HH 29-02
HC 12092/01

REPORTABLE - 1

MORGAN TSVANGIRAI
vs
REGISTRAR-GENERAL
and
OTHERS

HIGH COURT OF ZIMBABWE
ADAM J,
HARARE, 29, 31 December, 2001, 8 January and 27 February, 2002

Mr *B Elliott* for the applicant
Mr *M Majuru* for the respondents

ADAM J: In this matter applicant on an urgent chamber application sought a Provisional Order. On 31 December, 2001 by consent the parties were granted an order:

> "1. That the Registrar-General be and is interdicted from removing any person from the common voters' roll unless and until he complies with sections 25, 30, 31 and 32 of the Electoral Act (Chapter 2:01);
> 2. That if the Registrar-General has removed any person or persons from the common voters' roll without complying with the provisions of sections 25, 30, 31 and 32 of the Act he shall reinstate such person or persons forthwith on the roll;
> 3. That the Registrar-General make available on or before 7 January, 2002 to the applicant an electronic copy on compact disc supplied by the applicant and in comma deliminated ASC11 format of the common voters' roll in respect of all registered voters in Zimbabwe up to 2 January, 2002".

The consent order of 31 December, 2001 was predicated on the acceptance that the Constitution of Zimbabwe, as the supreme law of Zimbabwe (section 3) made provision for elections and of qualifications and disqualifications of voters. Section 22(1) provides that 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 leave Zimbabwe and immunity from expulsion from Zimbabwe.

Section 28(2) provides that the President must be elected by voters registered on the common roll. Section 58(3) and (4) specifies that the qualifications and disqualifications for registration as a voter or for voting at elections shall be as prescribed in Schedule 3 and subject to it, by the Electoral Law and an Act of Parliament shall make provision for election of members of Parliament. Section 60(2) stipulates that Zimbabwe shall be divided into 120 common roll constituencies. Section 113(1) defines "Electoral Law" as meaning an Act of Parliament having effect for purposes of section 58(4) which is for the time being in force. Schedule 3 paragraph 3 provides:

> "(1) Subject to the provisions of this paragraph and to such residence qualifications as may be prescribed in the Electoral Law for inclusion on the electoral roll of a particular constituency, any person who has attained the age of eighteen years and who -
> (a) is a citizen of Zimbabwe; or
> (b) since the 31st December, 1985, has been regarded by virtue of a written law as permanently resident in Zimbabwe;
> shall be qualified for registration as a voter on the common roll.
> …
> (3) Any person who is registered on the electoral roll of a constituency shall be entitled to vote at an election which is held for that constituency unless -
> (a) he has ceased to be a citizen of Zimbabwe; or
> …
> (b) in the case of a person registered on the electoral roll by virtue of qualifications referred to in subparagraph(1)(b), he has ceased to be so qualified".

The Electoral Act (Chapter 2:01) in section 15(2) states that the Registrar-General shall exercise such functions as are imposed or conferred upon him by or under the Act. Section 20(1) provides that the requisite residence qualifications to be registered as a voter in a particular constituency is that the claimant must be resident in that constituency at the date of his claim. Section 20(3) indicates that the Registrar-General or the constituency registrar may demand proof of identity (defined as a passport, identity document issued under the National Registration Act (Chapter 10:17) or drivers licence),

proof of qualifications as a voter (defined as a passport or identity document) and proof of residence in that constituency. Section 103 provides that subject to Part X1X (Elections to Office of President); Part X1V (Preparations for and Voting at Poll); Part XV (Voting by Post); Part XV1 (Proceedings after Close of Poll); and Part XV11 (General Provisions Relating to Polls) other than section 83 - abrogation of elections - shall apply, *mutatis mutandis*, to elections to the office of President.

Before considering the Immigration Act (Chapter 4:02) which speaks of "domicile" it is necessary to deal with domicile under Roman-Dutch law. In *Mason* v *Mason* (1885) 4 EDC 330 BARRY JP observed at 337:

> "Domicil means the place or country which is considered by law to be a person's permanent home. The law also says that no person can at any time be without a domicil. A domicil, too, which is once acquired is retained until it is changed. This permanent home is either the domicil received by him at his birth (or, as it is called, domicil of origin), or a domicil acquired by a man's own act, called domicile of choice. When a person is known to have had a domicil, whether of origin or of choice, he is presumed to retain such domicil in the absence of proof of change".

The Immigration Act provides in section 3(1) that a person shall be regarded as being domiciled in a country if (a) he resides permanently in that country or (b) that country is the country to which he returns as a permanent resident. Section 3(3) states that no person shall have a domicile in Zimbabwe unless he has lawfully ordinarily resided there for a continuous period of 10 years. Section 3(4)(a) provides that a person shall lose his domicile in Zimbabwe if he (i) has voluntarily departed from and resides outside of Zimbabwe or (ii) is absent from Zimbabwe for a continuous period of 5 years. Section 3(4)(b) stipulates that the fact one has taken up residence outside shall be *prima*

facie evidence of his intention of making his home outside Zimbabwe and the onus of proving otherwise is on him.

The National Registration Act in section 2 defines "resident" as any inhabitant of Zimbabwe over 16 years of age who has resided in Zimbabwe for a continuous period of not less than 6 months. Section 6(1)(b) requires any person who becomes a resident or ordinarily resides within a designated area to apply for registration. Section 6(2) requires an applicant to provide his full name, address, citizenship status, birth, entry into Zimbabwe, appearance, marital status, family particulars, tribal affiliations and registration and liability for national service under the National Service Act (Chapter 11:08); and submit his finger prints and photograph. Section 7 makes provision for the registration officer to issue an identity document. The National Registration Regulations 1977 (Government Notice 47 of 1977) in section 7 provides the form of an identity document. Section 8 states that applicants be classified in accordance with the Second Schedule. Section 9(2) indicates that if the holder of an identity document intends to leave Zimbabwe for more than 12 months he must surrender it when he departs at the port of exit. Section 9(4) provides that the Registrar-General must retain it for 2 years and thereafter destroy it unless it has been reclaimed by the person to whom it was issued. Under the Second Schedule the classification code on the identity document include CIT for citizens, NCR for non-citizen residents who are permanent residents or deemed permanent residents and ALIEN for others not covered under CIT and NCR.

The Citizenship of Zimbabwe Act (Chapter 4:01) in section 9(8) provides that any person who was ordinarily resident in Zimbabwe immediately before l December 1984, and who ceases to be a citizen of Zimbabwe in terms of section 9(3), (4), (5), (6) or (7)

shall be entitled, on or after the date he ceased to be a citizen of Zimbabwe to reside in Zimbabwe and generally, to do all such things as may be done by persons who are ordinarily resident in Zimbabwe.

The foregoing legislative provisions confirm that citizens living in Zimbabwe have their domicile in Zimbabwe and are therefore permanently resident in Zimbabwe. A citizen who leaves Zimbabwe for less than 12 months and keeps his identity document is still permanently resident in Zimbabwe. A citizen of Zimbabwe who leaves Zimbabwe for more than 12 months but returns home within 2 years resumes being permanently resident in Zimbabwe. All other citizens of Zimbabwe that leave Zimbabwe for more than 12 months without returning within 2 years are no longer permanently resident in Zimbabwe. A citizen in Zimbabwe permanently resident on 1 December 1984 who ceased to be a citizen of Zimbabwe on l December 1985 in terms of the Citizenship of Zimbabwe Act, 1984 in favour of a foreign citizenship, who was living in Zimbabwe was still permanent resident of Zimbabwe just like a citizen of Zimbabwe living in Zimbabwe.

Prior to 17 April 1991 in terms of Schedule 3 paragraph 3 of the Constitution only citizens of Zimbabwe who were permanently resident in Zimbabwe as well those not permanently resident were qualified to be registered on the common roll. It was after 30 November, 1985 that citizens permanently resident in Zimbabwe who ceased to be citizens of Zimbabwe were disqualified from voting. However, section 17 of the Constitution of Zimbabwe Amendment (No.11) Act, 1990, effective from l7 April 1991, allowed, not only, citizens of Zimbabwe who were permanently resident in Zimbabwe, as well as citizens of Zimbabwe not permanently resident, but also, added others who

since 31 December 1985 were permanently resident in Zimbabwe to be qualified for registration as voters on the common roll by amendment to paragraph 3 (1) of Schedule 3. It is clear, that a citizen of Zimbabwe permanently resident fell under the above amended legislative provision in the dual capacity as a citizen and as permanently resident since 31 December, 1985. When such a citizen of Zimbabwe permanently resident in Zimbabwe since 31 December 1985 ceased to be a citizen of Zimbabwe in terms of the Citizenship of Zimbabwe Act after 17 April 1991, he still qualified to remain registered as a voter on the common roll as someone permanently resident in Zimbabwe since 31 December 1985. This more particularly as Schedule 3 paragraph 3(3) of the Constitution required such a person to cease to be a citizen as well as cease to be permanently resident in Zimbabwe. It could not be maintained that such a person living in Zimbabwe since 31 December 1985, on the date he ceased to be a citizen only became permanently resident in Zimbabwe after 17 April 1991. Let us take for example twins born in Zimbabwe of a foreign born father who is also a citizen of Zimbabwe, all permanently resident and all registered voters on the common roll in 1980 and all holding dual citizenship - a foreign country and Zimbabwe. The son and father, just prior to l December 1985, renounce their foreign citizenship in terms of the Citizenship of Zimbabwe Act, 1984. The daughter being abroad failed to do so and she ceased to be a citizen of Zimbabwe and now has a mono foreign citizenship. All of them voted in the 1985 elections. The daughter did not vote in the 1990 elections but her brother and father did. It would seem that section 17 of the Constitution of Zimbabwe Amendment (No.11) Act, l990 effective on 17 April 1991 seems to reward the daughter for her conduct in failing to renounce her foreign citizenship before l December 1985 when she ceased to be

a citizen of Zimbabwe by permitting her to be qualified for registration as voters on the common roll. She duly registered as a voter. In the 1995, 1996 and 2000 elections they all voted. The father and son both failed to renounce their foreign citizenship in terms of the Citizenship of Zimbabwe Amendment Act, 2001. It cannot seriously be maintained that section 3 of the Citizenship of Zimbabwe Amendment Act, 2001 is now punishing both of them, after having been citizens of Zimbabwe permanently resident before 1980, for not renouncing their foreign citizenship in terms of the amended section 9(6) in 2001 or 2002. Both are deprived of being registered on the common roll on the grounds that they only became residents in 2001 or 2002 when they in fact have all along before 1980 been permanently resident in Zimbabwe. The legislature would have been well aware of the Constitution of Zimbabwe Amendment (No.11) Act, 1990 and could not have intended such a different and unjust result. In enacting section 9(8) of the Citizenship of Zimbabwe Act, 1984 those legislating must also have been well aware of the foregoing legislative provisions of the written law concerning permanent residents and its consequences. It was for that reason that such citizens of Zimbabwe permanently resident in Zimbabwe immediately before l December 1984 were entitled, on or after the date they ceased to be citizens of Zimbabwe, to do all such things as may be done by persons who are ordinarily resident in Zimbabwe. Someone who is permanently resident is also a person ordinarily resident. Thus a citizen who is permanently resident when he ceases to be a citizen becomes a foreign permanent resident who is ordinarily resident in Zimbabwe. It would be both straining the language and artificial in the extreme to hold that such a citizen of Zimbabwe permanently resident in Zimbabwe since 31 December 1985 was only qualified for registration as a citizen of Zimbabwe but not as one

permanently resident in Zimbabwe since 31 December, 1985. It would be wrong to hold that if he failed to renounce his foreign citizenship then he only became a mere resident in 2001 or 2002 when he ceased to be a citizen of Zimbabwe. I should point out that in an attachment relied upon by the first respondent, which is an advertisement from the British High Commission, it was indicated that those citizens of Zimbabwe who had not renounced their British citizenship should go and have their British passports stamped as permanent residents. In terms of our law they did not become permanent residents when their British passports were stamped since they all along had been permanent residents until they ceased to be citizens of Zimbabwe.

