MIKE WALUZA KAIRA v ATTORNEY-GENERAL (1980) Z.R. 65 (H.C.)

HIGH COURT
CULLINAN, J.
8TH AUGUST, 1980
1978/HP/No. 172

Flynote

Constitutional Law - Preservation of Public Security - Meaning of "Public Security - Unlawful externalization of funds - Whether prejudicial to Public" security.

Constitutional Law - Detention - Grounds of detention - Additional grounds - Necessity to communicate to detainee.

Headnote

The applicant was detained under the Preservation of Public Security Regulations, reg. 33 (1). He was served with two grounds of detention namely that he externalised vast sums of money on different dates. It was alleged that these activities were prejudicial to public security. At a later date the President of the Republic in a television and radio interview alleged that the applicant has been unlawfully paid K200,000 by ROP and that he was being detained for that matter. However the applicant was not served with this ground of detention.

In his application, the applicant claimed *inter alia* that his detention was invalid as the grounds for his detention were not relevant to the Preservation of Public Security. He further contended that he had not been furnished with all the grounds for his detention, namely that the statement of those grounds made no mention of the allegation concerning the payment by ROP to him of K200,000.

Held:

(i) The words "public security" in their ordinary sense mean the security of the safety of all persons and property and to that end the preservation of law and order. Thus, in order to protect the safety of persons and property it is necessary to maintain supplies and services essential to the life of the community, to prevent public disorder or subversive activities or indeed a breakdown of law and order. The emphasis is on the preservation of the safety of the community, rather than on its economic prosperity or otherwise. There may well be a nation whose

economy is little short of chaotic but the place and safety of whose citizens is never in doubt.

(ii) All grounds of detention must be communicated to the detainee and where there is an additional ground of detention, it is necessary that communication is made to the detainee.

Cases referred to:

(1) Kapwepwe & Kaenga In re (1972) Z.R .248.
(2) Munalula & 6 ors v Attorney-General S.C.Z. Judgment No. 2 of 1979.
(3) Mhango v Attorney-General (1967) Z.R .297.
(4) Banda (J) v Attorney-General (1978) Z.R.233.
(5) D'Souza v State of Bombay (1956) S.C.R. 382.
(6) Eleftheriadis v Attorney-General (1975) Z.R. 69.
(7) Mudenda v Attorney-General (1979) S.J.Z. (H.C.) 28.
(8) In Re Seeders (1976) Z.R. 117.
(9) Patel v Attorney-General (1968) Z.R. 99.
(10) Tembo v Attorney-General (1976) S.J.Z. (H.C.) 71.
(11) State of Bombay v Atma Ram Vaidya A.I.R. (1951) S.C.R. 157.

(12) Attorney-General v Chipango (1971) Z.R. 1.
(13) Sithole v State Lotteries Board (1975) Z.R. 106.
(14) Nkumbula & Kapwepwe v Attorney-General S.C.Z. Judgment No.15 of 1979.
(15) Gibson v Union of Show Distributive & Allied workers, [1968] 2 All E.R.252.

Legislation referred to:
Preservation of Public Security Regulations, Cap. 106, reg. 33 (1).
Constitution of Zambia, Cap. 1, Art. 27.

For the applicant: L.P.Mwanawasa Esq., Assistant Senior State Advocate and A. R. Lawrence Esq., of Solly Patel, Hamir & Lawrence .
For the respondent: K. R. K. Tampi Esq., Assistant Senior State Advocate, and A.S. Masiye Esq., State Advocate.

Judgment
CULLINAN, J.: The applicant seeks a declaration that his detention is invalid.

The applicant was detained on 20th August, 1979, under a Presidential order of detention of the same date made under reg. 33 (1) of the Preservation of Public Security Regulations (which I shall hereafter refer to as "the Regulations" and by regulation). The order reads thus:

> "In exercise of the powers conferred on me by Regulation 33 (1) of the Preservation of Public Security Regulations, I hereby Order that:
> MIKE WALUZA BRIAN KAIRA be detained."

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On 1st September the applicant was served with a statement of the grounds for his detention. Those grounds read as follows:

"1. That between 1st August 1977 and 1st January 1979 in Zambia and elsewhere, namely Botswana and South Africa, you unlawfully externalised K500,000.
2. That between 1st January 1979 and 30th April, 1979 in Zambia and elsewhere namely Botswana and South Africa you attempted to unlawfully externalise K150,000.

These activities are prejudicial to the public security and there is a genuine apprehension that if left at large you will continue to perpetrate these unlawful acts, and therefore it has been found necessary to detain you."

On 23rd October, 1979, the eve of Independence Day, His Excellency the President was interviewed on the national television and radio net work, a report of which interview appeared in two daily newspapers on 26th October. The report in the issue of the "Times of Zambia" newspaper for that date reads as follows:

> "ROP Scandal Man Detained."
>
> By Times Reporter
>
> "President Kaunda disclosed he was detaining a man in connection with irregularities at ROP which led to the suspension of three top executives.
>
> Dr Kaunda disclosed scandals at ROP which led to the suspension of the executives - general manager, Mr Maxwell Nyirongo, works manager, Mr Cosmas Chulu and purchasing manager, Mr Joseph Lukonde.
>
> 'In an Independence eve interview on television and radio, Dr Kaunda gave an example of an incident at ROP when the management ordered K1.4 million of South African raw

materials and this amount included freight charges.

'While the order is still on - ROP management, for reasons best known to themselves - all of a sudden we see K200,000 being paid to a certain fellow as freight charges yet the freight charges are included in the K1.4 million,' he said.

He added: 'Now as I am speaking to you those goods have not come into Zambia and I am detaining a fellow; and the general manager, as you know, has been suspended.

I hope this man dies in jail, I have no apologies in saying this.
A man who is able to punish Zambians for selfish reasons, to steal from people, peasants, just to fatten his selfish pockets, I have no mercy for him.'

"Dr Kaunda revealed that there was some further information pointing to gross misuse of funds and materials by the ROP management.

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'The management wanted to order some raw materials, but a chemist told them this stuff is rotten. This stuff was costing K250,000 foreign exchange, but the management went ahead and ordered that stuff.

When it came, it was rotten - quarter of a million Kwacha they buried it and we are going to show where they buried it. Our boys are militants, they know where they buried the stuff costing a quarter million Kwacha. Meanwhile Zambians are suffering,' Dr Kaunda said.

Asked how he would like to change the rotten system in the parastatals, Dr Kaunda reiterated that he wanted to see programmes, in every firm, private or public.

Asked why he had not taken action in other cases similar to that at ROP, Dr Kaunda said he did not believe in injustice, but whenever he took action or detained a person, there must be sufficient evidence.

'When I am clear, yes I have no hesitation at all.' "

The applicant claims that his detention is invalid for a number of reasons. They are as follows:

(i) the grounds for his detention are incorrect;
(ii) the detaining authority ignored certain consideration in detaining him.
(iii) the measures taken in detaining him exceeded anything which, having due regard to the circumstances prevailing at the time, could reasonably have been thought to be required for the purpose of dealing with the situation in question;
(iv) the grounds are vague;
(v) the detention was effected for a collateral purpose;
(vi) the detention is not preventive but punitive in nature;
(vii) the grounds for detention are not relevant to the object of the Preservation of Public Security Act;
(viii) he has not been furnished with all of the grounds of his detention.

