IN THE SUPREME COURT OF ZAMBIA **Appeal No. 96A/2004**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

IN THE MATTER OF: **ORDER 53 OF THE RULES OF THE SUPREME COURT**

AND

IN THE MATTER OF: **AN APPLICATION FOR LEAVE FOR JUDICIAL REVIEW BY ROY CLARKE**

BETWEEN:

THE ATTORNEY GENERAL **APPELLANT**

AND

ROY CLARKE **RESPONDENT**

Coram: Sakala, CJ, Lewanika, DCJ Chirwa, Mumba, Chitengi, Silomba and Mushabati, JJS
On 27th March, 2007 and 24th January, 2008

For the Appellant : Mr. D. Y. Sichinga, Chief State Advocate and Col. M. Phiri, State Advocate
For the Respondent: Dr. P. Matibini of Messrs PATMAT Legal Practitioners

JUDGMENT

Chitengi, JS, delivered the Judgment of the Court.

Cases referred to: -

1. Wandsworth LBC v Michalok [2002] 4 ALLER 144
2. Shilling Bob Zinka v Attorney-General (1990-1992) ZR 73.
3. Mifiboshe Walulya v Attorney General (1984) ZR 89 at 22
4. Independent Media Bill Case SCZ Judgment No.11 of 2007 (Unreported).
5. R v Immigration Appeal Tribunal Ex Parte Khan [1982] 2 All ER 420.
6. Secretary of State for Home Department vs. Rethman [2002] 11 BHRC 413.
7. Cohen v California 403 vs. 15 1971
8. Texas v Johnson 491 vs. 397 414 1989
9. Sata v The Post Newspapers Limited and Another 1992/HP/1385 & 1993/HP/821 (Unreported).
10. Resident Doctors Association of Zambia and Others v The Attorney-General (2003) ZR 88.

11. Lingen v Austria [1986] 8 EHRR 407
12. De Joinge v State of Oregon 299 vs. 353 1973
13. Padfield v Minister of Agriculture Fisheries and Food [1968] AC 997.
14. R v Secretary of State for Home Department ex parte Budgdaycay [1987] AC 514
15. R v Secretary of State for the home affice ex parte Brind [1981] 1AC 697.
16. Redmond Bates v Director of Public Prosecutions [1999] 7BHRC 375
17. Amnesty International v Zambia Complaint [2000] AHRLR 325 (ACHRPR 1999)
18. R v Leman Street Police Station Inspector ex parte Venicoff [1920] 3KB 22
19. R v Governor of Brixton Prison ex parte Soblen [1963] 2QB 243
20. Ridge v Baldwin [1964] AC 40.
21. R v Commission of Racial Equality ex parte Hillington LBC [1982] AC 787.
22. Sharp v Wakefield [1891] AC 173
23. Associated Provincial Pictures Houses Ltd v Wednesbury Corporation [1948] 1 KB 223.

Legislation referred to: -

1. Constitution of Zambia Articles 20 and 23
2. Constitution of Zambia 1964 Edition Part 3 Section 22
3. Immigration and Deportation Act Chapter 123 of the Laws of Zambia Sections 22(2) and 26(2).

International Instruments referred to: -

1. International Covenant on Civil and Political Rights Article 13.
2. African, Charter Articles 7 and 13.

Other works referred to: -

1. De Smith et al. On Judicial Review of Administrative Action, Fifth Edition (London Sweet and Maxwell (1995) P. 295 Paras 6 – 001.

At the hearing of the appeal, the Deputy Chief Justice, Mr. Justice Lewanika, was a member of the panel; but passed on before the judgment was ready. This judgment is therefore by majority.

This is an appeal, by the Attorney General, against the decision of the High Court which nullified the deportation of the Respondent by the Minister of Home Affairs, hereinafter referred to as the Minister, on the ground that the deportation violated the Constitution, section 26(2) of the Immigration and Deportation Act, and for procedural impropriety and being Wednesbury unreasonable.

The fact of this case, as revealed by the affidavits, can be briefly stated. The Respondent, who gave his profession as a journalist is a British national, holding established resident status in Zambia. He contributes with the *Post News Papers Limited* under a column called the *Spectator".* On 1st January, 2004, the Respondent submitted a satirical article entitled *"Mfuwe".* As a result of this satirical article, the Permanent Secretary in the Ministry of Home Affairs, one Peter Mumba, hereinafter referred to as the Permanent Secretary, issued a statement that he had recommended to the Minister that the Respondent be deported. This statement appeared in the *Daily Mail* and the *Post Newspaper* of 5th January, 2004. On the same day, while addressing cadres of his party, the MMD, the Minister said that the Respondent would not have more than twenty – four hours in the country. Curiously, a warrant for the deportation of the Respondent had already been signed by the Minister on 3rd January, 2004.

The article, which the learned trial Judge found an overstretched satire, irritating and offending, and we think rightly so, was written in crude language tinged with the Respondent's dislike for the President and the government and contained descriptions of the physical features of the characters the Respondents was writing about and allegations of rigging of elections by the President and some Ministers.

In the article attributed to him, the Permanent Secretary, said that the government intended to deport the Respondent over his satirical writing in which he called the President and two Ministers names. The Permanent Secretary also said that the article went beyond satire and comic. Further, the Permanent Secretary said that reference to some government leaders as Muwelewele, long legged giraffe, red-lipped, long fingered baboons and knocking knees was clearly an insult. The Permanent Secretary then reffered to some matters, which, for the purpose of determining this appeal, it is not necessary for us to recite in detail. We only mention here that the Permanent Secretary pointed out that a Zambian at the Zambian High Commission in London was deported for referring to the British Government and some people as toothless baboons. In fact, the correct expression was toothless bull dog. According to the newspaper article, the Minister's reaction was that the article was in bad faith and that he

would make his stand after looking at the article again. Subsequently, the Minister deported the Respondent from Zambia.

On these facts, the Respondent applied for the remedy of Judicial Review seeking the following reliefs:-

1. An order of certiorari to remove into the High Court for the purpose of quashing the decision of the Minister of Home Affairs to deport him.

2. An Order of mandamus to oblige the Minister of Home Affairs to reconsider the decision to deport the Applicant (Respondent).

3. A declaration that a decision to deport the Applicant (Respondent) is ultra vires Article 20 of the Republican Constitution.

4. A declaration that the Respondent (Appellant) is obliged under the Rules of natural justice to afford the Applicant (Respondent) an opportunity to be heard in person on the decision to deport him from the country.

The grounds for Judicial Review are stated as follows:- Irrationality/Procedural Impropriety, that:-

1. It is contended that the decision to deport the Applicant (Respondent) is irrational in the sense that the decision of the Minister of Home Affairs is so outrageous in its defiance of logic in so far as the nature of the article complained of is concerned that no sensible public officer who had applied his mind to the question to be decided could have arrived at it.

2. It is contended that there was a duty to afford the Applicant (Respondent) a hearing before a decision to deport him was made. In this case, save statement in the press, the Applicant (Respondent) has not been communicated to, in order to afford him an opportunity to be heard before the decision is made.

3. The decision of the Minister of Home Affairs has adversely affected the interests of the Applicant (Respondent). In the result, the Minister of Home Affairs has acted

unfairly by making the decision without affording the Applicant (Respondent) a hearing on the matter in accordance with the rules of natural justice before the decision was made.

4. At any rate, the decision to deport the Applicant (Respondent) on this set of facts is clearly ultra vires Article 20 of the Republican Constitution. It cannot be reasonably supported in a democratic country such as Zambia.

