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B CHIRWA v REGISTRAR-GENERAL*

High Court, Harare

Adam J

C 2 August 1990

Opposed application

NOTE: This decision has only recently become available

D *Constitutional law — right to passport — State has no right to withdraw passport from citizen*

Constitution of Zimbabwe — ss 9 & 22

E *Immigration Act 1979 — ss 13(10) & 26*

The applicant had successfully obtained an order declaring him to be a citizen of Zimbabwe. The respondent refused to release his passport to the applicant. The applicant sought an order requiring his passport to be delivered to him. The respondent opposed the application on the ground that the passport was issued at the will of the State and could be withdrawn or withheld.

Held, that in order to exercise the constitutional right to travel, the applicant needed his passport and the State has no right or power to withhold the passport of a citizen.

G Cases cited:

Sachs v Dönges NO 1950 (2) SA 265 (A)

Tutu v Min of Internal Affairs 1982 (4) SA 571 (T)

R v Sec of State for Foreign & Commonwealth Affairs, ex p Everett
[1989] 1 All ER 655 (CA)

H * *Editor's note*: An appeal was noted against this judgment.

- Fellner v Min of the Interior* 1954 (4) SA 523 (A) A
R v Brailsford [1905] 2 KB 730; [1904-07] All ER Rep 240 (KB)
Joyce v DPP [1946] AC 347; [1946] 1 All ER 186 (HL)
Re Application by Mwau [1985] LRC (Const) 444 (Kenya)
Kent v Dulles (1958) 357 US 116; 2 L Ed (2d) 1204 (US Sup Ct)
Aptheker v Sec of State (1964) 378 US 500; 12 L Ed (2d) 992 (US Sup Ct) B
Zemel v Rusk (1965) 381 US 1; 14 L Ed (2d) 179 (US Sup Ct)
Satwant Singh v Assistant Passport Officer [1967] 3 SCR 523 (SC India)
Maneka Gandhi v Union Govt [1978] 2 SCR 621 (SC India)
US v Cotroni & Anor (1989) 42 CRR 101 (SC Canada)
PF-ZAPU v Min of Justice 1985 (1) ZLR 305 (S); 1986 (1) SA 532 (ZS)
Rushwaya v Min of Local Govt & Anor 1987 (1) ZLR 15 (S) C
R v Oakes (1986) 26 DLR (4d) 200; 19 CRR 308 (SC Canada)
Thomsen v The Queen (1988) 32 CRR 257 (SC Canada)
CoT v CW (Pvt) Ltd 1989 (3) ZLR 361 (S); 1990 (2) SA 260 (ZS)
R v Big M Drug Mart Ltd (1985) 18 DLR (4d) 321; 13 CRR 64 (SC Canada) D

Miss *R Munemo*, for the applicant

B Q P Simelane, for the respondent

ADAM J: In this matter, at the end of the hearing, this court issued an order in terms of the draft order and these are now my reasons. In his founding affidavit the applicant indicates that he is a citizen of Zimbabwe and was issued a Zimbabwean passport. He states that in March 1986 the Chief Immigration Officer attempted to deport him, so he commenced proceedings in this court and after a trial, in case HC-1106-86, judgment was given that the Chief Immigration Officer be interdicted and restrained from removing or causing the applicant to be removed from Zimbabwe and the judgment also declared that the applicant was a citizen of Zimbabwe. The applicant avers that after judgment he learnt that his passport had been forwarded by the Chief Immigration Officer to the respondent, so he asked the respondent for it, but the respondent refuses to release his passport. The applicant maintains that he needs his passport to travel outside Zimbabwe in order to discharge his obligations in his employment. He mentions that in September 1989 on an urgent family matter the respondent caused to be issued to him an Emergency Travel Document valid for 21 days, a photo-copy of which was attached to his affidavit as Annexure "B" and which gives his date and place of birth as 20 July 20 1949 in Bulawayo. He asserts that he needs his passport for freer movement. E
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- A In his opposing affidavit the respondent disputes that the applicant is a citizen of Zimbabwe and asserts that the applicant obtained Zimbabwean citizenship and the passport fraudulently and/or by false representation and or by concealment of a material fact, and admits that the applicant's passport had been forwarded to him. He also admits that the applicant successfully challenged the Chief Immigration Officer's attempt to deport him.
- B He indicates that as the Registrar-General, with legal responsibility for processing citizenship applications and the granting of citizenship, he was not cited in that case and was not called as a witness. He states that the applicant's passport is being held by him for the reasons that the applicant's status as a citizen is questionable and therefore he is not entitled to a Zimbabwe passport. He indicates that it must be borne in mind that the holding of a Zimbabwean passport is a privilege, but he does admit that the applicant requires the passport for his employment and that it is true that in September 1989 for an urgent family matter the respondent caused an Emergency Travel Document to be issued to the applicant.
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- D In his answering affidavit, filed on 1 June 1990, the applicant asserts that his citizenship was one of the issues that this court had to determine in case HC-1106-86, whereby he was declared a citizen of Zimbabwe and so he denies that he obtained his citizenship by fraud. He maintains that he did not apply for citizenship as he is a citizen by birth and so obtained a birth certificate and the passport. He denies that the holding of a passport is a privilege but that it is a right which can only be taken away by law.
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On 26 June 1990, without leave of this court, the respondent filed a supplementary affidavit which was condoned by me on 28 June 1990, with at the same leave being granted to the applicant to file any further affidavits in response.

