



MALAWI JUDICIARY  
IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
MISCELLANEOUS CIVIL APPEAL NO. 220 OF 2019

Being Miscellaneous Case No, 196 of 2019 in the Senior Resident Magistrate's  
Court at Blantyre

BETWEEN

PAYAL JALPIKUMAR GOHEL.....1<sup>ST</sup> APPELLANT

-AND-

YAKSH JALPIKUMAR GOHEL.....2<sup>ND</sup> APPELLANT

-AND-

KIPALBHAI PRAFULBHAI GOHEL.....3<sup>RD</sup> APPELLANT

-AND-

CHIEF IMMIGRATION OFFICER (DIRECTOR  
GENERAL).....1<sup>ST</sup> RESPONDENT

AND

MINISTER OF HOMELAND AND INTERNAL  
SECURITY.....2<sup>ND</sup> RESPONDENT

CORAM: THE HON. JUSTICE J. N'RIVA  
Ms M Mpango of Counsel for the appellants  
Mr G Chilongo of Counsel for the respondents  
Ms Nkangala, Court clerk

RULING

The appellants brought a petition of appeal before the court of the Senior Resident Magistrate's sitting at Blantyre claiming that the second appellant had been living in Malawi before 2019 and the second appellant had been resident in Malawi since March 2019. The petition stated that on 19th May, 2019 immigration officers visited the first appellant's home in Limbe and arrested her on unknown charges and took

her and the other appellant to Blantyre Immigration Office on an understanding that they were going there to be interviewed.

The petition of appeal said that the appellants were kept at the immigration office from morning up to midday when they were dropped at Chileka International Airport to board a plane to India. The petition stated that the appellants had no proper home in India as they were residents in Malawi and that declaring them prohibited immigrants without proper and valid reason was unfair and a violation of their right to fair administrative justice. The petition further said that the appellants were challenging their declaration as prohibited immigrants on the ground that the immigration officer did not have any valid grounds for declaring them as prohibited immigrants and also that the immigration officers omitted necessary steps so as to declare the appellants as prohibited immigrants.

The grounds of appeal in the court below were that the Immigration Office erred in law in holding the appellants to be prohibited immigrants and did so without valid reason. Further, that the immigration authorities failed to give the appellants the right to be heard and to prove and justify the decision to declare them as prohibited immigrants. The further ground of appeal was that the appellants gave unnecessary information to the department of immigration truthfully and did not deserve the treatment they got from the immigration officers. Further, that the decision by the authorities had occasioned miscarriage of justice in that it was against the weight of evidence.

In the argument counsel for the appellants asked the court to declare the decision by the immigration officials against the interest of justice and the decision to remove them did not follow the laid down procedures. Counsel argued that the chief immigration officer did not comply with Section 43 of the Constitution concerning natural justice and appealed against the decision pursuant to Section 8 of the Immigration Act.

The representative of the State told the court that the first applicant holding a permanent resident permit in Malawi was connecting further people to produce fake permanent resident permits to them.

For that reason, the Chief Immigration Officer invoked section 4 of the Immigration Act and they were duly deported.

In response counsel for the applicant stated that the appellants were not heard and then there was a violation to their right under the Constitution. She said that on that

ground, she was challenging the decision that was made by the Chief Immigration Officer.

In his ruling, the learned Senior Resident Magistrate made reference to Section 8 of the Immigration Act and regulation 17(2) of Immigration Regulations. The court said that it was clear from the provisions that any person to be declared a prohibited immigrant had to be given a notice and to be heard. If not satisfied with the decision made against him or her, the court said, there was room for him or her to appeal to the Magistrates Court within the jurisdiction. The court went on to find that the appellants were declared prohibited immigrants based on the authority of Section 4(1)(a) of the Immigration Act.

The court referred to section 9 of the Act where it is said that no appeal shall lie against a decision made by the Minister under section 4 (1) (a) or (h) or section 4 (4) unless such appeal is directed solely to the identity of the person affected by the decision.

The court therefore for that by virtue of that provision, said it did not have jurisdiction to entertain an appeal emanating from section 4(1)(a) of the Act as the appeal was not based on the identity of the applicants. The court further said that section 9(5) of the Immigration Act provided that no person should have the right to be heard before and after the decision is made under section 4 (1)(a) of the Act and that no person affected by such decision shall have the right to be furnished with any information as to the grounds of such decision

The court said that it was aware of provisions of sections 41 and 43 of the Constitution but went on to say that that the provisions under section 9 of the Immigration Act were deliberately put by the legislature.

The grounds of appeal in this Court are just like those that were before the Senior Resident Magistrate's court. The Appellants are seeking the deportation order to be quashed, that the respondent be directed to allow the appellants to enter the Republic and have their residential status in Malawi restored, that and that the court should make any other order or direction that it deems fit and expedient in the circumstances.

The arguments by the appellants in this Court dwell much on the rights of appellants in this matter. The appellants depended on section 15 of the Constitution about human rights and freedoms enshrined in the constitution that have to be respected and upheld by the executive, legislature judiciary and all organs of the Government

and agencies. They further quote section 12 about the principles under which the Constitution is founded being inherent dignity and worth of each person and all persons having equal status before the law. There is need for all institutions and persons to observe and uphold the Constitution and the rule of law and that no institution or person shall stand above the law. The appellants went on to rely on section 19 a right not to be detained without a trial. Secondly, the right to freedom of movement and residence was also referred to as well as the right to access to justice and effective remedies in a court of law: sections 39, 41 and 43.

The court below based its decision on jurisdictional ground: that the court did not have jurisdiction to determine the matter. The appeal in this Court does not necessarily touch on the issue of jurisdiction. The appeal in this Court addresses the rights of the appellants under the Constitution. It appears that the argument is that the court below had to decide on the question of rights. I need not go into details of the law where an appeal in immigration matters lies on identity of the person. In brief, right of appeal does not apply, except only on issues to do with identity, to an undesirable inhabitant based on economic grounds or standards or habits of life (section 4(a)) and a person, who from diplomatic or official information, is deemed by the Minister to be an undesirable visitor or inhabitants (section 4 (1)(h)). The other provision is section 4 (4) where an Immigration Officer applies to the Minister to declare a prohibited immigrant a person who has entered or is entering the country to be or is likely to become 'a public charge'. Again such decision by the Minister would be final. Issues would arise as to whether such a law would pass basic constitutional principles. That seems to be what the appellants were seeking in the court below. The learned Senior Resident Magistrate was correct to state that he had no jurisdiction. The appeal would not lie to that court. Seemingly, the appellants wanted to challenge the lawfulness or constitutionality of the lack of right of appeal. There is also the issue of alleged procedural impropriety. For the court to make decisions on such points would be to make declaratory orders or to conduct judiciary review of the Immigration Officers' decision. The court would have been outside its jurisdictional mandate. Section 39(g) precludes any subordinate court from making declaratory orders. Magistrates do not have inherent jurisdiction and they act only in cases which are expressly conferred on them by statute.

The orders the appellants wanted to get can only be granted by the High Court-section 108 of the Constitution and order 19 rules 20-25 of Courts (High Court) (Civil Procedure) Rules, 2017. The questions the appellants raised were valid but were in a wrong forum.

The court below did not err.

The appeal is dismissed.

I make no order on costs.

Made this 2nd day of December, 2021

A handwritten signature in cursive script, appearing to read "J N'RIVA".

J N'RIVA

JUDGE