The Minister filed an Affidavit in Opposition to the Respondent's applicant for Judicial Review. In his Affidavit, the Minister deposed that the article in question was not satire but in fact it was a direct insult on the government, its leaders and the people of Zambia. The Minister also deposed that he was not influenced by the Permanent Secretary, in making his determination in accordance with his statutory powers. Regarding the statement he made to the protesting MMD party members, the Minister said by that time he had already issued the warrant to deport the Respondent. The Minister said that his opinion was that the Respondent by his presence in Zambia is likely to be a danger to peace and good order. The Minister said that the Respondent's reference to the people of Zambia as animals, monkeys, hippos etc has excited and encouraged hatred in Zambia and it is also a recipe for violence in the country. The Minister further deposed that in law, he is not obliged to give reasons for his decision to deport the Respondent. Furthermore, the Minister deposed that under the Immigration and Deportation Act, he is not bound to hear the Respondent before issuing a warrant of deportation. He said that, even if the Respondent was entitled to be heard, the insulting statements are obvious and serious to render the discretion to quash the decision on account of the right to be heard not appropriate. The Minister denied that the Respondent's right or any fundamental right as alleged or at all has been infringed. He said that there has been no illegality, irrationality and/or procedural impropriety in the decision making process.

The Respondent replied to the Affidavit in Opposition saying the article was satire, which is a form of social or political criticism, which takes the form of metaphor or allegory as a vehicle of pointing out hypocrisy, pomposity and absurdity. He said a satire is a textual version of a cartoon; that the meaning of satire is not explicit and largely depends on the interpretation put on it by the reader; that the lowest level of interpretation of satire is to take the metaphor literally and

thereby overlook or misinterpret the deeper critical insights; that in view of this, the article did not insult, nor was it intended to insult the government or the citizens of Zambia; that the Minister in his affidavit says he was influenced to deport the Respondent by the satirical article in question, that the article in question is humorous, albeit critical, and is not a recipe for violence in the country; that the decision to deport him was explicitly taken partly on grounds of his origin, nationality and race, and therefore in violation of the Constitution; that his presence in Zambia and the exercise of the freedom of expression is not a danger to the peace and good order in Zambia; that the administrative decision to deport him is calculated at imposing penal sanctions against him; that the decision to deport him on account of the satirical article he wrote is a clear violation of the right of expression and freedom of the press and that the article in question was published by the *Post Newspapers Limited* and the paper is entirely responsible and accountable for the publication. The Respondent is an established resident and has chosen Zambia as his residence or place of abode.

On this evidence, the learned trial Judge found that the Respondent was deported as a result of a satirical article of the first of January, 2004 which appeared in the *Post Newspaper*; that Mr. M'membe, Managing Director Editor of the Post Newspaper published the article and nothing has been done to Mr. M'membe the Editor-in-Chief and Publisher; that satirical articles have appeared in the Zambian Newspapers for decades, even the Applicant (Respondent) has written several articles of such a nature and that the article in question was an overstretched satire, irritating and offending.

After these findings, the learned trial Judge reviewed the law relating to Judicial Review as we know it. The learned trial Judge then considered the provisions of ***Section 26(2) of the Immigration and Deportation Act*** [(3)] and held that the words "in the opinion of the Minister" as used in the section mean that the Minister's action cannot be challenged on the merits; that the power is subjective. For reasons, which we cannot easily discern from the pleadings in this case, the learned trial Judge, citing foreign authorities, dealt with issues of equality before the law and held that the Respondent had been singled out for negative individualized treatment; while the Editor-in-Chief and publisher has not been sanctioned.

After dealing with the concept of equality before the law, the learned trial Judge, again citing

several foreign authorities, discussed the importance of freedom of the press and expression and held that the discretion to deport aliens should not be exercised in violation of the prescribed guarantees of equality and liberty. Further, the learned trial Judge, again, for reasons we cannot easily discern from the record, said that if the authorities deport those aliens against whom they bear some prejudice or whose protected liberties they wish to curtail, such a deportation is discriminatory. The learned trial Judge was critical of the Zambian authorities treatment of the Respondent by deporting him for reasons forbidden by the Constitution, i.e. constriction of the freedom of expression and discriminating against him as an alien because of his origin and race. The learned trial Judge then discussed deportation and characterized it as a grave sanction and went into the negative effects of deportation, which, for the purposes of determining this appeal, it is not necessary for us to recite.

In respect of the Respondent, the learned trial Judge said that the Respondent's deportation will mean the Respondent staying away from his wife, children and grand children who are Zambians, and who will be indirectly denied Zambian citizenship by forcing them to go and live with the Respondent in England. We must observe here that we have searched the record of evidence and we find nothing to the effect that the Respondent is married to a Zambian, has children and grand children in Zambia.

The learned trial Judge was of the opinion that the Minister having used his discretion under Section 26 (2) to deport the Respondent because of the article the Respondent published, that amounted to constricting a Constitutional right. He said to discriminate against an alien is not acting fairly. The learned trial Judge, again after citing foreign authorities, talked about when national security may be acted upon and said that the philosophy behind Section 26 (2) is security of the State against those who are bent on destroying the country. But we must say here that the reasoning and the situations cited by the learned trial Judge are irrelevant to this case. The Minister was not talking about matters of state security properly so called, but about the likelihood of such articles as the Respondent wrote leading to discord and possible violence in the country. The learned trial Judge then said that the Minister should have taken into consideration International Human Rights Instruments to which Zambia is a signatory when deciding the deportation of the Respondent, who, according to the learned trial Judge, has contributed 40 years of his life to the development of this country and has raised a family. It was

the learned trial Judge's opinion that, the fact that an article irritates, offends or shocks the State does not mean that Article 20 (3) of the Constitution does not apply.

In conclusion, the learned trial Judge held that the Respondent's rights to freedom of expression under Article 20 of the Constitution and protection of the law under Article 23 of the Constitution (1) were contravened in relation to the Respondent. The learned trial Judge said that there was procedural impropriety; that the facts were remotely connected to Section 26 (2), which was invoked by the Minister. He said that deportation in this case was unlawful and an excessive measure.

The learned trial Judge then expressed his personal opinions on the negative effects of deportation and talked about Zambian Christian values etc. We must say here that we disapprove of this kind of approach by a Judge. A Judge must decide the case on the evidence before him and must not devote part of his judgment to talking about himself or his personal views. In his views the learned trial Judge said that said officials should unlearn (whatever that may mean) the negativity of satire and the Applicant (Respondent) should learn the positivity of cultural accommodation and sensitivity.

Dissatisfied with this judgment, the Appellant now appeals to this court. The Appellant advanced four grounds of appeal.

The first ground is that the learned Judge misdirected himself in determining that the powers of the Minister under ***Section 26 (2) of the Immigration and Deportation Act*** ***(3)*** is confined to national security.

The second ground of appeal is that the learned Judge erred in law that the Respondent's Constitutional rights, that his freedom of expression and the right not to be discriminated under Article 20 and 23 of the Constitution (1), were violated by the Minister invoking ***Section 26 (2) of the Immigration and Deportation Act*** ***(3)***.

The third ground of appeal is that the learned Judge misdirected himself in law in determining

that the Minister's decision to deport the Respondent was not respective of our Christian values as Christian nation.

The fourth ground of appeal is that the learned Judge misdirected himself in law in determining that the Respondent succeeded on all three grounds of illegality, procedural impropriety being Wednesbury unreasonableness and for violating the Constitution.

Counsel filed detailed heads of argument which they augmented with oral submissions.

The argument on ground one is that the wording of **Section 26 (2)[(3)]** is such that even matters which are not of national security per se can be a basis for deportation under **Section 26 (2)**. It was argued that acts by aliens like engaging in immoral behaviour, which has the potential to destroy the fabric of social life and norms, or advocating nudism can fall under **Section 26 (2)[(3)]**. It was argued that the Respondent fell into this category.