The applicant claims that the grounds for his detention are not correct. In a ruling earlier delivered in these proceedings I indicated that the applicant was free to adduce evidence in support of this ground, but it could only avail if it went to show that on the facts the detaining authority could not reasonably have suspected that he had committed the alleged acts. I once again stress that this is not a court of trial, that is, the applicant is not being tried on the allegations contained in the grounds for detention. It is not the court's purpose, as such, to make a finding as to the guilt or innocence of

the applicant. The scope of the court's inquiry is to establish whether or not there was reasonable cause to suspect that the applicant

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had indulged in the alleged activities, that is, on the basis solely of the materials placed before the detaining authority, as it is on those materials that the detaining authority's satisfaction was based.

The applicant filed an affidavit, supporting it with his own testimony and that of his witnesses. The applicant is the Managing Director of two companies namely Mitaco Humanistic Agencies Limited ("Mitaco") incorporated in Zambia, and ZAMBOT (PTY) Limited, ("Zambot") a company incorporated and having its registered office in Botswana. The latter company was also subsequently incorporated in South Africa it seems. The two companies operated a forwarding and clearing agency business, dealing almost solely with the import into Zambia of supplies from Botswana and South Africa. Zambot in effect arranged for the transport of the commodities on behalf of Zambian importers and was responsible for the payment of freight charges submitted by transporters, that is, In the currencies of Botswana and South Africa, during the period August, 1977, to April, 1979. After effecting payment to the transporters Zambot would then submit the relevant statements to Mitaco which Would then in turn submit them through its bankers to the Bank of Zambia, as support for an application for permission to externalise the requisite funds. All this had the blessing of the Bank of Zambia, which authorised the opening of an imprest account in the amount of K50, 000 by Mitaco in Botswana, replenishment of the account being made with the prior approval of exchange control authorities "on production of original invoices evidencing payment made out of the account in Botswana". The letter of authority required Mitaco to submit at the end of each year a profit and loss account and balance sheet for the operation in Botswana. The letter also indicated that since Mitaco was the only Zambian clearing agency to have been given permission to operate from Botswana, exchange control authorities were "undertaking a campaign to inform all business houses who are in the habit of importing goods from South Africa to utilise the services of Mitaco Humanistic Agencies".

The applicant maintained throughout his evidence that the operation of the impress account had been in accordance with the authority given by the Bank of Zambia. The applicant testified that the allegations contained in the statement of the grounds for his detention were not the only matters which affected his detention; he said that Mr Felix Mwimbe, Senior Investigating Officer, Special Investigation Team (Economy and Trade) ("SITET") had accused him of defrauding ROP (1975) Limited ("ROP") of K200,000, paid by ROP to him in order to secure the transport of goods from South Africa to Zambia. The applicant testified that ROP had approached him on 6th December, 1978, requesting his urgent assistance in transporting goods from South Africa, as apparently operations with a South African based supplier had ceased. The applicant said that ROP agreed to pay K300,000 in advance. ROP in fact paid Mitaco K200,000 in Zambia, arranging with the South African supplier, with whom ROP was apparently in credit in respect of future freight charges in the amount of R125,000, to pay the latter sum to Zambot in South Africa. The applicant

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testified that he received only R94,000 in payment. He explained that "we hadn't received our exchange control allowance and they (ROP) wished to help us".

The applicant's younger brother Kenneth Kaira, Manager of Mitaco and Zambot, gave evidence which confirmed the arrangement with ROP, in particular the payment of K200,000 in Zambia and R94,000 in South Africa. These aspects were also confirmed in evidence by Mr George Kapila, who had been Assistant Purchasing Manager of ROP at the relevant time and who had acted as Purchasing Manager since October, 1979, the Purchasing Manager having been suspended. In particular Mr Kapila testified that only Zambot had been involved with ROP in the arrangement and that a number of SITET Officers had questioned him as to the above payments to Zambot.

Mr Felix Mwimbe testified that acting on information supplied he had begun to investigate the applicant's activities as early as November/December, 1977. He presented a report to the Minister of Home Affairs in April, 1979, again in May and a third report on 7th August, 1979, after which

the applicant was detained. He had received reports that the applicant by arrangement with transporters in Botswana and South Africa had presented invoices to the Bank of Zambia falsely made out by the transporters in amounts exceeding, by approximately 20 per cent, the correct amounts charged by the transporters for their services. The applicant was thus enabled to externalise funds for purposes other than those sanctioned by the exchange control authorities. Again, Mr Mwimbe said that he received reports that the applicant obtained blank invoices from some transporters and made out completely false invoices in respect of non-existent services, presenting them to the Bank of Zambia, thus fraudulently securing the externalisation of the relevant amounts. Mr Mwimbe testified that he had ignored amounts smaller than K2,000 in his calculations. He testified indeed that the figure of K500,000 supplied n the first ground of detention could well be enlarged with further investigation.

Mr Mwimbe testified that for some six months he had repeatedly travelled to Botswana and Swaziland and had spoken to many persons involved. While he did not wish to disclose the source of his information he did say that those he had spoken to were employed by the transporters involved and "certain national government bodies". He had further received certain "Embassy reports".

When Mr Mwimbe requested the applicant to produce the relevant invoices, counsel for the applicant had informed him in writing that they had been destroyed. In this respect the applicant in an affidavit filed in support of the application stated that in order to avoid retaining voluminous documents it had been the practice of Mitaco and Zambot to retain invoices only as long as they were required by the Bank of Zambia and that the relevant invoices had in fact been destroyed. Thus, invoices which pertained to operations over no more than eighteen months, some invoices, Mr Mwimbe testified, no more than a month old, had

been destroyed. Mr Mwimbe also pointed to the requirement by the Bank of Zambia that Mitaco supply a yearly profit and loss account and a balance sheet "indicating the state of affairs of the company in Botswana".

Mr Mwimbe testified that he had been informed by the Bank of Zambia that this requirement had not been met and he had not been shown any such accounts.

Mr Mwimbe's suspicions had also been aroused by the purchase in South Africa and Botswana of two Mercedes - Benz 280 saloon motor vehicles, together valued at K25,500, a Ford Granada saloon and three Ford Cortina Vanettes valued at K22,000, expensive musical recording and playing equipment, two video cassette recorders, a colour television set and three gold watches valued at K14,775, representing total purchases of K62,275. Mr Mwimbe testified that these items were purchased from the imprest account in Botswana without the permission of the Bank of Zambia. In this respect the letter of authority from that Bank to the applicant's bankers recognised the need to purchase "furniture and equipment for the office". The letter also authorised the purchase from an initial capital outlay of K75,000 of "equipment necessary for their business," all such assets "and indeed any other assets to be acquired by your customers (being) subject to repatriation at the time of ceasing business in that country". The assets purchased by the applicant can of course be repatriated but, whatever about the vehicles involved, Mr Mwimbe was not satisfied that the other items represented capital expenditure for business purposes and regarded their purchase as unauthorised expenditure on the imprest account. He suspected indeed that the extent of such purchases gave some indication of the amount of funds unlawfully externalised by means of fraudulent invoices.

As to the second ground of detention, Mr Mwimbe testified that acting on information he investigated an application by the applicant to the Bank of Zambia to externalise the equivalent of K256,000 to Botswana, based on four invoices purportedly supplied by a transporting company in that country. Mr Mwimbe obtained carbon copies of the four invoices from the latter company and having made a comparison thereof and received further information thereon he suspected that two of the invoices had not in fact been made out by the particular company but had been supplied blank to the applicant and subsequently forged each in the amount of K75,000, representing non-existent services. Once again the invoices in respect of such very recent transaction had been

destroyed by the applicant.

