

**EVALUATING THE EXTENT TO WHICH ILLEGAL IMMIGRANTS TO ZAMBIA  
CAN ENJOY THEIR HUMAN RIGHTS.**

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An Obligatory Essay submitted to the School of Law of the University of Zambia in partial  
fulfillment of the requirements for the award of the Degree of Bachelor of Laws (LLB).

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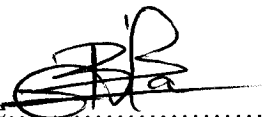
May 2012

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I Raphael Chilala, of computer number 29052475, do solemnly declare that this work entirely represents my own findings and that I have not in any respect used any work produced or submitted by any person to University of Zambia or any other institution without acknowledging it.

I therefore, bear the absolute responsibility for the contents, errors, defects and any omissions herein.

Date 11.05.12

Signature 

THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

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Entitled:

**EVALUATING THE EXTENT TO WHICH ILLEGAL IMMIGRANTS TO ZAMBIA  
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## **ABSTRACT:**

The study is concerned with establishing the extent to which illegal immigrants to Zambia can and are allowed to enjoy their human rights. Every human being, inclusive of an illegal immigrant, is entitled to enjoy human rights simply by being human, regardless of their immigration status in the country. It must be noted that human rights are not a provision of the law. Therefore, even if an individual violates the law, he or she is still entitled to enjoy human rights with qualified limitations. Illegal immigrants are therefore, entitled to continue enjoying their human rights, subject to certain limitations despite their immigration status.

However, in practice illegal immigrants' enjoyment of human rights is limited due mainly to administrative limitations. The Immigration and Deportation Act No. 18 of 2010 (the Act) requires immigration officers to adopt a human rights based approach and culture in their duties to control immigrants. Despite this, the human rights and circumstances under which the enjoyment of human rights can be restricted under the Act are not clearly stated thereby giving room for Immigration Officers to abuse their authority. The abstract nature of the human rights provisions in the Act makes it difficult for illegal immigrants to challenge immigration officers for human rights violations. Nevertheless, certain programmes have been put in place to promote the rights of illegal immigrants, although they are inadequately explicit for the target group to invoke them when in need.

Therefore, there is need for the clearly spelt out administrative programmes and comprehensive legal provisions of human rights in the immigration laws to enhance effective promotion of human rights enjoyment for illegal immigrants. The rights of illegal immigrants and restrictions thereof should clearly be spelt out in the immigration law for Officers to respect them.

## **ACKNOWLEDGEMENTS:**

My profound gratitude to God Almighty for His grace and His mercies, without which all the people that have played a part either in person or materially in my successes would not have done so.

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**DEDICATIONS:**

For my sons: Chibomba and Munamuchinga.

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**LIST OF ABBREVIATIONS AND ACCRONYMS**

- 1. DOI.....Department of Immigration
- 2. IOM.....International Organisation for Migration
- 3. ICCPR.....International Covenant for Civil and Political Rights
- 4. UDHR.....Universal Declaration of Human Rights
- 5. CAT.....Convention Against Torture
- 6. ICESCR..... International Covenant on Economic Social and Cultural Rights
- 7. ACHPR..... African Charter on Human and People’s Rights

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## **0.0: GENERAL INTRODUCTION TO THE STUDY:**

The old Zambia immigration law<sup>1</sup> was recently repealed and replaced with the new immigration and Deportation Act<sup>2</sup> to provide for, inter alia, a human rights based approach and culture to immigration control activities. The Department of Immigration (DOI) is responsible for enforcing the immigration laws in Zambia through such activities as arrests, prosecutions, removals and deportations. Given these immigration control activities, one would not envisage how immigration officers would employ a human rights based approach and culture when dealing with illegal immigrants bearing in mind that such immigrants entered the country irregularly.

The study establishes what is meant by a human rights based approach and culture to immigration control by looking at the rights of illegal immigrants and the extent to which they can enjoy their rights regardless of their immigration status in the country. The study further establishes the measures that the DOI, being responsible for enforcing immigration law, has put in place to promote respect for human rights in the light of both international and national obligations that Zambia has towards the promotion and protection of human rights. Furthermore, the study makes suggestions to enhance the promotion of respect for human rights in the enforcement of immigration laws.

## **CHAPTER ONE: INTRODUCTION TO THE RESEARCH:**

### **1.0: Introduction:**

This chapter introduces the research topic and generally gives an overview of what the study is all about. It deals with the basic issues of study including matters like an abstract of the study;

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<sup>1</sup> Immigration and Deportation Act, Cap. 123 of the Laws of Zambia

<sup>2</sup> Immigration and Deportation Act no. 18 of 2010

statement of the problem; purpose of the study; significance of the study and further outlines the operational definitions of the study as well as research methodology. The chapter also outlines the entire research in terms of chapter layout and briefly discusses what each chapter is all about before it concludes.

### **1.1: Statement Of The Problem:**

The movement of people across international borders has been in existence since time immemorial. People move for various reasons ranging from seeking ‘greener pastures,’ to asylum in the destination country. Some of the illegal immigrants may be ex-combatants who escape from persecution and possible prosecution in their country. The various causes of migration are generally classified as either push or pull factors.

Some migrant travellers use legal entry ports while others use unlawful means of entry and hence become illegal immigrants. There are various reasons for illegal immigration. However, for whatever reasons, illegal immigration has a negative impact on many political, economic, social and ethical issues of the general citizenry of the destination country. Nkombo Kalima<sup>3</sup> argues that illegal immigrants affect the performance of the country’s economy in the sense that the increased presence of illegal immigrants in any country affects the employment levels, education, health and general standard of living.

Therefore, illegal immigration, if uncontrolled, can cause a lot of hardships on the citizens of the destination country as already pointed out above. Furthermore, illegal immigrants may expose themselves to other dangers such as being intercepted and deported, or expose themselves to

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<sup>3</sup> Nkombo M Kalima, “ the impact of illegal immigrants on Zambia’s Socio-economic expansion, vis-à-vis General living conditions”, (an obligatory essay submitted to the School of law, Unza in partial fulfillment for the award of a Bachelor of Laws degree, 2006), 40

trafficking and sexual exploitation thereby increasing exposure to contracting HIV/AIDS because of desperation. Given the consequences of illegal immigration, the need to control it to protect the interests of the society cannot be over emphasised.

In Zambia, the Department of Immigration (DOI) is charged with the responsibility of regulating the movement of persons across international frontiers and controls the stay of those already in the country, to maintain security. While it is absolutely necessary to regulate and control immigration, there is need for the DOI to adopt methods of immigration control which do not only satisfy its mandate under the enabling Act but also serve to promote the respect of human rights needs of the immigrants in general and those who enter the country in contravention of the immigration law in particular.

Zambia is a signatory to and has ratified a number of human rights instruments which provide for inter alia, non- discriminatory application of laws to persons regardless of their national status. The Zambian Constitution also does provide for this under **Part III**. It is, therefore, important to ensure that immigration control in Zambia is done in such a way that it promotes a culture of human rights in its approach. It is important to mention that it is not enough to provide for such an approach in the law if the persons to be affected are not able to enjoy the rights provided for.

The study therefore, seeks to identify the relevant rights which are affected by immigration control and establish the extent to which such rights can be enjoyed by illegal immigrants.

### **1.2: Purpose Of Study:**

Illegal immigrants are human beings who enter the country through irregular means which are obviously not lawful. However, they are still entitled to enjoy their fundamental rights. The study, therefore, aims at establishing the rights of illegal immigrants and the extent to which they



are able to enjoy them. The study further establishes the measures that the DOI has put in place to promote illegal immigrants' human rights and show the effectiveness of such measures in promoting the human rights of illegal immigrants. Furthermore, the study analyses the effectiveness of the measures in place for promoting the human rights of illegal immigrants and suggests of ways of realizing a culture of human rights based approach in immigration control.

### **1.3: Significance Of The Study:**

The research comes at time when Zambia is experiencing some meaningful progress in economic development especially in the mining and tourism sectors. The growth in the mining industry, tourism and other sectors of the economy coupled with the middle income status has made Zambia very attractive for those seeking '*greener pastures*'. Furthermore, the stable political situation and the hospitality of the *Zambian* people make Zambia a preferred destination country for foreigners to migrate to some of whom are doing so using illegal means. As indicated above, illegal immigration requires checking and controlling to maintain sustainable socio-economic well being of the nation.

If this illegal migration is not checked, *Zambians* may not be able to reap the fruits of this development due to unplanned for and unfair competition for social services and other requirements from illegal immigrants who if unchecked could make it difficult for government to adequately plan for social services of the nation. The need for effective control of migration is absolutely necessary to ensure security of the nation.