The Registrar-General has consented to the order issued on 31 December, 2001. In terms of section 25(1) of the Electoral Act a written notice shall be sent to a voter registered on the voters roll which shall set forth the grounds of objection. The Registrar-General would be acting *mala fide* if the written notice of objection gave the grounds of objection to him that the person has ceased to be a citizen of Zimbabwe when he is a person who since 31 December, 1985 has been permanently resident in Zimbabwe. If the Registrar-General has sent after 31 December 2001 such defective written notices of objection with that ground of objection that he has ceased to be a citizen to voters registered on the voters roll such action on the Registrar-General's part would be ultra vires section 15(2) of the Electoral Act. His conduct would also constitute an attempt to deprive such persons of their right to vote given to them by section 58(3) of the Constitution. If he has sent such defective written notices of objection, they are deemed to be null and void and of no effect, and such voters registered on the voters roll shall be regarded to be still on the voters roll and to be entitled to vote. Should any names of the

voters registered on the voters roll be removed due to those defective written notices of objection having been sent by the Registrar-General, this would be in clear violation of the consent order of 31 December 2001 and if there are attempts to prevent such voters registered on the voters roll from voting such conduct may constitute a contempt of the consent order of 31 December, 2001. The foregoing are my reasons for that consent order.

Also, on 31 December, 2001 by consent of the parties an order was issued by me that the urgent chamber application be converted into a court application with the founding affidavit filed of record by the applicant to be the founding affidavit and that the first, second and third respondents file their notices of opposition and opposing affidavits by no later than 4 p.m. on 3 January, 2002, with the applicant to file an answering affidavit, if any, by 12 noon on 4 January 2002. Further directions were conveyed to the parties, dated 3 January 2002, that the applicant file his heads of argument by 9 a.m. on 7 January, 2002, with the respondents to file their heads of argument by 9 a.m. on 8 January, 2002 and that the matter would be heard at 10 a.m. on 8 January, 2002.

On 3 January, 2002 the first respondent filed his opposing affidavit, with the third respondent having filed his opposing affidavit (out of time) on 4 January, 2002, which was condoned, and the applicant having filed his answering affidavit on the same date without having sight of the third respondent's opposing affidavit. The second respondent did not file an opposing affidavit. The parties filed their heads of argument. On 8 January, 2002 by consent of the parties the applicant was granted an adjournment to 2.15 p.m. of that date to file an answering affidavit, if any, to the third respondent's opposing affidavit. An answering affidavit was filed on behalf of the applicant.

In his founding affidavit the applicant avers that he intends to stand in the forthcoming Presidential elections, that he has received complaints from persons (Zimbabwean citizens who are permanent residents) who were previously on the voters' roll but whose names have been removed summarily and unlawfully from it; that the first respondent has not complied with the provisions of the Electoral Act so he sought an order interdicting the first respondent from removing the names from the voters' roll unless and until he complied with the provisions of sections 25, 30, 31 and 32 of that Act and that the first respondent reinstate the names of those persons removed from the roll in breach of sections 25, 30, 31 and 32 of the Act; that the Citizenship of Zimbabwe Amendment Act, 2001 (Act 12 of 2001), amended section 9(7), which the applicant understood that the first respondent's interpretation of the amended section 9(7) is that any person who was born in Zimbabwe and a citizen of Zimbabwe, one or both of whose parents were born in a foreign country, must renounce any claim which he or she may have to that foreign citizenship in terms of that foreign law by 6 January, 2002 if he or she wishes to retain his or her Zimbabwe citizenship; that the effect of the first respondent's interpretation is that failure to renounce means that he or she will automatically cease to be a Zimbabwe citizen and become an alien in the land of their birth, that the consequences of the first respondent's interpretation in relation to the forthcoming Presidential Election is that after 6 January 2002 such persons may cease to be registered voters because of the Constitution of Zimbabwe Schedule 3 paragraph 3 (3)(a); that paragraph 3 (3)(a) indicates that any person who is registered on the electoral roll shall be entitled to vote "unless he has then ceased to be a citizen of Zimbabwe"; that the first respondent will summarily and unlawfully remove all persons on the voters roll

after 6 January 2002 who in terms of amended section 9(7) have ceased to be citizens of Zimbabwe; that he has been advised that the first respondent's interpretation is wrong in law in that it is only persons who are actually citizens of a foreign country who have to renounce it; that it is not necessary for those who have a claim to foreign citizenship to renounce that foreign citizenship; that the number of persons who have a claim to foreign citizenship, as interpreted by the first respondent, must run into hundreds of thousands, if not millions, of potential voters, including all persons born here over l8 years one or both of whose parents were born in Malawi, Mozambique, Zambia or South Africa; that many of these persons, if given the opportunity will vote for him in the forthcoming Presidential Election and so he has a real and substantial interest in them remaining being treated as citizens of Zimbabwe after 6 January, 2002; that the time period allocated in terms of section 9(7) of the Act is wholly inadequate; that the period stipulated has deliberately been made short so as to terminate before the date of the forthcoming Presidential Election to enable the first respondent to remove scores of people from the voter's roll; that the requirement under the Citizenship of Zimbabwe (Renunciation of Foreign Citizenship) Regulations 2001 (S I 127 of 2001)) for delivery of the renunciation by registered post or by delivery to Makombe Building Harare is wholly inadequate, in that the postal service is erratic and unreliable and that the first respondent's offices have been inundated with people who wish to register their renunciation; that most of the people live in the rural area, are poor and cannot come to Harare; that he has not given adequate publicity; that embassies have been inundated with people wishing to renounce citizenship in light of the first respondent's wide interpretation; that some of the foreign embassies have not been able to cope with the extra work; that representations have been

made to the third respondent to exercise his powers in terms of section 19 of the Citizenship of Zimbabwe Act but he has not responded and that in not extending the time period of 6 months, the third respondent has acted in a grossly unreasonable manner, bearing in mind the following points - the wide interpretation of section 9(7) of the Act by the first respondent; the relatively short period of 6 months. bearing in mind the enormous numbers of people involved; the wholly inadequate means by which renunciation can be effected; the pressure on the foreign embassies and the inability of those affected to compel embassies to deal with their claims for renunciation by the deadline; there is suspicion that the 6 months period has deliberately been made short so as to end before the forthcoming Presidential Election to enable the first respondent to remove persons from the voters' roll whom he deems to have lost their Zimbabwe citizenship; that the exercise concerning registration of voters currently taking place be properly conducted so as to enable Zimbabwe citizens and permanent residents to vote, that the Registrar-General is obliged to give notice in terms of section 94 of the Electoral Act.

There is a supporting affidavit from Ricardo Goncalves, who avers that he was born in Zambia; that he entered Zimbabwe in 1969, since when he has lived here; that he is a permanent resident of Zimbabwe; that he is a citizen of Portugal; that on 27 April 1994 he registered as a voter (attached was his Certificate of Registration Serial No 372403 C); that he voted in the general election in 1995, in the Referendum in 2000 and in the general election in 2000; that he proceeded on 25 November, 2001 to the Avondale Primary School at the Voters Inspection Centre and was informed he was not on the voters' roll; that he was told he could not register because he was not a citizen of

Zimbabwe; that he went to the mobile centre at Strathaven Shopping Centre where the official confirmed he was not on the voters' roll but he was registered and given a new Voter's Registration Certificate so he handed them in with his 1994 Voters Registration Certificate; that the following day the official who registered him took his new Voter's Registration Certificate and later that day he retrieved his 1994 Voter's Registration Certificate at the Strathaven Shopping Centre.

In his opposing affidavit the third respondent disputes that he unlawfully and summarily removed names from the voters roll; that the applicant has not supplied details of persons affected so as to enable him to respond accordingly; that he would like to bring to the attention of this Court that Ricardo Goncalves is in fact a registered voter in the Harare Central Constituency and is entitled to vote; that he has always complied with the provisions of sections 25, 30, 31 and 32 of the Electoral Act; that the provisions of section 9(7) of the Citizenship of Zimbabwe Act should be read together with section 9(2), which provides "subject to this section, no citizen of Zimbabwe of full age and sound mind shall be entitled to be a citizen of a foreign country"; that the key word here is entitlement or claim, which must be renounced according to the form and manner prescribed by the laws of the foreign country, that the provisions of the Act gives the individual a choice, either to retain Zimbabwe citizenship through renunciation of his/her entitlement to foreign citizenship or lose Zimbabwe citizenship by default in favour of foreign citizenship, and attached is the Form of Declaration of Renunciation of Foreign Citizenship in the Schedule; that he denied that he has unlawfully and summarily removed persons from the voters roll; that in terms of Schedule 3 paragraph 3 (3) of the Constitution, he is empowered to remove persons who have ceased to be citizens from