The learned counsel for the applicant Mr Mwanawasa submits that Mr Mwimbe was not sure of the applicant's involvement and was no more than suspicious: hence the detaining authority could not in turn have entertained reasonable suspicion. I do not see why not. In any event the court is not immediately concerned with the investigating officer's state of mind but with that of the detaining authority, based on the materials. whatever they may be, placed before him by the investigating officer, Mr Mwanawasa points to the fact that the statement containing the grounds of detention makes no mention of suspicion. It is not necessary for

the statement to do so it merely recites, as required by Art. 27 (1) (a) of the Constitution, the grounds of detention. Mr Mwanawasa's latter submission appears to suggest that a recital of the detaining authority's satisfaction is necessary.

It seems to me that the invocation of the powers under reg. 33 (1) suffices and this is to be found in the detention order under consideration. In any event the detaining authority's satisfaction in the matter is, as I see it, indirectly expressed in the last paragraph of the statement of the grounds for detention reproduced earlier in this judgement.

There are other aspects of Mr Mwimbe's evidence which I have not dealt with, some of which relate to the grounds supplied and others which refer to entirely additional transactions. I do not see that it is necessary to consider any of them, at least not at this stage, as they were not placed before the detaining authority for his consideration. having regard only to those matters which were placed before the detaining authority, that is, prior to the order of detention, the destruction of the relevant invoices, the whole basis, as supporting documentation, of the auditing of the books of a company which served not to supply a physical service but to engage the services of others, must surely alone give rise to suspicion. The court has not attempted to substitute its satisfaction for that of the detaining Authority. All that I say in the matter is that on all the evidence before me it has not been shown that the detaining authority could not have entertained reasonable suspicion as to the grounds for detention.

It will prove convenient to consider the fourth ground of the application at this stage. Mr Mwanawasa submits that the grounds of detention are vague. He submits that unlawful externalisation of funds can take various forms: the grounds do not specify the nature of the transactions involved, that is, whether for example an illegal payment or smuggling of currency notes was involved, nor do they specify the countries to which the funds were externalised. There is no doubt that the grounds lack for particularity but that is not the test. In both grounds a specific period is mentioned and also a specific sum of money. The prejudicial activity alleged is the unlawful externalisation of funds. A distinction is drawn between the first and second ground in that the first alleges a complete act whereas the second alleges an attempt thereat.

It is not stated as to which country in particular the funds were externalised but as the applicant's activities are alleged to have extended to Botswana and South Africa it seems to me that the plain meaning of the grounds is that it is alleged that funds were externalised to one or both of those countries. Mr Mwanawasa suggests that the grounds could be interpreted to also mean that the applicant externalised funds from Botswana and/ or South Africa. I feel that this is stretching the plain meaning of the words used. The act of externalisation, not importation is alleged; furthermore the amounts involved are expressed in Zambian currency and in my view can only refer to the alleged externalisation of funds from Zambia.

The test to be applied is that laid down -by the Supreme Court in *Re Kapwepwe & Kaenga* (1), and *see* also *Munalula and Others v Attorney-General* (2), namely that the detainee must be furnished with

sufficient information to enable him to know what is alleged against him and to make a meaningful representation. The grounds in this case could be more particularised but then as Doyle, C. J., said in *Kapwepwe and Kaenga* (1) at p. 254.,

> "Where facts are notorious or the detainee must himself know them, it cannot be said that a failure to refer in the ground to these facts causes the ground to fail to be in detail."

In applying that dictum in the case of *Mhango v Attorney-General* (3) at p. 302 this court observed:

> "As I see it therefore, the test is simply this: if in supplying grounds for detention a detaining authority relies on notorious facts or facts which are known to the detainee, the grounds themselves must contain sufficient information to direct the detainee's mind thereto; if not, the grounds cannot then be said to "furnish sufficient information to enable the detainee to know what is being alleged against him and to bring his mind to bear on it".

The applicant on his own evidence was involved during the relevant periods with the externalisation of funds, purportedly on a legal basis to Botswana and South Africa. While it is not stated whether one or many transactions are involved, the grounds in my view contain sufficient information to direct the applicant's mind to the facts within his own knowledge. As I see it, he is enabled to make a meaningful representation: for a start, he may maintain that all of the transactions in which he was involved were valid, which in fact he has done in his evidence, inviting inspection of all relevant documentation. In my judgment the grounds are not vague and the requirements of the provisions of Art. 27 (1) (a) of the Constitution.

The second and third grounds for this application, the third ground being based directly on the latter provisions of Art. 26, can in the circumstances of this case be considered as one. Mr Mwanawasa submits that the detaining authority ignored certain considerations in detaining the applicant, namely that his bank accounts in Zambia had all been blocked by Ministerial order and he was not therefore in a position to illegally externalise funds in the future: hence the detaining authority could not reasonably have been satisfied that it was necessary to detain him. Here I feel that Mr Mwanawasa is hoist by his own petard, the short answer to the submission being found in his own submission concerning the vagueness or otherwise of the grounds, that is, that "unlawful externalisation of funds can take various shapes and numerous transactions". In short, the fact that the applicant's accounts are frozen only precludes one method of unlawful externalisation of funds. It has not been shown therefore that the detaining authority could not have been reasonably satisfied that it was necessary to detain the applicant.

The applicant's fifth ground is that the detention was effected for a collateral purpose. Mr Mwanawasa contends that the investigating officer had not, on his own evidence, concluded his investigations and that therefore, the applicant had been detained solely for the purpose of

facilitating the completion of investigations. This he submits, relying on the authority of *Banda (J) v Attorney-General* (4) at p. 240, was an improper motive: there is a strong connection between the approach of the Police and that of the detaining authority, Mr Mwanawasa claims. He submits indeed that an improper motive on the part of the Police should be attributed to the detaining authority, to the extent at least that if it is shown that a Police officer acts on the basis of an improper motive then there is a burden upon the State to show that the detaining authority did not act on that basis. It suffices here to repeat the words of Jaga nnadhadas, J., in delivering the judgment of the Supreme Court of India in the case of *D'Souza v State of Bombay* (5) at p. 387:

> "We also agree with the view of the High Court that, what has got to be made out is not the want of bone fides on the part of the police, but want of bone rides . . . on the part of the detaining authority".

I cannot see how, as a general rule, a lack of bone fides on the part of the investigating officer can necessarily be ascribed to the detaining authority. The case of *Banda (J)* (4) concerned the detention of the appellant by a Police officer under reg. 33 (6) and is only relevant to the extent that an improper motive on the part of the Police was established.

It certainly is not an authority for extending such motive to a subsequent order of detention under reg. 33 (1). Again, the evidence in *Banda (J)* (4) clearly indicated that the detention was effected for the collateral purpose of investigating a criminal offence, namely murder, in respect of which the appellant would have been charged, and not detained, if such investigation had revealed sufficient evidence. In the present case the investigating officer did not exercise the powers under reg. 33 (6). Furthermore, the fact that investigations have continued which in fact have revealed, additional material, does not affect the validity of the initial detention. As I see it, sufficient materials were initially placed before the detaining authority to give rise to reasonable suspicion as to the alleged activities and to reasonable satisfaction of the necessity for detention. Again, it matters not for the purposes of these proceedings whether the applicant in the future might face a criminal prosecution in respect of the grounds for detention. The point is that it cannot be said that such detention was effected solely for the purpose of investigating the applicant's activities.