However, while immigration control is important and necessary, the control activities of the DOI should take a human face to ensure that the rights of illegal immigrants are protected and

promoted while ensuring that the rights of citizens are equally observed. It is important to note that the fact that a foreigner has entered the country in contravention of the immigration law does not make him or her less human than those that followed the right channels to enter the country and the citizens as well. Therefore, there is need to observe minimum standards of respect for human rights of illegal immigrants which they deserve by virtue of being human when the DOI is exercising its control duties.

The study, therefore, helps to establish the rights of illegal immigrants and how these rights can be enjoyed by these persons. It will further suggest ways through which the promotion of human rights in immigration control duties can be enhanced.

#### **1.4: Operational Definitions:**

- **Illegal immigrant:** means a foreigner who is in Zambia in contravention of the Act<sup>4</sup> and includes a prohibited immigrant.<sup>5</sup>
- **Immigration control:** involves the regulation of the movement of people across international frontiers and includes activities such as arresting, removing, detaining and deportation of illegal immigrants in order to safeguard the interests of the citizens of the country. It also includes regularising certain illegal immigrants by placing them on permits to either wind up their activities and leave the country on their own, or to remain in the country for a specified duration and for specific reasons.
- **Arrest:** is the depriving of someone “... of his liberty by some lawful authority, for the purpose of compelling his appearance to answer a criminal charge, or as a method of execution.”<sup>6</sup> This arrest may be effected in either of the following ways:

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<sup>4</sup> Act No. 18 of 2010

<sup>5</sup> Act No. 18 of 2010, Section 2

1. with a warrant: a forcible restraint or seizure resulting in keeping a person in custody which is made under authority of a writ issued to direct a law enforcer to arrest, search or seize another person's property.<sup>7</sup>

2. without a warrant: is the taking of a person into custody without a valid warrant or a legal arrest based on probable cause of perpetrating a felony.<sup>8</sup>

- **Removal**: is defined as the removing of an illegal immigrant by an immigration Officer, on the order of Director General and does not include deportation.<sup>9</sup>
- **Deportation**: means removing or causing to be removed an illegal immigrant from Zambia, by the Minister, or detaining an illegal immigrant in accordance with the Act.<sup>10</sup>
- **Human Rights**: are defined as the "...fundamental rights, which empower human beings to shape their lives in accordance with liberty, equality and respect for human dignity."<sup>11</sup>

#### **1.5: Research Questions:**

1. What is meant by human rights based approach to immigration control?
2. What rights are illegal immigrants entitled to enjoy in Zambia?
3. When such rights are violated particularly in cases of deportation and removal, are there any remedial programs in place to pre-empt violation?
4. Are the powers of the DOI under *Sections 6, 8, 9, and 18* as altered by the new Act consistent with the human rights based ideals on immigration control?

#### **1.6: Methodology:**

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<sup>6</sup> Mick Woodley, *Osborne's Concise Law Dictionary*, 11<sup>th</sup> Edn, (London: Sweet & Maxwell, 2009), 37

<sup>7</sup> Brian A. Garner, *Black's Law Dictionary*, 8<sup>th</sup> Edn, (West: Thomson Group, 2004), 117 & 1616

<sup>8</sup> Garner:117

<sup>9</sup> Act No. 18 of 2010, Section 2

<sup>10</sup> Act No. 18 of 2010, section 2

<sup>11</sup> Manfred Nowak, *Introduction to the International Human Rights Regime*, (Leiden: Martinus Nijhoff Publishers, 2003),1

The study was carried out through the black letter law research as well as field research in form of personal interviews and observations to obtain optimum information.

It must be emphasised that most of the responses to the research questions as outlined above were obtained from the Legal and Investigations Wings of both the DOI Headquarters and the Southern Province from which information on the general practice of the DOI in relation to the treatment of illegal immigrants was also observed. Furthermore, library research concerning the questions of human rights standards and state obligations in general with regard to human rights protection and promotion was obtained.

### **1.7: Outline Of Chapters:**

The study is divided into five chapters as follows:

#### **Chapter 1: Introduction to the Research**

This chapter introduces the research topic and generally gives an overview of what the study is all about. It deals with the basic issues of study including matters like an introduction of the study; statement of the problem, significance of the study, operational definitions and research methodology. Chapter one further outlines the chapters of the study and briefly indicates what each chapter is all about.

#### **Chapter 2: Constitution And International Human Rights Provisions: An Overview**

This chapter discusses an overview of human rights provisions under the constitution and international Human Rights instruments. It will establish international human rights standards and how they can be used to protect the rights of illegal immigrants. This chapter will also

discuss, by way of examples, some of the short-comings of the repealed Act<sup>12</sup> in the promotion of human rights and give an indication of how the new Act<sup>13</sup> will attempt to deal with them.

**Chapter 3: Identified Rights of Illegal Immigrants and Limitations to Enjoying Them:**

Despite being unlawfully in the country, illegal immigrants still possess rights which must be respected even if they have violated the law. This chapter identifies these rights and seeks to establish the extent to which the illegal immigrants are allowed to enjoy them. The chapter also brings to the fore the practices of the DOI vis-à-vis the handling of illegal immigrants as observed and found out from the relevant identified authorities.

**Chapter 4: Available Measures aimed at promoting the Rights of Illegal Immigrants**

This chapter evaluates the measures which have been put in place to promote the rights of illegal immigrants and establish whether or not they are effective. It discusses how issues of permits, for instance, are handled and whether an illegal immigrant can demand to be placed on a permit as a right.

**Chapter 5: Conclusion and Recommendations:**

This chapter discusses the general conclusion of the study by giving the general synopsis of the extent to which illegal immigrants to Zambia enjoy their rights. It also discusses general recommendations on how best illegal immigrants’ rights can be promoted and protected.

**1.8: Conclusion:**

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<sup>12</sup>, Cap 123 of the Laws of Zambia(repealed)

<sup>13</sup> Act No. 18 of 2010

This chapter has discussed the gist of the study bringing forth, *inter alia*, the statement of the research problem, significance of the study and research methodology as well as the outline of the chapters of the study providing under each chapter a synopsis of what each chapter discusses. Among other things, this chapter has discussed the need to observe, respect, protect and promote the fundamental human rights of illegal immigrants as the DOI carries out their immigration control activities. It has brought out the fact that human rights are not given as charity but that they are entitlements due to every human being, including illegal immigrants, by virtue of being human. Therefore, the fact that a foreigner is illegal in Zambia does not make them less human than others, as human rights are not a provision of the law.

The next chapter is an overview of the various human rights provisions of both the International human rights instruments and state obligations of the member states as well as constitutional human rights provisions which every individual is entitled to. Special emphasis is given to the non-discriminatory provision of the constitution so as to show that even foreigners are entitled to enjoy certain rights in Zambia. Further under this chapter, the relevant inadequacies of the repealed Act<sup>14</sup> will be discussed by way of examples and show how the new Act<sup>15</sup> attempts to address them.

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<sup>14</sup> Cap 123 of the Laws of Zambia(repealed)

<sup>15</sup> Act No. 18 of 2010

**CHAPTER TWO: CONSTITUTIONAL AND INTERNATIONAL HUMAN RIGHTS**

**PROVISIONS: AN OVERVIEW**

**2.0: Introduction:**

Zambia, as party to many international human rights instruments, has certain obligations towards realising the provisions of the human rights instruments she has ratified. This Chapter therefore, looks at some international human rights provisions as set out in the international human rights instruments. It generally defines human rights in terms of their characteristics and classification. It must be noted that the classification as will be shown in the chapter does not in any way suggest that human rights are divisible. The chapter further discusses the obligations of State Parties vis-à-vis the implementation of the provisions of the human rights instruments as per treaties themselves before it looks at national level. It further discusses briefly the inadequacies of the repealed law<sup>1</sup> by way of a case study before showing how the new Act<sup>2</sup> attempts to provide for remedies.

**2.1: Functional Importance Of Human Rights:**

Human Rights are defined as the “... fundamental rights which empower human beings to shape their lives in accordance with liberty, equality and respect for human dignity.”<sup>3</sup> It must be noted that by their very nature human rights serve to, inter alia, protect human dignity, ensure the fulfillment and well being of human beings and preserve peace and justice among all human

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<sup>1</sup> Cap123 of the laws of Zambia (repealed).