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I point out at the outset that both in his opposing and supplementary affidavits the respondent has merely made bald assertions as to the status of the applicant, that much of his affidavits are hearsay and that he did not adduce any supporting material. In addition the respondent also attached a photocopy of the page after p 40 of the applicant's passport which is as follows:

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"CONDITIONS OF ISSUE

This passport remains the property of the Government of Zimbabwe and may be amended, withdrawn and cancelled at any time. The holder or bearer of this passport shall forthwith surrender the passport when so required by an authorized official.

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This passport is liable to be impounded if —

- (a) it is found in the possession of an unauthorized person; or
- (b) it is mutilated in any way; or
- (c) an amendment, endorsement or addition is made by any person other than a duly authorized official.

When departing from or entering into Zimbabwe this passport must be produced on demand to the authorized official at the place of departure or port of entry, as the case may be.”

In his further affidavit in answer to the respondent's supplementary affidavit, the applicant states that he was born in Zimbabwe in 1949, as had been testified by his uncle Akinson Chirwa and his aunt Levis Nyalongwe in this court in case HC-1106-86 and he referred to that evidence. He asserts that the Chief Immigration Officer, a “privy of the respondent”, levelled the same allegations in that case.

In the applicant's heads of argument, his legal practitioner submits that as this court had declared the applicant a citizen, the question of his citizenship was *res judicata* and so could not be an issue for determination by this court in this application. She maintains that, as a Zimbabwean citizen, the applicant has the constitutional right of freedom of movement within Zimbabwe, and in leaving or entering Zimbabwe, and in order to enable him to enjoy this constitutional right the applicant obtained a Zimbabwean passport and that by the respondent's refusal to release his passport the applicant's constitutional right had been infringed. She argues that the provisions of the Immigration Act 1979 requires that no person leave or enter Zimbabwe unless he is in possession of a travel document. She asserts that the respondent has no lawful justification for withholding the applicant's passport.

In the respondent's heads of argument his legal practitioner submits that the granting of a passport is a privilege of the Executive and that the holding of a passport is at the pleasure of the Executive, which action is not reviewable: *Sachs v Dönges* NO 1950 (2) SA 265(A); *Tutu v Minister of Internal Affairs* 1982 (4) SA 571 (T) and *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Everett* [1989] 1 All ER 655 (CA). He argues that the applicant's passport contains certain conditions on it and the respondent was invoking one of the conditions of issue: *Fellner v Minister of the Interior* 1954 (4) SA 523 (A).

A I should mention that during the hearing the respondent's legal practitioner on the respondent's behalf abandoned the contention that the applicant is not a citizen of Zimbabwe. *

In this case the most relevant provisions of the Constitution of Zimbabwe are as follows:

B "3. This Constitution is the supreme law of Zimbabwe and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void.

C 4. A person who, immediately before the appointed day, was or was deemed to be a citizen by birth, descent or registration shall, on or after that day, be a citizen of Zimbabwe by birth, descent or registration as the case may be.

D 9. Notwithstanding the provisions of this Chapter, an Act of Parliament may make provision in respect of citizenship and, without prejudice to the generality of the foregoing, may provide for —

(a) the acquisition of citizenship of Zimbabwe by persons who are not eligible or who are no longer eligible to become citizens of Zimbabwe under this Chapter;

E (b) the circumstances in which a person may cease to be a citizen of Zimbabwe;

(c) the deprivation of any person of his citizenship of Zimbabwe;

(d) the renunciation by any person of his citizenship of Zimbabwe:

F Provided that no such law shall provide for the cessation by, or deprivation of, any person of citizenship of Zimbabwe where such person is a citizen thereof by birth except on the grounds that he is or has become a citizen of some other country.