The applicants sixth ground is that the detention is not preventive but punitive in nature. The ground is based on two separate submissions.The first of those is that the detaining authority could not reasonably have entertained any future apprehension as to the applicant's activities and hence on the authority of the dicta of Doyle, C.J., in the case of *Eleftheriadis v Attorney-General* (6) the detention must be punitive in nature. In the present case a statement of future apprehension was made in unequivocal terms in the communication containing the grounds for detention. The seventh ground in this respect is really a repetition of the second and third grounds to the application and for the reasons stated in considering those grounds the present ground cannot succeed on this point.

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The second submission on which the seventh ground is based is that in the light of the words spoken on the occasion of the television and radio interview on 23rd October, 1979, the applicant's detention then assumed a punitive nature. Mr Mwanawasa submits that the interview as reported in the newspapers reveals an intention to detain the applicant for many years if not for life. The newspaper article exhibited is not of course evidence in itself of its contents. In this respect I have accepted the evidence of Kenneth Kaira who watched the interview on television on 23rd October, at about 2000 hours and whose version of the interview indicates that the newspaper article is an accurate report of the interview. The article serves as no more than a useful summary of the interview but I wish to stress that it is on Kenneth Kaira's evidence that I rely in ascertaining the words spoken.

The question is whether the words used in the interview in reference to the person detained were spoken of the applicant. The learned counsel for the respondent Mr Tampi was unable to concede the point as he had no instructions thereon. Neither was any affidavit in opposition filed. I have heard the applicant's evidence, that of Kenneth Kaira and also that of Mr George Kapila the Acting Purchasing Manager of ROP as to the transaction between ROP and Zambot. There is no evidence to the contrary on the point. Indeed the evidence of Mr Mwimbe as to his investigations serves but to confirm, and I am accordingly satisfied that the relevant words spoken during the interview relating to the person detained were spoken of the applicant.

Mr Tampi submits that what the detaining authority said in a television and radio interview is absolutely irrelevant. With respect it seems to me that the words spoken must have some relevance. If every man is presumed to intend the natural consequences of his acts then I think I can safely assume that *prima facie* a man means what he says. It has been suggested that the words were spoken in anger, in just anger indeed; but **30** anger very often lends force and conviction to words. The words were spoken and recorded on the eve of Independence on the national television and radio network, in a direct address to a large portion of the population. In the absence of any evidence to the contrary I can only place on the words used their ordinary and natural meaning.

In this respect the provisions of Art. 27 of the Constitution, which in part read as follows, are relevant:

> "27. Where a person's freedom of movement is restricted, or he is detained, under the authority of any such law as is referred to in Article 24 or 26, as the case may be, the following provisions shall apply:

(a) he shall, as soon as is reasonably practicable and in any case not more than fourteen days after the commencement of his detention or restriction, be furnished with a statement in writing in a language that he understands pacifying in detail the grounds upon which he is restricted or detained;

(b) if he so requests at any time during the period of such restriction or detention not earlier than one year after the

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commencement thereof or after he last made such a request during that period, as the case may be, his case shall be reviewed by an independent and impartial tribunal established by law and presided over by a person, appointed by the Chief Justice, who is or is qualified to be judge of the High Court;

(c) he shall be afforded reasonable facilities to consult a legal representative of his own choice who shall be permitted to make representations to the authority by which the restriction or detention was ordered or to any tribunal established for the reviewer of his case;

(d) at the hearing of his case by such tribunal he shall be permitted to appear in person or by a legal representative of his own choice.

(2) On any review by a tribunal in pursuance of this Article of the case of a restricted or detained person, the tribunal may make recommendations to the authority by which it was ordered concerning the necessity or expediency of continuing his restriction or detention but, unless it is otherwise provided by law, that authority shall not be obliged to act in accordance with any such recommendations.

(3) The President may at any time refer to the tribunal the case of any person who has been or is being restricted or detained pursuant to any restriction or detention order."

As will be seen Art. 27 contains provision for the making of representation , immediate if necessary, by a detainee to the detaining authority and for the annual review of his case by a tribunal on request. Originally provision was made for an immediate review by the tribunal on request and thereafter at six monthly intervals on request. Subsequently the Constitution provided for an automatic review within a month and there after at intervals of not more than six months. The relative severity of the existing provisions introduced in 1969, (cl. (3) in 1974), is mitigated to some extent by the fact that they provide that a detainee can make immediate representation direct to the detaining authority, who indeed may at any time, with or without such representation, refer the detainee's case to the tribunal. The very feet however that the period of review has been enlarged over the years, serves nonetheless to emphasise the preventive nature of detention and the aspect of mandatory review at least on request. As Baron, D.C.J., said in the case of *Munalula and 6 Ors v Attorney-General* (2) at p. 16.

"I have no doubt whatever that the powers in question permit the detention of a person for an indefinite period without that person being brought to trial. This does not mean that the person will in fact be detained indefinitely; there are detailed provisions for the review of the case of a detained person by the tribunal established **45** under regulation 33 (7)"

The whole purpose of detention without trial is to prevent a breach of public security. Once the detaining authority is not satisfied that the detainee any longer constitutes a threat to public security then he must be

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released. While the power exists to detain indefinitely until such decision is reached, nonetheless the period of detention cannot be pre-determined: and it cannot be decided in advance that the - detainee will remain in detention for many years if not for life. To do so would be to render futile the constitutional provisions of representation and review. While the detaining authority may not necessarily be swayed by such representation and in particular need not adopt the recommendations, of the tribunal, nonetheless due consideration thereof must be given, precluding

any pre-determination in the matter..

In the case of *Eleftheriadis* (6) Doyle, C.J., observed at p. 71:

> "Regulation 33 is directed to the preservation of the public security I have no doubt whatever that it cannot be used solely as a punitive measure."

It will be seen that the above dictum of Doyle, C.J., in *Eleftheriadis* (6) referred to a detention which was "solely" punitive. The detention in that case was based on an allegation of a single act of conspiracy to unlawfully obtain import licences committed over a year before that.

There was no statement of future apprehension made by the detaining authority and the Supreme Court was unable, in the particular circumstances of the case, to draw an inference of future apprehension. The only conclusion to be drawn in the matter therefore was that the detention was solely punitive in nature. That is not the case here. The court *has* expressly found that *it has not been shown* that the detaining authority *could not initially have been reasonably satisfied* that it was necessary to detain the applicant. The detention cannot be then said to have been or to have become solely punitive.

The words used in this case however constituted in my view a declaration of intention and while the applicant's detention may not have become solely punitive in nature it nonetheless assumed a punitive element. The question arises as to how permanent or transient was that element or underlying intention. If a detainee could succeed in showing that, although the detaining authority's initial satisfaction had been a reasonable one, thereafter representations made by him had not been considered and his constitutional rights had thus been effectively frustrated, that might be a different matter. A perfectly valid satisfaction formed by the detaining authority might thus be vitiated by an intention to detain a person for a length of time, regardless of whether or not the detainee's release would constitute a threat to public security, such intention being expressed in a refusal to consider representation.

I appreciate that it would be extremely difficult for a detainee to establish that his representations had not received due consideration. In the present case however I am of the view that the words spoken raise a *prima facie* case that in the least the applicant's rights of representation were in jeopardy. As I see it, that *prima facie* case calls for an answer. There is no evidence to the contrary and Mr Tampi has had no instructions on the point. Up to the time when the court reserved judgment however there was evidence before me that the applicant

had made representation to the Attorney-General and the Minister of Home Affairs. There was no evidence that such representation was placed before the detaining authority and there was certainly no evidence before me that any such representation had not been given due consideration by him. Meanwhile the court has been informed by Mr. Mwanawasa that since the court reserved judgment the applicant has recently been released. That as I see it materially affects the issue. I do not see how it can nova be said, in the light of the applicant's release, that the detaining authority intended to detain him for a very long time if not for life, or that any representation was not given due consideration. This ground must therefore fail.