On the second ground of appeal it is argued that the Judicial Review application did not ask to declare the deportation under ***Section 26 (2)*** *[(3)]* of the Immigration and Deportation Act as discriminatory and ultra vires Article 23 of the Constitution. It was submitted that the grounds of ultra vires should, therefore, not have been entertained as it was caught by ***Order 53/6/1 RSC***. It was pointed out that even assuming that the learned trial Judge had the right to make a determination of discrimination under ***Article 23(1)*** and infringement of the freedom of expression under ***Article 20*** *[(1)]***,** the finding the learned Judge came to was erroneous because freedom of expression is not limitless. Freedom of expression is subject to the constitutional provisions in Article 20 and all other legislation including the Immigration and Deportation Act provisions which are reasonably justifiable in a democratic society. It was emphasized that the issue of discrimination did not arise because the undisputed evidence is that the Respondent is an alien; that the Respondent does not, therefore, stand on the same plane with non alien's for there to be discrimination. The case of ***Wandsworth LBC v Michalok***[(1)] was cited on what amounts to discrimination. But in view of what we are going to say later; we do not find it necessary to give the facts of this case. Suffice it to say that the thrust of the judgment in that case is that for there to be discrimination, persons must be similarly circumstanced but given

different treatment.

The submission on ground three is simply that the learned trial Judge was not invited to make a decision on the reasonableness or otherwise of the Respondent's deportation with respect to our Christian values as a Christian nation.

The argument on ground four is that under ***Section 26 (2)(3)*** there is no right to be heard before deportation. In support of this statement the cases of ***Shilling Bob Zinka v Attorney-General (2)*** and ***Mifiboshe Walulya v Attorney General (3)*** were cited.

Mr. Sichinga, the learned Chief State Advocate, who appeared with Col. Phiri, the learned State Advocate, made oral arguments on grounds one, three and four.

The thrust of Mr. Sichinga's oral submissions on grounds one and four, which he argued together, is that by determining that the power of the Minister under ***Section 26(2)(3)*** is only confined to national security, the learned trial Judge fell into error. It is Mr. Sichinga's submission that ***Section 26(2)(3)*** is broad enough to cover any disturbance and acts of people engaged in immoral behaviour. He pointed out that there should not always be a crime for ***Section 26 (2)(3)*** to come into operation. He said a person can be conducting his ordinary business but in that conduct he may upset the good order of the society. Mr. Sichinga submitted that the article the Respondent wrote was found by the Minister, in his subjective opinion, to be an insult to the government and its leaders. It was Mr. Sichinga's submission that by finding that ***Section 26(2)(3)*** is confined to national security the learned trial Judge put the matter into the realm of ***Section 26(2)(3)*** which deals with matters of national interest. He said that in ***Section 26(2)(3)*** the intention of the Legislature was to cater for circumstances where one has not necessarily committed an offence. He pointed out that there is no ambiguity in **Section 26 (2)(3)** to suggest that it is confined to crime. Mr. Sichinga then referred us to the Independent Media Bill case (4) where we said that the court must give effect to the literal meaning of words. For these reasons Mr. Sichinga submitted that there was no illegality, irrationality and Sichinga submitted that there was no illegality, irrationality and unreasonableness.

On ground three Mr. Sichinga submitted that the declaration of Zambia as a Christian nation was nothing but a political declaration. He pointed out that the learned trial Judge was never invited or asked to base his decision on the Respondent's deportation on the principles of our Christian nation. In any case, Mr. Sichinga argued, the learned trial Judge ought to have given guidelines on what to do when there are compelling reasons to deport.

Col. Phiri argued ground two. He submitted that the learned trial Judge erred when he held that the Minister violated the Respondent's fundamental rights when he invoked Section 26(2). He pointed out that the Minister has power to deport any person who, in his opinion, his presence in Zambia is a danger to peace or good order; he said these powers have been exercised in respect of national security and public order. Col. Phiri submitted that freedom of expression is not limitless. He pointed out that the learned trial Judge found the article to be overstretched satire, irritating and offending. He said the words were insulting to the government, its leadership and the people of Zambia. He said that it is incumbent on all the citizens to accept the values of the society. He argued that the article was not acceptable in this society and that it is the duty of the Minister to maintain public order. Col. Phiri ended by saying that the Minister's decision was firmly anchored on law which is required in a democratic society; that a balance must be struck between private interest and public interest/order. He said in this case public interest/order out weight private interests. He urged us to allow the appeal.

Dr. Matibini, learned counsel for the Respondent argued the grounds of appeal seriatim.

Dr. Matibini's written arguments on ground one are that then learned trial Judge did not confine the provisions ***of Section 26(2)***[3] to national security. He said the learned trial Judge properly directed himself when he said that the court was not concerned with the merits under ***Section 26(2)***[3], but with whether it was lawful and reasonable to apply ***Section 26(2***)[3] to the facts. Dr. Matibini pointed out that the evidence is that the Respondent was deported because of the satrical article entitled: *"Mfuwe"*. He said the issue for determination is whether or not the learned trial Judge determined that the legislature had not (and could not constitutionally) have intended to confer upon the Minister the discretion to deport a person for writing an objectionable article. He submitted that the learned trial Judge was on firm ground when he said that "*the legislative objective under **Section 26(2)**[3] is not rationally connected to a satirical article*."

Citing the case of ***R v Immigration Appeal ex Parte Khan***[5] as authority, Dr. Matibini canvassed the proposition that even where a threat was envisaged under Section 26(2)(3), sufficient reasons for the decision must be given by tribunals dealing with immigration matters for the decision to make it apparent to the parties directly or by inference that it had considered the point in issue between the parties and was further required to indicate the evidence for the decision.

In that case, Lord Lane referring to the above proposition, said that "the basis of this proposition is that in the absence of reasons, it is impossible to determine whether or not there has been an error in law. Failure to give reasons therefore amounts to a denial of natural justice…"

With regard to national security interests, Dr. Matibini submitted that there must be materials upon which the authorities can reasonably and proportionately come to the conclusion that the individual poses a threat to national security. As authority for this proposition Dr. Matibini cited the case of ***Secretary of State for Home Department v Rethman***[6]***.*** He argued that what amounts to "*peace*" and "*good order*" is a matter of construction which falls within the jurisdiction or competence of the court. He argued that in this case; there is no factual basis for the conclusion that the Respondent's presence in Zambia or indeed his conduct in writing satirical article is a danger or likely to be a danger to peace and good order in Zambia. It was Dr. Matibini's submission that even if it was shown that the Respondent's article would have led to some people engage in violence, the deportation would still be unlawful because the Constitution protects freedom of expression even if the expression is likely or actually attracts a hostile and even violent reaction from listeners. He argued that a person who expresses himself peacefully can never be punished for the violent reaction or others. Dr. Matibini then cited the cases of ***Cohen v California***[7] and ***Texas v Johnson***[8] to support the proposition that the reaction of other persons to the lawful conduct of the Respondent is irrelevant.

Finally, on this ground Dr. Matibini submitted that the learned trial Judge did not hold that ***section 26 (2)*** is confined to matters of national security; that the concern of the trial Judge was whether it was lawful and reasonable to apply ***section 26 (2)*** to the facts of this case. On ground two, Dr. Matibini wrote long detailed arguments and cited several authorities including the

Constitution of Zambia on the importance of freedom of expression and the need for persons holding public offices to expect criticism and for them to develop think skins. However, in the view we take of these submissions we do not find it necessary to restate the arguments or recite the details of the authorities cited. Suffice it to say that we have given these submissions and authorities cited our careful consideration. This issues raised by Dr. Matibini are moot. Even the Appellant does not say anything in his arguments that suggests that freedom of expression and freedom of the press are not important in Zambia. Superior courts in Zambia have emphasized the importance of freedom of expression and freedom of the press in many cases like ***Sata v The Post Newspapers Limited*** and the ***Resident Doctors Association of Zambia and Others V the Attorney-General.*** In these cases, we have also said repeatedly, that citizens have the right to criticize their government and those holding public offices and that the latter must be tolerant to criticism.