<sup>2</sup> Act No. 18 of 2010

<sup>3</sup> Nowak, 1

beings.<sup>4</sup> Nowak further notes that the focus of human rights is on the life and dignity of human beings.<sup>5</sup> This clearly does not exclude the protection of the dignity of illegal immigrants. According to Chanda, human rights are a birthright of every human being and no other qualification must be met for one to enjoy human rights other than being human.<sup>6</sup> Therefore, since being human is the only qualification required to enjoy human rights, illegal immigrants, despite entering the country and remaining therein unlawfully, are still entitled to enjoy these human rights because they are human beings, regardless of their status at law. Spagnoli asserts that human beings cannot be classified as illegal immigrants by virtue of entering a particular country without following legal procedures because what is illegal is the act of entering a country without following the laws regulating the entry into that country and not the human being.<sup>7</sup> The characteristic features of human rights, such as universality and inalienability imply that human rights are inherent in and are a birthright of all human beings. Therefore, wherever a human being is, certain human rights exist irrespective of race, sex, religion, political, or national or social origin or other opinion.<sup>8</sup> It must be noted that human rights are not given by law but are recognised and protected by law.

It is important to note that human rights serve to protect and promote human dignity which must not be violated. Nowak argues that human dignity is violated when a human being is subjected to torture, forced to live in slavery, refused medical care and has his privacy or personal liberty

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<sup>4</sup> Alfred W Chanda, "The role of lower courts in the domestic implementation of human rights," *Zambia Law Journal*, Vol. 33, (2001), 1.

<sup>5</sup> Nowak, 1

<sup>6</sup> Chanda, 1.

<sup>7</sup> Filip Spagnoli, "human rights quote (125): amnesty for illegal immigrants," <http://filipspagnoli.files.com/2009/05/illegal-immigrants> (Accessed on 15th November, 2011)

<sup>8</sup> Constitution of the Republic of Zambia, Cap 1 of the Laws of Zambia, Article 11.



unduly interfered with.<sup>9</sup> He therefore, argues that human rights are the only universally recognised system of values which is not closed in itself, but one that provides a “... network of minimum standards and procedural rules for human relations, all of which are equally applicable not only to governments, law enforcement bodies... but also to ... private individuals.”<sup>10</sup> Illegal immigrants are entitled to enjoy their fundamental human rights despite being unlawfully resident in the country. The Government of Zambia and immigration officers have an obligation to ensure that illegal immigrants’ rights are protected in order to promote their human dignity. The rights are however, enjoyable subject to lawful restrictions. For instance, the fact that freedom of movement is a fundamental right of every human being guaranteed both at international level and on the domestic plane, does not in any way suggest that it is absolute because it has certain restrictions, such as passport requirements and immigration laws especially for international travel.

At international level, the international Bill of Rights which include the Universal Declaration of Human Rights (UDHR), International Covenant on Economic Social and Cultural Rights (ICESCR), International Covenant on Civil and Political Rights (ICCPR) and its optional protocols provide for the human rights standards with such obligations on the member states to recognise, respect and protect human rights of the peoples under their territorial jurisdiction.

The UDHR recognises the inherent dignity and the equal and inalienable rights of all members of the human family. This recognition goes to show that human beings regardless of their status in society are entitled to a minimum standard of treatment even if they are in a foreign country. The International Bill of Rights recognises human rights as essential to the well being of all

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<sup>9</sup> Nowak, 1

<sup>10</sup> Nowak, 1

humanity. It must be mentioned that the International Bill of Rights draws its authority from the United Nations Charter which, though it does not list the fundamental human rights, provides for general obligations to member States to promote “universal respect for and observance of human rights and fundamental freedoms to all without distinction....”<sup>11</sup> This is reflected in the UDHR, ICCPR and ICESCR under Articles 2, 26 and 2(2), respectively where among other factors, nationality and status of an individual are prohibited from being a basis for discriminating against a person in the enjoyment of human rights. Other human rights of importance for the study include the right to life, liberty and security of person, the right to protection of privacy, right to recognition before the law, right to freedom from torture, inhuman and other degrading treatment and freedom of religion and conscience, as provided for under Articles 9, 17, 16, 6, 7 and 18 of the ICCPR, respectively. It must however, be noted that the enjoyment of these rights may be subject to limitations where it becomes expedient for national security, public morality and order as long as such restrictions are not discriminatory.<sup>12</sup> Illegal immigrants are clearly entitled to enjoy the human rights as reflected in the International Bill of Rights except those that are specifically meant for citizens of a particular State, such as the right to participate in public life of that State.<sup>13</sup>

## **2.2: International Human Rights Obligations:**

It must be noted that human rights are divided into first, second and third generation rights for convenience. The first generation rights are the civil and political rights as contained in the UDHR and the ICCPR while the second generation rights are economic, social and cultural

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<sup>11</sup> United Nations Charter, Article 55 (c)

<sup>12</sup> International Covenant for Civil and Political Rights (ICCPR), Article 4 and 14(1)

<sup>13</sup> ICCPR, Article 25

rights which are provided for under the ICESCR. The third generation rights are the collective rights mainly contained in Regional human rights instruments like the African charter. This classification is for convenience and does not suggest that human rights are stratified and divisible. State parties to the human rights treaties are required to ensure enjoyment of all the rights for the individuals under their territorial jurisdictions by taking measures that serve to promote and protect individuals' human rights.

The foundation of human rights obligations for member states are founded on the UN charter that creates "...general obligations to respect and promote human rights,"<sup>14</sup> and has therefore laid the legal and conceptual framework of modern day international human rights law obligations. The State parties committed themselves "... to take joint and separate action in cooperation with the Organisation for the achievement of the...universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."<sup>15</sup>

It is important to note that the UDHR is only declaratory of the human rights, although it is proclaimed to be the common standard of achievement for all peoples and all nations regarding human rights. Most nations have constantly referred to it as a source of human rights making it a customary international law with a force of law.<sup>16</sup> Nevertheless, the UN charter makes it mandatory for member States to implement the provisions of the UDHR either jointly or individually.

Furthermore, State parties have a moral obligation to secure the universal and effective recognition and observance of human rights standards as set out in the UDHR both among

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<sup>14</sup> Chanda, 2

<sup>15</sup> United Nations Charter, Articles 55(c) and 56

<sup>16</sup> Carlson Anyangwe, *Introduction to Human Rights and International Humanitarian Law*, (Lusaka: UNZA Press, 2004), 33

themselves, inter se and the peoples of territories under their jurisdiction. Under the ICCPR, State parties of which Zambia is a party, have an obligation to ensure the implementation of the rights within their own State jurisdictions and to adopt the necessary legislative and other measures to effect realisation of the rights. The civil and political rights are not a creation of the law and as such state parties should only seek to protect the rights against undue violations by adopting legislative and other measures to ensure promotion of human rights. State obligations under the ICESCR are progressive and contingent on the available resources in which case State parties are to implement them to the maximum of their available resources either individually or collectively to ensure realisation of the rights.

Further binding obligations have also been created in Regional Human Rights instruments such as the African Charter on Human and People's Rights (ACHPR), European Convention for the Protection of Human Rights and Fundamental Freedoms (ECPHR) and the American Convention on Human Rights to ensure that the peoples of the world are protected against violations which affect their dignity.

The recognition of the inherent dignity and equal and inalienable rights of all human beings serve to show that human beings regardless of status in a society are entitled to minimum standards of treatment even if they are in a foreign country. Human dignity is founded on freedom, justice and peace in the world.<sup>17</sup> Human beings should be free to express themselves in terms of speech or belief as these are the greatest aspirations of humanity. Nations the world over are encouraged through teaching and education to promote respect for these rights and freedoms.<sup>18</sup>

### **2.3: National Human Rights Obligations:**

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<sup>17</sup>Nowak, 1

<sup>18</sup> Universal Declaration Human Rights(UDHR) preamble

Most world States have made human rights legally binding in their constitutions as a result of these international obligations. Zambia has ratified the International Bill Rights except the second protocol to ICCPR which abolishes the death penalty. However, the legal dualism that Zambia practices makes it difficult for international treaty laws to have a binding legal effect on the domestic scene without domesticating their provisions. However, this dualism does not hold as an excuse for human rights violations. Human rights abuses often attract international attention especially where they are systematically carried out and failure to correct such abuse could result in sanctions against the erring State.

Nevertheless, the Zambian Bill of Rights guarantees the basic human rights to all individuals within her territory. This is in line with the requirements arising from her international obligations to promote observance of human rights within her jurisdiction. Some of the rights espoused by the Zambian Bill of Rights are the rights to life, right to a fair trial, equality before the law, protection against undue interference of an individual's right to privacy, to mention a few. All individuals including illegal immigrants are entitled to enjoyment of their human rights except for those rights that are exclusively meant for the citizens, such as the right to participate in public life and the right to vote, to mention a few.

