

CUTHBERT MAMBWE NYIRONGO v. THE ATTORNEY-GENERAL (1990 - 1992) Z.R. 82 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., GARDNER AND SAKALA, JJ.S.
8TH OCTOBER AND 26TH NOVEMBER, 1991
(S.C.Z. JUDGMENT NO. 10 OF 1991)

Flynote

Immigration - Passport - Right to - Citizens have a right to issue of passport.
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Headnote

The right of a Zambian citizen to enter Zambia pre-supposes a right for such a citizen to have left Zambia in the first place. A Zambian citizen has the right to the issue of a passport, subject to the restrictions referred to in the Constitution of Zambia.

Case referred to:

(1) Kent v Dulles 357 U.S. 116 (1958).

For the appellant: P.N. Kasoma, Kasoma and Lumina.

For the respondent: J.M. Mwanachongo, Principal State Advocate.

Judgment

GARDNER, J.S.: delivered the judgment of the Court.

This is an appeal from a judgment of the High Court refusing to order the return of a passport by the Government.

The facts of the case are that on 12th February, 1991 the appellant was found guilty of possessing cannabis, and fined a sum of K7 000,00. Before the appellant was arrested in connection with that offence the Anti-Drug Commission took possession of some of the appellant's belongings including his passport, No. ZA 58368. After the appellant was convicted he applied for the return of his passport but to no avail. He therefore instituted proceedings against the Attorney-General, as representative of the Government, and filed an affidavit in support of such proceedings setting out the facts to which we have referred. In reply an affidavit sworn by one Louis Kalungwangwa Nyirongo was filed averring that the Government had issued a highly classified document pertaining to the issuance, withdrawal and cancellation of passports. The contents of the highly classified document were matters of national security and could not be divulged and the Government had decided to withdraw and cancel the appellant's passport.

In his judgment the learned trial judge found that it was not a right but a privilege to possess a passport, that the issuing authority had a discretion to grant or refuse a passport, that the passport was the property of the government, and that the appellant was a self-confessed criminal who had abused the privilege granted to him by engaging himself in drug trafficking which was an international crime. On these grounds the learned trial judge refused to order the return of the passport and it is against that judgment that the appellant now appeals.

Mr *Kasoma*, on behalf of the appellant, argued a number of grounds of appeal but during the course of the hearing before this Court he contended that the issuing authority had a discretion to refuse to issue a passport, subject to there being proper grounds for such refusal, and that the passport remained the property of the Government. This left two grounds to be argued, namely that it was wrong for the learned trial judge to find that it was not a right but a privilege to possess a passport and that the discretion to withdraw a passport was not exercised for a proper reason, in that the possession of a small quantity of cannabis, that is 1.6 g, according to Mr *Kasoma*, could not amount to drug trafficking as found by the learned trial judge.

Mr *Mwanachongo*, on behalf of the respondent, conceded that under art. 24 of the Constitution there was a right of movement out of Zambia and consequently a right to the grant of a passport subject to the limitations

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contained in the article. Mr *Mwanachongo* also contended that the possession of 1.6 g of cannabis was not evidence to drug trafficking and did not justify the withdrawal of the passport.

Article 24 of the previous Constitution of Zambia, which was in force at the time of the withdrawal of the passport, reads (*inter alia*) as follows:

"24(1) No person shall be deprived of his freedom of movement, and for the purpose of this article the said freedom means the right to move freely throughout Zambia, the right to reside in any part of Zambia, the right to enter Zambia and immunity from expulsion from Zambia.

(3) Nothing contained in or done under the authority of 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 makes provision:

(a) for the imposition of restrictions that are reasonably required in the interests of defence, public safety, public order, public morality or public health or the imposition of restrictions on the acquisition or use by any person of land or other property in Zambia, and except so far as that provision or, as the case may be, the thing done under the authority thereof, is shown not to be reasonably justifiable in a democratic society."

We agree with Mr *Kasoma* that a right for a Zambian citizen to enter Zambia pre-supposed a right for such citizen to have left Zambia in the first place, and consequently such right could only be withheld or taken away on the grounds set out in clause 3(a) of the article.

We would comment that since the coming into effect of the Constitution of Zambia Act on 30th August, 1991 the old art. 24 has been replaced by art. 22, the beginning of which reads as follows:

"22(1) Subject to the other provisions of this article and except in accordance with any other written law, no citizen shall be deprived of his freedom of movement, and for the purposes of this article freedom of movement means:

- (a) the right to move freely throughout Zambia;
- (b) the right to reside in any part of Zambia; and
- (c) the right to leave Zambia and to return to Zambia".