The next ground for this application is that the grounds for detention have no relation to the preservation of public security. In this respect s. 2 of the Preservation of Public Security Act reads as follows:

> "2. In this Act, the expression 'public security' includes the securing of the safety of persons and property, the maintenance of supplies and services essential to the life of the community, the prevention and suppression of violence, intimidation, disorder and crime, the prevention and suppression of mutiny, rebellion and concerted defiance of and disobedience to the law and lawful authority, and the maintenance of the administration of justice. "

I have experienced much difficulty in ascertaining the interpretation to be placed on the above definition, which to my mind could well have been couched in terms more readily understandable.

My chief difficulty lies with the words " and crime " and their positioning in the above passage. The definition can be broken down as follows:

(i) the securing of the safety of persons and property;
(ii) the maintenance of supplies and services essential to the life of the community;
(iii) the maintenance of public order;
(iv) the maintenance of the administration of lawful authority;
(v) the maintenance of the administration of justice.

All five groupings involve the prevention and suppression of particular acts which could well amount to crimes. For example the securing of the safety of property could involve the prevention and suppression of, say, arson. The third and fourth groupings, in the form expressed in the definition, obviously involve the prevention and suppression of acts which in all probability would amount to crimes. It can be said therefore that the word "crime" is not connected with activities related to the five groupings in the definition, as those groupings automatically cover related activities which may or may not be criminal. It can thus be said that the word "crime" refers to all other criminal activities.

I hesitate to think however that the Parliament intended to cover the prevention and suppression of all crimes. I cannot see how for example even a marked prevalence of the offence of common nuisance could in

any way endanger the security of the nation. It seems that Baron, D.C.J., was of the same opinion in *Banda J. v Attorney-General* (4) at p. 239 where in reference to the powers of a police officer under reg. 33 (6) he said:

> "The police officer must have reason to believe that the person concerned, if left at liberty, is likely to engage in activities prejudicial to public security. If what the police officer "had reason to believe" was not as a matter of law a good ground for detention under reg. 33 (1) then the arrest and detention under 33 (6) were unlawful *ab initio.* Suppose, for instance, the police officer believed that it was a valid ground of detention under reg. 33 (1) that the person concerned had committed a series of petty thefts from local stores... It is, one would have thought, self-evident that the regulation does not give power to detain for reasons such as those."

With that observation I respectfully agree. Had it been Parliament's intention to cover all crimes, then I cannot see that he would have placed the words "and crime" in their present position in the definition. In my view I would have given the prevention and suppression of all crimes a separate treatment, perhaps at the beginning or end of the definition. I had initially thought that due to the positioning of the words "and crime" they referred only to crimes of violence, intimidation and disorder; but the words themselves, "violence, intimidation, disorder", are fully descriptive and embrace all acts of that nature, criminal or otherwise. The same holds good if one applies the word "crime" to the words "mutiny, rebellion, and concerted defiance of and disobedience to the law and lawful authority." Difficulty is encountered in every direction. While the first, second and fifth groupings in the definition obviously involve the prevention and suppression of crime having a connection therewith, it may well be that the Parliament thought it best, to make assurance doubly sure, to specifically provide therefore.

The same can be said of the third and fourth groupings, though I consider that the use of the words "and crime" in reference thereto was particularly unnecessary. Suffice it to say however, doing the best I can, that the only reasonable construction that I can place on the definition is that the word "crime" relates to all crimes having a connection with the above five groupings, that is, with public security as otherwise defined.

In the course of the argument Mr Mwanawasa referred to the case of *Elefthertadies* (6). He submitted that the Supreme Court there indicated that an act of conspiring (a year before that) to corruptly procure import licences might not constitute a breach of public security. The order of

detention was invalidated in that case, as I have earlier said, for the reason that in the circumstances of the case the Court was not prepared to draw an inference of future apprehension. In passing, Doyle, C.J., made reference to " any question which might arise as to the reasonableness of the measures taken". That observation in my view refers to the reasonableness or otherwise of the necessity to detain the appellant

in that case, on the basis of a solitary act of conspiracy committed a year before that, rather than to the question whether the particular conspiracy was an activity contemplated by the relevant legislation. Inasmuch as the Supreme Court made no observation as to the content of the ground for detention, it can be said to have impliedly accepted that the ground had sufficient connection with public security: indeed as the conspiracy in question was aimed at corruptly procuring import licences to import goods it might be said that the latter crime was indirectly prejudicial to the maintenance of supplies and services essential to the life of the community, though I must observe that the connection is somewhat remote. On the other hand it can be said that as the Supreme Court allowed the appeal on another point it was not thought necessary to consider or pronounce upon the content of the ground for detention.As I see it therefore, the case is of uncertain authority on the point.

The Regulations themselves contain examples of specific crimes appropriate to the definition of public security. As their title implies, the Regulations are directed to the preservation of public security. The offences contained therein were no doubt created to achieve the same object, and it follows therefore that they constitute crimes which may,in certain circumstances, be prejudicial to public security. For example it is an offence under reg. 7 to injure any person or damage any property at an assembly, a measure designed *inter alia* to secure the safety of persons and property. Presumably regs. 37A, 46, 44 and 45 were made with a view to maintaining essential supplies and services: those regulations *inter alia* make it an offence respectively to take part in a strike in a necessary service, to encourage employees to absent themselves therefrom, to smuggle out of Zambia or without lawful authority possess any petroleum product. In the interests no doubt of public order, regs. 4 and 7 respectively make it an offence to attend a prohibited meeting or to attend an assembly while in possession of a firearm. Again presumably with a view to secure the administration of lawful authority, it is an offence respectively under regs. 26 and 36 to obstruct an officer in the execution of his duty or to knowingly harbour a person whose activities constitute a threat to public security.

I do not wish to be taken as suggesting than the Regulations, or indeed the other regulations made under the Act, contain a full code of the crimes indirectly referred to in the definition of "public security" in the Act. It is my view simply that the Regulations necessarily contain samples of the type of crime which the Parliament had in mind in the said definition. In my judgment it is only that type of crime which has a connection with the objects contained in the definition and which may, in certain circumstances, result in detention.

I say "in certain circumstances" because the commission of a crime having a connection with public security cannot in itself give rise to the necessity for detention. This is exemplified in the following oft-quoted passage in the judgment of Baron, J.P., in *Re Kapwepwe and Kaenga* (1) at p. 260:

> "The machinery of detention or restriction without trial (I will hereafter use 'detention' and cognate expressions 'to include restrictions' and cognate expressions) is, by definition, intended for circumstances where the ordinary criminal law or the ordinary criminal procedure is regarded by the detaining authority as inadequate to meet the particular situation. There may be various reasons for the inadequacy; there may be insufficient evidence to secure a conviction; or it may not be possible to secure a conviction without disclosing sources of information which it would be contrary to the national interest to disclose: or the information available may raise no more than a suspicion, but one which someone charged with the security of the nation dare not ignore; or the activity in which the

person concerned is believed to have engaged may not be a criminal offence; or the detaining authority may simply believe that the person concerned, if not detained, is likely to engage in activities prejudicial to public security. And one must not lose sight of the fact that there is no onus on the detaining authority to prove any allegation beyond reasonable doubt, or indeed to any other standard, or to support any suspicion. The question is one purely for his subjective satisfaction.These are far-reaching powers. In particular it must be stressed that the President has been given power by Parliament to detain persons who are not even thought to have committed any offence or to have engaged in activities prejudicial to security or public order, but who, perhaps because of their known associates or for some other reason, the President believes it would be dangerous not to detain. "