the voters roll; that he is equally empowered by section 25 of the Electoral Act to remove such persons from the voters roll; that he denied that his interpretation is wrong; that there is no question of potential right on a descendant whose parents were born outside this country; that this category of persons need not apply or be granted citizenship of foreign country anyway, as they automatically qualify for benefits of the foreign country by virtue of their descendant's rights and as provided for by the foreign laws of the respective countries of origin of their parents; that this category of persons does not necessarily have to submit formal application for citizenship but merely prove that their parents originate from the countries concerned, in which case the claimant is automatically entitled to a passport of that particular country as a citizen e.g. countries such as the United Kingdom, Mozambique, Uganda, Botswana, Republic of South Africa, etc have this provision in practice; that such descendants who want to go to Britain merely produce their parents' birth certificates and that during the renunciation period many such people have surrendered either their foreign passports or Zimbabwe passports, and there is attached a list of people born in Zimbabwe who have surrendered their Zimbabwe passports or had their Zimbabwe passports seized because they have a foreign passport; that the question of mono citizenship in Zimbabwe is embodied in the Constitution, as read with the Citizenship of Zimbabwe Act; that he is merely implementing the provisions of such laws, and therefore the numbers affected is immaterial as all persons must abide by the law; that the applicant is merely speculating that people affected by the renunciation are going to vote for him, as no one should make such a claim as the vote is secret; that the inadequacy of the period in which to renounce referred to by the applicant is speculative, because the bulk of the affected people who

are willing to renounce their foreign citizenship are already complying; that the applicant has not proved that the time is inadequate and his speculation should be dismissed as being irrelevant; that in any case he is not empowered to extend the period allocated in section 9(7) of that Act; that he is being required to extend the retention of dual citizenship contrary to the provisions of section 9(2) of that Act; that it is common knowledge to him that the idea of wishing to extend the period allocated in section 9(7) is simply to afford these people the opportunity to retain dual citizenship and their right to vote at the same time, enjoying the protection of both Zimbabwe and a foreign country; that in fact the applicant admits that the idea of seeking an extension is for them to retain the right to vote, which they will lose in terms of Schedule 3 paragraph 3 (3)(a) of the Constitution if these people choose to relinquish Zimbabwe citizenship in favour of their foreign citizenship; that after the promulgation of the law, the provisions of the new amended legislation enjoyed wide publicity, in both the print and electronic media, both inside and outside the country; that he does not understand why this generally acceptable method of communicating to those affected is being construed as inadequate; that the process of renunciation by this means has not proven inadequate; that the applicant is merely speculating, as his experience in processing the renunciation has shown that all renunciations submitted through the post are being received timeously; that again the applicant is speculating on the number of people turning up, and that those who are from outside Harare are coming in to submit their renunciation forms and those who are unable to do so are posting them as provided for; that the provisions relating to posting are meant to alleviate the problem of those who cannot afford to submit their applications in person; that he has adequately published the provisions of the new amendment and attached are

adverts placed by the Indian High Commission, the British High Commission and certain articles in newspapers; that there is no uncertainty about the citizenship status of the persons concerned, because the person either renounces his foreign citizenship and retains his Zimbabwe citizenship or loses his Zimbabwe citizenship by default; that the provisions of the amended section 9(7) of the Act are quite clear; that the applicant should be reminded that retention of Zimbabwe citizenship is voluntary; that foreign embassies referred to by the applicant have not raised any concerns with his office; that it is his contention that the applicant has taken upon himself to be a spokesman for foreign embassies and individuals concerned; that it appears he has no *locus standi* to do so; that it is his contention that the order sought by the applicant is meant deliberately to interfere with and disrupt his preparations for the 2002 Presidential Elections; that his programme of action for the preparations is in terms of the provisions of the Electoral Act, that the applicant's fears that he will not comply with the provisions of the Act by giving the requisite notice are unfounded and unsustainable.

In his opposing affidavit the third respondent averred that he was not aware that many of the people who are required to renounce a foreign citizenship would, if given a chance, vote for the applicant and he puts him to the proof thereof; that he does not accept that the time period which he allocated in terms of the amended section 9(7) of the Citizenship of Zimbabwe Act for the renunciation of foreign citizenship was inadequate; that in his opinion 6 months, in most cases, is a long enough period for any serious person to institute and finalise proceedings for the renunciation of foreign citizenship; that this law affects the lives of people in a fundamental way and calls on citizens to make decisions with far-reaching consequences on personal and property rights for both

themselves and generations of their descendants; that he would expect such people to treat this matter as an absolute priority and make haste to put their houses in order; that he does however concede that there may be exceptional cases where citizens may have been prevented from taking action, due to extraordinary factors beyond their control; that in such cases the law gives such citizens the right to appeal to the President to be exempted from the prohibition against possession of dual citizenship; that he denies that he made the time period deliberately short so as to terminate before the date of the forthcoming Presidential Elections; that Parliament, in which the applicant's party is substantially represented, passed this amendment Act in the ordinary course of its duties; that he introduced the Bill as part of his ordinary duties as Minister of Home Affairs, after having realised that the current law did not give effect to the intention of our supreme law, which is the Constitution of Zimbabwe; that his sole intention in introducing this Bill was to create the legal framework for people to renounce effectively a foreign citizenship if they intend to retain their Zimbabwe citizenship as required by the Constitution; that it was not his intention to disenfranchise anybody although he does accept that disenfranchisement is a possible consequence of choosing not to renounce foreign citizenship; that this law was not only promulgated in the *Gazette*, thus giving constructive notice of its existence to all citizens of Zimbabwe, it was also hugely publicized by the local and foreign press; that those people who chose to do nothing about this law were in fact choosing to lose their rights and citizenship of Zimbabwe; that he is not aware that the postal service is erratic and unreliable, especially if one makes use of the registered mail which provides a superior service to ordinary mail; that there are commercial couriers who also deliver such important documents; that if the office of

the first respondent is inundated with people wishing to register their form of declaration of renunciation of foreign citizenship, the reason cannot be that 6 months was inadequate, rather he believes people have procrastinated and waited until the last moment to do so; that he also believes the reason for the procrastination is that this law was very unpopular from the beginning among certain sectors of the Zimbabwean community, who had up to that point enjoyed the benefits of holding dual citizenship, thus enjoying the best of both worlds; that the law in question would terminate their privilege in 6 months time; that, in an effort to hold on to this privilege for as long as possible, some people waited until the last minute; that if such people are now facing the pressure and inconvenience of taking action at the eleventh hour, the blame should not be laid on his door; that Parliament, in common with other law-making organs of all other governments in the world, makes laws which have universal application within the country; that there is no law for the rich and another for the poor, although inevitably certain laws will affect each in different ways; that this is an unavoidable consequence of governing; that this result occurs regularly, whenever and wherever laws are passed; that to insist that Parliament should ensure that the laws it passes have the same effect on all the people is unbelievably naïve, to say the least, as this would make it impossible for the Government to function; that he accepts that the law in question occasions different degrees of inconvenience for different people, depending on their circumstances; that the law in question was published in the *Gazette* and, according to our laws, this is adequate notice; that, as pointed out by him, this law was extremely unpopular, with lots of hue and cry about it; that it was extensively debated; that the first respondent took the trouble to place advertisements in the local press; that rarely has he seen a piece of legislation attract so much publicity; that

no person has ever made a proper and formal application to him to extend the time period in question; that, for the reasons he has fully expounded, he did not believe that the 6 months period in question was inadequate for the purposes of effecting renunciation.

In his answering affidavit the applicant avers that it is apparent, from part of the first respondent's opposing affidavit, that after 6 January, 2002 he intends to remove summarily all persons from the voters' roll who, according to his interpretation of the law, have ceased to be Zimbabwean citizens; that the first respondent cannot purport to advise this Court on the provisions of any foreign law, since that can only be done by way of evidence given by an expert in that particular foreign law; that the first respondent's unlawful interpretation has created enormous problems, as indicated in the attached supporting affidavit of Roland Whitehead; that his affidavit is mainly concerned with wealthy citizens of Zimbabwe who can do something to try to comply, but there are literally hundreds of thousands, if not millions of them who have no chance whatsoever of complying; that, for instance, the queue of people outside the South African High Commission consists mainly of white people, so how, many particularly Ndebele people with South African connections, must be affected but are unable to do anything about it, and what about Zimbabwe citizens who have connections with Malawi, Zambia or Mozambique; that he emphasises that all who wish to renounce their foreign citizenship or to claim it are obliged to come to embassies and High Commissions in Harare to do so; that a vast majority of the people affected live in the rural areas and are poor, and therefore have to come to Harare; that he attaches a letter written on behalf of the Secretary for Home Affairs in reply to a letter from Coghlan, Welsh and Guest dated 26 October 2001, which contradicts the first respondent's interpretation; that the third

respondent has acted grossly unreasonably in not extending the deadline to 6 January 2003.

In his supporting affidavit Roland Whitehead avers that he was born in 1944 in Zimbabwe and is a fourth generation Zimbabwean citizen; that he is a retired Mining Engineer, now working as a Human Rights Activist; that at about 8.05 a.m. on 31 December 2001 he was at Makombe Complex and he observed a section of the public who were there, so he learnt, to complete formalities relating to citizenship which he videotaped (video photo shows a section of large crowd); that he went to the South African High Commission at 8.35 a.m., where he observed members of the public waiting there to comply with the newly introduced citizenship law; that he talked to Stuart Frost who told him he had been in the queue since 6 a.m., having been turned away the previous week as the High Commission could not cope with the inundations of requests for renunciations (video photo shows Stuart Frost seated with others, mainly white people, waiting at the gate); that on 2 January, 2002 he was at the South African Mission at 5.55 a.m.; that he learnt that people had been in the queue since 5 p.m. the previous day in order to try to comply with the new citizenship laws; that Peter Bournhill informed him that he was number 67 in the queue waiting in connection with the renunciation of a possible claim to South African citizenship through descent (video photo shows crowd sitting mainly white people); that on the same day he went to Makombe Building where he learnt, from people in the front of the queue, that they had been there since 1 a.m. that day (video photo shows a crowd of people waiting); that he went on 3 January, 2002 at 6.15 a.m. to the South African High Commission and saw people waiting outside (video photo shows a crowd of mainly white people waiting)

where he spoke to Peter Bournhill who was number 1 in the queue was told and that he had been waiting since 2 January 2002; that he spoke to Jenny Travina from Bulawayo, who had been in the queue since 1 a.m. on 3 January, 2002 and had incurred expenses amounting to well over $2 500 to date in travelling and accommodation; that he went to Makombe Complex and seen a man who had been there since 3.15 a.m. and was number 2 in the queue; that he saw a couple with Dutch parents, who had travelled from Mutare in order to complete initial formalities at the Netherlands Embassy on 2 January, 2002 and now were waiting at the Makombe Complex, having incurred expenses of many thousands of dollars; that he spoke to a lady from Bulawayo who was number 67 in the queue, and had been there since 5 a.m. who had incurred substantial travel expenses but was fortunate to be able to stay with relatives; that on 3 January, 2002 at 12.30 p.m. he visited the Avondale Shopping Centre where he observed people queuing outside a photo shop, waiting to obtain photo-copies of documents required by embassies to complete formalities regarding renunciation of any possible claim to dual citizenship; that on 4 January, 2002 at about 5.50 a.m. he visited the South African High Commission and then the Makombe Complex, where he observed long queues of people and where he learnt that most of them had been the overflow from the previous day's attempts to finalise renunciation formalities; that a lady there told him that she tried to complete the formalities required in Johannesburg, without success, and she had had to travel to Harare to the South African High Commission to do so; that a lady from Botswana informed him that she was unable to complete the requirements in that country and that she had had to travel to Harare for this and had been doing so since 27 December, 2001.