The remainder of the new article is the same as the old one, so that the same limitations on the right of freedom of movement apply; but, had there been any doubt about the right to move out of Zambia, which doubt has now been resolved by this judgment, the new art. 22 makes the matter quite clear.

In considering whether the right to leave Zambia is equivalent to a right to the issue of a passport we have taken note of the law in this respect in other countries. In England, as in Zambia, there is no statutory authority governing the issue or withdrawal of passports, and in England the position, set out in *Halsbury's Laws of England* (4th ed.) vol. 18 at para. 1412, is that the Secretary of State has a discretion to accede to or refuse an application for a passport and may revoke or impound a passport at the discretion of the Crown. However, there appears to be no machinery for appeal or any judicial means of review of a refusal to grant a passport in England.

In the United States of America there is no specific constitutional right to leave or enter the country but in the case *Kent v Dulles* 357 U.S. 116 (1958) the Supreme Court held that the right of travel is a part of the 'liberty' of which a citizen cannot be deprived without the due process of

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law of the Fifth Amendment. In that case a citizen had applied for a passport and had been told that he could not have one unless he swore an affidavit that he was not a communist. He argued that his political views were immaterial and that only the question of a valid citizenship was material. The Supreme Court, by a majority, held that the Secretary of State did not have an unbridled discretion where, as to denial of passports, the administrative practice under an Act of Congress, conferring on the Secretary of State the authority to issue passports, was limited to situations involving either citizenship and allegiance to the United States or criminal activity. There were other findings to the effect that Acts of Congress must be *intra vires* the Constitution. The finding most important in comparing the rights of citizens of Zambia was that citizens of the United States of America were entitled to the issue of passports. The ratio *decidendi* for this finding was that, as the exit and immigration laws of the United States required the production of passports, the issue of passports was necessary to enable citizens to exercise their constitutional right to travel.

The authorities which we have quoted, whilst not being of this Court, may be referred to for the persuasive effect. In considering the relative merits of the English and American authorities we particularly note that the United States, like Zambia, has a written Constitution. We also note that there appear to be no English decisions on the right to the issue of a passport.

Perhaps that is because, as said in para. 1412 of *Halsbury*, there appears to be no machinery for appeal or judicial review of a refusal to issue a passport. In any event we respectfully agree with the reasoning of the Court in the *Kent* case, that, where there is a constitutional right to travel, there is a right to the issue of a passport.

We therefore hold that a Zambian citizen has a right to the issue of a passport subject always to the restrictions referred to in art. 24(3)(1a) of the old Zambian Constitution, which article

has now been replaced by art. 22 of the present Constitution.

We now have to consider whether, in the circumstances of this case, there was a proper reason for the issuing authority to withdraw the passport.

We have seen the record of the case relating to the appellant's conviction in the subordinate Court. There is no reference to the weight of the cannabis found in the appellant's possession. Instead the particulars of the charge refer to one plastic container and eight packets of cannabis sativa (Indian hemp) valued at K2 000. In view of Mr *Kasoma's* assertion that the quantity of cannabis involved was 1.6 g this Court called for production of the items in question. The plastic container and packets referred to are very small indeed and we had no reason to doubt Mr *Kasoma's* statement to the Court as to the weight. In view of the sentence imposed in the subordinate Court and the comments of the learned trial judge when he referred to trafficking we have no doubt the wording of the charge led to a misunderstanding as to the amount of cannabis involved.

We are satisfied that had the exhibits been produced before the learned trial judge he would not have considered that the quantity found in the possession of the appellant could properly have given rise even to a suspicion of future trafficking.

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Article 24(3) provides that nothing contained in or done under the authority of any law shall be held to be inconsistent with the article to have extent that it makes provision for the imposition of restrictions for any of the reasons set out in (a) such as public morality or public health. If, therefore, there is any such law under which a citizen may be prevented from leaving the country and, therefore, deprived of his right to a passport, such a law could be invoked in this case to justify the withdrawal of the appellant's passport; provided of course such a law applied to him. No such law has been drawn to our attention by counsel, and the only such law which could be remotely relevant is s. 23 of the Dangerous Drug (Forfeiture of Property) Act. 7 of 1989, which provides that where the Director of Public Prosecutions intends to take certain causes of action relating to scheduled offences he may make an order of disclosure or restraint, which order may require a person named (*inter alia*) to surrender all his travel documents. The scheduled offences referred to do not include the possession of cannabis, consequently the power to make such an order does not apply in this case.

There is therefore no law applicable to the circumstances of this case which enables the appellant to be deprived of his right to the issue or possession of a passport.

This appeal is allowed and we make a declaration that the appellant is entitled to the return of his passport or a replacement thereof if his passport has been physically cancelled.

Costs to the appellant in this Court and in the Court below.
Appeal allowed.