Dr. Matibini pointed out that in this case, the Respondent was primarily engaged in satire, a form of social or political criticism which takes the form of metaphor allegory. In essence, it is the textual version of cartoons. He submitted the meaning of satire is not explicit and largely depends on the interpretation put upon it by the reader. He said the lowest level of interpretation of satire is to take the metaphor literally and thereby overlook or misinterpret the deeper critical insights. As to the standard to be applied in a case arising out of the written word, Dr. Matibini referred to a passage in ***Sata case*** where Ngulube, CJ said, inter alia, that *"………. and the standard to be applied in a case arising out of written word is that of a reasonable reader, that is a literate reasonable person who can read the captions relate pictures to their context. Any meaning assigned by an out of context illiterate imagination would not qualify as the reasonable understanding of the judicially acceptable reasonable average person who ordinarily reads newspapers".*

On the basis of these authorities, Dr. Matibini submitted that the learned trial Judge was on firm ground when he held that though the article in question may be poor in taste and culturally insensitive, these considerations did not remove the constitutional protection from the article. It was Dr. Matibini's submission that *"ideas*" that *"offend*" or *"disturb*" the State are also protected by ***Article 20 of the Constitution(1)***.

On the submission on behalf of the Appellant that freedom of expression is not limitless and that in the subjective determination of the Minister; the article constituted a danger to peace and good order, Dr. Matibini submitted that the learned trial Judge was on firm ground when he said that the basis of the claim of threat to the public order being a statement or expression, it implicates the constitutional protection of freedom of expression and it is for the court to determine whether the facts support justification under ***Section 26(2)***[(3)]. Dr. Matibini submitted that in this case there is no probable and proximate relationship between ***Section 26(2)***[(3)] and the article authored by the Respondent. In any case, Dr. Matibini argued, to criticize the government or its leaders (no matter how tastelessly expressed) cannot possibly constitute a "*threat to the Public Order*". He said the very purpose of the constitutional protection of the freedom of expression is to allow a variety of view points to contend in the market place of ideas for support. In this regard, Dr. Matibini cited the case of ***De Jonge v State of Oregon*** where the Federal Supreme Court of the United States said:-

"The right to support or criticize governments and politicians is fundamental to the democratic way of life and the freedom of speech and expression and is one which cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of civil and political institutions..."

Dr. Matibini ended his submission on this ground by saying that expression of views which may be unpopular, obnoxious, distasteful or wrong, is nonetheless within the ambit of freedom of speech and expression, provided there is no advocacy of/or incitement to violence or other illegal conduct. Further, he submitted that stifling of the peaceful expression of legitimate dissent today may result inexorably in the catastrophic explosion of violence some other day.

In ground three, Dr. Matibini ingeniously tried to justify the learned trial Judge's reliance on the Christian principles when deciding this case. But, as it was rightly pointed out by Col. Phiri, no one asked the learned trial Judge to invoke the declaration of Zambia as Christian nation when determining this case. Indeed, the learned trial Judge said he was speaking for himself. We appreciate the force of Dr. Matibini's submissions in support of the trial Judge's reliance on Christian declaration but we do not accept them because, as Dr. Matibini himself rightly said, the

Christian nation principles have no juridical value. We shall say no more of the Christian nation declaration.

The remainder of Dr. Matibini's submissions on this ground deal with the sanctity of marriage and right to family fair treatment of aliens, matters which are not in dispute. The basis of these submissions is the finding by the learned trial Judge that the Respondent has contributed 40 years of his life to the development of this country and has raised a family. The learned trial Judge said the Minister should have taken into account ***Article 13 of the International Covenant on Civil and Political Rights***[(1)] to which Zambia is a signatory before deporting the Respondent. Article 13 is against the deportation of aliens except in accordance with the law and except where compelling reasons of national security otherwise require and to be allowed to submit reasons against his deportation and to have his case reviewed by competent authority etc.

It was Dr. Matibini's submission that Article 13 requires that a potential deportee must be given an opportunity to be heard unless there are compelling reasons of national security. He said that in this case, it has not been demonstrated that there existed compelling reasons. Dr. Matibini ended his submissions on this ground by stating that the learned trial Judge was on firm ground when he held that it was unlawful to deport the Respondent when there were no compelling reasons of national security and because the deportation interfered with his family life.

Dr. Matibini argued ground four under the heads of: -

1. Illegality;
2. Irrationality (Wednesbury Unreasonableness); and
3. Procedural Impropriety.

On illegality, Dr. Matibini submitted that while the fact, that the Minister's power to deport any person from Zambia is incontrovertible, the decision to deport may be challenged if it is illegal. Citing **de Smith et al**[(1)], Dr. Matibini said that a decision is illegal if:-

(1) it contravenes or exceeds the terms of power which authorizes the making of the decision; or

(2) it pursues an objective other than for which the power to make the decision was conferred.

Dr. Matibini attacked the argument on behalf of the Appellant that the Minister had under ***Section 26(2)***[(3)] absolute discretion to determine what is and is not "*a danger to peace and public order*" and the assertion by the Minister in his Affidavit that he need not disclose how he arrived at the decision to deport the Respondent and said that it was erroneous. Dr. Matibini submitted that the learned trial Judge was on firm ground when he held that in conferring upon the Minister power to "*maintain and sustain public order*", Parliament never intended to confer upon the Minister power to constrict a constitutional right or rights. Further, Dr. Matibini submitted that the learned trial Judge was correct in construing narrowly the discretion of the Minister, at least in so far the Minister asserted, a right to exercise his discretion to deport the Respondent on grounds of the article he had written.

Dr. Matibini then compared '*absolute discretion*" and "*unfettered discretion*" and said that they were similar. He said that a claim of "*unfettered*" discretion was rejected in the case of ***Padfield v Minister of Agriculture Fisheries and Food***[(13)]. In that case it was held that whether the adjective "*unfettered*" appeared in the Act or not, it can do nothing to fetter the control which the Judiciary have over the Executive, namely that in exercising their powers; the latter must act lawfully and that is a matter to be determined by looking at the Act and its scope and object in conferring a discretion upon the Minister rather than by use of adjectives.

Dr. Matibini submitted that if unfettered discretion can be rejected where there is no written Constitution, then it is weaker here where there is a written constitutional right to free expression. He argued that the learned trial Judge was, therefore, right when on the facts of this case and in light of the provisions of Article 20 of the Constitution, he narrowly construed the power of the Minister to deport the Respondent.

In view of this, Dr. Matibini submitted that the learned trial Judge was right to consider the ground of illegality although it was not set forth in the statement seeking Judicial Review. Dr. Matibini then made submissions and cited authorities justifying the consideration of illegality although it

was not set forth in the Statement. However, on account of the view we hold about this ground of appeal, we do not intend to state these arguments and recite the authorities. We only say that we have given these submissions and authorities our careful consideration. Dr. Matibini ended on this ground by saying that the Appellant did not suffer prejudice because they had the opportunity to argue the issue of illegality; but elected not to do so in more than a cursory fashion.

On irrationality, Dr. Matibini began by citing a passage from ***de Smith et al***[(1)] which state the Court's approach when dealing with the exercise of power conferred on a person or body by Parliament. The passage reads:-

> "*The Court will of course generally defer the assessment of facts to the person or body whom Parliament has entrusted with the decision making powers. However, as with other administrative decision making, the authorities must confine themselves to the relevant facts, take into account all relevant considerations and not come to an irrational decision."*

Dr. Matibini also referred to a passage in the ***Resident Doctors Association and Others case***[(10)] where we said that there is need for the Court when interpreting provisions conferring fundamental rights to adopt an interpretation which does not negate the rights. In this regard Dr. Matibini also cited the case of *R v Secretary of State for the* ***Home Department ex parte Budg***[(14)] which expresses similar views and ends with the sentence:-

> "The Court must be entitled to subject an administrative decision to the most rigorous examination to ensure that it is in no way flawed according to the gravity of the issue which the decision determines."

On administrative action which involves a right of free speech Dr. Matibini cited the case of ***R v Secretary of State for the Hone Department ex Parte Brind***[(15)] where it was stated that:-

"The Court was perfectly entitled to start from the premise that any restriction of the right to freedom of expression requires to be justified and that nothing less than an important competing public interest will be sufficient to justify it ---------."