G 22. (1) No person shall be deprived of his freedom of movement, that is to say, the right to move freely throughout Zimbabwe, the right to reside in any part of Zimbabwe, the right to enter and to leave Zimbabwe and immunity for expulsion from Zimbabwe.

(2) Any restriction on a person's freedom of movement that is involved in his lawful detention shall not be held to be in contravention of subsection (1).

H (3) Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) to the extent that the law in question makes provision —

- (a) for the imposition of restrictions on the freedom of movement of persons generally or any class of persons that are required in the interests of defence, public safety, public order, public morality or public health; A
- (b) for the imposition of restrictions on the acquisition or use of land and other property in Zimbabwe; B
- (c) for the imposition of restrictions by order of a court on the movement or residence within Zimbabwe of any person or on any person's right to leave Zimbabwe — B
- (i) in consequence of his having been found guilty of a criminal offence under the law of Zimbabwe or for the purpose of ensuring that he appears before a court for trial for such a criminal offence or for proceedings preliminary to trial; C
- (ii) for proceedings relating to his extradition or lawful removal from Zimbabwe; or
- (iii) for the purpose of ensuring that he appears before a court as a witness for the purposes of any criminal proceedings; C
- (d) for the imposition of restrictions on the movement or residence within Zimbabwe of persons who are neither citizens of Zimbabwe nor regarded by virtue of a written law as permanently resident in Zimbabwe or for excluding or expelling from Zimbabwe any person who is not a citizen of Zimbabwe; D
- (e) for the imposition of restrictions by order of a court on the right of any person to leave Zimbabwe that are required for the purpose of ensuring that he appears before a court or other adjudicating authority as a party or a witness or to secure the jurisdiction of the court or other adjudicating authority for the purposes of any civil proceedings; or E
- (f) for the imposition of restrictions within Communal Lands of persons who are not tribespeople to the extent that such restrictions are reasonably required for the protection of the interests of tribespeople or their well-being; F

except, in the case of any provision referred to in paragraphs (a) to (e), 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. G

(4) The provisions of subsection (3)(a) shall not be construed as authorizing a law to make provision for preventing any person from leaving Zimbabwe or excluding or expelling from Zimbabwe any person who is a citizen of Zimbabwe.” H

- A Now the Immigration Act 1979, in s 13(10), stipulates that no person shall enter Zimbabwe (if aged 16 years and over) without a travel document issued to him, and in s 26(1) provides that no person shall depart from Zimbabwe (if aged 16 years and over) without a travel document issued to him. Section 36 imposes a fine of not exceeding one thousand dollars or to imprisonment not exceeding two years or both such fine and such imprisonment for the
- B contravention of those sections.

In *R v Brailsford* [1905] 2 KB 730 (KB) at 745, LORD ALVERSTONE CJ said:

- C “It will be well to consider what a passport really is. It is a document issued in the name of the Sovereign on the responsibility of a Minister of the Crown to a named individual, intended to be presented to the Governments of foreign nations and to be used for the individual’s protection as a British subject in foreign countries, and it depends for its validity upon the fact that the Foreign Office, in an official document, vouches the respectability of the person named.

- D Passports have been known and recognized as official documents for more than three centuries, and in the event of war breaking out become documents which may be necessary for the protection of the bearer.”

- E In *Joyce v DPP* [1946] 1 All ER 186 (HL) at 191-192 LORD JOWITT LC stated:

- F “The terms of a passport are familiar. It is thus described by LORD ALVERSTONE CJ in *Brailsford*’s case [1905] 2 KB 730, at p 745: ... By its terms it requests and requires in the name of His Majesty all those whom it may concern to allow the bearer to pass freely without let or hindrance and to afford him every assistance and protection of which he may stand in need. It is, I think, true that the possession of a passport by a British subject does not increase the Sovereign’s duty of protection, though it will make his path easier. For him it serves as a voucher and means of identification... To me, my Lords, it appears that the Crown in
- G issuing a passport is assuming an onerous burden, and the holder of a passport is acquiring substantial privileges. A well known writer on international law has said (see *Oppenheim’s International Law*, 4th Edn, Vol I, p 556) that by a universally recognised customary rule of the law of nations every State holds the right of protection over its citizen abroad. This rule thus recognised may be asserted by the holder of a passport
- H which is for him the outward title of his rights. It is true that the measure

in which the State will exercise its right lies in its discretion. But with the issue of the passport the first step is taken." A