Although the above passage stresses that a person may be detained where he is not even thought to have committed a criminal offence, nonetheless it also demonstrates that he cannot be detained simply because he has committed a criminal offence. It is only where the detaining authority regards, and I would add, reasonably regards the law as inadequate, for example for the reasons stated in the above passage, to deal with the situation, that the commission of a particular crime in itself may otherwise constitute a threat to public security. For example, the offence of armed robbery is a crime which could be said to have a connection with public security. Nonetheless an armed robber may only be detained where the ordinary law is inadequate to deal with the situation and where the commission of the crime actually results in a threat to public security. If it were otherwise then the ordinary law would be otiose; and so indeed would be the criminal sanctions to be found in the Regulations themselves. Iam confirmed in my view by the following passage in the judgment of Baron, D.C.J., in the case of *Banda (J)* (4) at p. 240:

"The evidence is in my opinion overwhelming that the grounds for the plaintiff's arrest and detention were because she was a suspect in a murder investigation; this is not *per se* a ground falling within the powers conferred by reg. 33 (6). It follows that

in my judgment the arrest of the plaintiff and her detention for nine days were unlawful, and that this appeal should be allowed. "

and further on (at p. 240):

". . . the fact remains that an Assistant Commissioner of Police ordered the detention without trial, and without evidence sufficient to support a charge, of a person suspected of complicity in an offence which could not remotely be regarded as being connected with public security "

There is a distinction to be drawn between those passages and the earlier quoted passage from the same case citing the example of the commission of a series of petty thefts. The distinction lies in the use of the words " *per se* ". I venture to say that the learned Deputy Chief Justice was thereby in effect expressing the new that although the crime of murder, being a crime of violence, could be said to be connected with public security the commission of such a crime in itself was not a ground for detention under reg. 33 (6) - and ultimately reg. 33 (1) - unless the ordinary law was inadequate to deal with the situation and unless of course the commission of such crime did in fact in the particular circumstances of the case result in a threat to public security. It is apparent that the latter consideration did not arise in *Banda* (*J*) (4). To illustrate that consideration, there might be strong suspicion but no conclusive evidence of a single isolated incident of common assault, a crime of violence, but it could hardly be said that such suspicion was "one which someone charged with the security of the nation dare not ignore".

It will be seen that the definition of "public security" makes use of the word "includes". In the case of *Mudenda v Attorney-General* (7) at p. 31 Silungwe, C.J., was of the opinion that such word served to indicate that the definition was not exhaustive. With that observation I respectfully agree but I am particularly influenced by the learned Chief Justice's subsequent observation:

"However, in accordance with the rules of construction of statutes, anything not specifically

> referred to in the section but which is shown to fall within the spirit and intendment of the said section would have to be governed by the ejusdem generis rule. "

A breach of the exchange control legislation may affect the economy of the nation, depending of course on the sheer magnitude of the amount of money involved. The question is, does it affect the nation's security? In the case of In *Re Seegers* (8) the grounds of detention alleged the unlawful externalisation of "large amounts of currency" The relevancy of the grounds of detention to public security was never raised in that case, the applicant securing his release on a different point. The case is only of interest in that the statement of the grounds for detention alleged that such unlawful externalisation of currency was "prejudicial to the economic security of the Republic", and there is the crux of the matter.

Is the nation's economic security embraced by the definition of public security? The only stated object within the definition which comes

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any way close to the subject of the nation's economy is `'the maintenance of supplies and services essential to the life of the community." The question is whether, applying the ejusdem generis rule, that object and the definition should be construed to include the aspect of the nation's economy. I must at once observe that nothing would have been simpler for the Parliament to have inserted the phrase "the maintenance of the national economy " or some such-like words in the definition, had it been his intention to cover the question of economic security.

It can be said that the unlawful externalisation of large sums of money and the corresponding deficit in foreign exchange might indirectly affect the import of essential supplies and thus the maintenance of supplies essential to the life of the community. The unlawful externalisation of money might have lots of side effects; the question however is one of proximateness. In the case of *Patel v Attorney-General* (9) Magnus, J., in considering the relevancy of exchange control legislation to the aspect of "public safety", then contained in s. 18 of the Constitution, had this to say (at p. 124):

> "It could conceivably happen that complete financial anarchy might so weaken the economy that internal disaffection might be caused, leading to rioting and civil disturbance. So might widespread unemployment, caused, say, by over population. So might prolonged drought which disrupted agricultural production. One might think of many things which could, ultimately, affect the public safety. None of them would, however, have the quality of proximateness which would justify involving this exception. Nor do I think that exchange control is sufficiently proximate to public safety to warrant the present legislation being adopted 'in the interests of' public safety. Nor do I think that, when the exchange control legislation was drafted, did the draftsmen have in mind that they were doing so in the interests of public safety, nor, for the matter, did the Minister of Finance have this in mind in approving the Regulations.

Magnus, J., was there dealing with the aspect of "public safety". That term as he observed (at p. 123) is defined in Basu's Commentary on the Constitution of India Vol. I at p. 627. The definition reads:

> "Public Order also includes public safety in its relation to the maintenance of public order. 'Public safety' ordinarily means security of the public or their freedom from danger, external or internal. From the wider point of view, public safety would also include the securing of public health, by prevention of adulteration of food stuffs, prevention of epidemics and the like. But from the point of view of 'public order', it would have a narrower meaning and offences against public safety would include - creating internal disorder or rebellion, interference with the supply or distribution of essential commodities or services, inducing members of the Police to withhold their services or inducing public servants engaged in services essential to the life of the community to

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> withhold their services . . . In its external aspect, 'public safety' would mean protection of the country from foreign aggression. "

It will be seen that there is little difference between the definition of "public safety", even in the narrower sense, and the definition of "public security" contained in the Act. Indeed the two expressions "public safety" and "public security" are used in various regulations and it is not apparent to me that they are used in any differing sense: for example the dissemination of religion in a dwelling without consent may be prohibited in the interests of public security and the retirement of a public officer may be prohibited in the interests of public safety. I consider that the dicta of Magnus, J., are appropriate to this case. While the unlawful externalisation of large sums of money might indirectly result in a shortage of essential supplies, I do not see that such result is at all proximate. The smuggling of large quantities of petrol out of the Republic has a direct result, that is, a shortage of an essential supply, and hence has a direct connection with the maintenance of essential supplies and indeed services: the smuggling of large quantities of money on the other hand has the direct result of a weakened economy: the consequences of a weakened economy are legion but they cannot be said to flow directly from the initial act of smuggling. Suffice it to say that while a breach of exchange control legislation can be said to have a connection with public security, I do not consider that such connection is in any way proximate.

The Regulations themselves, as I have said, contain samples of the type of offences having a connection with public security. Those regulations and others made under the Act deal with matters as widely separated as control of assemblies, possession of offensive weapons, dissemination of religion, compulsory acquisition and destruction of property, entry into Zambia without travel documents, wearing and possession of foreign uniforms, curfews, direction of labour and restriction of retirement or dismissal in essential industries, prohibition of lock-outs and strikes, smuggling and possession of petroleum products, and administration of rail and air services, movement of vehicles and control of waterways. That is surely a wide spectrum but nowhere is the aspect of exchange control even remotely mentioned.