Further, Dr. Matibini pointed to Lord Ackner's speech in the same case where he said that in the field which concerns a fundamental human right – namely that of free speech – close scrutiny must be given to the reasons provided as justification for the interference with the right. It was Dr. Matibni's submission that applying the "*close scrutiny test*" that is required where freedom of expression is concerned, the learned trial Judge was on firm ground when he held that the Minister could not reasonably have come to the conclusion that thee was a threat to "*peace*" and "*good order*" posed by the article of the Respondent.

Dr. Matibini then raised issues of alleged defamation of the government and cited authorities to show that it is not in the public interest that government organs, central or local, should sue for libel. We do not find these arguments much relevant to the decision of this appeal. In any case, the Minister did not say the Respondent defamed the government and its leader but that the Respondent insulted the government and its leaders. It is trite that an insult is not defamation.

On the assertion by the Minister that the article led to protests by certain members of the Movement for Multi Party Democracy which he said might turn violent, Dr. Matibini submitted that as a matter of law it is not reasonable to hold a person who has expressed himself peacefully liable for the actual or (potential) violent reactions of those who disagree with him. As authority for this statement, Dr. Matibini cited the case of ***Redmond – Bate v Director of Public Prosecutions***[16]. In that case three Christian Fundamentalist women peacefully, but in a provocative manner, preached the gospel and attracted a large hostile audience. They were arrested for breach of the peace. The conviction was overturned on appeal on the ground that the women could not be held liable for the unlawful reactions of others to their own lawful actions. In this regard, Dr. Matibini submitted that the learned trial Judge was on firm ground when he held that the legislative objective under ***Section 26(3)*** is not rationally connected to the satirical article.

On procedural impropriety, Dr. Matibini submitted that those to be affected by an act or decision should be given an opportunity to be heard. In support of this statement Dr. Matibini cited, inter alia, passages from de Smith et al on Judicial Review of Administrative Action(1) and the case of

Zinka v The Attorney General (12). The passage in de Smith referred to states that: -

> "There is a presumption that procedural fairness is required whenever the exercise of a power adversely affects an individual's rights protected by common law or created by statute."

In the passage from ***Zinka***[(12)] we said, inter alia, that: - principles of natural justice must be observed by, inter alia, all persons and bodies having the duty to act judicially except where their application is excluded expressly or by implication. We went on to say that "*in order to establish that a duty to act judicially applies to the performance of a particular function, it is now unnecessary to show that the function is analytically of a judicial nature…"*

Further, we said that, prima facie, a duty to act judicially will arise in the exercise of power to deprive a person of his livelihood or of his legal status where the status is not merely terminable at pleasure or to deprive a person of liberty, property rights or any other legitimate interests or expectations or to impose a penalty. Dr. Matibini also cited the case of ***Amnesty International v Zambia*** involving ***Steven William Banda and John* Lyson Chinula**[(17)] who were deported from Zambia to Malawi. In that case the African Commission of Human and People's Rights said that Chinula was entitled to have his case heard in the courts in Zambia. Dr. Matibini submitted that when arguing that the Minister was not under an obligation to provide notice and an opportunity to be heard the Appellant relied on the older cases or ***R v Leman Police Station Inspector ex Parte Venicoff***[(18)] ***and R v Governor of Brixton Prison ex Parte Soblen***[(19)]. It was Dr. Matibini's submissions that these cases were decided at the time when the ability to exclude or expel aliens was seen as an "act of state" "incident of sovereign" and a matter of Ministerial prerogative. He said these cases acknowledged only a limited ambit of Judicial Review. He submitted that with subsequent cases like ***Ridge v Baldwin***[(20)] ***and R v commission of Racial Equality ex Parte Hellington***[(21)] the position at law has changed and the right to be heard where the decision will adversely affected the rights of the person concerned has been established and that there is a duty to act fairly. Dr. Matibini cited several other cases on the right to be heard. We have considered these cases, but we do not find it necessary to reproduce them because the principles they lay down are the same as those in the

cases; we have already stated. Dr. Matibini submitted that in this case the Respondent was entitled to be heard before his deportation. He said that the decision to deport the Respondent without an opportunity to be heard was therefore, procedurally improper. Finally, Dr. Matibini submitted that the learned trial Judge was on firm ground when the quashed the decision to deport the Respondent.

In his oral submissions Dr. Matibini again argued the grounds of appeal seriatim.

The thrust of Dr. Matibini's oral submissions on ground one is that while the Minister has power to deport, that power is not absolute; that Parliament never intended that the Minister could deport the Respondent on the basis of the satirical article. He pointed out that there is no evidence to show that because of the satirical article, the presence or continued presence of the Respondent in Zambia was a danger to peace and good order in Zambia.

On ground two Dr. Matibini submitted that this ground essentially deals with the interplay between ***Section 26 (2)*** and ***Article 20 of the Constitution.*** It was Dr. Matibini's submission that the authorities cited show that in most jurisdictions courts have adopted interpretations that ensure that fundamental rights are enjoyed. Dr. Matibini said it is also relevant to consider the date of the legislation when there was no Bill of Right. This is not correct because the ***Zambian Constitution 1964*** annex to the Zambia Order in Council 1964 had a Bill of Rights and Freedom of Expression appear in ***Section 13***. The ***Immigration and Deportation Act*** under enquiry was enacted in 1977.

On ground three Dr. Matibini conceded that the Christian nation declaration had no juridical value. He said the important issues are ***Articles 7 and 13 of the African Charter***[1] respecting the right to family and right to be heard.

On ground four Dr. Matibini submitted that the Minister's discretion under ***Section 26***[3] is not absolute and that it can be challenged if it is illegal. Further, he submitted that there is no rationale connection between the article and the deportation. Dr. Matibini then repeated his arguments on procedural impropriety.

In reply, on grounds one, two and four, Mr. Sichinga submitted that by referring to the

Constitution; the learned trial Judge went beyond the confines of Judicial Review. He said in Judicial Review, there is no need to call evidence. He said that under the law, the Minister cannot disclose the reasons and the Minister is not obliged to give reasons. The issue is not satire. Mr. Sichinga referred the Court to ***Article 23(1)(4)(b)***[(1)] which deals with discrimination. Col. Phiri did not reply.

We have carefully considered the evidence that was before the learned trial Judge, the submissions of counsel, the authorities cited to us and the judgment appealed against.

We shall deal with the grounds of appeal seriatim.

The first ground of appeal attacks that part of the learned trial Judge's judgment which says that the philosophy behind ***Section 26(2)***[(3)] is security of the State against those that are bent on destroying the country. In arguing this ground, Mr.Sichinga, the learned Chief State Advocate, submitted that the wording of ***Section 26(2)***[(3)] is such that it covers even matters which are not of national security per se. He argued that acts by aliens like engaging in immoral behaviour which has potential to destroy the fabric of social life and norms or, advocating nudism can fall under ***Section 26(2)***[(3)]. It was Mr. Sichinga's submission that the Respondent could come under the above category of aliens. He argued that by confining the powers of the Minister under Section 26(2)(3) to national security only the learned trial Judge fell into error. He submitted that the Minister in his subjective opinion found the article in question to be an insult to the government and its leaders. Further, Mr. Sichinga submitted that by confining the provisions of Section ***26(2)***[(3)] **t**o national security the learned trial Judge put the matter in the realm of ***Section 22(2)*** which deals with matters of national security. Finally, Mr. Sichinga submitted that there is no ambiguity in ***Section 26(2)***[(3)] to suggest that it is only confined to crimes. He urged us to give effect to the literal meaning in statutes as we said in the Independent Media Bill case (4).

Dr. Matibini's submissions on this ground of appeal are that the learned trial Judge did not confine the provisions of ***Section 26(2)***[(3)] to national security only but went on to deal with the lawfulness and reasonableness of invoking ***Section 26(2)***[(3)] on the facts of this case.