In *Sachs v Dönges* *NO supra* at 277, 278 and 287, WATERMEYER CJ observed:

"It was suggested in the course of argument, relying upon something which was said in the judgment in the case of *R v Brailsford* [1905] 2 KB 730, that a passport was a document vouching for the respectability of the bearer. As to that suggestion, it must not be overlooked that conditions governing travel in foreign countries have changed considerably since 1905, when *Brailsford*'s case was decided. Passports were not then such indispensable documents for travel in foreign countries as they have become to-day. In fact, very few countries at that time required a traveller to carry a passport. B C

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But the position is different with regard to the passport in the present case, which cannot be regarded as a badge of respectability, seeing it is obtainable from a subordinate official upon an application in which only particulars of identity and nationality are furnished, and its main purpose is to serve as an official certificate of identity and nationality. D

From a juristic point of view the grant of a passport is a contract. In consideration of a fee of £1 a document of value to the recipient is delivered to him upon certain conditions. The conditions are an intimation to the recipient that the passport is valid for five years and can be renewed on payment of a fee, but that it may be cancelled for stated causes. In the present case not only was the document accepted and paid for on these conditions, but the representations contained in it were acted upon by the recipient who incurred expenses in consequence of them. So that a right to the possession and retention of the passport vested in the recipient by delivery of it subject to those conditions, and the principles of estoppel, prevent the Crown from claiming any right inconsistent with them. E F

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It seems clear, therefore, that there is no substance in the contention that the revocation of a passport is an Act of State which cannot be questioned in a court of law." G

While SCHREINER JA at 306-307 stated:

"I ... only wish to add a brief comment on the meaning of the prerogative. H

A The word is ordinarily used to describe compendiously the non-statutory powers of the executive. I use the word powers to include what might perhaps more appropriately be called by other names ... An act done by virtue of the prerogative is simply an act done by the executive, without statutory authority, the lawfulness of which depends on the customary law of England as adopted by us. It does not derive its lawfulness from
B any vague and elastic notion of executive sovereignty.

Although in describing the category of prerogative powers the word 'discretionary' is sometimes used, this only means that the exercise of the powers is not restricted within the limits of any statute. It does not mean that the powers falling within the category form an almost mystical field in which the executive is free not only to do whatever it wills, but also to undo whatever it has done. There is no general rule that whatever has been done by the executive without statutory authority can be revoked by it at will. Each purported exercise of a prerogative power must be considered, when a case arises, on its own merits to see whether the power exists and whether the exercise is within the power; and this applies equally to the revocation of a previous act, done under a prerogative power."
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In *Fellner v Minister of the Interior supra* where the appellant had applied, with the requisite fee, after the 5 years for which her passport was valid had expired, to the passport office, in order to travel abroad and the renewal of her passport was refused by the respondent without giving any reasons. MURRAY J (as he then was) at first instance held that he was bound to follow *Sachs v Dönges NO*; that a contractual relationship was created, which gave her a right of renewal, clearly exercisable at her option to extend the validity of her passport by the payment of the requisite fee for a further period of one to five years, but after her passport expired she had no right of renewal; and so MURRAY J refused to order the respondent to issue her a passport. The Appellate Division held that there was no reason why it should apply the *stare decisis* rule with the same rigidity as in England and that it was not absolutely bound by its own previous decision. It held by a majority that the *ratio decidendi* in *Sachs v Dönges NO supra* was not that the issue of a passport created a contractual relationship (since only two of the appellate judges so held, while majority did not). The fee charged was for services rendered, which was no different from fees customarily charged by the government, like transfer registration fees; therefore the granting of a renewal of a passport was an executive act on part of the government and so the appellant could not by legal process compel the respondent to renew her passport.
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In *Tutu v Minister of Internal Affairs supra* where the applicant was issued a passport on 19 January 1981 valid until 18 January 1986. The payment was revoked by the respondent during April 1986. GORDON J held that the "Conditions of Issue" in the passport provided that it remained the property of the Government and could be amended, withdrawn or cancelled at any time at the pleasure of the respondent and, upon request of the respondent, had to be forthwith surrendered. As this differed from what was provided in the passport in *Sachs v Dönges NO, supra*, in the exercise of the prerogative power to issue and refuse passports the respondent accordingly had an unchallenged right to revoke the passport before expiry date without giving any reasons for his actions. Further, even if the respondent was required to show good cause for revoking the passport, he had done so.