Article 11 of the constitution of Zambia provides that

it is recognised that every person in Zambia has been and shall continue to be entitled to the fundamental rights and freedoms of the individual, that to say, the right, whatever his race, place of origin, political opinions, colour, creed, sex or marital sex status, but subject to limitations... to each and of the following:

- a. Liberty, security of person and the protection of the law

- b. Freedom of conscience, expression, assembly, movement and association
- c. Protection for the privacy of his home and other property....

It is clear from the cited Article above, that the immigration status of an individual is not a prerequisite to enjoying human rights. Therefore, the rights of illegal immigrants are also guaranteed by Article 11(1) of the Constitution of Zambia. Furthermore, illegal immigrants upon arrest are entitled to such procedural rights as:

to be informed as soon as reasonably practicable, in a language that he or she understands and in detail, the nature of the charge; to appear before an independent and impartial court of law within a reasonable time after having been charged; to be given adequate time and facilities for the preparation of his or her defence; and, to be permitted to have without payment the assistance of an interpreter if he or she cannot understand the language used at the trial of the charge,<sup>19</sup> to mention a few.

It is important to note that illegal immigrants are also entitled to certain substantial rights, in addition to the procedural rights such as, the right to privacy, freedom of religion, right to liberty, life, equality before the law, to mention a few. The right to privacy, for instance, is one of the most important fundamental rights protecting the dignity of the human beings and it includes the right not to be subject to searches on one's person, home or property, seizure of private possession, or interference with private mail.<sup>20</sup> The recognition of this right therefore makes it imperative for Immigration "... Officers to obtain a search warrant from a magistrate before they proceed to invade a person's privacy,"<sup>21</sup> as they carry out their duties.

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<sup>19</sup> Chanda, 5-6 and Cap 1 of Laws of Zambia, Article 18(2).

<sup>20</sup> Chanda, 13

<sup>21</sup> Chanda, 13

However, in practice this rarely happens due to overriding concerns as will be seen later in the study. Illegal immigrants' right to privacy is violated, usually, without recourse for the illegal immigrants to seek redress. The value of human rights to the well being of every human being can not be overemphasized as these serve to protect human dignity, as already indicated. For example, freedom of expression as provided for in Article 20 of the Republican Constitution serves to help "... an individual to attain self fulfillment and assist in the discovery of truth"<sup>22</sup> which is very important for the illegal immigrants to both learn all they need to and express themselves appropriately.

It must be noted that while the Constitution of Zambia does provide for the human rights in Part III, the realisation of such rights depends to a large extent on other laws, administration and practices of the state. For instance, under the repealed immigration law,<sup>23</sup> illegal immigrants did not have adequate avenue to seek recourse for them to challenge the immigration authorities other than through administrative tools as judicial review which were not provided for in the Act. Other than appealing against refusal to be placed on a permit or refusal on their part to comply with an order to leave the country, which appeals only went up to the Minister of Home Affairs<sup>24</sup> beyond which, illegal immigrants had no clearly defined recourse. For instance, in 1989 Zambia expelled a large number of West Africans and had kept them in a special camp for two months without giving them an opportunity to challenge the decision of the DOI. Under international law, mass expulsions on the basis of ethnicity constitute a special violation of human

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<sup>22</sup>Chanda, 13

<sup>23</sup>Cap 123

<sup>24</sup>Cap 123 (repealed), section 24

rights.<sup>25</sup> This case demonstrates that the repealed immigration law did not have adequate avenues for illegal immigrants to challenge the decision of the DOI.

However, the new immigration Act<sup>26</sup> while retaining some provisions of the repealed Act<sup>27</sup> does provide for avenues for the aggrieved illegal immigrant to appeal against a decision that adversely affect them. This is because it was necessary to take into account the basic human rights of illegal immigrants. Due to this realisation, the Immigration and Deportation Act<sup>28</sup> provides for a human rights based approach to immigration activities which takes into account the basic rights of the immigrants. The Act<sup>29</sup> provides for an avenue to enable illegal immigrants who get arrested to appeal against such a decision as long as it is not an appeal against deportation or removal. It provides that

after making a decision, under this Act, which adversely affects a person, other than a decision relating to a deportation or removal, an immigration officer shall notify that person of the decision and the reasons for the decision and give the person at least forty-eight hours to make representations.<sup>30</sup>

As indicated above the DOI has adopted a human rights based approach and culture in their conduct of duties which incorporates the international best practices by providing immigrants alike with an avenue to enjoy the rights due to them by virtue of being human beings.<sup>31</sup> The immigration law does not only provide for such an avenue but also compels an Immigration Officer to keep the affected illegal immigrant informed of the decision concerning their appeal

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<sup>25</sup> *Recontre Africain Pour la Defense des Droits de l'Homme v Zambia*, Communication No. 71/92

<sup>26</sup> Act no. 18 of 2010

<sup>27</sup> Cap 123 of the laws of Zambia.

<sup>28</sup> Act no.18 of 2010

<sup>29</sup> Act no.18 of 2010

<sup>30</sup> Act no.18 of 2010, Section 10(1)

<sup>31</sup> Oral Interview: Enos Chibombe, Head Legal Unit, Immigration Headquarters, 10<sup>th</sup> January, 2012



thereby according them the enjoyment of their freedom of information as provided for both in the international human rights instruments and the Constitution of Zambia.

#### **2.4: Conclusion:**

It has been demonstrated above that human rights are not only a preserve of the citizens of Zambia but that all individuals regardless of their status are entitled to enjoy their human rights. Human rights serve to protect the human dignity of human beings and help them to attain self fulfillment. The only qualification required for one to enjoy human rights is being human and therefore, illegal immigrants are entitled to enjoy their rights irrespective of their status in Zambia. At international level, Zambia is bound to effect the protection and observance of human rights for all within her territory. Despite her legal dualism, Zambia is still under an obligation to ensure that individuals in her jurisdiction are allowed to enjoy their human rights with such limitations as are necessary under the law. This obligation is reflected in the Bill of Rights for Zambia where every person is entitled to enjoy his rights regardless of his or her status in the country. Furthermore, the Immigration and Deportation Act no 18 of 2010 provides for human rights based approach to immigration control that ensures that illegal immigrants are treated in a humane manner and are allowed to enjoy their rights. Illegal immigrants, as human beings are therefore, entitled to enjoy their human rights.

The next chapter identifies the rights which illegal immigrants are entitled to and discusses them in details. The chapter also discusses the extent to which illegal immigrants can enjoy these rights by discussing some factors that override the smooth recognition and promotion of the identified human rights. Furthermore, the chapter brings to the fore the practices of Immigration

Officers in handling illegal immigrants, as observed challenges to illegal immigrants' enjoyment of their human rights.

## **CHAPTER THREE: ILLEGAL IMMIGRANTS' HUMAN RIGHTS AND LIMITATIONS TO ENJOYING THEM**

### **2.0.: Introduction:**

As indicated above in chapter two, human rights are entitlements due to a human being by virtue of being human and no other qualifications are required. Therefore, illegal immigrants being human beings are entitled to minimum standards of humane treatment despite their immigration status. This chapter therefore, highlights some of the identified human rights that illegal immigrants are entitled to enjoy despite being unlawfully resident in Zambia. The chapter further discusses the limitations to enjoying these rights and generally discusses some immigration practices, as observed, that have a bearing on the illegal immigrants' enjoyment of human rights before it concludes.

### **2.1: Identified Human Rights:**

Article 11 of the Republican constitution provides that every individual within the Zambian territory is entitled to enjoy the fundamental freedoms and rights which are guaranteed in the constitution without due regard to race, place of origin, political opinion, creed, marital status, sex or colour. This is important for the study as it goes to show that all human beings, including illegal immigrants, are entitled to the enjoyment of the fundamental freedoms and rights which are due to every human being simply by virtue of being human.

However, it should be mentioned that the identified rights and freedoms are not absolute because they are subject to both legal and administrative restrictions as will be seen below in this chapter.

In Zambia human rights are protected by the Constitution and other statutes and as such, any violations can be claimed against the state at national level. The Zambian Bill of Rights contains

the civil and political rights, which for convenience, can be classified as substantive and procedural rights. Substantive rights are defining basic and fundamental rights, such as the right to life, right to freedom from torture and other inhuman and degrading treatment, to mention a few.

Procedural rights, on the other hand, are those rights that define the procedure and practice in the execution of duties by law enforcement officers and courts of law, such as the right to a lawyer, right to be informed of the reasons for arrest, right to be presumed innocent till proven guilty, to mention a few.