We have considered the submissions on this ground of appeal. To put the issue in proper perspective, it is necessary to reproduce ***Section 26(2)[(3)]***. This section reads:-

"26 (1)………………………………………………….

> *(2) Any person who in the opinion of the Minister is by his presence or his conduct likely to be a danger to peace and good order in Zambia may be deported from Zambia pursuant to a warrant under the hand of the Minister."*

On proper construction these provisions; as Mr. Sichinga rightly submitted, are broad enough to catch any conduct which does not necessarily have to amount to national security. In the event, the reference by the learned trial Judge to national security was a misdirection. Indeed, Dr. Matibini in his submission on ground one did not and quite properly, attempt to argue that ***Section 26(2)[(3)]*** is confined to national security. The thrust of Dr. Matibini's submissions on this ground is on other matters which we shall deal with later in our judgment. To the extent that the learned trial Judge dealt with matters of national security when interpreting ***Section 26(2)(3)*** in the manner he did, this ground succeeds.

Ground two has two limbs. One limb deals with expression under ***Article 20 of the Constitution[(1)].*** The Other limb deals with protection from discrimination under Article 23 of the ***Constitution[(1)].***

We propose to deal with the discrimination limb first. The submissions on this limb are that the Judicial Review Application did not ask to declare the deportation of the Respondent under ***Section 26(2)[(3)]*** as discriminatory and ultra vires under ***Article 23 of the Constitution[(1)]***. That being the case, it is argued, the ground of discrimination should not have been entertained. It is argued that even assuming that the learned trial Judge had to determine the issue of discrimination under ***Article 23[(1)]***, the conclusion the learned trial Judge came to was erroneous because the Respondent does not stand on the same plane with non aliens for there to be discrimination.

In his submissions Dr. Matibini did not address the issue of discrimination and the need to plead it. In the case of ***Anderson Kambela Mazoka and Others v Levy Patrick Mwanawasa and Others***[22]***,*** we emphasized the long standing principle that a party cannot rely on un-pleaded matters except where evidence on the un-pleaded matter has been adduced in evidence without objection from the opposing party. We said that in that event, although it does not amount to this court condoning parties leading evidence on un-pleaded matters, the court cannot exclude the evidence adduced and allowed without objection.

In this case, the matter was decided on affidavit evidence. Nothing was said in the affidavits touching on discrimination. Nor was discrimination mentioned in the statement and grounds for Judicial Review. Further, there was no viva voce evidence on discrimination. We cannot, therefore, say that matters of discrimination were adduced without objection, entitling us to consider them. In the event, it was a misdirection by the learned trial Judge to have taken into consideration discrimination when nullifying the deportation of the Respondent. In view of what we have said above, we do not intend to go into an academic exercise of considering what would be the position if discrimination were pleaded.

On freedom of expression, the submissions are that the learned trial Judge's finding that the deportation violated the Respondent's freedom of expression under ***Article 20 of the Constitution***[1] was erroneous because freedom of expression is not limitless. That freedom of expression is subject to the provisions of ***Article 20 of the Constitution***[1] itself and all other legislation including the Immigration and Deportation Act provisions of which are reasonably justified in a democratic society. Col. Phiri in his oral submissions submitted that the Minister has power to deport any person who, in his opinion, his presence in Zambia is a danger to peace or good order. He said that these powers can be exercised in respect of national security and public order. He pointed out that the learned trial Judge found the article to be overstretched satire, irritating and offending. He submitted that the article was not acceptable in the society it and is the duty of the Minister to maintain public order; that a balance must be struck between private interest/order and public interest/order and that in this case public interest outweighed

private interests.

The theme of Dr. Matibini's submissions on this limb of freedom of expression is to emphasize the importance of freedom of expression and the need for people in public life and particularly politicians to be tolerant of criticism. As we have already said above, no one disputes the importance of freedom of expression in a democratic society. Indeed, the Constitution itself has enshrined the freedom of expression in ***Article 20*[(1)]**. And in this judgment, we re-affirm what we have said in the previous cases that freedom of expression is one of the strong attributes of a democratic society and that to the extent permitted by the ***Constitution*[(1)]** itself, freedom of expression must be protected at all costs and that those who hold public offices must be prepared, to suffer, and be tolerant, of criticism.

Dr. Matibini then raised issues of the probable and proximate relationship between the article complained of and ***Section 26(2)*[(3)]**, issues which we think can be properly dealt with, and belong to, ground four. Finally, Dr. Matibini submitted that the expression of ideas which may be unpopular, obnoxious, distasteful or wrong is nonetheless within the ambit of freedom of expression as long as there is no advocacy of or incitement to violence or other illegal conduct.

We agree with Dr. Matibini's submissions. But the critical issue is whether the action taken by the Minister in itself amounted to violation of freedom of expression as protected by ***Article 20 of the Constitution*[(1)]** in so far as it relates to the Respondent. According to the learned trial Judge, the violation of ***Article 20 of the Constitution*[(1)]** lies in the fact that the action taken by the Minister under ***Section 26(2)*[(2)]** constricts the Respondent's freedom of expression under ***Article 20 of the Constitution*[(1)]**; that the powers conferred upon the Minister under Section ***26(2)*[(3)]** were not intended for the Minister to constrict freedom of expression under ***Article 20 of the Constitution*[(1)]**. We do not agree with this reasoning because it was made in vacuum and with no regard to the provisions of ***Article 20 of the Constitution*[(1)]** itself. The Appellant's case properly considered and evaluated is not that the Respondent should not express himself at all; but that his expression went beyond the protection enshrined in ***Article 20 of the Constitution*[(1)]**. The Affidavits on behalf of the Respondent are clear on this issue. The

Constitution itself is also clear. ***Article 20(3)(a)***[1] reads:-

"(3) Nothing contained in or done under the authority or any law shall be held to be inconsistent with or in contravention of this Article to the extent that it is shown that the law in question make for provision:-

(a) that is reasonably required in the interests of defence public safety public order, public morality or public health;

(b) …………………………………………………….;

(c) …………………………………………………….;

And except so far as that provision or, the thing done under the authority thereof as the case may be, is shown not to be reasonably justifiable in a democratic society."

From these provisions it is clear, as Mr. Sichinga and Col. Phiri submitted, that the Constitution itself limits, or to use the learned trial Judge's language, constricts freedom of expression. Freedom of expression is not limitless. For the Minister to deport an alien on the belief that alien has exceeded the limits of freedom of expression does not itself amount to constricting the freedom of expression and, therefore, a violation of ***Article 20*** of the Constitution. In the result, we must hold that the learned trial Judge misdirected himself in law when he held that the Minister's action to deport the Respondent violated ***Article 20 of the Constitution***[1] in so far as it relates to the Respondent. As Dr. Matibini correctly pointed out in one of his submissions, Zambia is a constitutional democracy. Therefore, in our interpretation of our laws we should avoid romantic acceptance of all the theories on any issue, in this case, on the freedom of expression and freedom of the press, because doing so may lead to an interpretation that offends the Constitution itself. As framed, the learned trial Judge's judgment suggests that freedom of expression is limitless, which is contra the Constitution.

The second limb of ground two having succeeded also, the entire ground two succeeds.

We have already disposed of the issue of Christian declaration. The only submissions by Dr. Matibini we have consider now are those on the sanctity of marriage, right to family and fair treatment of aliens. As we have already said, these matters are not in dispute. The learned trial

Judge said that when deporting the Respondent, the Minister should have taken into consideration ***Article 13*** of the ***International Covenant on Civil and Political Rights***[(1)] to which Zambia is a signatory. Article 13 requires that a potential deportee must be given an opportunity to be heard unless there are compelling reasons of national security. It was Dr. Matibini's submission that in this case, it has not been demonstrated that there existed compelling reasons. Dr. Matibini ended his submissions on this ground by saying the learned trial Judge was on firm ground when he held that it was unlawful to deport the Respondent when there is no compelling reasons of national security and because deportation interfered with his family life.