In *Re Application by Mwau* [1985] LRC (Const) 444 the Kenyan applicant's passport was withdrawn in 1983 by the Principal Immigration Officer. The High Court of Kenya held that in the absence of statutory authority the issue and withdrawal of passports was the prerogative of the Kenyan President exercisable by the responsible Minister in his discretion and therefore not subject to judicial review. Further, the right to freedom of movement in the Kenyan Constitution was not absolute and therefore there was no statutory or legal duty on the Principal Immigration Officer to issue or return passports. The Constitution of Kenya in s 81 states:

"81. (1) No citizen of Kenya shall be deprived of his freedom of movement, that is to say, the right to move freely throughout Kenya, the right to reside in any part of Kenya, the right to enter Kenya, the right to leave Kenya and immunity from expulsion from Kenya.

...

(3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision ... for the imposition of restrictions on the movement ... or any person's right to leave Kenya that are reasonably required in the interests of defence, public safety or public order."

SIMPSON CJ referred to the statement contained in the passport which read that the passport was the property of the Kenya Government and may be withdrawn at any time and relied on the fact that British passports issued under the royal prerogative may be refused, revoked and impounded in the absolute discretion of the executive and that there was no formal machinery

- A for appeal or judicial review. Therefore he held that the prerogative was that of the President which was not subject to judicial review.

But in *R v Secretary for Foreign and Commonwealth Affairs, ex p Everett supra* the applicant, on the expiry of his passport, was refused the issue of a new passport by the Foreign and Commonwealth Office. MANN J at first instance quashed the decision in the letter of July 24, 1986 refusing the applicant the passport. The English Court of Appeal held that although the issue of a passport involved the exercise of prerogative power, the court had jurisdiction to review such a decision and to inquire whether the passport had been wrongly refused. O'CONNOR LJ said at 657-659:

- C “Until the decision of the House of Lords in *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935, [1985] AC 374 it was generally assumed that the law was that decisions of the administration taken under the prerogative were not amenable to judicial review ... It is quite clear since that decision that there are areas of the exercise of the prerogative which the courts can and will review. There are other areas, some of which identified in that case, which they will not.

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- D The judge held that the issue of a passport fell into an entirely different category. That seems common sense. It is a familiar document to all citizens who travel in the world and it would seem obvious to me that the exercise of the prerogative, because there is no doubt that passports are issued under the royal prerogative in the discretion of the Secretary of State, is an area where common sense tells one that, if some reason a passport is wrongly refused for a bad reason, the court should be able to inquire into it.

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- E It seems to me that the Secretary of State, in the fair exercise of his discretion, was entitled to refuse the passport but to give his reason for so doing ... but he should, when notifying the applicant that that was the reason for refusing the passport, tell him that if there were exceptional circumstances which might call for the issue of a passport he would consider them.”

- G International legal instruments have also for a considerable period made provision for the right of freedom of movement. As long ago as the Universal Declaration of Human Rights (UN General Assembly Resolution 217A (III) of 10 December 1948) which declared in Article 13:

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- “1. Everyone has the right to freedom of movement ... A
 2. Everyone has the right to leave any country including his own and to return to his country.”

Also, the International Covenant on Civil and Political Rights (UN General Assembly Resolution 2200 A (XXI) of 16 December 1966) stated in Article 21:

- “2. Everyone shall be free to leave any country including his own. B
 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (order public), public health or morals or the rights and freedoms of others, and consistent with the other rights recognized in the present covenant. C
 4. No one shall arbitrarily be deprived of the right to enter his own country.”

Further, the American Convention on Human Rights (San Jose, Costa Rica, 22 November 1969) provided in Article 22:

- “2. Every person has the right to leave the country freely, including his own. D
 3. The exercise of the foregoing rights may be restricted only pursuant to a law, to the extent indispensable in a democratic society in order to prevent crime or to protect the national security, public order, public morals, public health or the rights or freedoms of others.” E

Also, the African Charter on Human and People's Rights (Nairobi, Kenya, June 1981) indicated in Article 12:

- “2. Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restriction, provided for by law for the protection of national security, law and order, public health or morality.” F

Similarly, the United States Supreme Court had held that a citizen has the right to travel. Federal legislation passed authorized the President and the Secretary of State to regulate the issue of passports, and so the Executive imposed restrictions whereby passports were denied to individuals on the grounds of political beliefs and by area restrictions that prevented visits to certain countries. In *Kent v Dulles* 357 US 116 (1958); 2 L Ed (2d) 1204, passports had been denied to individuals because they were communists. The G
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A Supreme Court said at 125-126:

B “The right to travel is part of the ‘liberty’ which the citizen cannot be deprived without due process of law under the Fifth Amendment... Freedom of movement across frontiers in either direction, and inside frontiers as well, was part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values ... Freedom to travel is, indeed, an important aspect of the citizen’s liberty.”