In the further answering affidavit on behalf of the applicant it was averred that Levente Petho who was born in Hungary and came to Zimbabwe in 1958, had been regarded by the Government Authorities as stateless but, because he never renounced his citizenship in terms of the Hungarian law, he fell within the provisions of section 9(7) of the Citizenship of Zimbabwe Act; that he took the matter up with the Hungarian Embassy in Pretoria, where he was told that it was going to be impossible for him effectively to renounce his Hungarian citizenship by 6 January 2002, that Levente Petho's legal practitioners wrote to the third respondent on 12 November, 2001 informing him that the Hungarian Embassy indicated that, in terms of the Hungarian Law, the matter would have to be referred to the President of Hungary and that this procedure could take up to one year; that since the third respondent, in terms of section 19 of the Act, is empowered to extend the period would the third respondent extend the time period, by a further 12 months. since Levente Petho, who is now 80, having lived in this country since 1958 and been a citizen since 1963, is anxious to retain his citizenship of Zimbabwe and that they understood that many people are in the same predicament; that no response to that letter was received and so an urgent reminder letter was written on 28 November, 2001 but there was no response from the third respondent.

In the applicant's Heads of Argument Mr *Elliott* submitted that section 8 of the Constitution of Zimbabwe originally permitted dual citizenship but, in terms of section 2 of the Constitution of Zimbabwe Amendment (No.3) Act, 1983, that section was repealed as was section 9, which allowed Parliament to enact legislation in respect of citizenship. The new section 9 of the Constitution includes: -

> "Provided that no such law shall provide for the cessation by, or deprivation of, any person of his 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".

The Citizenship of Zimbabwe Act, 1984, in section 9(8), states that a citizen of Zimbabwe who was on l December 1984 a citizen of a foreign country, shall cease to be a citizen of Zimbabwe one year from that date unless, before that period (i.e. 30 November, 1985), he had renounced his foreign citizenship in the prescribed form. The Citizenship of Zimbabwe (Dual Citizenship) Regulations, 1984 (S.I. 384 of 1984) merely required a declaration to be made in the prescribed form before a Commissioner of Oaths, and to be submitted to the Registrar-General. together with his foreign passport. There was no requirement, either in the 1984 Act or the 1984 Regulations, for the person to renounce his foreign citizenship in accordance with the relevant foreign law. The decision of the Supreme Court in *Carr* v *Registrar-General* SC 136/2000 confirmed that renunciation in the prescribed form under the 1984 Act was sufficient, without renunciation under the relevant foreign law. To overcome this, the Citizenship of Zimbabwe Amendment Act, 2001 was enacted, which provided that a citizen of Zimbabwe who, on 6 July, 2001, is also a citizen of a foreign country and who, at any time before that date, has renounced or purported to renounce his foreign citizenship and has, despite such renunciation, retained his foreign citizenship shall cease to be a citizen of Zimbabwe 6 months after that date unless before the expiry of that period (i.e. 6 January, 2002) he had effectively renounced his foreign citizenship in accordance with the relevant foreign law and has made a declaration before a commissioner of oaths in the prescribed form (S.I. 287 of 2001) and submitted it, together with documentary proof of such renunciation, duly authenticated by the relevant foreign government, to the Registrar-General.

It was submitted by Mr *Elliott* that, under the 1984 renunciation procedure citizen of Zimbabwe had one full year within which to renounce his foreign citizenship, by simply completing the prescribed form and having it sworn before a commissioner of oaths, before submitting it to the Registrar-General. But, under the 2001 renunciation procedure, a citizen of Zimbabwe had only 6 months within which first to complete his renunciation in terms of the relevant foreign law, then to complete the prescribed form before a commissioner of oaths and submit it, together with duly authenticated documentary proof of his foreign renunciation from the relevant foreign government, to the Registrar-General.

It was further submitted by him that even before *Carr* v *Registrar-General, supra*, it was apparent to the Government that the 1984 renunciation procedure required compliance only with Zimbabwean law. In 1994 the Government published the Citizenship of Zimbabwe Amendment Bill, which was intended to tighten up against dual citizenship for those who held foreign citizenship and became citizens of Zimbabwe by registration. They were required to renounce their foreign citizenship in accordance with the relevant foreign law within one year. There was therefore obviously no particular urgency from the Government's point of view to force persons who had dual citizenship to renounce their foreign citizenship in accordance with the relevant foreign law. Despite this, and despite the far more onerous 2001 procedure for foreign citizenship renunciation under the relevant foreign law, the time period is half that for the old simple 1984 renunciation procedure.

It was also submitted by Mr *Elliott* that it is quite clear that the requirements of the new provision applies to a person who is a citizen of Zimbabwe and who is also a

citizen of a foreign country. But the first respondent has interpreted it in a much wider manner, by insisting that any person born in Zimbabwe one or both of whose parents were born in a foreign country, must renounce any entitlement or claim to foreign citizenship. The first respondent attached to his affidavit various documents dealing with various foreign laws relating to citizenship. It must first be emphasized, in relation to this attitude of the first respondent, that he is not an expert and cannot speak authoritatively on the citizenship laws of any foreign country. In terms of section 25 of the Civil Evidence Act (Chapter 8:01), this can only be done by an expert in the law of the relevant foreign country. The first respondent seems to think that all foreign laws are the same, in that all persons born in Zimbabwe whose parents were born in a foreign country are automatically citizens of that foreign country. This, once again, is a fundamentally wrong interpretation of the law by the first respondent. Each and every case needs to be examined on its own facts, in relation to, firstly, whether the law of the foreign country in which the person was born automatically grants citizenship to him or whether it is necessary for him to apply to that foreign country for citizenship and, secondly, where application is necessary, whether that person has received citizenship after application. It cannot be presumed that the mere fact that a person is born in another country confers on him citizenship of that country. Even if it did, this might require an examination of the foreign law to ascertain whether or not citizenship by birth is lost upon the happening of some other event. There is no reason why some other countries cannot have a law similar to Zimbabwe, which provides that upon obtaining a citizenship of another country you automatically lose your citizenship by birth. If that is the case, then such a person, although born in that foreign country, would not be a citizen of that foreign country.

Further, where a person is born in Zimbabwe but one or both of his parents were born outside Zimbabwe, it may be necessary to find out whether or not that foreign country bestows citizenship on such a person born in Zimbabwe by virtue of one or other of his parents being a citizen of that foreign country, or by virtue of one or other of his grandparents having been a citizen of that foreign country, since citizenship may not be automatically given and may require application in order to obtain it. Section 6 of the Constitution of Zimbabwe, which deals with citizenship by descent, provides that a person born outside Zimbabwe, whose parents are born in Zimbabwe, is not a Zimbabwe citizen unless "his birth is registered in accordance with the laws relating to the registration of births" in Zimbabwe. If that registration does not take place, then such a person is not a citizen of Zimbabwe, despite the fact that his parents were citizens of Zimbabwe by birth. Similarly the case of a person born in Zimbabwe to parents born outside Zimbabwe must be examined to ascertain whether the person born in Zimbabwe is himself a citizen of a foreign country, through his parents, and has not subsequently lost that citizenship by becoming a citizen of Zimbabwe. If, from the factual position, he is not a foreign citizen, regardless of the fact that his parents were born outside Zimbabwe, he does not have to renounce any foreign citizenship for the simple reason that he does not have such foreign citizenship to renounce.

It was submitted by him that the provisions of the new legislation apply only to a person who is a citizen of two countries - Zimbabwe and a foreign country. The interpretation given in the letter on behalf of the Secretary for Home Affairs is completely at variance and does not support the first respondent's interpretation.

It was submitted by Mr *Elliott* that the applicant has indicated that the number of persons involved must run into hundreds of thousands, if not millions, which has not been disputed by the first respondent (who holds that the numbers affected is immaterial) or by the third respondent. The effect of these numbers is to increase dramatically the volume of work required to be done by the foreign embassies and by the first respondent's office. In turn this makes it much harder to comply with the first respondent's interpretation that everything must be done within the period of 6 months. The effect of the first respondent's interpretation will obviously be that very many people will not be able to renounce their foreign citizenship as required by the first respondent. The consequence of this is that a substantial number of people will be disenfranchised and will not be able to vote at the forthcoming Presidential Elections. It is apparent from his affidavit that the first respondent intends to remove persons from the voters roll as soon as they cease, according to his interpretation of the law, to be Zimbabwean citizens.

It was also submitted by Mr *Elliott* that the legislature obviously deliberately inserted section 19 in the Citizenship of Zimbabwe Act so that, in appropriate cases when it is justified, the third respondent should exercise the powers vested in him to extend any period stipulated in that Act. In deciding whether or not to exercise those powers the third respondent must do so in the national interest and not for any partisan reasons. He further submitted that the facts in this case are an ideal example of an occasion when the third respondent should exercise it and extend the time period allowed to renounce foreign citizenship. The decision by the third respondent not to extend the time period is a decision subject to review - *PF-ZAPU* v *Minister of Justice* 1986 (1) ZLR 305(S); *Mutambara & Ors* v *Minister of Home Affairs* 1989 (3) ZLR 96(H). It was submitted by

him that this Court can investigate whether the facts relating to the exercise of the third respondent's discretion is reasonably capable of supporting his decision not to extend the time period - *Minister of Home Affairs* v *Austin & Anor* 1986 (1) ZLR 240 (5) at 259. He also submitted that the third respondent is acting in a grossly unreasonable manner in deciding not to extend the time period by the failure on his part to apply his mind to the matter. The remedy is for a mandatory order against the third respondent to do so - *Mhora & Anor* v *Minister of Home Affairs & Anor* 1990 (2) ZLR 236 (H) 243F-244A and 244E-248F.