We have considered these submissions. We agree that in applying and construing our statutes we can take into consideration international instruments to which Zambia is a signatory. However, these International Instruments are only of persuasive value unless they are domesticated in our laws. The provisions relating to deportation as contained in ***Section 26(2)***[(3)] which we have reproduced above are clear. We cannot import in our interpretation of ***Section 26(2)***[(3)] glosses and interpolations derived from Article 13(1) aforesaid. **Under Section 26(2)**[(3)] long stay in Zambia and raising a family in Zambia by an alien does not legally immunize a foreigner from deportation. Further, for one to be deported under ***Section 26(2)***[(3)], there need not necessarily be compelling reasons of national security. When interpreting our laws. To the extent argued by Dr. Matibini ground three also succeeds.

In support of ground four, Mr. Sichinga submitted that under ***Section 26(2)***[(3)] there is no right to be heard before deportation. As authority for this proposition Mr. Sichinga cited the cases of ***Zinka***[(2)] ***and Walulya***[(3)]. He pointed out that the Minister in his subjective opinion found the article in question to be an insult to the government and its leaders. He submitted that there was no illegality, irrationality and unreasonableness in this case.

As we have already said, Dr. Matibini argued ground four under the heads of illegality irrationality (Wednesbury unreasonableness) and procedural impropriety).

On illegality, Dr. Matibini submitted that it is erroneous to argue that the Minister had absolute discretion to determine what is and is not "*a danger to peace and public order*" and that the

Minister need not disclose how he arrived at the decision to deport the Respondent. It was Dr. Matibini's submission that the learned trial Judge was on firm ground when he held that the conferring upon the Ministers power to "*maintain and sustain public order*", Parliament never intended to confer upon the Ministers power to constrict a constitutional right or rights. Dr. Matibini then compared "*absolute discretion*" and "unfettered discretion" which he said are similar. And citing the case of ***Padfield***(13) as authority, he advanced the proposition that even where there is unfettered discretion, that does not fetter the Judiciary to control the executive in the exercise of their powers to ensure that they act lawfully. Dr. Matibini then said that if unfettered discretion can be rejected, where there is no written constitution, then it is weaker where there is no written constitutional right to free expression. For these reasons he argued that the learned trial Judge was correct to narrowly construe the powers of the Minister to deport the Respondent.

Dr. Matibini then raised issues of illegality not being pleaded and made submissions and cited authorities to support the learned trial Judge's decision to deal with the issue of illegality. However, in the view we take of the issue of illegality, it is not necessary for us to rule on these issues.

We agree with Dr. Matibini's submissions that even where the Executive have discretion in the exercise of their powers, they are subject to the control of the Judiciary to ensure that they are acting lawfully. As Lord Halsury said in ***Sharp v Wakefield***(22).

> "………………When it is said that something is to be done within the discretion of the authorities, that something is to be done according to the rules of reason and justice, not according to the private opinion, according to law not humour. It is not to be arbitrary, vague or fanciful but legal and regular."

A discussion of the authorities cited by Dr. Matibini and the ones we have cited sufficiently shows that there is nothing like unfettered discretion immune from Judicial Review. We want to emphasize that in a Government under law, like ours, there can be no such thing as un reviewable discretion. But with respect to the case presently before us, we have no basis upon which we can rule that the Minister was guilty of illegality. As we have already said above, the mere fact that the Minister thought that the Respondent, over-stepped the constitutionally permitted freedom of expression

does not per se amount to constriction of the right to freedom of expression as enshrined in Article ***20 of the Constitution***[(1)]. As it was rightly submitted by Mr. Sichinga and Col. Phiri, and as we have already held, the Constitution itself does not grant limitless right to freedom of expression; the Constitution itself limits the right to freedom of expression. For these reasons, the illegality limb of ground four succeeds. The learned trial Judge misdirected himself in law when he found that there was illegality.

After illegality, we propose to deal with procedural impropriety. Mr. Sichinga's submission is that under **Section 26(2)**[(3)] there is no right to be heard. Dr. Matibini's submission on this issue is that those to be affected by an act or decision should be given an opportunity to be heard. In support of this proposition, Dr. Matibini cited ***de Smith on Judicial Review of Administrative Action(1)***, the ***case of Zinka***[(2)]***,*** which Mr. Sichinga also relied upon and the case of ***Banda and Chinula***[(17)]. On the argument that the Minister is not obliged to give notice and an opportunity to be heard, Dr. Matibini submitted that that is old law decided in ***R v Leman Police Station Inspector ex Parte Veniciff(***[18)] ***and R v Governor of Brixton Prison ex Parte Soblen***[(19)] decided at a time when the ability to exclude and expel aliens was seen as an "*act of State" "incident of sovereignty*" and a matter of Ministerial prerogative. It was Dr. Matibini's submission that with the decision in subsequent cases like ***Ridge v Baldwin*** [(20)] ***and R v Commission of Racial Equality ex Parte Hellington***[(21)] the right to be heard where the decision will adversely affect the rights of the person concerned has been established and that there is a duty to act fairly. Dr. Matibini submitted that in this case the Respondent was entitled to be heard before being deported and failure to give the Respondent an opportunity to be heard amounted to procedural impropriety.

To put the arguments and submissions on this limb of ground five into proper perspective, it is necessary to produce ***section 26(2)***[(3)] again. ***Section (26(2)***[(3)] reads:

> *"26 (1)……………………………………………………………………………*
>
> *2. Any person who in the opinion of the Minister by his presence or his conduct is likely to be a danger to peace and good order in Zambia may be deported from*

Zambia pursuant to a warrant under the hand of the Minister."

As Mr. Sichinga submitted, these provisions do not provide statutory right for prior notice before deportation or the right to be heard. Dr. Matibini citing the case of ***Zinka***[2] which Mr. Sichinga also relied upon argued that the Respondent should have been given an opportunity to be heard. Relevant to this limb of ground four is also the case of ***Khan***[5] which Dr. Matibini cited when arguing ground one.

In ***Zinka***[2], quoting de Smith in his book at page 144, under the general heading "The Path of Deviation" we said:-

> "Where no statutory provision is made for prior notice to be given, it can often be assumed that the omission was deliberate."

But we held that where there is no express statutory provision to exclude the "***audi alteram partem***" rule and a power is exercised to impose penalties, or to deprive property rights or any other legitimate interests or expectations, then a rebuttable presumption arises as to the necessity to give prior notice and opportunity to be heard. We went on to say that the presumption equally arises where the revocation of a license causes deprivation of livelihood or serious precursory lives or is dependant on finding of misconduct. In the ***Zinka case***[2]***,*** we were dealing with the interpretation of ***Section 24*** of Trades licensing Act the wording of which, like Section 26(2)(3) did not provide for a prior notice to be given and an opportunity to be heard. In the Zinka case (2) the Appellant's license we revoked by the President.

In this case, we are not dealing with the revocation of the Respondent's license. Therefore, what we said with respect to revocation of a license does not apply to this case. What applies to this case are imposition of penalties or depriving a person of his livelihood; legal status (not being terminable at pleasure, (personal liberty (not involving an illegal immigrant); property rights or any other legitimate interests or expectations.

In this case the Respondent is not a Zambian citizen but an established resident. The Respondent cannot, like a Zambian, claim as of right to stay in Zambia forever. None of the

situations we have just referred to above apply to him. The rebuttable presumption we discussed in ***Zinka***[2] does not, therefore, arise in relation to the Respondent.

The case of ***Khan***[5] which deals specifically with immigration matters which Dr. Matibini cited to us is clearly distinguishable because the fact of that case are totally different from the facts of this case. We need not even recite the facts of ***Khan***[5]. It is sufficient only to say that on the facts of ***Khan***[5] an opportunity to be heard was necessary.

In terms of ***Section 26(2)***[3] and on authority we are satisfied that this case does not come within the ambit of ***Zinka case***[2] ***or Khan case***[5]. We are satisfied that the Minister was not obliged under Section 26(2)[3] to give the Respondent prior notice and the opportunity to be heard before deporting him.