It must be remembered that the Preservation of Public Security Act is a product of pre - Independence legislation and wars enacted, as I see it, primarily to prevent civil unrest. The words "public security" in their ordinary sense surely mean the securing of the safety of all persons and property and to that end the preservation of law and order. It can be said that the last four objects stated in the definition supplement the first object. Thus, in order to protect the safety of persons and property it is necessary to maintain supplies and services essential to the life of the community, to prevent public disorder, or subversive activities, or indeed a breakdown of law and order. The emphasis, in my view, is on the preservation of the safety of the community, rather than on its economic prosperity or otherwise. There may well be a nation whose economy is little short of chaotic but the peace and safety of whose citizens is never in doubt.

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I accept, as did Doyle, C.J., in *Eleftheriadis* (6) at p. 71, that the definition under consideration is contained in emergency legislation and that its construction must relate solely to its natural meaning without any leaning in favour of the applicant. I do not see however that the Court should be at pains to construe the definition in favour of the responent: there must in the least be some doubt that such is the construction to be placed on the definition. As I see it, Art. 26 of the Constitution places an onus upon the respondent to show that the detention was effected under the authority of reg. 33, namely that the grounds of detention are sufficiently connected with public security. I am not satisfied that such is the case and accordingly I find that the applicant's detention was invalid.

The final ground for this application is that the applicant contends that he has not been furnished with all the grounds for his detention namely that the statement of those grounds makes no mention of the allegation concerning the payment by ROP to him of K200,000. Mr Mwimbe testified that he investigated this allegation and became suspicious of the transaction somewhere between 26th September and the second week of October, 1979, that is, after the applicant had been detained, making a report on the matter for the first time in that same week. I do not see, as I have earlier said in this judgment, that it is necessary for me to consider whether the detaining authority must have

entertained reasonable suspicion in respect of the particular allegation as no reference to the allegation is made in the statement of grounds with which the applicant was furnished. Mr Mwanawasa submits however that the words spoken at the television and radio interview clearly illustrate that the allegation concerning the payment by ROP was a ground for the applicant's detention, that the satisfaction for the necessity to detain the applicant in respect thereof had been formed no later than 23rd October when the interview took place and that as the applicant had not been informed of such ground his detention became invalid.

The aspect of whether the allegation concerning the payment of K200,000 by ROP to the applicant constitutes an additional ground for detention then arises. In this respect Mr Tampi in the course of submissions made a brief reference to an earlier case before this court,*Tembo v Attorney-General* (10) at p. 74 where the aspect of additional grounds of detention was briefly considered. Reference was there made to the case of *State of Bombay v Alma Ram Vaidya* (11). The judgment of the Supreme Court of India in that case turned on the provisions of Art. 22 (5) of the Constitution of India which read:

> "(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order. "

In considering those provisions the Supreme Court (per Kania, C.J.), observed (at p. 164)

> "The argument that supplementary grounds cannot be given after the grounds are first given to the de'tenu, similarly requires a closer examination. The adjective 'supplementary' is capable of covering cases of adding new grounds to the original grounds, as also giving particulars of the facts which are already mentioned in the ground to lead to the conclusion of fact contained in the ground originally furnished. It is clear that if by 'supplementary grounds' is meant *additional* grounds, i.e.; conclusions of fact required to bring about the satisfaction of the Government, the furnishing of any such additional grounds at a later stage will amount to an infringement of the first mentioned right in Art. 22 (5) as the grounds for the order of detention must be before the Government before it is satisfied about the necessity for making the order and all such grounds have to be furnished *as soon as may be*.The other aspects, viz., the second communication (described as supplemental grounds) being only particulars of the facts mentioned or indicated in the grounds firstly supplied, or being additional incidents which taken along with the facts mentioned or indicated in the ground already conveyed *lead to the same conclusion of the fact*, (Which is the ground furnished in the first instance) stand on a different footing. These are not new grounds within the meaning of the first part of Art. 22 (5). Thus, while the first mentioned type of " additional " grounds cannot be given after the grounds are furnished in the first instance, the other types even if furnished after the grounds are furnished as soon as may be, but provided they are furnished so as not to come in conflict with giving the earliest opportunity to the detained person to make a representation, will not be considered an infringement of either of the rights mentioned in Art. 22 (5) of the Constitution. "

The above passage serves to illustrate the difference between additional grounds for detention and particulars of or additional incidents related to the initial grounds. In the present case the allegations concerning the payment by ROP involved a completely different transaction and I cannot see how it could be regarded as constituting even an additional incident which leads to the same conclusion of fact in either of the two grounds originally supplied, much less as constituting particulars thereof. Mr Mwanawasa submits, as I have said, that the words spoken at the television and radio interview clearly illustrate that the allegation constituted an additional ground for detention. I do not think there can be any doubt about this. The question is whether there was any obligation to serve that ground upon the applicant.

In this respect the provisions of Art. 27 of the Constitution are relevant. Clearly the provisions of Art. 27 (1) (*a*) in particular apply to the commencement of detention. Those provisions were of course complied with when the applicant was first detained. Hence Mr Tampi submits that the

initial detention cannot be invalidated. Mr Mwanawasa seeks not to impugn the initial detention however, at least not on this point, but the continued detention, that is, after the satisfaction for the necessity to detain the applicant on the additional ground was formed. It can

be said that once the detaining authority complies with the requirement of Art. 27 (1) (a) that there is no obligation upon him to do so again. But that approach seems to me to ignore the clear intention behind those particular provisions, as construed with the remainder of the Article, and that is that the detainee must be informed of the grounds for his detention in order that he may, if he so wishes, make a meaningful representation in respect thereof as soon as possible to the detaining authority and ultimately, after the lapse of one year, to the tribunal. If a detainee is unaware of an additional ground he might well by dint of representation satisfy the detaining authority that his activities no longer or indeed never had constituted a threat to public security, that is, as far as the initial grounds were concerned; he would nonetheless remain in detention in ignorance of the existence of the additional ground. I doubt if the framers of the Constitution ever intended such a result. Further, the detainee might thus be frustrated in making representations to the tribunal, which might conceivably in turn be frustrated in making its recommendations to the detaining authority. While it is more than likely that the evidence adduced before the tribunal would indicate the existence of the additional ground for detention, the detainee is nonetheless entitled to a definitive statement in writing as to the existence of such ground, and he obviously should not be deprived of his liberty partly if not wholly in respect thereof, possibly for almost a full year, before learning of such ground for the first time from evidence adduced at the setting of the tribunal.

The passage I have quoted from *Atma Ram* (11) indicates that Kania,C.J. was there dealing with the case where grounds for detention were in existence when the order for detention was made but not all of them were communicated to the detainee: any subsequent communication of such grounds would clearly infringe Art. 27 (1) of the Constitution of Zambia, at least if not communicated within fourteen days of the commencement of the detention. The passage quoted indeed speaks of the grounds being before the detaining authority before his satisfaction can be formed. It is now widely accepted in our courts that the grounds for detention must be in existence before an order for detention can be made. If an additional ground subsequently arises upon which the detaining authority's original satisfaction for the necessity to detain is fortified, the detention is then based on grounds additional to, or in other words different from those already communicated to the detainee. It can then be said to be a different detention. I respectfully agree with the dicta of Kania, C.J. that the serving of additional grounds would in effect vitiate the initial order of detention. Grounds must relate to a particular order of detention. In the present case the additional ground was not in existence when the order of detention was made and cannot therefore relate to such order. But it is no answer however to say that for those reasons the additional ground should not be served. I entertain no doubt that to adopt that approach would be contrary to the clear underlying intention of Art. 27. The answer to the problem lies as I see it in the very word "commencement" in Art. 27 (1) (a). In my view when a detaining authority's satisfaction is formulated on an additional ground

a separate detention commences. Mr Mwanawasa submits that at that stage the original order of detention should be revoked, a fresh order made and served and a statement containing the original grounds (if still applicable) and the additional ground served upon the detainee.

