

**In Re CHIRWA (EDWARD YAPWANTHA) (1974) ZR 14 (HC)**

HIGH COURT  
CULLINAN J  
2nd JANUARY 1974  
(1973/HP/1066)

**Flynote**

**Administrative law - Minister's <sup>40</sup> discretion under s. 22 (2) of the Immigration and Deportation Act to declare a person a prohibited immigrant -**

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**Whether applicable to a refugee under the terms of the Refugees (Control) Act, 1970**

**Headnote**

The applicant entered Zambia in 1964 as a refugee from Malawi and was treated "a refugee in law" since 30th June, 1971. On 15th October, 1972, the Minister of Home Affairs invoked the provisions of <sup>5</sup>s. 22 (2) of the Immigration and Deportation Act and declared the presence of the applicant in Zambia to be inimical to public interest and served him with notice to leave Zambia. The applicant's representation under s. 24 (1) of the Act having failed he was ordered to be detained under the provisions of s. 26 (3) of the Act. On a further representation he was <sup>10</sup>released but again detained after some time under s. 26 (3) of the Act. He sought an order of *certiorari* against the Minister's declaration of 15th October, 1972, and/or a declaration that the same was *ultra vires*.

*Held:*

It was *ultra vires* the powers of the Minister to invoke his powers <sup>15</sup>under the Immigration and Deportation Act and declare prohibited immigrant a refugee under the provisions of the Refugees (Control) Act, 1970.

Case referred to:

- (1) *Radebe v Attorney-General* (1973) ZR 273<sup>20</sup>

Legislation referred to:

Immigration and Deportation Act, Cap.122, ss. 22 (2), (3), 24 (1), 26 (3) (a).

Statutory Instruments Nos 131 and 140 of 1971.

Refugees (Control) Act, 1970, s. 10.

*M W Mwisinya, Mwisinya, Chongwe & Co*, for the applicant. <sup>25</sup>

*A M Kasonde, State Advocate*, for the respondent.

**Judgment**

**Cullinan J:** In September, 1964, the applicant left Malawi, due to political difficulties, and entered Zambia. He was taken to Makeni Refugee Camp where he was accommodated up to and through 1965. About that time there was a large influx of refugees from Mozambique <sup>30</sup>and Angola and the authorities apparently suggested that the applicant and others leave the camp and take up employment, in order to make room for other refugees. On 13th October, 1972, the Minister of Home Affairs invoked the provisions of subsection (2) of section 22 of the Immigration and Deportation <sup>35</sup>Act and declared the presence of the applicant in Zambia to be inimical to the public interest. Under the latter provisions the applicant was then regarded as a prohibited immigrant and on 3rd November was served with a notice under section 23 of the Act requiring him to

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leave Zambia. On the same date the learned counsel for the applicant Mr Mwisinya, made written representations to the Minister on the applicant's behalf under the provisions of section 24 (1) of the Act. On 7th December, a letter was addressed by the Ministry to Mr Mwisinya informing <sup>5</sup>him in effect that the applicant's representations had been unsuccessful. Thereafter the applicant was detained for some three months, presumably under the provisions of section 26 <sup>10</sup>(3) (a) of the Act, but was released as a result of further representations made by Mr Mwisinya. On 8th August, 1973, he was again detained under the provisions of section 26 (3) (a) of the Act. The applicant now seeks an order