In the respondents Heads of Argument Mr *Majuru* submitted that the discretionary power to extend any period specified in that Act is vested in the third respondent and that, before he can exercise it, there must be facts or evidence placed before him upon which he must base his decision. Besides the application itself, the third respondent states he has not received any representations. It is only when he has failed to consider those facts or evidence before him or unreasonably failed to act on it, that the third respondent's decision can be taken on review and a mandatory order issued. He submitted that, significantly, the applicant in his affidavit does not indicate when and who made representations - whether organisations or individuals on behalf of a group of persons; in what form the representations were made - written or oral, and what reasons were given for this. It was submitted by him that this Court is not in a position to determine on review the reasonableness or otherwise of the third respondent's decision, as he has not, prior to this application, applied his mind to this issue. It was also submitted on his behalf that this Court cannot usurp the powers and discretion reposed on the third respondent by Parliament by substituting it with its own, particularly without affording

him the opportunity of exercising those powers. He also submitted that only extraordinary circumstances can justify such an approach by the Court and that none have been placed before this Court. He submitted that, almost 6 months after the amendment came into effect the applicant, as it were almost on the eve of the deadline, rushes to this Court on an urgent basis, seeking the extension, without explaining why it has taken him this long. He submitted that, whatever the number of people involved, the 6 months period was sufficiently long enough for any serious-minded person who wished to renounce, and that no credible evidence was proffered showing that the 6 months period is unreasonably short. The applicant has merely succeeded in showing that affected persons, for whatever reason waited until the last minute to effect renunciation.

Mr *Elliott*, at the hearing, submitted that the third respondent had been approached for an extension on 12 November 2000 and that he had been served with this application. Mr *Majuru* indicated that his instructions from the third respondent were that the third respondent did not intend to extend the period. Both counsel have intimated that they would like this Court to elucidate on the law on the submissions made in this matter.

In 1888 Queen Victoria recognised Lobengula as the King of the Matabele and Mashona, and as a result of the Moffat Treaty of 11 February 1888 with him, his country fell within the British sphere of influence - *In re Southern Rhodesia* [1919] AC 211 (PC) at 214. Thereafter the Rudd Concession was obtained from Lobengula, but there was no delegation in it by Lobengula of legislative and administrative functions - *In re Southern Rhodesia supra*, at 218. On 29 October 1881 a Charter was granted to the British South Africa Company by Queen Victoria, which provided for administrative, legislative and

judicial powers. Under it the British South Africa Company had the capacity to administer and govern, subject to the approval of a Secretary of State. The British flag was raised on 12 September, 1890 in Salisbury, as it then was. In 1891 a protectorate was established by the British over this country - *In re Southern Rhodesia, supra*, 217. By the South Africa Order in Council of 9 May 1891, the Crown's powers were delegated to the High Commissioner for South Africa in Cape Town and the country was brought under his jurisdiction. The "conquest" of 1894 on behalf of the Crown - *In re Southern Rhodesia, supra*, 221 - resulted in the country being conquered territory. The Southern Rhodesia Order in Council 1898 empowered the Legislative Council to make laws for the "peace, order and good government" of the territory. The Southern Rhodesia Naturalisation Order in Council of 7 March 1899 regarded the Crown as having power and jurisdiction over the territory, and it permitted the British South Africa Company's Administrator to grant aliens resident for at least 12 months in the territory local naturalisation as British subjects. The Southern Rhodesia (Annexation) Order in Council of 30 July 1923 made the country part of the dominions of the Crown. The British Nationality and Status of Aliens Act, 1914 (as amended by 1918, 1922, 1933 and 1943 Amendment Acts) applied to this country; it deemed various persons to be natural-born British subjects including any person born within the Crown's dominions and allegiance. This statutory provision was from the English common law, which held that any person born within the dominions and allegiance of the Crown was deemed to be a British subject. *Jus soli* embodied this rule, that citizenship is based on the place of a person's birth. *Jus sanguinis* laid down the principle that citizenship is to be determined by parentage or ancestry; such was the rule of the Roman Law.

From l January 1950 the Southern Rhodesia and British Nationality Act, 1949 became the law here, until l March 1958, from which date it was the Citizenship of Rhodesia and Nyasaland and British Nationality Act, 1957 that set out the law. This Act granted citizenship to persons born in the Federation before, on or after l March 1958. The Citizenship of Southern Rhodesia and British Nationality Act, 1964, from l January 1964 regarded persons born in Southern Rhodesia on, before and after that date to be citizens, as well as those who held citizenship of the Federation who were born outside Southern Rhodesia. The Citizenship of Rhodesia Act, 1970, from 2 March 1970 continued citizenship of those who were citizens before that date and made provision for the manner in which citizenship could be acquired. The Zimbabwe Constitution Order 1979 (S I 1979/1600) in its Schedule - The Constitution of Zimbabwe - in section 4 stated that a person who, on 18 April 1980 was, or was deemed to be, a citizen by birth, descent or registration shall on and after that date be a citizen of Zimbabwe by birth, descent or registration. In section 8 it was provided that a person who, on l8 April, 1990, was a citizen of Zimbabwe and was also a citizen of some other country, could not be deprived of citizenship of Zimbabwe by or under any law. Under this section 8, such persons had a constitutional vested right - *Chairman, Public Service Commission & Ors* v *ZIMTA & Ors* 1996 (1) ZLR 637 (S) at 651-5. When the Constitution of Zimbabwe Amendment (No 3) Act, 1983 was enacted, effective l September 1983, which repealed section 8, it did not deprive such a person of his dual citizenship. The Citizenship of Zimbabwe Act, 1984 was promulgated in the *Gazette* on 26 October, 1984 and brought into effect on l December 1984. This Act repealed the Citizenship of Rhodesia Act (Chapter 23). Section 9 thereof prohibited dual citizenship. In terms of section 22, the Citizenship of

Zimbabwe (Dual Citizenship) Regulations 1984 (Statutory Instrument 384 of 1984) were made. They became effective on l December, 1984. Section 9 of the 1984 Act provided:

> "(2) Subject to this section, no citizen of Zimbabwe who is of full age and sound mind shall be entitled to be a citizen of a foreign country.
> (3) A citizen of Zimbabwe of full age who, by voluntary act other than marriage, acquires the citizenship of a foreign country shall immediately cease to be a citizen of Zimbabwe.
> (4) A citizen of Zimbabwe who acquires by marriage the citizenship of a foreign country shall cease to be a citizen of Zimbabwe one year after the date of the marriage unless, on or before the expiry of that period, he has renounced his foreign citizenship in the form and manner prescribed.
> (5)A citizen of Zimbabwe of full age who, by some means other than voluntary act or marriage, acquires the citizenship of a foreign country shall cease to be a citizen of Zimbabwe one year after the date of such acquisition unless, on or before the expiry of that period, he has renounced his foreign citizenship in the form and manner prescribed.
> (6)A citizen of Zimbabwe who, when he becomes of full age, is also a citizen of a foreign country shall cease to be citizen of Zimbabwe one year after he attains his majority unless, on or before the expiry of that period, he has renounced his foreign citizenship in the form and manner prescribed.
> (7)A person who becomes a citizen of Zimbabwe by registration while he is a citizen of a foreign country shall cease to be a citizen of Zimbabwe one year after such registration unless, on or before the expiry of that period, he has renounced his foreign citizenship in the form and manner prescribed.
> (8)A citizen of Zimbabwe of full age who, on l December 1984, is also a citizen of a foreign country shall cease to be a citizen of Zimbabwe one year after that date, unless on or before the expiry of that period, he has renounced his foreign citizenship in the form and manner prescribed.
> (9)Notwithstanding anything to the contrary contained in any other enactment, but subject to subsection (10), any person who was ordinarily resident in Zimbabwe immediately before l December 1984 and who ceases to be a citizen of Zimbabwe in terms of subsection (4), (5), (6), (7) or (8) shall be entitled, on or after the date on which he ceased to be a citizen of Zimbabwe -
>
> (a) to reside in Zimbabwe; and
> (b) to acquire, hold and dispose of movable and immovable property in Zimbabwe; and
> (c) to be indentured as an apprentice or trainee and to enter, practise or engage in any profession, trade, calling or employment in Zimbabwe; and
> (d) to obtain education for himself and his children in Zimbabwe; and

(e) generally, to do all such things as may be done by persons who are ordinarily resident in Zimbabwe.

(10)The Minister may, by order, deprive a person of all or any of his rights under subsection (9) on the same grounds as he could deprive that person of his citizenship, if that person were a citizen of Zimbabwe by registration, and section *eleven* shall apply, *mutatis mutandis*, in respect of an order made in terms of this subsection.

(11)Notwithstanding any other provision of this section, where a person is of unsound mind for the whole or any part of any period during which he may elect to renounce his foreign citizenship in terms of subsection (4), (5), (6), (7) or (8), the period during which he may make the election shall be extended accordingly.

(12) Where he considers that it is necessary or desirable in the case of an individual to do so, and that it will not be contrary to the national interest, the President may, by order, grant such individual an exemption from all or any of the provisions of this section subject to such conditions as he may specify, and may revoke or amend any such exemption".

A proviso was added to section 9(7), as a result of the enactment of section 152(5) of the Electoral Act, 1990 which was regarded to have impliedly amended it with effect from 28 March, 1990.

"(7) …
manner prescribed:

Provided that a person who, at any time between the lst January, 1985, and the 31st December, 1985 -

(a) became a citizen of Zimbabwe by registration; and

(b) was enrolled as a voter on any roll in terms of the Electoral Act, 1979 (No. 14 of 1979);

shall be deemed not to have lost his citizenship of Zimbabwe solely on account of his not having renounced his foreign citizenship in terms of this subsection."

The Citizenship of Zimbabwe Act (Chapter 4:01) renumbered the subsection of that section, with section 9(2) being section 9(1). The rest followed sequentially with the proviso being incorporated in the new section 9(6).

Under the 1984 Regulations, section 2 specifically provided that a person who wished to renounce his foreign citizenship for the purposes of section 9 of the 1984 Act shall make the renunciation in accordance with the provisions of section 2. The intention

of the legislature, as far as renunciation of foreign citizenship in terms of section 9 was concerned, was that it must be in the manner and form prescribed in section 2 of the 1984 Regulations. That method was mandatory for the renunciation of foreign citizenship. Those who complied with section 2 of the 1984 Regulations by renouncing their foreign citizenship had been given a vested right - *Carr* v *Registrar General, supra*.

> The third respondent has admitted in his affidavit that section 9
>
> "affects the lives of people in a fundamental way and calls on citizens to make decisions with far reaching consequences on personal and property rights for both themselves and generations of their descendants".

