary purported to be acting under section 33(1) of the Act in declaring **De Caro Giovanni**, a prohibited immigrant.
24. According to him, the Applicant's presence in Kenya was contrary to national interest. However, one's presence in Kenya contrary to National interest is not one of the grounds specified in section 33(1) under which the Cabinet Secretary 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.**

25. 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."

26. 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 person 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."

27. The Respondent, however, seems to be of the view that 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."

28. The law is that in the ordinary way and particularly in cases, which affect life, liberty or property, an executive authority 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 executive is not one of the reasons upon which the executive is legally entitled to act, the Court is entitled to intervene since the action by the executive would then be based an irrelevant matter.
29. 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 or 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.**
30. To hold that the executive 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.
31. The respondent has further contended that the applicant's husband was a fugitive from law in Italy. The applicant has exhibited documents which go to show the contrary. Had the respondent afforded the applicant's an opportunity of being heard a more informed decision would have been arrived at after considering relevant material rather than taking a decision which was arbitrary, capricious and whimsical.
32. It was further contended that the applicant's husband had already been declared by a competent

Court of law to have been in the country unlawfully. However the applicant has averred which averment was not controverted that the said decision was in actual fact stayed by this Court. Accordingly, that decision could not form the basis of a valid order of deportation of the applicant's husband. As this Court held in **Judicial Service Commission vs. The Speaker of the National Assembly & Another Petition No. 518 of 2013:**

"In my view it does not matter that the person alleged to have acted in contempt of court was unaware of the existence of the order. Whereas he may not be committed for contempt of a court order which he was not aware of, his unawareness does not sanitise the illegal action which would still be null and void."

33. It is therefore clear that the decision by the respondent to deport the applicant's husband in the face of an existing valid court order rendered the decision of the respondent null and void and of no effect. Such a decision taken with impunity cannot be the subject of an exercise of the Court's discretion in declining to grant judicial review orders. To violate a Court order and then tell the Court that an illegal action has been taken hence the Court cannot do anything about it, is the height of arrogance and impunity on the part of the executive which cannot be countenance by any Court of law. The rule of law is the foundation of any democratic society and the rule of law and democracy are both recognised under Article 10 of our Constitution, the supreme law of the land, as constituting national values and principles of governance.
34. Any decision taken in contempt of a court order must therefore be reversed and the *status quo ante* restored so as to send a message that a state lawlessness and anarchy will not be tolerated in a democratic society.
35. In my view section 43 which was relied upon by the respondent as justifying the bypassing of Parliament in deportation processes does not assist the respondent. Section 43(3) of the Act provides that "*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.***"** It follows that an order under section 43 is subject to section 33(1) of the Act which subjects the decision of the Cabinet Secretary to an approval by Parliament. Therefore any action taken by the Cabinet Secretary without the approval of the Parliament must necessarily be unlawful and without jurisdiction
36. It is therefore clear that the respondent's decision was tainted with illegality, irrationality and procedural impropriety. It cannot be permitted to stand.

Order

37. Having so found, I have no hesitation in removing into this Court the decision of the first Respondent issued on the 9th May, 2014 declaring the Applicant's husband, **Giovanni De Caro**, a prohibited immigrant and his removal out of Kenya which decision is hereby quashed. I however cannot grant an order of prohibition in terms of the 2nd prayer as to do so would have the effect of permanently prohibiting the respondent from declaring the applicant's husband a prohibited immigrant.
38. It follows that the *status quo ante* the deportation of the applicant's husband is reinstated and the respondent is prohibited from taking any action against the applicant's husband based on the quashed decision.
39. The applicant will have the costs of this application to be borne by the 1st respondent.

Dated at Nairobi this 11th day of March, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Oyomba for the ex parte Applicant

Mr Odhiambo for the Respondent

Cc Patricia