of *certiorari* against the declaration made by the Minister on 13th October, 1972, as read with the notice requiring the applicant to leave Zambia, and/or a declaration to the effect that the Minister's declaration was ultra vires and the subsequent notice of no effect. Mr 15 Mwisuya has referred me to the judgment of this court in the case of *Radebe* [1]. The learned State Advocate, Mr Kasonde, has conceded that in view of the applicant's evidence he could be regarded as a refugee. As in the case of *Radebe* the applicant obviously came under the terms of Statutory Instrument No. 131 of 1971. Again, in view of the applicant's 20 evidence, there can be little doubt that he also came under the terms of Statutory Instrument No. 240 of 1971. Indeed, he was accepted, treated and accommodated as a refugee by the authorities on his arrival in Zambia. He was a refugee in fact, therefore, as early as September, 1964, and a refugee in law since 30th June, 1971. Mr 25 Kasonde also concedes that in that event, following upon *Radebe*, the court could well make an order. As I see it, however, the facts of *Radebe* are distinguishable. There the court was concerned with the provisions of subsection (1) of section 22 of and the Second Schedule to the Act. In the latter of the two judgments the court went no further than saying 30 (at page 4) that refugees, once accepted as such, should be excluded from the provisions of the Second Schedule. In the present case we are concerned with the exercise of the Minister's discretion under subsection (2) of section 22 of the Act. If it be the case that the Minister may exercise such discretion in 35 the case of a refugee then we have the incongruous situation that a person could be at once a refugee and a prohibited immigrant, subject to deportation both under section 26 of the Immigration and Deportation Act and section 10 of the Refugees (Control) Act, 1970. As the court observed in *Radebe*, the latter Act, enacted some years subsequent to the Immigration 40 and Deportation Act, seems to have been so enacted as to provide a special status and safeguards for refugees. The machinery for their deportation was provided for in detail under section 10 of the Refugees (Control) Act. That section provides certain safeguards which are not apparent in the apparently unfettered discretion conferred upon the 45 Minister under section 22 (2) and section 24 (2) of the Immigration and Deportation Act. It seems to me that the intention of the legislature in enacting the Refugees (Control) Act would be defeated if such safeguards could be discarded by resorting to an alternative machinery under the

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Immigration and Deportation Act. No doubt the Minister might well decide the presence in Zambia of a particular refugee to be inimical to the public interest. In my judgment, however, the legislature made provision for such an eventuality in the terms of section 10 of the Refugees (Control) Act, which terms the Minister may at any time invoke. 5 It may well be argued that it was not intended to grant refugees an immunity not enjoyed by other aliens. It can be said, for example, that where a refugee is convicted of and imprisoned for an offence specified in section 33 of the Penal Code that his deportation becomes mandatory under the provisions of section 26 (1) of the Immigration and Deportation 10 Act - it was discretionary up until Acts Nos 31 and 32 of 1972 took effect. I put this point to Mr Mwisuya and he submits that in such a case deportation must be effected in accordance with the provisions of section 10 of the Refugees (Control) Act. In my opinion the two provisions cannot be read as complementing one another. Deportation under section 26 (1) 15 is mandatory; it is discretionary and subject to representations under section 10. Further, there may be cases where deportation cannot be effected at all under section 10 - where for example the provisions of subsection (4) thereof apply. I imagine in any event that although deportation under the provisions of 26 (1) is mandatory there might well be 20 cases where it would prove impossible, where the convict's country of origin, or any other country for that matter, might not accept him. In the case of a refugee the difficulties might be greater.

The provisions of section 33 of the Penal Code cover an offence "under any written law other than an offence relating to the driving 25 of a motor vehicle . . . ". What is to be the fate therefore of a refugee convicted of and imprisoned for an offence, say, under the Refugees

(Control) Act itself? That Act could well have provided for mandatory deportation to cover such an eventuality. It did not do so, the legislature conferring a discretionary power upon the Minister under section 10, 30 inhibited by the provisions of subsections (4) and (6) thereof. In my opinion the legislature did not intend to alter that situation in passing Acts Nos 31 and 32 of 1972. Those Acts contained general provisions whereas those of the Refugees (Control) Act are particular provisions - dealing with refugees in particular. 35 I appreciate that the above observations concerning section 26 (1) of the Immigration and Deportation Act are *obiter*. They have, however served to reinforce my view that once a refugee is accepted as such the provisions of subsection (2) of section 22 of the Immigration and Deportation Act cannot be invoked against him. 40 Mr Mwisya has said that he would be quite content with the court's declaration to that effect. I see no need therefore to determine whether *certiorari* could lie against the Minister's declaration or whether such an order should be made. Instead I hold that the declaration made by the Minister under the provisions of subsection (2) of section 22 of the Immigration and Deportation Act was *ultra virus*, that the applicant is not a 45 prohibited immigrant, that the act of an immigration officer under section

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23 (1) of that Act of requiring him to leave Zambia and of subsequently detaining him under the provisions of section 26 of that Act was invalid and I so declare.

*Declaration granted*