C It held that such broad delegation had not been given to the Executive and declared that it would “construe narrowly all delegated powers that curtail or dilute” the right to travel abroad. Again in *Aptheker v Secretary of State* 378 US 500 (1964); 12 L Ed (2d) 992, where the issuance of passports was prohibited to individuals who belonged to communist organizations, the Supreme Court found such prohibition to be over-broad, holding that such governmental regulation affecting “basic freedoms” like foreign travel must be narrowly drawn to prevent the supposed evil and therefore unconstitutional. However, in *Zemel v Rusk* 381 US 1 (1965); 14 L Ed (2d) 179 where the Secretary of State was empowered to impose area restrictions, the Supreme Court upheld the prohibition to travel to Cuba distinguishing it from *Kent v Dulles*, *supra*.

E Likewise, the Constitution of India in Articles 14 and 21 provides:

“14. The State shall not deny to any person equality before the law and the equal protection of the laws ...

F 21. No person shall be deprived of his life or personal liberty except according to procedure established by law.”

G In *Satwant Singh v Assistant Passport Officer* [1967] 3 SCR 523 the petitioner, an entrepreneur, had his passport withdrawn by the respondent. He brought a writ petition to the Indian Supreme Court, alleging that the right to leave and travel outside of India and return is part of the personal liberty guaranteed in Article 21 and so the withdrawal of his passport and the unfettered discretion given to the respondent to issue or not issue a passport offended Article 14. SUBBA RAO CJ said at 534, 537-9 and 542:

H “But the Supreme Court of America for the first time defined the scope of a passport in *Kent v Dulles* ... Mr Justice Douglas described the nature

of the passport thus: 'A passport not only is of great value — indeed necessary — abroad; it is also an aid in establishing citizenship for purposes of re-entry into the United States.' ... So a passport, whether in England or in the United States of America serves diverse purposes: it is a 'request for protection', it is a document of identity, it is *prima facie* evidence of nationality, in modern times it not only controls exit from the State to which one belongs, but without it, with a few exceptions, it is not possible to enter another State. It has become a condition for free travel.

The want of a passport in effect prevents a person leaving India. Whether we look at it as a facility given to a person to travel abroad or as a request to a foreign country to give the holder diplomatic protection, it cannot be denied that the Indian Government, by refusing a permit to a person residing in India, completely prevents him from travelling abroad...

In India, the Supreme Court has made some observations on the scope of personal liberty in Art 21 in some decisions which throw light on the content of personal liberty. In *Gopalan's* case [1950] SCR 88 ... at p 138, FAZAL ALI J, says:

' There can therefore be no doubt that freedom of movement is in the last analysis the essence of personal liberty.'

DAS J, ... at p 301 ... observes:

' Its purpose is not to provide protection for the general right of free movement but to secure a specific and special right of the Indian citizen to move freely throughout the territories of India regarded as an independent additional right apart from the general right to locomotion emanating from the freedom of person. It is a guarantee against unfair discrimination in the matter of free movement of the Indian citizen throughout the Indian union. In short, it is protection against provincialism.'"

The Indian Supreme Court, by a majority, issued a mandamus against the respondent. I should indicate that the Indian Passport Act 1967 makes provision that a passport authority shall upon application from any Indian citizen issue him a passport unless (1) the applicant is likely to undertake activities prejudicial to the sovereignty and integrity of India, or the applicant's foreign visit is likely to be harmful to the security of India; (2) the issuance of a passport to him is not in the public interest or his absence or presence in

- A a particular foreign country is likely to prejudice India's good relations with that country; (3) the applicant has been convicted of a crime involving moral turpitude, or criminal proceedings are pending in India, or summons for his appearance in court or a warrant of arrest has been issued or the court has prohibited him from leaving India; (4) the applicant has been repatriated at government's expense and he has not reimbursed the authorities. That Act
- B also calls for the refusal to be in writing, with a brief statement of reasons for such refusal unless the passport authority is of the opinion that it is not in the interest of the general public to give reasons. In *Maneka Gandhi v Union Government* [1978] 2 SCR 621 the Indian Supreme Court considered that Act. The court declared that the statutory power to withhold a passport in the
- C public interest was not unconstitutionally vague and indefinite as the Indian Constitution itself spoke of the public interest in Article 19 and therefore it had to be so construed.