In view of what we have said, the cases dealing with treatment of aliens, which Dr. Matibini cited, are not of any assistance to the Respondent. This limb of ground four also succeeds. The learned trial Judge misdirected himself when he found that on the facts of this case there was procedural impropriety.

Lastly, we deal with irrationality.

The thrust of Mr. Sichinga's submissions on this limb is that the Minister acted within the law and that the issue of illegality does not, therefore, arise.

In arguing this limb of ground four, Dr. Matibini referred us to a passage from de ***Smith***[1] and the cases of ***Secretary of State for the Home Department ex Parte Budg***[14] and ***R v Secretary of State for the Home Department ex Parte Brind***[15] which lay down the principle that an administrative decision can be interfered on ground of irrationality. In this case, Dr. Matibini submitted, that the Respondent's deportation was not rationally connected to the satirical article.

We have considered these submissions and we have looked at the satirical article. The Respondent in his Affidavit in reply explains to us what satire is. We know what satire is. The

meaning the Respondent wants to put on satire is not the critical issue in this appeal. The critical issue in this appeal is whether having regard to the article complained of, could any other reasonable authority come to the conclusion that the Respondent be deported. As de Smith says in the passage cited by Dr. Matibini, the court will generally defer the assessment of facts to the person or body whom Parliament has entrusted with the decision-making powers But as Lord Greene said in Associated ***Provincial Pictures Houses Limited v Wednesbury Corporation***[(23)] "If a decision on competent matter is so unreasonable that no reasonable authority could ever have come to it, then the court can interfere…………….". and as ***Lord Halsbury said in Sharpe v Wakefield***[(22)] a passage we have already referred to: "……. When it is said that something is to be done within the discretion of the authorities, that something is to be done according to law not humour, is to be not arbitrary, vague or fanciful, but legal and regular."

We have reproduced these passages, to emphasize that for an administrative decision to escape interference by the court it must be one that any other reasonable authority can come to it.

We have looked at the satirical article in question. The characters in the article are animals. Both the Minister and the Permanent Secretary put literal meaning on the characters in the article and said the Respondent had called government leaders animals. Of course, this was a misunderstanding of the article. Correct English usage clearly shows that the reference to the animals was metaphorical and not literal. In the article in the Daily Mail attributed to the Permanent Secretary and the Minister, the Permanent Secretary was annoyed and said the Government would deport the Respondent because the article, inter alia, referred to the Government leaders as animals. The Minister said the article was in bad faith and that he would make his stand after looking at it again. We do not know what the reaction would have been if the correct meaning was put on the characters. In the article attributed to him, the Permanent Secretary said that one Zambian diplomat was deported for calling Britain a toothless bull dog. That is a wrong analogy. In the Zambian diplomat case, the matter was dealt with under diplomatic regime, while in this case, we are dealing with purely legal matters. What may amount to reason for a diplomat being asked to leave the host country does not necessarily amount to an infringement, which brings into play the law of the host country. The respondent is not a diplomat in Zambia.

The learned trial Judge said the article was an overstretched satire, irritating and offending. However, the learned trial Judge did not say what he found irritating and offending about the article. What we ourselves find irritating and offending are the reference to the concerned persons physical appearances in crude language. While some other action could have been taken against the Respondent for the descriptions, and the crude language he used, we find the deportation on these facts to be disproportionate was too extreme an action. However, this judgment does not amount to granting a licence to the Respondent or indeed any other misguided persons, like the Respondent, to write whatever they want to write. In a proper case the consequences can be serious.

From the details of the Respondent as given by the learned trial Judge, it appears the Respondent is an old man who has lived long in this country and married to a Zambian woman. But despite this long stay in Zambia and actually living and rearing a family with a Zambian woman, the Respondent strikes us as eccentric old man, who does not, in the least, care about or reflect on, the effect of what he writes. The Respondent is also an old man, who has insulated himself from the realities of the Zambian cultural environment and is impervious to the cultural values and norms of the Zambian people, who, according to the learned trial Judge, the Respondent has lived for over forty years. The Respondent, despite his old age also appears to have warped ideas of the freedom of expression.

The learned trial Judge was critical of the Zambia authorities action saying the Zambian authorities must unlearn the negativity of satire. The learned trial Judge also told the Respondent to learn the positivity of cultural accommodation and sensitivity. It is clear that the learned trial Judge misunderstood the Appellant's case. The Appellants case is not that they are averse to satire. The Appellant's case is that the article by the Respondent went beyond what is comical. It was not enough for the learned trial Judge to say that the Respondent should learn the positivity of cultural accommodation and sensitivity. It is not for the Respondent to accommodate the cultural values and norms of the Zambian people. It is for the Respondent to conform. The adage is that when you are in Rome do as the Romans do and not that the Romans should do as you the alien to Rome does.

In Zambia, one can criticize or poke fun at the Head of State and government leaders or indeed

elders but his must be done in felicitous language and not in the crude language the Respondent used. We have no doubt that in every other country you cannot say and write things using words and expressions that are not in consonance with the cultural values and norms of the people of that country.

In resisting the deportation, the Respondent has called in aid the constitutional right to freedom of expression. But on the facts we are satisfied that the Respondent has no genuine belief and interest in the freedom of expression. Indeed, it is not without significance that when the Minister deported him, the Respondent chose to put the blame on the Post News Papers Limited saying the Post News Papers Limited were entirely responsible and accountable for the publication. This is not the conduct of a person who genuinely believes in the freedom of expression and who is ready to suffer for its protection.

The learned trial Judge tacitly agreed with the Respondent saying that no action had been taken against Mr. Fred M'membe the publisher of the Post News Paper and that this amounted to discrimination in the application of the law. As we understand discrimination in relation to people, it means treating similarly circumstanced people differently. Mr. Fred M'membe is a Zambian and we do not know under what law a national of Zambia can be deported from Zambia so that he gets the same treatment as the Respondent who is not a national of this country.

The attempt by the Respondent to bring Mr. Fred M'membe in his problems clearly shows to us the malice and evil intentions of the Respondent in writing the article. Why did the Respondent contribute the article to the Post Newspapers if he did not want it to be published?

In this regard, we are constrained to comment here that the Media must be careful with people like the Respondent who have hidden agendas. It is not our intention to tell the Media what to publish and what not to publish. That is entirely the right of the Media. We appreciate the need and importance of a free Media. This we have repeatedly said in our judgments. What we are saying here is that the Media should be circumspect to avoid people with evil intentions destroying our cultural values and norms and our way of life, using evil intentions cloaked in the freedom of expression and freedom of the press, noble ideals which, we Judges always strive to protect.

In his arguments on the other grounds Dr. Matibini said that this is a defining case because it will show to posterity the extent to which they can enjoy their freedom of expression. In the same vein, we also want to say that in terms of cultural values and norms, to the extent we have

endorsed them, this case is also a defining case because it will show posterity that Zambians are not ready to allow aliens to show disrespect to their cultural values and norms and disrupt their way of life.

At the expense of being repetitive, we have found that, on the facts of this case and the authorities we have cited, the deportation of the Respondent was disproportionate and it is for this reason that we dismissed the appeal. And on the facts of this case, we do not see any reason why the government, by deportation, should make the Respondent a martyr, when he has no greater cause or principle, which he is pursuing and entitling him to martyrdom. The Respondent is not fighting for the noble cause of freedom of speech and press freedom in which, as his efforts to shift the responsibility for the article in question on Mr. M'membe and The Post shows, he does not genuinely believe but for his personal survival using freedom of speech and press freedom as a shield. We make no order as to costs.

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E.L. SAKALA
CHIEF JUSTICE

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D.K. CHIRWA
SUPREME COURT JUDGE

F.N.M. MUMBA
SUPREME COURT JUDGE

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PETER CHITENGI
SUPREME COURT JUDGE

S.S. SILOMBA
SUPREME COURT JUDGE

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C.S. MUSHABATI
SUPREME COURT JUDGE