This would no doubt have applied to the 1984 Act. For such momentous decisions citizens of Zimbabwe who were affected were given from 26 October 1984 until 30 November 1985 for just going before a commissioner of oaths to complete the form prescribed under section 2 of the 1984 Regulations. Yet, Mr *Elliott* has submitted, for the more onerous task of approaching the relevant foreign country and then completing the form prescribed under section 2 of the 2001 Regulations citizens of Zimbabwe, the people affected were given a short period from 6 July 2001 to 6 January, 2002. It is not disputed by Mr *Majuru* that the third respondent had applied his mind to the applicant's affidavits in this application. He also accepted that, if the position was that the third respondent had an opportunity to apply his mind to any extension of the period for renunciation, this Court would be in a position to determine, on review, the reasonableness or otherwise of the third respondent's decision. It is clear from the papers filed in this matter that the third respondent was served with this application on 31 December, 2001 and correspondence on behalf of Levente Petho was sent on 12 November, 2001 with a reminder letter on 28 November, 2001. It follows from this that

the third respondent had more than adequate time until the respondents' Heads of Argument were filed on 8 January, 2002. His response, after the filing of the applicant's supplementary answering affidavit, through Mr *Majuru* is that he has declined any extension of the period. In his Opposing Affidavit the third respondent does not accept that the 6 month period in the 2001 Amendment Act was inadequate. He has done this without dealing with the wide discrepancy of the time given in the 1984 Act for renunciation, with that given under the 2001 Amendment Act. If such a lengthy period was deemed by him to be needed for simply completing a form before a commissioner of oaths under the 1984 Act, it would seem that more time, or at least the same amount of time, would have been required under the 2001 Amendment Act. Also, the third respondent has not disputed the applicant's assertion that a very large number of persons were affected by the 2001 Amendment Act. The first respondent was in a position to inform this Court as to the numbers of persons who had carried out renunciation under the 1984 Regulations and the number of persons that had been processed under the 2001 Amendment Act, till his opposing affidavit was filed but he has not done so. Instead, his attitude is that the number of people affected by the inadequacy of the time within which to renounce is merely speculative. He adds that the idea of wishing to extend the period provided in this amendment is simply to afford persons the opportunity to retain dual citizenship and their right to vote and at the same time to enjoy the protection of both Zimbabwe and a foreign country. This differs from the third respondent, whose sole intention was to create the legal framework for people to renounce effectively their foreign citizenship in favour of Zimbabwean citizenship; that it was not his intention to

disenfranchise anybody, although he accepted that disenfranchisement was a possible consequence for failing to renounce foreign citizenship within the time allocated.

In *R* v *Barlow* (1693) 91 ER 516 (2 Salk. 609), an indictment in terms of a statute had been laid against church wardens for not making a rate to reimburse the constables. An exception was taken to it, that the statute only puts it in their power to do so by the use of the word "may, etc" but did not require the doing of it as a duty, for omitting to do so they were punishable. It was held:

> "…for where a statute directs the doing of a thing for the sake of justice or the public good, the word 'may' is the same as the word 'shall'."

In *Julius* v *Lord Bishop of Oxford* (1880) 5 App.Cas 214(HL) [1874-80] All ER Rep 43, Dr Julius preferred a complaint to the Lord Bishop of Oxford against the Rector of the parish for unauthorized deviations from the ritual of the Church in the communion service and the use of unauthorized vestment, and required the Lord Bishop to issue a commission under the Church Discipline Act to inquire into the complaint. The Lord Bishop declined to issue the commission. The Court of Queen's Bench unanimously issued a writ of mandamus against the Lord Bishop. The Court of Appeal unanimously reversed the Court of Queen's Bench. On appeal the House of Lords unanimously upheld the Court of Appeal. EARL CAIRNS LC said at 222-225,

> "But there may be something on the nature of the thing empowered to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise the power when called upon to do so. Whether the power is one coupled with a duty such as I have described is a question, which, according to our system of law, speaking generally, it falls to the Court of Queen's Bench to decide, on an application for a *mandamus*.
> …
> My Lords, the only other case I will refer to is one which was decided in the Court of Queen's Bench in 1849, *Reg*. v *Tithe Commissioners* (1849) 14 QB 458.

> A power was there given to the Tithe Commissioners in dealing with certain landowners, to confirm agreements for commutation of tithe under certain special circumstances and conditions which I need not refer to at length. The Court held, upon the construction of the whole statute, that if a case occurred, coming within the terms of the statute, the Commissioners were bound to confirm the agreements there mentioned. In delivering the opinion of the Court, Mr Justice COLERIDGE uses these words : 'The words undoubtedly are only empowering, but it has been so often decided as to have become an axiom, that in public statutes words only directory, permissory, or enabling, may have a compulsory force where the thing to be done is for the public benefit or in advancement of public justice'. To the rule thus guardedly expressed there is not, perhaps, much to object… The only axiom Mr Justice COLERIDGE spoke of was, that, under certain circumstances, enabling words might have a compulsory force.
>
> My Lords, the cases to which I have referred appear to decide nothing more than this : that where a power is deposited with a public officer for the purposes of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the Legislature of the condition upon which they are entitled to call for its exercise, that power ought to be exercised, and the Court will require it to be exercised".

In *R* v *Board of Education* (1910) 2 KB165(CA) the local education authority of Swansea continued to pay to teachers in the provided schools at a higher rate than those paid to teachers in a non-provided school. Subsequently, an increase was made in the salaries of teachers in the provided schools only, so the managers of the non-provided school complained to the Board of Education that (1) the local authority had failed to maintain and keep efficient the non-provided school under the Education Acts; (2) the salaries paid by the local education authority are inadequate; (3) the teachers' salaries should be contained in agreements between the local authority and the managers and that in future the school should be maintained by the authority without any discrimination as to salaries between the non-provided school and provided schools; (4) the sums paid to the teachers by the managers and expenses properly incurred by the managers for which provision should have been made by the local authority and that payments should forthwith be made to the managers in respect of those expenses; (5) the Board of

Education should make such orders and grant such other relief as may be necessary to make good the default of the local authority. The Board appointed a barrister to hold an inquiry. He reported that the local authority had regularly earned the governmental grant only through the deficiency in the salaries paid to the teachers in the non-provided school being made good by the managers and so the local authority had failed to maintain and keep efficient the school. The Board decided that there had not been such a failure by the local authority, on the grounds that there was no statutory right on the part of the managers of any particular school to receive any particular scale of salaries, and that it had not been shown that the money provided by the local authority was inadequate for the purposes of maintaining and keeping efficient the schools. LORD ALVERSTON CJ observed in issuing the *mandamus*:

> "It appears to be beyond all question that the Legislature intended that, from the point of view of the teachers, their salaries, and their qualifications, in provided and non-provided schools were to be treated alike, and that there is not the slightest justification for any claim by a local education authority to differentiate between the scale of salaries allowed to the same class of teachers in provided as compared to non-provided schools. ….A local education authority has no power under the Act of 1902 to differentiate in the matter of teachers equally qualified and teaching the same subjects between the salaries paid in provided and non-provided schools as such".

On appeal from the Divisional Court of the King's Bench Division the Court of Appeal agreed with it that the decision of the Board must be quashed and that *mandamus* issued directing the Board to determine the issue in accordance with the law. FARWELL LJ said at 175-182:

> "It is sufficient to state that ever since 1904 or 1905 the Swansea local education authority has persistently asserted its right to prefer provided schools to non-provided, and has refused to pay salaries to the teachers in the latter of the same amount as those paid to teachers in the former, solely and entirely on the ground that the latter are Church schools. It is quite clear, and is now conceded by both the Attorney-General and the Solicitor-General, that this is a contravention of the

Act…the Swansea authority, by their preliminary statement and by their counsel [before the barrister holding the inquiry] contended that they were entitled to prefer the provided to the non-provided schools; they also alleged in their statement that there were special circumstances; but they offered no evidence in support of these allegations, notwithstanding that their attention had been directed to the importance of special circumstances by the letter of the Board of July 31, 1906. The subject matter of the inquiry may be stated thus : Is it true that the Swansea authority refuses to provide salaries on the same scale for the non-provided as for the provided school? If so, is there any and what ground for such refusal? It is quite plain from the preliminary facts and disputes that this is the substance of the question that the Board of Education was requested to answer, and I entirely dissent from the Attorney-General's contention that they were entitled to turn the question put to them into another question so as to evade the real point.

…but the question that the Board have chosen to answer is not that asked, but is a hypothetical question, irrelevant to the point in issue.

…

Then it was contended that, even if this be so, since this Court has no jurisdiction to interfere - the Attorney-General went so far as to say on any ground or in any way whatever. The Solicitor-General qualified the generality of their contention by saying 'unless they have wrongfully given themselves or assumed a jurisdiction that they did not possess'. The Solicitor-General's contention is, in my opinion, the more accurate, but it requires explanation and expansion. The point is of very great importance in these latter days, when so many Acts of Parliament refer questions of great public importance to some Government department. Such department when so entrusted becomes a tribunal charged with the performance of a public duty, and as such amenable to the jurisdiction of the High Court, within the limits now well established by law. If the tribunal has exercised the discretion entrusted to it *bona fide*, not influenced by extraneous or irrelevant considerations, and not arbitrarily or illegally, the Courts cannot interfere; they are not a Court of Appeal from the tribunal, but they have powers to prevent the intentional usurpation or mistaken assumption of a jurisdiction beyond that given to the tribunal by law, and also the refusal of their true jurisdiction by the adoption of extraneous considerations in arriving at their conclusion or deciding a point other than that brought before them, in which cases the Court's have regarded them as declining jurisdiction. Such a tribunal is not an autocrat free to act as he pleases, but is an inferior tribunal subject to the jurisdiction of the King's Bench for centuries, and the High Court since the Judicature Acts, has exercised over such tribunals. In this case the Board, by acting on a wrong construction of the Act, have not exercised the real discretion given to them…

Further, they have by answering a question not put to them, and avoiding any answer to the real question, declined jurisdiction; see judgment of COCKBURN CJ in *Reg.* v *Adamson* (1875) 1 QBD 201. In that case … justices were to issue a summons 'if they shall think fit'. Application was made to justices on a written statement of several witnesses present in Court and ready to be sworn. The

magistrates heard the statements and refused the summons without giving any reasons. COCKBURN CJ at 204 says this: 'If I could see my way to the conclusion that the magistrates had considered this evidence and given a decision upon it, I should certainly say that the Court could not act upon the matter further, or send the case back to the magistrates; but the Solicitor-General has called our attention to the evidence of such a description that I cannot resist the conclusion that the magistrates must have acted upon a consideration of something extraneous and extra-judicial which ought not to have affected their decision, and which, it seems to me, was the same as declining jurisdiction'. Then a little lower down he says: 'I think it very probable they thought that they were doing what was right, and that they were influenced by their distaste for the views and doctrines promulgated at the meeting, and thought the sooner the matter was buried in oblivion the better. But these are considerations which ought not to have influenced them at all, and under the circumstances I think they must be taken to have declined jurisdiction'.