- D Further, the court decided that no one can be prohibited from obtaining a passport and leaving India without the use by the governmental authorities of a procedure that is reasonable, fair and just; the applicant must be informed of the grounds on which the action has been taken and be given an opportunity to challenge it by making representations.

The Constitution Act 1982 (Canada) in the Canadian Charter of Rights and Freedoms makes provision in ss 1 and 6(1) as follows:

- E "1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
- F ...
6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada."

- G In interpreting the Constitution, the Supreme Court of Canada held that a Constitution "must be approached from a broad perspective" and "must be interpreted generously so as to fulfil its purpose of securing for the individual the full benefit of the Charter's protection": *United States of America v Cotroni* (1989) 42 CRR 101 at 109. It also declared that if the right to remain in one's country is to be interfered with, such interference must be justified as being required to meet a reasonable state purpose. It concluded that extradition *prima facie* infringed s 6(1), but the objectives sought by the
- H Extradition Act (Canada) related to concerns that were pressing and substantial,

impaired the s 6(1) right as little as is reasonably possible (even when a Canadian citizen could be charged and tried in Canada for the offence concerned) and which, therefore, warranted interference with the right under s 6(1). A

The respondent's contention is founded on the Executive's exercise of the prerogative, by the vehement assertion that a passport is the property of government, held at its pleasure and that it has absolute discretion in revoking or refusing a passport, which discretion is not subject to judicial review. In *PF-Zapu v Minister of Justice, Legal & Parliamentary Affairs* 1985 (1) ZLR 305 (S) at 320 and in *Rushwaya v Minister of Local Government & Town Planning & Anor* 1987 (1) ZLR 15 (S) at 19, the Supreme Court relying on *CCSU v Minister of Civil Service, supra*, held that the Executive's exercise of the prerogative is amenable to judicial review. B C

Also, it is clear from the foregoing that the right of freedom of movement (or mobility rights) encompasses, not only, "locomotion", but also, the right to travel including going abroad and returning to one's own country. The right of leaving and entering one's own country concerns itself with what happens at its entry and departure points, as well as what transpires at the entry and departure points of the traveller's destination. As SUBBA RAO CJ pointedly observed, a refusal of a passport prevents a person's departure and completely denies him foreign travel. D E

But the right guaranteed under s 22(1) of the Constitution of Zimbabwe is not, however, an absolute right, since it may be curtailed by what is in any law or done under the authority of such a law to the extent that law makes provision for matters mentioned in s 22(1), except in the case of any provision referred to in paras (a) to (e) of s 22(3), so far as that provision or thing done under thereof is shown to be reasonably justifiable in a democratic society. There are two aspects under this that need to be determined: first whether that guaranteed right has been infringed; and second, whether that infringement is permitted pursuant to s 22(3), since a limitation put on that guaranteed right, therefore calls for the following requirements to be considered: (a) contained in any law or thing done under the authority thereof; (b) shown to be reasonably; (c) justifiable; (d) in a democratic society. F G

The wording of s 22(3) of the Constitution makes it clear that the burden or onus is cast, on a balance of probabilities, upon those that seek to rely on the limitation that has been placed on the guaranteed right: *R v Oakes* (1986) 19 CRR 308 (SCC) at 335. Further, the curtailment must be contained in any law H

A or thing done under the authority thereof, which means it has to be decreed by law, that is, it must be expressly provided for by statute or delegated legislation or results by necessary implication from the terms of a statute or regulation or from its operating requirements and it may also result from the application of a common law rule: *Thomsen v Theedveen* (1988) 32 CRR 257 (SCC) at 265.

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In *Commissioner of Taxes v CW (Pvt) Ltd* 1989 (3) ZLR 361 (S) GUBBAY JA (as he then was) said at 371-372:

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“It has been said that the word ‘reasonable’ implies intelligent care and deliberation — the choice of a course which reason dictates, and that legislation which arbitrarily or excessively invades the enjoyment of a substantive right does not possess the quality of reasonableness ... With that concept I respectfully agree. The principle of reasonableness strikes at arbitrariness and inequality in State action and ensures fairness and impartiality of treatment.

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In endeavouring to derive a meaning, the learned judge had regard to the *dictum* in *Speiser v Randall* (1958) 357 US 513 at 537, that a democratic country is ‘a free society in which government is based upon the consent of an informed citizen and is dedicated to the protection of the rights of all, even the most despised minorities.’

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There is no doubt that the aforementioned quality provides a broad guide as to the fundamental concept of a ‘democratic society’. It is a factor of weight, yet can hardly be taken as determinative of the inquiry. The ambiguous nature of the phrase causes it to mean different things to different persons. It is, with the passage of time, continually open to a change in perceptions ...