With this submission I agree. Mr Tampi counters that if that is the case the detaining authority would spend a good deal of his time revoking and remaking orders of detention. Regulation 33 makes provision for the variation, revocation and suspension, conditional or otherwise, of detention orders and for the revocation of such suspension and the variation of conditions attaching thereto. Mr Tampi would no doubt agree that his submission reflects a good deal of exaggeration. This is surely an exceptional case. Regulation 33 (6) makes provision for a period of investigation before even an order of detention under reg. 33 (1) is made. Thereafter it is not in every case that farther investigations will take place, or if they do that they will yield any further materials at all, much less materials on which the detaining authority will positively formulate the necessary satisfaction. In any event the priority where the liberty of the subject is concerned is hardly one of convenience. As

Doyle, C.J., said in the case of *Attorney-General v Chipango* (12) at p. 63:

> "Section 26A (now Article 27) appears in a part of the Constitution which has formally and deliberately set out to enshrine the rights and freedoms of the people of Zambia. It is a section introduced to provide for the protection of those rights and freedoms and where possible it should be interpreted effectively to protect the rights and freedoms. That the protection given is a limited protection is no reason for cutting down what is given."

While I appreciate that the facts in *Chipango* (12), which turned on the failure to supply grounds within fourteen days of the commencement of detention, must be distinguished, I am of the view nonetheless that the only interpretation to be placed upon the provisions of Art. 27 as they apply to this case is that submitted by Mr Mwanawasa. Mr Tampi submits that if that is the case an otherwise perfectly valid detention may thus be vitiated merely by the fact that investigations reveal a further ground for detention, reinforcing indeed the necessity for such detention. The validity of the grounds for detention were never challenged in *Chipango* (12) however and an otherwise valid detention was vitiated by failure to supply such grounds within the Constitutional period. The issue in this case, as I see it, is not the validity of the original detention or of the supporting grounds. If that were the case then the validity of the additional ground would also be in issue but; that is not in issue. What is in issue is the question of the constitutional requirement of communication of the grounds of detention so that the detainee is given the opportunity of making a meaningful representation. Much has been written about the words ". . . specifying, in detail, the grounds upon which he is . . . detained", contained in Art. 27 (1) (a). Quite clearly they must in the least be construed to mean that all of the grounds which form the

basis of the detaining authority's satisfaction must be communicated to the detainee (*see* the dicta, of Kania, C.J. in *Atma Ram* (11) quoted above.) If for example three grounds for detention existed when an order was made, and only two were communicated I have no doubt that the detention would be invalid in the face of the failure to communicate all of the grounds. It matters not how valid might be the grounds served, or how reasonably satisfied might the detaining authority be as to the necessity to detain on those grounds. The validity of the grounds served could not save the order from being vitiated in the face of the strict constitutional requirement of communication of all of the grounds in existence. I can see no basic difference between that situation and the circumstances of this case. Injustice is done in either case if the third or additional ground is not served.

It is no answer to say in the example I have given that the detention nonetheless continues because the detention is still based on the first two grounds, which were communicated: the detention was in fact initially and continued to be based on three grounds, one of which was not communicated. Similarly that answer cannot apply to the present case: the detention was initially based on two grounds but subsequently was based on three grounds. The initial detention could not continue to have had an existence independent of the third ground: the detention was no longer based on only two grounds. There cannot be two separate detentions running concurrently and even if that was the case they would have to be supported by two orders of detention. There is only one order in this case. While I consider that emphasis is to be placed on the necessity to communicate the additional ground rather than the consideration of making a fresh order, nonetheless as I see it the only channel of effecting service of the additional ground in the present case was first by revocation of the initial order and then by the making and service of a fresh order. In my judgment therefore as the satisfaction as to the necessity for detention on the additional ground had clearly been formulated no later than 23rd October, 1979, the applicant's continuing detention in any event became invalid thereafter.

I must now decide whether or not, in view of the applicant's release to grant him a declaration. I have been assisted in the matter by the judgments of Doyle, C.J., and Baron, D.C.J., in *Sithole v State Lotteries Board* (13) at pp. 109/111 and 116 and that of Gardner, Ag. D.C.J., in *Nkumbula & Kapwepwe v Attorney-General* (14) at p. 14. Mr Mwanawasa submits that there is still the question of costs to be settled, but it seems to me that the various findings which I have made in this judgment should suffice to determine that issue. He stresses that matters have not been finally concluded as the applicant is still engaged in discussions with officers of SITET. I do not see how

such discussions, whatever their content, affect the issue. Mr Mwanawasa in turn submits that although the applicant is precluded by the provisions of Art. 29 (8) of the Constitution from pursuing damages in a legal action, the tribunal may nonetheless recommend to the detaining authority that compensation be paid to a person released from detention; he suggests that the tribunal might find a declaration by the High Court to be of persuasive value.

The tribunal may only consider the question of compensation however when reviewing case of a detained person "in pursuance of Art. 27." The provisions of Art. 27 (1) (*c*) or (*d*) do not appear to cover the case of a detainee released within one year. Art. 27 (3) however provides that the President "may at any time refer to the tribunal the case of any person who has been or is being detained," and that provision in my view gives rise to the possibility of an award of compensation in a case such as this. The tribunal however hears evidence makes its own findings and exercises its own discretion in the matter and I cannot see how, on the issue of compensation in particular, the tribunal would find the Court's declaration to be of even persuasive value.

The power to make a declaration is discretionary and the Court will not generally decide hypothetical or academic questions. In the case of *Gibson v Union of Shop Distributive and Allied Workers* (15) the plaintiff sought a declaration that *inter alia* the decision of a trade union to suspend him from membership for two years was void. Due to the lapse of time between the issue of the writ and the setting down of the action for trial, only some three weeks of the period of suspension remained. Nonetheless Buckley, J., proceeded to hear the action and ultimately granted the declaration observing (at p. 254):

> "If, however, when the action is instituted the plaintiff has or may have a good ground of complaint, not of an academic character but involving substantial legal issues, it seems hard that, when the case comes on for trial, he should be faced with the suggestion that it ought not to be tried because by then the relief which he seeks has become much less important or has ceased to have practical implications owing to the lapse of time between the date when he issued the writ and the time when, having regard to the business of the court and the necessary preparatory steps, the action comes on for trial."

It cannot of course be said that the issues in this case were academic at the outset. I do not see therefore why the applicant should be deprived of a declaration because of his release meanwhile. I cannot see that such release affects the nature of the issues involved. Nothing could be more appropriate to the exercise of the court's power to make a declaratory order than the liberty of the subject: indeed the provisions of Art. 29 (2) seem to me to envisage such an order. I do not see that the court's order will be of no avail: a declaration that his detention without trial has been invalidated may well affect the applicant in his every day life. Further- more the subsequent invalidity of the applicant's detention turns on a point of constitutional law which has not to my knowledge been raised in our courts before, and may well be therefore, to use the words of Baron, D.C.J., in *Sithole* (13) at p. 110/111 "of general importance".

In all the circumstances therefore, in the exercise of my discretion, I am of the view that the applicant should have his declaration. I accordingly declare that the applicant's detention was invalid *ab initio* and in any event became invalid after 23rd October, 1979

Detention declared invalid ab initio