…

I apply that to the present case and say that, if the Board did know the law to be as it is now admitted to be, they must have acted upon a consideration of something extraneous and extra-judicial which ought not to have affected their decision, and this was suggested by the Attorney-General when he said that the Board were in a difficulty and that questions of policy were involved. If this means that the Board were hampered by political consideration, I can only say that such considerations are pre-eminently extraneous, and that no political consequence can justify the Board in allowing their judgment and discretion to be influenced thereby. Further, if the Board did not proceed on the mistaken assumption of the law, but deliberately disregarded it either on the question of the construction of the Act or on the entire want of evidence, then I should be of the opinion that they had been guilty of misconduct so flagrant as to make it impossible for their decision to stand. The Board cannot disregard and proceed in defiance of facts: suppose the facts to be that the authority paid nothing, but that the non-provided schools were supported by voluntary subscriptions only, a finding by the Board that the authority maintained and kept efficient the schools would be perverse to such an extent that the Court would infer that they must have been influenced by extraneous and therefore improper considerations, and had not, in fact, exercised their discretion. In the present case the mere fact that the Board have not answered the question put, or any reasonable equivalent of it, but have stated a new and irrelevant question of their own, is sufficient to show that they have not exercised the discretion given them".

In *Padfield* v *Minister of Agriculture* [1968] 1 All ER 694 (HL) members of the south east regional committee of the Milk Marketing Board made a complaint on 4 January, 1965 to the Minister that the Board's terms and price of the sale of milk to it did not take fully into account variations between producers and the cost of bringing milk to

a liquid market, and so asked the Minister to refer the complaint to a committee of investigation. In effect, the complaint was that the price differential worked unfairly against the producers in the popular south east region, where milk was more valuable, the cost of transport was less and the price of land was higher. The matter had been raised on many occasions previously with the Board. The Minister declined, on 2 March, 1965, to refer the complaint to the committee of investigation. In a letter dated 1 May 1964 written by the Ministry (before the letter of complaint) its attitude was indicated. The Minister in his affidavit referred to this letter dated l May 1964 without disapproval. The Divisional Court of the Queen's Bench granted an order of *mandamus* which was set aside by the Court of Appeal (LORD DENNING MR dissenting). On appeal to the House of Lords the appeal was upheld and the decision of the Court of Appeal reversed. In the letters dated l May 1964 and 23 March 1965, the Minister gave reasons which included that (in effect) his main duty had been to decide the suitability of the complaint for such investigation, but it was one which raised wide issues so he did not think it suitable for such investigation, as it could be settled through arrangements available to producers and the Board within the milk marketing scheme; that he had unfettered discretion, and that if the complaint was upheld he might be expected to make a statutory order to give effect to it. LORD REID said at 700-701:

> "The first reason which the Minister gave in his letter of Mar. 23, 1965 was that the complaint was unsuitable for investigation because it raised wide issues. Here it appears to me that the Minister has clearly misdirected himself… In my view it is plainly the intention of the Act of 1958 that even the widest issues should be investigated if the complaint is genuine and substantial, as this complaint certainly is.
>
> …
>
> Paragraph 3 of letter May 1, 1964 refers to the possibility that if the complaints were referred and the committee were to uphold it, the Minister 'would be expected to make a statutory order to give effect to the committee's

recommendations.' If this means that he is entitled to refuse to refer a complaint because if he did so he might find himself in an embarrassing situation, that would plainly be a bad reason.

…

It was argued that the Minister is not bound to give any reasons for refusing to refer a complaint by the committee, if he gives no reasons his decision cannot be questioned, and that it would be very unfortunate if giving reasons were to put him a worse position. I do not agree, however, that a decision cannot be questioned if no reasons are given. If it is the Minister's duty not to act so as to frustrate the policy and objects of the Act of 1958, and if it were to appear from all the circumstances of the case that has been the effect of the Minister's refusal, then it appears to me that the court must be entitled to act.

LORD UPJOHN said at 777-719:

"My Lords, on the basic principles of law to be applied there was no real difference of opinion, the great question being how they should be applied to this case. The Minister in exercising his powers and duties conferred on him by statute can only be controlled by a prerogative order which will only issue if he acts unlawfully. Unlawful behaviour by the Minister may be stated with sufficient accuracy for purposes of the present appeal (and here I adopt the classification of LORD PARKER CJ, in the divisional court): (a) by an outright refusal to consider the relevant matter; or (b) by misdirecting himself on points of law; or (c) by taking into account some wholly irrelevant or extraneous matter or (d) by wholly omitting to take into account a relevant consideration…

In the circumstances of this case which I have sufficiently detailed for this purpose it seems to me quite clear that *prima facie* there seems to be a case for investigation by the committee of investigation. As I have said already it seems just the type of situation for which the machinery of s.19 was set up, but that is the matter for the Minister. He may have good reasons for refusing an investigation, he may have indeed good policy reasons for refusing it though that policy must not be based on political considerations which as FARWELL LJ said in *R* v *Board of Execution, (supra)* are pre-eminently extraneous. So I must examine the reasons given by the Minister, including any policy on which they may be based, to see whether or not he has acted unlawfully and thereby overstepped the true limits of his discretion, or as it has been frequently said … exceeded his jurisdiction.

…

Summing up the matter shortly, in my opinion every reason given shows that the Minister has failed to understand the object and scope of s.19 and of his functions and duties thereunder, which he has misinterpreted and so misdirected himself in law.

…

My Lords, I would only add this… a decision of the Minister stands on quite a different basis; he is a public officer charged by Parliament with the discharge of a public discretion affecting Her Majesty's subjects; if he does not give any reason

> for his decision it may be, if circumstances warrant it, that the court may be at liberty to come to the conclusion that he had no good reason for reaching that decision and directing that a prerogative order to issue accordingly."

Mr *Elliott's* submission is that the third respondent is acting in a grossly unreasonable manner in not extending the period for renunciation. It is accepted that section 19(1) of the Citizenship of Zimbabwe Act (Chapter 4:01) provides that the Minister may extend the period specified in this Act within which any act may be or is required to be done, whether before or after the period has expired. It is not disputed that, by virtue of section 19(1) the Minister is "a public officer charged by Parliament with the discharge of a public discretion" affecting persons in Zimbabwe. He has, in his opposing affidavit merely averred that no person has made a proper and formal application for an extension and that he did not believe the 6 month period was inadequate. The third respondent has had this application, as well as the letters written in November, 2001 on behalf of Levente Petho, but has been content not to give any reasons, besides indicating his belief that 6 months is adequate. His failure to give reasons for not extending the period of renunciation thus leaves this Court at liberty to come to the conclusion that he had no good reasons for reaching that decision. In the circumstances of this case, the third respondent has had ample opportunity to apply his mind to the issue and his negative response, without cogent explanation for the discrepancy between the time given under the 1984 Act and that given under the 2001 Amendment Act, leaves this Court little option but to conclude that he has acted contrary to his duty under the Act. His duty is not to act so as to frustrate the objects of the Act. I am satisfied that his act is grossly unreasonable in not extending the period in terms of section 19(1).

In *Chirwa v Registrar-General* 1993(1) ZLR 1 (H) the applicant had obtained from this Court an order declaring him to be a citizen of Zimbabwe. The respondent had secured possession of the applicant's passport, refusing to return it on the grounds that this Court's declaration was not binding on him as he was not a party, and that the granting of a passport is a privilege, the holding of which is at the pleasure of the Executive. The applicant sought an order from this Court requiring the respondent to deliver his passport to him. In granting the order, it was held that the respondent had failed to apply a reasonable, fair and just procedure in refusing to give him his passport and that, for the purpose of exercising his constitutional right of freedom of movement, including the right to travel, a passport was a necessity. The respondent had not shown that he had any right or power to withhold the passport of a citizen. In that case reference was made to a number of decisions, including *Kent* v *Dulles* 357 US 116, 2L Ed 2d 1204 (1958) and *Satwant Singh* v *Assistant Passport Officer* (1965) 3 SCR 523. In *Kent* v *Dullas, supra*, it was held that the right to travel is part of the liberty of which the citizen cannot be deprived without due process under the Fifth Amendment of the United States Constitution. A passport was necessary to travel abroad and it is also an aid in establishing citizenship for purposes of re-entry to the United States. Since the exercise by an American citizen of an activity included in constitutional protection - the need of a passport, the US Supreme Court will not readily agree that Congress gave the US Secretary of State unbridled discretion to grant a passport or withhold it. The issuance of the passport carries some implication of intention to extend to the bearer diplomatic protection. But that function is subordinate to its crucial function, being control over exit. In *Satwant Singh* v *Assistant Passport Officer, supra*, the Indian Supreme Court

held that the passport serves diverse purposes : it is a request for protection, a document of identity, *prima facie* evidence of nationality, to-day it not only controls exit from the country to which one belongs, but without it, with few exceptions, it is not possible to enter another country. The passport has become a condition of free travel. The want of a passport, in effect, prevents a person leaving India. "Liberty" in the Indian Constitution bears the same comprehensive meaning given to the expression 'liberty" in the US Fifth Amendment. Since right to travel is part of the personal liberty of a person, he cannot be deprived of this right except according to the procedure established by law.

On appeal in *Registrar-General* v *Chirwa* 1993(1) ZLR 241 (S), the Supreme Court in dismissing the appeal, held that this Court's order declaring the respondent a citizen of Zimbabwe concerned the status of a person and so was a judgment *in rem*, binding on all persons, whether or not they were parties to the original proceedings. The decision to retain the passport by the appellant was simply because, in his opinion, the applicant was not a citizen - a conclusion of his which refused to take account of the binding nature of the High Court's order declaring the respondent to be a citizen of Zimbabwe. The Supreme Court upheld this Court's order requiring the appellant to return the respondent's passport.

It was also submitted by Mr *Elliott* that the first respondent insists that all persons born in Zimbabwe of one or both foreign-born parents, must renounce any entitlement or claim which such Zimbabwean born citizens may have to that foreign country's citizenship in accordance with that country's laws. This has not been refuted by Mr *Majuru* on behalf of the first respondent.

