

AKINDELE POOPOLA AKINDE O-BONYO
versus
MINISTER OF HOME AFFAIRS

HIGH COURT OF ZIMBABWE
MAKARAU J
HARARE 1 November 2004 and 12 January 2005

Opposed Application

Ms *J Wood*, for applicant
Ms *C Mudenda*, for respondent

MAKARAU J: The applicant was born in Dominica in the West Indies in 1950. He studied medicine in the United Kingdom ending up specialising as a physician. During that time he met and fell in love with a Zimbabwean woman who was studying nursing and midwifery at the same hospital he was attached to. The two married and eventually established a home in Zimbabwe in 1982. In Zimbabwe, the applicant obtained a permanent residence permit and has lived and practiced his profession in this country since 1982. He applied for citizenship, which was not granted.

Exactly 20 years later, in July 2002, the applicant was served with a notice informing him that his residence permit had been cancelled and that he is a prohibited person in terms of s 14 (1) (g) of the Immigration Act [*Chapter 4.02*], (“the Act”). The section provides as follows:

“14 Prohibited persons

- (1) Subject to this Act, the following persons are prohibited persons-
- (g) any person who, from information received from any source , is deemed by the Minister to be an undesirable inhabitant of or undesirable visitor to Zimbabwe;”

The respondent did not furnish any reasons to the applicant for the decision as he acted under S22 (2) of the Act, which provides that:

- “(2) No information or reasons on which a decision in terms of section *fourteen* or a decision to withdraw or cancel a permit may be disclosed in any court if the Minister certifies that its disclosure is not in the public interest, and no court may question the adequacy of the grounds for any such decision.”

On 3 July, 2202, the same day the respondent issued an order deeming the applicant an undesirable inhabitant or visitor to Zimbabwe, he also issued a certificate in terms of s22 (2) of the Act, certifying that it is not in the public interest that he disclose the reasons why he acted as he did.

Upon being served with the notices described above, the applicant filed this application seeking an order setting aside the decision of the respondent and compelling the respondent to restore his residence permit. At the same time, he obtained interim relief from this court on a certificate of urgency, restraining the respondent from deporting him from the country pending the determination of the application before me. The respondent opposed the main application on the basis that the law protected him from disclosing in any court of law his reasons for declaring the applicant a prohibited person as long as he certified that the disclosure of such reasons is not in the public interest.

The main argument advanced by the applicant in his papers is that the decision of the respondent and the manner in which that decision was made, denies him the right to a fair hearing by an impartial adjudicating authority as enshrined in s18 (9) of the Constitution of Zimbabwe. This section provides that:

“(9) Subject to the provisions of this Constitution, every person is entitled to be afforded a fair hearing within a reasonable time by an independent and impartial court or other adjudicating authority established by law in the determination of the existence or extent of his civil rights or obligations.”

Due to the wording of the section, the respondent wisely abandoned the argument that had been advanced on his behalf that the applicant was not entitled to the protection of the Constitutional provision cited above as he is not a citizen of this country. The Constitutional protection is extended over all persons, citizens and non-citizens alike.

It was argued on behalf of the applicant that he had not been afforded a fair hearing from an impartial adjudicating body, being the respondent in this matter in that he did not know what case he had to answer and further, the adjudicating body did not furnish him with the evidence before it and on which basis it deemed him an undesirable inhabitant or visitor. The argument further attacked the impartiality of the respondent in the absence of the reasons that led to his decision.

When the matter was called up and after I had called for supplementary arguments, there emerged very little difference in the positions of the parties as regards the resolution of the legal issues presented by the facts of this matter.

The applicant's application was based squarely on a perceived violation of the rights granted him under the Constitution of Zimbabwe. He alleged that his right to a fair hearing by an impartial adjudicating authority had been infringed. The first legal issue upon which the parties reached consensus was the jurisdiction of this court to determine the constitutional issue raised by the applicant. The point arose in view of the wording of s 24 of Constitution of Zimbabwe that provides for a direct approach to the Supreme Court of Zimbabwe for redress for any alleged infringement of the Bill of Rights. Due to this provision, the perception may have been created that only the Supreme Court of Zimbabwe has original jurisdiction in constitutional issues. The parties herein are agreed that that is not the correct position. S 24 of the Constitution provided for original jurisdiction on the part of the Supreme Court without taking away the inherent jurisdiction of this court. This point was succinctly put by GILLESPIE J in *S v Chakwinya* 1997 (1) ZLR 109(H) and was approved by DEVITTIE J in *S v Kusangaya* 1998 (2) ZLR 10 (H).

