



**IN THE HIGH COURT OF MALAWI**  
**PRINCIPAL REGISTRY**  
**CIVIL DIVISION**  
**JUDICAL REVIEW CASE NUMBER 33 OF 2022**

**BETWEEN:**

**THE STATE (On the application of:**

**CHIKHULUPILIRO ZIDANA)**

**CLAIMANT**

**AND**

**THE PRESIDENT OF THE REPUBLIC OF MALAWI**

**DEFENDANT**

**CORAM: JUSTICE M.A. TEMBO,**

Lusungu Gondwe, Counsel for the Claimant

Thabo Chakaka Nyirenda, The Attorney General, for the Defendant (absent)

Makhambera, Court Clerk

**ORDER**

1. This is the order of this Court on the claimant's application seeking permission to apply for a judicial review of the putative defendant's decision, the impugned decision, to appoint Brigadier General Kalumo (Retired) as Director General for Immigration and Citizenship Services.
2. The impugned decision was communicated by a public notice from the Office of the President and Cabinet on 5<sup>th</sup> August, 2022. The public notice indicated that the President of the Republic of Malawi made the appointment pursuant to the powers of his office provided for in section 89 of the Constitution and section 6 of the Public Service Act.

3. The application was brought in the usual manner, without notice to the putative defendant, pursuant to Order 19 rule 20 (3) of the Court (High Court) (Civil Procedure) Rules. The application for permission to apply for judicial review was brought last year in August before my brother Judge who ordered that the same be heard on notice to the putative defendant. The matter was then set down once for both parties to be heard on the permission application on 8<sup>th</sup> September, 2022. The record does not indicate what transpired on that date but it is clear that no hearing took place. The claimant indicated that the hearing failed to take place at the instance of the Attorney General.
4. The matter was subsequently transferred to my Court, as we closed for business at the end of last year, after my brother Judge recused himself from hearing this matter ‘for personal reasons’. This Court then set another date of hearing of the application for permission to apply for judicial review on 13<sup>th</sup> February, 2023. On that date, the Attorney General could not appear before this Court because he had travelled elsewhere. This Court was asked by the claimant to consider the papers filed by the defendant on the permission application alongside the those of the claimant and to determine the application considering how long the permission application has been pending before the Court.
5. This Court considered the overriding objective of the civil procedure rules under Order 1 Rule 5 of the Courts (High Court) (Civil Procedure) Rules which is to deal with matters justly, which includes ensuring parties are on equal footing and that proceedings are dealt with expeditiously. In the circumstances, where this matter has been pending for a considerable time, this Court agreed with the claimant’s view that it was just that this Court proceed to determine the claimant’s application for permission to apply for judicial review as suggested.
6. It must be observed at the outset that the purpose of an application for permission to apply for judicial review, like the instant one, is firstly to eliminate at an early stage, applications which are either frivolous, vexatious or hopeless and secondly to ensure that an application is only allowed to proceed to substantive hearing if the court is satisfied that there is a case fit for further consideration. See *State and Governor of the Reserve Bank of Malawi ex parte Finance Bank of Malawi* Miscellaneous Civil cause number 127 of 2005 (High Court) (unreported); *Ombudsman v Malawi Broadcasting*

*Corporation* [1999] MLR 329 and *Inland Revenue Commissioners v National Federation of Self Employed and Small Businesses Limited* [1981] 2 All ER 93. This Court must determine whether the claimant's case is fit to proceed to a substantive hearing.

7. The case of the claimant is that he has experience since 2012, as an immigration officer at the Department of Immigration and Citizenship Services. He seeks review of the decision of the putative defendant because the decision is illegal and irrational in that it contravenes a number of statutes or laws. He indicated the decision herein contravenes section 3 of the Immigration Act in that the Director General ought to be appointed by the Minister of Homeland Security and not the President of the Republic. In opposition to this, the defendant indicated that the President of the Republic has power under section 6 of the Public Service Act to appoint any person in public service to a post above the rank of under- secretary in which band the Director General's post is. And that therefore the President was the appointing authority and not the Minister of Homeland Security.
8. The claimant then contended that the President's decision was illegal and irrational since the Director General was not in the public service at the time of his appointment given that section 3 of the Immigration Act requires that appointment of a Director General or Chief Immigration Officer be from members serving in the public service. There was no response from the putative defendant on that aspect.
9. The putative defendant's view is also that the claimant has no sufficient interest given that he is at Grade I/PO level and does not have the relevant experience for the post of Director General of Immigration and Citizenship Services contrary to the claimant's assertions.
10. The claimant then also alleged that the putative defendant's decision is illegal and irrational for contravening section 29 of the Public Service Act which prescribes that anyone above the age of 60 years can no longer serve in public service. He asserted that the Director General was aged over the prescribed retirement age at the time of his appointment. There was no response from the putative defendant on this aspect.
11. The claimant essentially seeks to challenge the appointment as illegal and irrational since there are serving members in public service eligible for the

appointment herein rather than the incumbent Director General who is above the retirement age and was appointed from outside the public service.

12. The putative defendant contended that in fact the impugned decision itself cannot be challenged using the judicial review process but the decision making process only. And that, the claimant could therefore not challenge the decision herein in the manner he seeks to. The putative defendant also contended that the claimant is raising issues of discrimination at the workplace and that he should have commenced proceedings in the Industrial Relations Court and not before this Court.
13. This Court observes that it appears that the claimant has standing before this Court given his years of experience in the Department spanning over a decade. He also now holds a Bachelor of Laws (Honours) Degree.
14. The issues raised by the claimant, alleging that the impugned decision herein whereby public law powers under statute were exercised allegedly illegally and irrationally, bring the matter herein squarely under the purview of judicial review. There are countless authorities to the effect that a decision will be subject to judicial review if it is alleged to constitute an irrational exercise of public power, in this case power under statute.
15. In the final analysis, this Court finds that the present application has merit in that the issues raised are fit to proceed to a full hearing and this Court grants the claimant permission to apply for judicial review. The defendant shall therefore file a defence within the time stipulated by the rules of civil procedure once the application herein is served.
16. With regard to the claimant's application for stay of the decision herein, this Court exercises its discretion not to grant the same considering all the circumstances of this case and for the sake of good administration in that it is necessary that there is an officer in place until such time as the impugned decision is tested and the issues raised by the claimant are determined.

Made in chambers at Blantyre this 17<sup>th</sup> February, 2023.

M.A. Tembo  
**JUDGE**