Anyangwe identifies the substantive and procedural rights in terms of the functions they perform in the protection of human dignity and promotion of human rights as:<sup>1</sup>

- a) those that protect the physical integrity of the person, which include the right to life,<sup>2</sup> right to personal liberty and security,<sup>3</sup> right to freedom from torture,<sup>4</sup> right to freedom of movement,<sup>5</sup> to mention a few;

These rights protect the physical integrity of the person regardless of their immigration status in the country;

- b) those that protect the legal integrity of the person which include such rights as the procedural rights where any person who has been arrested is required to know that he has the right to be recognized before the law, the right to equality before the law, the right to a fair trial by an impartial and independent tribunal.<sup>6</sup> These are important rights for illegal immigrants who have been arrested and detained as the rights give such persons hope that

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<sup>1</sup> Anyangwe, 201-202

<sup>2</sup> Cap 1, Article 12

<sup>3</sup> Cap 1, Article 13

<sup>4</sup> Cap 1, Article 15

<sup>5</sup> Cap 1, Article 22

<sup>6</sup> Cap 1, Article 18

despite their predicament, they still have certain rights. The Immigration and Deportation Act<sup>7</sup> in this vein, obligates an immigration Officer who, for instance, arrests an illegal immigrant to inform him or her of the reasons for the arrest;<sup>8</sup>

- c) those that protect the moral and mental integrity of the person which include rights that protect the privacy<sup>9</sup> of an individual and also the rights to freedom of conscience, thought and religion<sup>10</sup> as well as freedom of expression.<sup>11</sup> These rights are key to an individual's discovery of the truth and attainment of self fulfillment;
- d) those that promote the joint activities of individuals which include the freedom of association and freedom of assembly. These rights promote individual self identity; and,
- e) those that protect the individual ownership of property as guaranteed in the right not to be deprived of the property without compensation.<sup>12</sup>

### **2.1.0 : Substantive rights:**

The following substantive rights constitute basic human rights to which every human being is entitled:

#### **2.1.1: Right to life:**

The right to life is the most fundamental human right upon which the existence and enjoyment of all other rights depend. The Icelandic Human Rights Centre simply states that “there can be no rights if there is no life.”<sup>13</sup> The importance of this right is shown from the fact that it is non-

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<sup>7</sup> Act No. 18 of 2010

<sup>8</sup> Act No. 18 of 2010, section 10 (1)

<sup>9</sup> Cap 1, Article 17

<sup>10</sup> Cap 1, Article 19

<sup>11</sup> Cap 1, Article 20

<sup>12</sup> Cap 1, Article 16

<sup>13</sup> <http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/human> ( accessed on 27.02.12)

derogable even in times of war or public emergency threatening the life of the nation.<sup>14</sup> The obligation to protect the right to life does not only involve the prohibition to take another person's life but also requires the country to protect the right to life so as to avoid arbitrary deprivation of life by law enforcement officers. It is therefore, important for the state to protect individuals at risk from others, to avoid a real and immediate risk to life.<sup>15</sup> Life is central to humanity and therefore, it must be protected. However, it is important to learn that in Zambia, the right to life, protected under Article 12 of the Republican constitution, is not absolute in the sense that it can be taken away through a court sentence for a crime warranting death as punishment.<sup>16</sup> Zambia still embraces the death penalty and this is why she has not ratified the second protocol to the ICCPR which seeks to abolish the death penalty.

2.1.2: Right not be tortured:

This is guaranteed under Article 15 of the Republican Constitution prohibits all forms of torture or inhuman or degrading punishment or other like treatment against any person.

It must be noted that the right to freedom from torture is non-derogable even under the state of emergency or threats to national security. Therefore, no conduct of an individual would warrant the derogation on this right. The prohibition on torture and other degrading treatment is one of the fundamental values of human life as it ensures the security of the person of an individual. For treatment to amount to be inhuman or degrading it must attain a minimum level of severity which depends on, interaction, duration of treatment and its physical or mental effects on the individual.<sup>17</sup> Jackson argues that for an act to be torturous it must be a deliberate inhuman

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<sup>14</sup> ICCPR, Article 4(2)  
<sup>15</sup> David Jackson, *Immigration Law and practice*, 2<sup>nd</sup> Ed, (London: Sweet & Maxwell, 1999), 81  
<sup>16</sup> Penal Code Act, Cap 87 of the laws of Zambia, sections 24(a) and 25.  
<sup>17</sup> Jackson, 81

treatment which causes very serious and cruel suffering to another person.<sup>18</sup> Immigration Officers therefore, are not expected to inflict any form of torturous or inhuman treatment on illegal immigrants as the violation of this right cannot be excused on any reason or conduct of the illegal immigrant. According to the Convention Against Torture (CAT), torture is

... any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or the third person has committed or is suspected of having committed, or intimidation or coercing him or a third person, for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.<sup>19</sup>

It is therefore, clear from the definition of torture by the CAT that for torture to occur there must be some degrading treatment method which is inhuman inflicted on a person to a certain level of severity by a public official for the purpose of getting information. The Icelandic Human Rights Centre further states that different factors including the duration of treatment, its effects on the physical and mental wellbeing of the person and the age ,sex and general health of the person, are taken into account in considering whether torture has taken place.<sup>20</sup>

Given that the right to freedom from torture is non-derogable, illegal immigrants are entitled to enjoy this right without any form of interference.

### 2.1.3: Right to liberty and security:

The right to liberty and security of person is a fundamental human right which must be protected for the enjoyment of all persons. The Republican constitution provides that a person shall not be

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<sup>18</sup> Jackson, 81

<sup>19</sup> Article 1

<sup>20</sup> <http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/human> ( accessed on 27.02.12)

deprived of his personal liberty unless it is authorised by law<sup>21</sup> for such purposes as execution of a court order, prevention of ingress to Zambia, to mention a few.

It is important to mention that while the law permits exceptions to the enjoyment of the right to liberty, immigration officers should realise that the right to liberty is a fundamental human right which must be respected and only be violable with compelling reasons. The immigration laws<sup>22</sup> of the country allow immigration officers to arrest any foreign national without a warrant who is reasonably suspected to be unlawfully resident in the country. While this is true, the officers are expected to be mindful of the importance of this right so that their execution of duties is not done arbitrarily.

2.1.4: Freedom of movement:

As already indicated under chapter two, a person is free to move freely without undue interference. However, international travelers are restricted by among other things the requirement of a passport and adherence to the immigrations laws. Failure to adhere to such requirements gives rise to further restrictions of the freedom of movement due to arrests and detention pending either prosecution for flouting immigration laws or removal back to the country of origin. This is legally provided for under Article 22 (2) of the Republican Constitution of Zambia and the provisions of the Immigration and Deportation Act<sup>23</sup> are consistent with this constitutional provision. However, because of the importance of these rights, the Immigration Officers are obligated to inform the illegal immigrant of reasons for the intended removal or deportation.

2.1.5: Freedom of expression:

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<sup>21</sup> Cap 1 of the laws of Zambia, Article 13  
<sup>22</sup> Act No.18 of 2010, sections 6,8, 9 and 18  
<sup>23</sup> Act No. 18 of 2010



The right to freedom of expression provides that every individual has the freedom of expression in which an individual is free to hold opinions and to receive and impart information and ideas without undue interference from public authority. This right is important because it helps an individual to attain self fulfillment and make informed decisions about their situation. It must be noted that the right to freedom of expression does not only guarantee an individual's freedom of expression but also entitles him to receive information from those he is dealing with. The Republican Constitution further provides that an individual's right to freedom of expression shall not be interfered with unless the individual consents.<sup>24</sup> Therefore, unless they consent, illegal immigrants are entitled to enjoy this right as it helps them to make informed decisions and even prepare their defence when facing prosecution for violating immigration laws.

However, the enjoyment of this right is limited due to the needs of society where the public safety, public order, public morality and public health needs are threatened. Furthermore, the principle of 'live and let others live' comes alive when the rights of an individual are restricted for the benefit of other individuals.<sup>25</sup>

#### 2.1.6: Freedom of conscience, thought and religion:

Article 19 of the Republican constitution provides for the protection of freedom of conscience, thought and religion. It provides among other things that a person shall not be compelled to take oath in contradiction of his religion or belief.<sup>26</sup> The freedom of conscience, religion and thought also allows an individual to organise, and propagate either individually or as a community his beliefs and or his religion. Illegal immigrants are free to enjoy this right and exercise their worship rights unless their enjoyment of their rights is causing discomfort on other members of

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<sup>24</sup> Cap 1 of the laws of Zambia, Article 20

<sup>25</sup> Cap 1 of the Laws of Zambia, Article 17 (2) (b)

<sup>26</sup> Cap 1 of the laws of Zambia, Article 19 (4)

the organisation or society in general in which case his freedom of expression will be restricted as will be seen below.