It is apparent that the specific wording in section 9, in its subsections (3), (4), (5) by deliberately using "acquires", and in its subsections (6) and (7) by deliberately using "becomes", demonstrates that the clear intention of the legislature is to prevent a citizen of Zimbabwe having another citizenship. It is the "acquisition" and "becoming" of a foreign citizenship that is required to be renounced so as to retain one's citizenship of Zimbabwe. These provisions in subsections (3), (4), (5), (6) and (7) are not concerned with any entitlement or claim to foreign citizenship. The 1984 Regulations, in section 2(1), speak of a "person who wishes to renounce his foreign citizenship for purposes of section 9 of the Act" must do so by completing the form in the schedule sworn before a commissioner of oaths and to submit it with any valid foreign passport. He is asked to swear in the form, under oath, that he is "also a citizen or national" of a foreign country "by birth/descent/naturalization/registration/marriage/other". Under section 2(2) the Registrar-General must return, without delay, the foreign passport to the foreign government concerned. The Act and the 1984 Regulations are concerned with citizens of Zimbabwe who have actually acquired or become foreign citizens. There is no requirement under the 1984 Regulations for citizens of Zimbabwe to renounce their claim or entitlement to a foreign citizenship. The Memorandum to the Citizenship of Zimbabwe Bill 1984 stated:

> "Zimbabwean citizens who voluntarily acquire foreign citizenship after the fixed date will immediately and automatically cease to be citizens of Zimbabwe. All other Zimbabwe citizens who have or acquire foreign citizenship - that is…by marriage or by some involuntary act… - will have one year within which to renounce their foreign citizenship in the form and manner prescribed in the regulations, failing which they will automatically cease to be citizens of Zimbabwe"

The Memorandum to the Citizenship of Zimbabwe Amendment Bill 1994 (which was not enacted), which in clause 4 sought to amend section 9, stated:

> "This claim will alter the requirements of the section in several respects. In the first place, it will prohibit all citizens, whether by birth, descent or registration, from voluntarily acquiring the citizenship of a foreign country; if they do, they will immediately lose their Zimbabwean citizenship. Secondly, persons who hold foreign citizenship when they become citizens by registration will be required to forego their foreign citizenship within a year - and their renunciation of foreign citizenship will have to be made according to the law of the foreign country concerned, not according to Zimbabwean law as at present…People who have already made a declaration renouncing their foreign citizenship in the form and manner prescribed under the Act will not be obliged to make a fresh renunciation".

Similarly the Memorandum to the Citizenship of Zimbabwe Amendment Bill, 2001 states:

> "The effect of this Bill is to amend section 95 so that now a person who wishes to retain Zimbabwean citizenship will have to renounce his foreign citizenship in accordance with the law of that foreign country…".

The 2001 Regulations, in section 2, provide that a "person who wishes to make a declaration confirming the renunciation of his foreign citizenship for the purposes of section 9 must comply with that section. Under section 2(c) (before it was amended) the person is also required to submit to the Registrar-General any valid foreign passport issued to him. The form in the Schedule, that must be sworn before a commissioner of oaths, requires him to indicate that he "was also a citizen or national of" a foreign country "by birth/descent/registration".

Further, the first respondent asserts that citizens of Zimbabwe by birth, one or both of whose parents are foreign-born, do not necessarily have to submit a formal application but merely prove that their parents originate from a foreign country in which case they are automatically entitled to that foreign country's passport as its citizen. The

first respondent gave as examples countries such as Britain, Uganda, Mozambique, Botswana and South Africa by attaching photo-copies of one page (page 3) about British law, one page (page 14) from the Constitution of Uganda, three pages (pages 12, 14 and 16) from the Nationality law of Mozambique; one page from the Citizenship law of Botswana and two pages (pages 9 and 10) of the South African Citizenship Act, 1995. These attachments can only be of assistance if all the relevant pages were made available. Despite this, as regards British law, if both parents are British citizens otherwise than by descent, any child born outside Britain on or after 1 January, 1983 will become a British citizen automatically at birth. If you are a British citizen by descent or either spouse is a British citizen by descent, but neither of them is a citizen otherwise than descent, any child born outside Britain will not be a British citizen at birth, but the child will have an entitlement to be registered at the Home Offices as a British citizen in certain circumstances. In the case of Uganda, it is true that Article 10(b) of the Constitution of Uganda does indicate that every person is a citizen of Uganda if he was born in or outside Uganda and one of his or her parents or grandparents was, at the time of his or her birth, a Uganda citizen by birth. But if one looks at Article 15(1) - which was not in the attachments - it provides that a Ugandan citizen shall not hold the citizenship of another country concurrently with Ugandan citizenship. Article 15(4) states that a Ugandan citizen who loses his Ugandan citizenship as a result of the acquisition or possession of a foreign citizenship shall, on renunciation of his foreign citizenship again become a Ugandan citizen. In Mozambique, although Article 14 provides that children born abroad before independence of a Mozambican mother and father who took part in the liberation struggle are citizens of Mozambique, Article l9 indicates that children born outside

Mozambique to a Mozambican mother or father are Mozambican citizens provided they expressly renounce on their own behalf, if above 18 years, or through their parents or guardian if younger any foreign nationality to which they may be entitled. The Botswana law provides in section 5(1) that a person born outside Botswana to a father who is a Botswana citizen or in the case of a person born out of wedlock whose mother is a Botswana citizen, but section 5(2) requires that such a person be a citizen at the commencement of that Act. But the Constitution of Botswana, at independence on 30 September 1966, in section 22 provided that a person born outside of Botswana on or after 30 September 1966 shall become a Botswana citizen at the date of his birth if on such a date his father was a Botswana citizen, with the proviso that he shall not become a Botswana citizen if at the time of his birth he became a citizen of a foreign country. As for South Africa, before the 1995 Act the South African Citizenship Act, 1949, in section 6, provided that a person born outside South Africa on or after 2 September 1949 shall be a South African citizen if his father was, at the time of his birth, a South African citizen by birth, registration or naturalization and that the person's birth was registered within one year at a South African Consulate. The 1995 Act, in section 3(1), states that any person born outside South Africa on or after the commencement of that Act, one of whose parents was at the time of his birth a South African citizen, and whose birth is registered in terms of the Births and Deaths Registration Act 1992, shall be a South African citizen. Section 9 makes provision for loss of South African citizenship when a foreign citizenship is acquired.

It is abundantly clear from the foregoing that, except for a solitary British provision touching on citizenship, none of the examples referred to by the first

respondent support what he asserted. It appears that, without any basis whatsoever, the first respondent made it a presumption that citizens of Zimbabwe by birth born to foreign-born parents, are foreign citizens or have an entitlement or claim to foreign citizenship. None of the countries in his examples grant automatic citizenship to children born abroad to foreign-born parents. The old adage that a little knowledge is dangerous is appropriate here. In terms of section 25(2) of the Civil Evidence Act only a person who in the opinion of the court is suitably qualified shall be qualified to give expert evidence on foreign law. It would seem that the rule in most countries is against dual citizenship. The first respondent if he has been demanding from Zimbabwe born citizens, one or both of whose parents were born in a foreign country that they renounce their foreign citizenship, then he is flagrantly acting *ultra vires* section 3(2) of the Citizenship of Zimbabwe Act. His conduct would certainly be unlawful. The first respondent, a mere public functionary, seems to have arrogantly and unashamedly arrogated to himself the functions of the legislature and the powers of the judiciary. Section 21 of the Citizenship of Zimbabwe Act provides that the use of a current Zimbabwean passport or a current foreign passport contrary to its provisions is an offence. It is for the police and the Attorney-General to determine whether or not a person has committed an offence in terms of section 21. The attitude of the first respondent shows that he has usurped those functions and that he regards it as being his responsibility, since he has taken it upon himself to require Zimbabwean-born citizens of foreign born parents to renounce their foreign citizenship, as if they would have been committing an offence under section 21. In his capacity as Registrar-General, it is not his responsibility to grant citizenship under the Citizenship of Zimbabwe Act. That Act falls under the administration of the Minister

of Home Affairs. Section 11 empowers that Minister, with the discretion to deprive a citizen of Zimbabwe by registration of his citizenship and section 9(9) also gives him a discretion relating to certain rights of those citizens of Zimbabwe that ceased to be citizens.

In *Carr* v *Registrar-General, supra,* the Supreme Court castigated the first respondent when MUCHECHETERE JA observed at 10-11:

> "Faced with what in a way was 'a mission impossible', counsel for the respondent had no option but to concede that the present state of the law is that being contended for by the applicant and her counsel. For, as already indicated, he could not point to any provisions which gave the respondent the power to impose the conditions he sought to impose on the applicant. The function of the respondent, and indeed all public servants, is to implement the law as it is and not, as in this case, as he thinks it ought to be. And, as already indicated, any change in the law must be made by Parliament and not by administrative decree of the respondent".

Since filing his Opposing affidavit on 3 January, 2002 in this matter, in *Morgan Tsvangirayi* v *Registrar-General* HH 22/2002 MAKARAU J on 18 January, 2002 ruled that the first respondent had been in contempt of the interim relief granted by her in Case No 185/2002 on l9 January, 2002 and so refused to hear him. In *Combined Residents Association of Harare & Anor* v *Registrar-General & Ors* HH 24/2002, CHINHENGO J observed that the first respondent was "more than just *prima facie* in contempt of the Supreme Court Order" of 7 December, 2001 in *Combined Harare Residents Association & Anor* v *Registrar-General* Case No SC 348/01.

In *Movement for Democratic Change* v *Registrar-General* HH 71/2001 CHINHENGO J observed at 10:

> "That is the design of the Electoral Act and that Act must be given such broad and purposive interpretation as would enhance the holding of elections in a truly democratic fashion. The Registrar-General must always, I think, realise that it is far more important that an election is all-inclusive, fair and transparent than that

> he should be permitted to hide behind the skirt of legal technicalities to avoid conducting elections in the spirit of the enabling legislation and the morality and values which pervade at all elections".

I find that this is the approach that should have commended itself to the respondents. I can see no ground for not making an order and declaration sought. Accordingly there will be an order, with costs to be paid by the first and third respondents, that the third respondent shall, within seven days of this Order, in terms of section 19(2) of the Citizenship of Zimbabwe Act (Chapter 4:01) extend the period stipulated in section 9(7) of the Act from 6 January, 2002 to 6 August, 2002 or such later date as he may decide upon. If he fails to do so, the period stipulated in section 9(7) of the Act is extended from 6 January, 2002 to 6 August, 2002. Also, it is declared (a) that the provisions of section 9(7) of the Act do not apply to citizens of Zimbabwe by birth in terms of section 4 or 5 of the Constitution of Zimbabwe either of whose parents were born in a foreign country except to the extent that any such citizen of Zimbabwe actually holds a foreign citizenship; (b) that the provisions of section 2 of the Citizenship of Zimbabwe (Renunciation of Foreign Citizenship) Regulations, 2001 apply to a citizen of Zimbabwe in terms of section 4 or 5 of the Constitution either of whose parents were born in a foreign country only if a citizen actually holds a foreign citizenship, and not to a citizen of Zimbabwe who has an entitlement or claim to a foreign citizenship; (c) that a person that was a citizen of Zimbabwe on 31 December, 1985 who has ceased to be a citizen of Zimbabwe in terms of section 9(7) of the Act is since 31 December, 1985 regarded as permanently resident in Zimbabwe and shall be qualified for registration as a voter on the common roll in terms of paragraph 3(1) of Schedule 3 of the Constitution.

Gill, Godlonton & Gerrans, applicant's legal practitioners
Civil Division of the Attorney General's Office, respondents' legal practitioners