I am in agreement with the submission of both counsel that there is no impediment to this court hearing and determining an application as the one before me where the applicant seeks redress for an alleged infringement of the Bill of Rights in his respect. It is indeed beneficial to the Supreme Court that constitutional issues be ventilated in the lower courts first and that the eminent jurists in the superior court repair and refine the results of the hatchet jobs of the lower courts.

The mainstay of the applicant's application to this court is for s 22 (2) of the Immigration Act to be held in conflict with the provisions of s 18 (9) of the Constitution of Zimbabwe. Simply put, the applicant argues that the provision in the Act destroys the impartiality of the respondent and offends against the notion of a fair hearing if the respondent can act on the basis of information from any source and has no obligation to disclose neither the source nor the content and cogency of the information so received.

The parties were once again *ad idem* that there is no room in our jurisprudence for the respondent to act and deprive someone of their rights without disclosing the reasons for such action. Counsel relied on the judgment in *Hambly v The Chief Immigration Officer* (1) 1995 (2) ZLR 264 (H), wherein it was held that s 18 (12) of the Constitution of Zimbabwe takes away the perceived right of authorities in the position of the respondent not to disclose any matter on the basis that it is not in the public interest to do so. The court shall arrange for such matter to be disclosed to it in camera. Thus, the perceived protection that the respondent purported to act under is no protection at all, as it must yield to the constitutional provisions I have referred to above.

I again agree with the position advanced by both counsel as representing the position at law in this jurisdiction. The bottom line then becomes the following: while the respondent may receive information from any source and act upon that information to terminate the residence permit of a visitor to this country and to further deem and declare such a person an undesirable inhabitant or visitor to this country, the respondent cannot refuse to divulge his conclusions from that information to a court of law. This will then enable the court to review the decision of the respondent on any of the known grounds under administrative law.

Despite having agreed that the respondent cannot avoid giving reasons for his decision, counsel was not agreed as to the disposition of this matter. Mrs *Wood* has urged me to set aside the decision by the first respondent as it was made on the basis of a section of the Act that is null to the extent that it conflicts with the Constitution. Miss *Mudenda* on the other hand has urged me to request the respondent to submit his reasons to this court for the decision he took.

Both positions do not find favour with me.

Firstly, I have no legitimate basis before me for setting aside the decision of the respondent. The mere fact that he acted under a statutory provision that does not protect him from giving his reasons does not on its own make his decision susceptible to be set aside. The law is quite clear as to when a court may interfere with the decision of an inferior adjudicating body. No such circumstances have been alleged and proved before me.

Secondly, the application before me is not to compel the first respondent to disclose his reasons to the court. I am not quite sure as to how to proceed after the reasons are furnished to the court. Ours is strictly an adversarial system of procedure where the role of the court is not investigative but purely arbitral on issues arising from the opposing facts and interpretations of the law brought before the court. Our courts do not go out looking for issues to try. If I were to request for the reasons from the first respondent I would, in my view, be going outside my arbitral role. It is my view that asking for the reasons is investigative and depending on the content and cogency of the reasons, I would then have to review the decision of the respondent in the absence of any affidavit or other pleading by the parties. With respect, that does not appear to me to be the proper way of proceeding in this matter.

It is my view, and which view is shared by both counsel, that the applicant was not afforded a fair hearing and that the respondent was partial in that he did not disclose to the applicant the reasons for his decision. It is my further view that the remedy that the applicant is entitled to is full enjoyment of that right the constitution grants him. He is entitled to a fair hearing before his rights as a permanent resident are terminated. He is also entitled to be heard by an impartial adjudicating authority in the existence or extent of his rights as a permanent resident of this country. The ball is in the court of the respondent to respect and uphold the provisions of the Constitution in fulfilling the mandate granted him by the Immigration Act in deeming persons undesirable inhabitants or visitors to this country.

In the result, I make the following order:

1. The respondents are hereby restrained from deporting or causing the deportation of the applicant from Zimbabwe pending affording the applicant the rights enshrined in s18 (9) of the Constitution of Zimbabwe.
2. The respondent shall bear the applicant's costs of this application.

Atherstone & Cook, applicant's legal practitioners

Civil Division of the Attorney-General's Office, respondents' legal practitioners