#### 2.1.7: The right to privacy:

The right to privacy, guaranteed under Article 17 of the Republican Constitution is one of the most fundamental rights. The Icelandic Human Rights Centre asserts that the right to privacy mirrors the liberal concept of the individual's freedom as a self governing being.<sup>27</sup> It is the right to individual autonomy and provides for the right not to be subjected to searches on one's person, home or property. However, the enjoyment of this right is highly controversial because it is one's right that is violated more often though, in accordance with the law as will be shown below. Nevertheless, arbitrary interference of the right to privacy amounts to violation of human rights. Illegal immigrants, as human beings, are entitled to enjoyment of this right even if their presence in Zambia is in contravention of immigration Laws.

However, in practice apart from the fact that the constitution provides for instances when the right to privacy may be derogated upon as in Article 17(2) of the Republican constitution, immigration officer are empowered under the Act<sup>28</sup> to enter and search any premises without a warrant on suspicious grounds. This is not to be seen as a violation of the illegal immigrants' right to privacy because it is authorised by the constitution of Zambia under Article 17 (2).

#### 2.2.0: Procedural Rights:

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<sup>27</sup> <http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/human> ( accessed on 27.02.12)

<sup>28</sup> Act no. 18 of 2010, section 6

Another set of human rights that an illegal immigrant to Zambia is entitled to are procedural rights which ensure that the accused is given effective and efficient treatment in the administration of justice. These apply to procedure and practice of law enforcement Officers and the court process. Every individual has the right to be treated fairly, efficiently and effectively in the administration of justice.<sup>29</sup> These rights confer the power on the detained illegal immigrants to demand for reasons for their detention and to be brought before the court of competent jurisdiction within a reasonable time. The Procedural rights are contained the right to due process of the law and include the following:

**2.2.1: Right to a fair trial:** is guaranteed under Article 18 of the Republican Constitution, Cap 1 of the laws of Zambia and guarantees the rights of the accused before, during and after trial. The rights provide for an effective remedy for an illegal immigrant who has been taken before an independent and impartial tribunal within a reasonable time. The Immigration and Deportation Act provides that an illegal immigrant must be brought before the court of law within forty-eight hours of arrest and detention.<sup>30</sup> It must be noted that where the illegal immigrant is in custody pending removal or deportation, he shall not remain in custody for longer than thirty (30) days unless he is on a court warrant.<sup>31</sup> This ensures fairness at post trial level which is also enhanced by the fact that once the accused has been tried or convicted, he will not be tried again for the same offence.

In pre- trial stages, the accused person is entitled to be informed of the reasons for his arrest and shall be given time to prepare his defence. The constitution provides that “every person who is

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<sup>29</sup> <http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/human> ( accessed on 27.02.12)

<sup>30</sup> Act No.18 of 2010, section 18 (2)

<sup>31</sup> Act No. 18 of 2010. Section 18 (1) (b)

charged with a criminal offence shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence charged.”<sup>32</sup>

During the trial of the accused, fair trial also promotes the right to remain silent in the sense that the accused person is not compelled to give evidence in his defense. Illegal immigrants are therefore, entitled to enjoy this right as no person regardless of his immigration status can be compelled to speak when he or she has chosen to remain silent. Furthermore, the illegal immigrant is also entitled to an interpreter during trial at no cost to him if he cannot understand the language used.<sup>33</sup>

However, this does not happen in reality due to the fact that interpreters are usually unavailable. This delays the delivery of justice and violates the right to due process of the law.

### **2.2.2: Presumption of innocence:**

The Republican constitution guarantees the right to presumption of innocence for any person charged with a criminal offence. Such a person is to remain innocent before the law until the offence for which he has been arrested is proven. This ensures that an illegal immigrant so arrested is given an opportunity to explain the circumstances under which he has flouted the immigration laws. In the process of interviewing the illegal immigrant, it may be established that such an immigrant is actually a victim of human trafficking or has just been smuggled into the country or indeed a victim of persecution who enters the country as an asylum seeker. When such illegal immigrants are discovered they are treated differently due to their circumstances. The right to presumption of innocence ensures that the accused is not imprisoned until he has been sentenced by the court after establishing his guilt. Illegal immigrants are therefore, entitled to enjoy this right, though in practice this does not happen due to overriding interests and

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<sup>32</sup> Cap 1 of the Laws of Zambia, Article 18 (2) (b)

<sup>33</sup> Cap 1 of the laws of Zambia, Article 18 (2) (f)

challenges such as lack of holding cells and their not having a fixed abode to keep them as illegal immigrants while awaiting further immigration formalities. Illegal immigrants are instead sent to prison to await further immigration formalities before the court finds them guilty of abrogating immigration laws by illegal entry.

### **2.3.0: Limitations to the enjoyment human rights:**

Although illegal immigrants are entitled to enjoy the identified rights further limitations, other those discussed under each identified right, inhibit the enjoyment of these rights. Chanda says that the degree of protection of the individual human rights depends on the laws, administrative and other practices of the state and on the government that exercises authority.<sup>34</sup> This is revealed in the following discussion.

#### **2.3.1: Mindset of officers:**

In a walk-in interview with immigration officers of Risk Management and Compliance Unit (RMC) at Immigration Headquarters regarding illegal immigrants' human rights revealed some level of conservatism. The officers remarked that, "there are no human rights for illegal immigrants here, sir. If you are looking for human rights, you should go to Customer Service Centre"<sup>35</sup> of the Department of Immigration. Officers are still attuned to the old practices of immigration control despite enforcing the law that provides for human rights based approach and culture in immigration control. This mindset of the law enforcers serve as a limitation to the enjoyment of human rights by illegal immigrants.

#### **2.3.2: Language Barrier:**

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<sup>34</sup> Chanda, 4

<sup>35</sup> Risk Management and Compliance Unit, Immigration Headquarters, Room 107: Oral interview, 8<sup>th</sup> February, 2012.

The aspect of language poses a limitation to the enjoyment of human rights by illegal immigrants. The immigration laws of the country are written in the English language which is hardly understood by most foreigners unless through an interpreter who may not be available at the point of need. Officers practically find it difficult to inform the illegal immigrants of their rights at the point of arrest as required by law. For instance, when an illegal immigrant is arrested and detained pending removal or deportation, the Act<sup>36</sup> provides that such an illegal immigrant shall be informed of the reasons for removal or deportation in writing and in a language he understands better. If the dealing officers are not conversant with the illegal immigrant's language, then it becomes a challenge to let the subject enjoy his freedom of expression.

### 2.3.3: Public concern:

The Act authorises immigration officers to arrest without a warrant which is clearly a violation of freedoms such as liberty and movement. The justification for this is that as a Department charged with the maintenance of internal security of the nation, any issue that threatens public safety requires immediate attention. Therefore, when security of the society is at stake, the observation of human rights becomes less strict. The DOI may even refuse to place a foreigner on a permit and opt to declare such a person to leave the country as soon as possible. This was the case with one Nigerian Pastor of one the churches in Lusaka who was asked to leave the country because his flock had accused him of unchristian conduct. The Pastor was escorted out of the country through the Kenneth Kaunda International Airport on 6<sup>th</sup> January, 2012 without giving him an opportunity to challenge his removal. Therefore, when there is a public outcry against a foreigner regardless of their immigration status, such an immigrant will be removed

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<sup>36</sup> Act No. 18 of 2010, section 18 (1) (a)

from the country. The right to due process of the law is in this case violated due security concerns.

#### **2.3.4: Other limitations:**

The other limitations to the enjoyment of human rights are attributed to the inadequate human resources to be able to execute their duties efficiently in order to ensure that illegal immigrants are able to enjoy their rights with minimal interference. For instance, the requirement that when an illegal immigrant is arrested and detained should be made to appear before the court of law within forty-eight (48) hours is a challenge to achieve due to critical shortage of human resources. It was further observed that, some illegal immigrants are just removed after a lengthy detention due to inadequate human resources. This limits the right to due process of the law to which illegal immigrants are entitled.

Sometimes illegal immigrants remain longer in detention due to lack logistics such as transport and funds to remove such illegal immigrants as soon as possible after they have served their sentences. This indirectly punishes them twice for the same offence which is against the principles of natural justice.