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Appreciative of the insuperable difficulty of defining the reach of human rights derogations by making them subject to the criterion of a democratic society, the Canadian courts have adopted the approach of attaching less and less importance to the abstract and illusive standard of a democratic society and placing an increased focus on whether the derogations imposed on the entrenched freedoms are reasonable. See, for example, *Re Federal Republic of Germany and Rauca* (1982) 141 DLR (3d) 412 at 424. That approach commands itself and I propose to follow it.”

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H It is true that, in the Canadian case cited, the learned Chief Justice of the Ontario High Court did not interpret the concept of a democratic society

when he considered “reasonable limits” in s 1 of the Canadian Charter of Rights and Freedoms. He held that the phrase “reasonable limits” called for an objective test and the judge must determine if the limit was reasonable or unreasonable. The issue was whether the judge considered there was a rational basis for the limitation — “a basis that would be regarded as being within the bounds of reason by fairminded people accustomed to the norms of a free and democratic society. That is the crucible in which the concept of reasonableness must be tested.”

The concept of “a democratic society” may be “ambiguous in nature” and it may have an “abstract and illusive standard”. However, with respectful deference, I disagree with the learned JUDGE OF APPEAL (as he then was) since there is little doubt that “a democratic society” does have certain central and well-defined features which distinguishes it from a totalitarian or dictatorial one. It is against at least that type of a society that the validity of the claim of limitation sought has to be determined. Subsequently, in *R v Big M Drug Mart Ltd* (1985) 13 CRR 64 (SCC) at 97-98 DICKSON CJC observed:

“A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms ... Freedom must surely be found in respect for the inherent dignity and the inviolable rights of the human person ...

Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the Charter is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction; coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedom of other, no one is forced to act in a way contrary to his beliefs or his conscience.

What may appear good and true to a majoritarian ... or to the state acting

A at their behest, may not, ... be imposed upon citizens who take a contrary view. The Charter safeguards ... minorities from the threat of 'the tyranny of the majority'."

Further, in *R v Oakes, supra*, the Supreme Court of Canada laid down the two central criteria that had to be satisfied. DICKSON CJ said at 336-337

B "First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be 'of sufficient importance to warrant overriding a constitutionally protected right or freedom: *R v Big M Drug Mart Ltd, supra*, at p 352. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s 1 protection...

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D Second, once a sufficiently significant objective is recognized, then the party invoking s 1 must show that the means chosen are reasonable and demonstrably justified. This involves 'a form of proportionality test': *R v Big M Drug Mart Ltd* at p 352. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair 'as little as possible' the right of freedom in question: *R v Big M Drug Mart Ltd* at p 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of 'sufficient importance'.

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G With respect to the third component, it is clear that the general effect of any measures impugned under s 1 will be the infringement of a right of freedom guaranteed by the Charter; this is the reason why resort to s 1 is necessary. The inquiry into effects must, however, go further. A wide range of rights and freedoms are guaranteed by the Charter, and an almost infinite number of factual situations may arise in respect of these. Some limits on rights and freedoms protected by the Charter will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which

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impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purpose it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.”

I propose to apply the above principles to the respondent's contention. The respondent not only has failed to apply the reasonable, fair and just procedure enunciated by the Indian Supreme Court, but also has not even provided him the opportunity spoken of by O'CONNOR LJ when notifying him of his reasons for refusing the passport. As the onus is on the respondent seeking the limitation to the applicant's right to enter and leave Zimbabwe guaranteed under s 22, he must also show that the objective which the limitation intended to achieve was of sufficient importance to overcome the protected constitutional right. Further, the respondent must demonstrate that the means adopted to achieve this are proportional or appropriate to the ends. It is true that the nature of the proportionality test will vary depending on the circumstances.

An enquiry in terms of the above principles entails an examination of the nature of the Executive's interest or objective which accounts for its claim of absolute discretion in the refusal and revocation of a passport. In this case, the respondent has not established what the Executive's aim was in invoking absolute discretion in the matter when considered in relation to defence, public safety, public order, public morality or public health. The respondent has also failed to show that the Executive's claim can be characterised as substantial and pressing. Nor can it be said that the means chosen by the Executive has passed the proportionality test. I have been unable to find a satisfactory justification for this most arbitrary claim of the respondent.

In all the circumstances of the case there will be an order in terms of the draft order.

Gambe, Chinyenze & Associates, applicant's legal practitioners
Civil Division of the Attorney General's Office, respondent's legal practitioners