#### **2.4.0: Conclusion:**

This chapter has demonstrated that illegal immigrants, as human beings, are entitled to enjoyment of human rights as identified. However, such enjoyment is subject to both statutory and other administrative limitations. It is important to mention that the statutory limitations are necessary since the enjoyment of these rights is not absolute except that of freedom from torture and right to life which is only affected by a court sentence. The rights are also affected by administrative limitations and others such as language.

The next chapter deals with the possible measures available to promote the illegal immigrants' enjoyment of human rights. The chapter also discusses whether the measures are efficient enough to promote the observance of illegal immigrants' human rights and also the issues of permits to establish whether an illegal immigrant can actually demand to be placed on a permit.



**CHAPTER FOUR: AVAILABLE MEASURES AIMED AT PROMOTING  
THE RIGHTS OF ILLEGAL IMMIGRANTS:**

**4.0: Introduction:**

The State has a mammoth responsibility of protecting and promoting individual human rights. The Government has therefore, put measures in place to, through certain established institutions, promote the enjoyment of human rights by all individuals without distinction as to race, sex, language, nationality or other status.

This chapter explores the measures which government and the DOI in particular, has put in place to promote the human rights of illegal immigrants. The chapter further looks at how effective these measures are in promoting the human rights of illegal immigrants.

**4.1: Available measures:**

The measures available to promote the human rights of illegal immigrants can be broadly classified as institutional, constitutional and statutory and inter-agency cooperation. It must be noted that Zambia has an obligation to ensure equal promotion of respect for human rights arising from her membership to both Regional and International human rights instruments and the need for good governance that is founded on the rule of law. Therefore, the following measures have been established and are available to promote respect for human rights for all:

**4.1.1: Institutional measures:**

As a signatory to UN and Regional treaties providing for the protection of individual human rights, Zambia has to ensure adequate promotion and protection of individual human rights for

all within her territory. The following institutions are among others that were set up to help to promote human rights:

- a) The Human Rights Commission:<sup>1</sup> which came into being in 1997 to, inter alia, investigate human rights violations and maladministration of justice. Any individual, including an illegal immigrant, whose rights have been violated, can take complaints against public officers to the institution which then investigates, after which it makes certain recommendations to address the situation. It is not a judicial body and this makes it less effective in addressing human rights violations. The Commission cannot sue a particular government department which is responsible for human rights violations even if this is proved.

The Commission also visits places of detention and liaises with the DOI on the need to ensure that the detained illegal immigrants are promptly brought before the competent court of law for them to receive justice and those that have served their sentences are quickly removed to their countries of origin.

- b) Judiciary:<sup>2</sup> The independent and impartial judiciary established by the constitution<sup>3</sup> is a beacon of hope for an illegal immigrant whose rights have been violated. It is a primary institution charged with the responsibility of enforcing Zambia's Bill of rights and therefore, any illegal immigrant, who feels his or her rights have been or are about to be violated can seek redress from the High Court for Zambia<sup>4</sup> which enforces the Bill of Rights. The Judiciary has been quite effective in addressing

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<sup>1</sup> <http://hrc.org.zm/rights.php> ( accessed on 27.02.12)

<sup>2</sup> <http://hrc.org.zm/rights.php> ( accessed on 27.02.12)

<sup>3</sup> Cap 1, Part VI

<sup>4</sup> Cap 1, Article 28

human rights violations of illegal immigrants especially where it involves the violation of the right to be heard. This was demonstrated by the Supreme Court decision in *Attorney General v Roy Clarke*<sup>5</sup> in which the respondent was served with a deportation warrant on the basis of a satirical article he had written in accordance with section 26(2) of the repealed Cap 123 of the laws of Zambia to leave Zambia. He challenged the decision to deport him by way of judicial review on the ground that he was not given a chance to challenge the deportation. The court held that the deportation was disproportionate.

- c) Judicial Complaints Authority:<sup>6</sup> is one institution that helps check the conduct of judicial officers for misconduct in the execution of their judicial duties. If an individual feels justice was not dispensed with in the protection of his rights by the judiciary due to misconduct of the judicial staff involved, he or she can make a report of the misconduct of such an officer to the Judicial Complaints Authority which investigates such allegations.
- d) The Legal Aid Board:<sup>7</sup> The right to the due process of the law requires, inter alia, that every person charged with criminal offence shall be accorded legal representation. Article 18 (2) of the constitution provides that the accused person “shall, unless legal aid is granted to him in accordance with the law enacted by Parliament for such purpose, be permitted to defend himself before the court in person, or at his own expense, by a legal representative of his own choice.”<sup>8</sup> The Legal Aid Board was established in 2002 for the purpose of providing free legal

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<sup>5</sup> SCZ No. 4 of 2008

<sup>6</sup> <http://hrc.org.zm/rights.php> ( accessed on 27.02.12)

<sup>7</sup> <http://hrc.org.zm/rights.php> ( accessed on 27.02.12)

<sup>8</sup> Cap 1 , Article 18(2)(d)

assistance especially to the poor and vulnerable persons who are in conflict with the law. Illegal immigrants are also eligible to access legal aid if they cannot afford legal representation of their own at their own expense. This enhances the promotion of the right to due process of the law.

#### **4.1.2: Constitutional and Statutory measures:**

The Republican Constitution provides for an avenue through which an individual whose rights have been violated or threatened with violation can seek redress. Article 28 of the Constitution provides that if any person feels his or her human rights are about to be violated or have been violated, he or she can seek redress to the High court. The High Court is empowered to make such orders, issue such writs and give such directions as may be appropriate to ensure the realisation of the individual's human rights. For instance, in *Jean Nepomuscene Ndayisenga v The Attorney General*<sup>9</sup> the applicant, a Congolese national, applied to the High Court to review the decision of the DOI and the Minister of Home Affairs to refuse to give him a study permit. In his application for judicial review, he sought an order of *mandamus* to oblige the DOI to reconsider the decision of rejecting the application. The applicant was successful and the DOI was ordered to place him on the study permit by the High Court. Therefore, judicial review of the actions of the immigration officers dealing with illegal immigrants is an available measure which the aggrieved illegal immigrants can use to get his human rights enforced. It may not be as effective due to the length of time it takes the court to decide on the matter as well as the procedure of invoking judicial review. The cited case took about one and half (1 ½) years to be disposed of from September, 2007 to January 2009. Nevertheless, it is still an available avenue

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<sup>9</sup> 2007/HP/1229

of seeking redress where an illegal immigrant's rights have been violated by immigration officers.

Another constitutional provision that ensures freedom of liberty is the constitutional bail.

Article 13(3) provides that,

Any person who is arrested or detained-

(a) for the purpose of bringing him before a court in execution of an order of a court; or  
(b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law in force in Zambia;

and who is not released, shall be brought without undue delay before a court; and if any person arrested or detained under paragraph (b) is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.<sup>10</sup>

The constitutional bail ensures that the immigration officers do not arrest and detain illegal immigrants for unnecessarily long before they are taken to court for justice to be done.

The DOI also has a system of intervention by higher authorities to address an illegal immigrant's human rights concerns which is called the appeal system. The system operates where an illegal immigrant who is not happy with the manner in which he or she has been handled by immigration officers seeks the indulgence of the Director General of Immigration (DGI). In section 10(1) an illegal immigrant is allowed to make representations regarding a decision made that adversely affects him within forty-eight hours of such a decision. The DGI may alter that decision, reverse or uphold it. If the DGI decides to reject the illegal immigrant's representations,

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<sup>10</sup> Cap 1 of the laws of Zambia

the Act<sup>11</sup> authorises such an individual to appeal to the Minister of Home Affairs (the Minister), within forty-eight hours of receiving a response from the DGI.

The Minister may modify or overturn the decision of the DGI.<sup>12</sup> If the illegal immigrant is still not happy with the Minister's decision he or she can appeal to the court,<sup>13</sup> which may either quash or modify the decision of both the Minister and the DGI as was the case in the *Jean Ndayisenga case* cited above.<sup>14</sup> It is important also to mention that if an illegal immigrant is served with a deportation warrant he or she can also appeal to the Minister and pray for the Minister to reconsider his decision.<sup>15</sup> The Minister is empowered to revoke or vary the deportation warrant which has been served on an illegal immigrant.<sup>16</sup>

It must be mentioned that the availability of an appeal system in immigration control helps to enhance the promotion of respect for illegal immigrants' human rights. The system enhances the promotion of the enjoyment of the freedom of expression, right to be heard and respect for the right to liberty, in the sense that the applicant gets an opportunity to explain his or her concerns over his or her immigration status.

Furthermore, the right to liberty is enhanced further under the Act by a provision for granting of bail to illegal immigrants. Section 57(1) of the Act provides that,

A person arrested and charged with an offence under this Act, may be admitted to bail in accordance with section *one hundred and twenty- three* of the Criminal Procedure Code Act:

Provided that if a person who was deported from Zambia unlawfully returns into the country, the person shall not be admitted to bail if arrested and charged with an offence under this Act.

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<sup>11</sup> Act No. 18 of 2010, section 10(3)

<sup>12</sup> Act No. 18 of 2010, section 10 (4)

<sup>13</sup> Act No. 18 of 2010, section 10 (5)

<sup>14</sup> Act No. 18 of 2010, section 10 (5)

<sup>15</sup> Act No. 18 of 2010, section 17 (4)

<sup>16</sup> Act No. 18 of 2010, section 17 (4)

(2) The Director-General of Immigration shall issue a person admitted to bail under subsection (1), with an appropriate permit pending the hearing and determination of that person's case before a court.

It must be noted that the illegal immigrant admitted to bail is subject to be placed on a permit as provided for in section 57(2) cited above. The most appropriate permit, in this case, that can be issued to illegal immigrants is the temporary permit<sup>17</sup> to legalise an illegal immigrant's presence in Zambia. The decision to place the illegal immigrants on temporary permit is influenced by, among other things, immigration principles as provided for in the first schedule of the Act, and situations such as is provided for section 57 (2) cited above. While a temporary permit is the most appropriate for illegal immigrants, it must be mentioned that an illegal immigrant is not authorised to demand to be placed on a temporary permit as a matter of right.

At international level, it must also be mentioned that where the illegal immigrant has not been accorded an opportunity to exercise his or her freedom of expression, right to be heard in domestic courts (exhaustion of local remedies) due to one reason or another, the aggrieved illegal immigrant can resort to international mechanisms to enforce his or her rights. A State is proscribed by international human rights standards from expelling or deporting any foreign national without respecting the minimum standards of due process, including the right to challenge on an individual basis the reasons for expulsion.<sup>18</sup> Mass expulsion of foreign nationals based on belonging to a certain ethnic group, national or religious grouping is prohibited.<sup>19</sup> This prohibition was demonstrated in the *Recontre African Pour la Defense des Droits de l'Homme* case cited above on page 19, where Zambia was found to have violated the provisions of the African Charter when she expelled some West Africans en masse without giving them an

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<sup>17</sup> It is issued in accordance with section 27 of Act No. 18 of 2010.

<sup>18</sup> Bronwen Manby, *Citizenship Law in Africa: A comparative study*, (New York: Open Society Foundations, 2010), 25

<sup>19</sup> African Charter on Human and Peoples' Rights, Article 12

opportunity to be heard. It must be noted that even where the need to deport or remove an individual from the country is grounded in national security, preservation of law and order or public morality, the African Commission held that such reasons do not preempt the right to have the case heard, and for the state to prove the threat to national security or public morality that an illegal immigrant poses to the state.<sup>20</sup>

#### **4.1.3: Inter Agency Co-operation:**

The Act<sup>21</sup> allows for the participation of other law enforcement agencies, other Government Departments, civic and international organizations dealing with the promotion of human rights to promote respect for human rights for illegal immigrants. Notable among these organizations, is the International Organization for Migration (IOM) which, among other things, directly assists particularly vulnerable migrants in situations of mixed flows.<sup>22</sup> The organisation also provides support services to governments and other actors responding to illegal immigrants.<sup>23</sup> To this end IOM provides both logistical and monetary support for speedy and safe removal of illegal immigrants back to their countries of origin. For instance, in 2011, IOM assisted the DOI in removing twenty-five (25) illegal immigrants, of which four (4) were victims of human trafficking, while ten (10) were potential victims, back to their countries of origin in a programme the organisation calls voluntary return and reintegration.<sup>24</sup>

Apart from the assistance to illegal immigrants, IOM also helps in developing policy and legislation which helps to enhance the promotion of fundamental rights of illegal immigrants and train immigration officers to help them appreciate the need to respect the human rights of illegal

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<sup>20</sup> Manby, 27 and *Amnesty International v Zambia*, AHRLR 1999, paragraph 42.

<sup>21</sup> Act No. 18 of 2010, Section 5(3)

<sup>22</sup> Mixed flows refer to irregular immigrants who include victims of human trafficking, asylum seekers, refugees and other illegal immigrants.

<sup>23</sup> [www.iom.int/internationalmigrationlawseries](http://www.iom.int/internationalmigrationlawseries) (accessed on 02.02.2012)

<sup>24</sup> IOM, Zambia Office.



immigrants. Immigration officers are trained, through IOM programmes such as Border Management training, to appreciate that it is not every illegal immigrant who arrives in the country in an irregular manner is illegal per se, because some illegal immigrants may be victims of human trafficking or asylum seekers who are compelled to leave their country by circumstances beyond their control.<sup>25</sup> Based on this realisation, the Act<sup>26</sup> now provides for the issuance of Asylum seeker's permit which can be issued to genuine asylum seekers in accordance with section 31(1) to help them remain in the country while sorting out their refugee status with the Commissioner of Refugees, under the Ministry of Home Affairs. This effectively helps to promote the right to liberty in the sense that the asylum seekers are not treated like any other illegal immigrants who evade entry requirement due to their own failure to meet the immigration requirements.

#### **4.2.0: Conclusion:**

The measures discussed are available to victims and potential victims of human rights violations. Any illegal immigrant who feels that his rights have been violated can seek the intervention of the established court to get redress. However, the court process may take long but justice is always delivered. This gives victims of human rights violation hope of getting redress as was the case in the *Jean Ndayisenga* case.

The appeal system is quite an efficient measure in terms of time, as the victim can get his response within the shortest period of time when the matter is within the immigration administration system.

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<sup>25</sup> [www.iom.int/internationalmigrationlawseries](http://www.iom.int/internationalmigrationlawseries) (accessed on 02.02.2012)

<sup>26</sup> Act No. 18 of 2010

The inter-agency cooperation initiative is quite a good measure because it supplements the DOI in ensuring the fundamental rights and freedoms of illegal immigrants are promoted through speedy removals assistance. The training programmes help to shape and change the mindset of immigration Officers in order to realise that illegal immigrants are human beings who deserve to be treated with dignity and due regard to their inherent human rights.

The next chapter is a conclusion of the study and highlights the extent to which the study objectives have been realised. It further proffers some recommendations aimed at improving the existing efforts towards the promotion of human rights of illegal immigrants.

## **CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS:**

The chapter gives a summary of the preceding four chapters and makes recommendations basing on the findings regarding the extent to which illegal immigrants can enjoy human rights due to them as human beings despite their immigration status as illegal immigrants.

### **5.1: Conclusion:**

The study has demonstrated that illegal immigrants, despite their immigration status, are entitled to minimum standards of treatment that incorporates international best practices taking into account their inherent human rights. As human beings, illegal immigrants have inalienable rights as contained in both in international human rights instruments and Part III of the Constitution,<sup>1</sup> which must be observed by immigration officers as they conduct their duties in their pursuit to maintain internal security of the nation. In their approach to immigration control, immigration officers are required to take cognisance that the enjoyment of human rights is not a preserve of the citizens of Zambia but that all individuals regardless of their immigration status are entitled to enjoy their inherent human rights within the territory of Zambia. The functions of human rights in human life cannot be over emphasised. Suffice to state that human rights serve to protect the human dignity of human beings and help them to attain self fulfillment and self-worth and therefore, every human being, by virtue of being human, is entitled to enjoy their human rights irrespective of their immigration status in Zambia.

However, the enjoyment of such human rights is subject to both statutory and administrative limitations. These limitations are necessary to ensure orderly enjoyment of such rights so as to allow the needs of other members of the human family to thrive without being interfered with

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<sup>1</sup>Cap1 of the laws of Zambia.

and also to maintain national security. Therefore, when state security is at stake, individual rights can be interfered with by powers of immigration officers as provided for in sections 6, 8, 9 and 18 of the Act<sup>2</sup> where officers are empowered to arrest without a warrant. The check in the use of such powers is that they should be used in a non-discriminatory manner. It is important for Immigration Officers to realise that the universal principle of non-discrimination underlies and governs the application of human rights to all individuals without regard to their immigration status.

Therefore, the Zambian Government, in its efforts to promote respect for individual human rights and in response to its international human rights obligations, has put in place some mechanisms to ensure observance of fundamental rights and freedoms for all without regard to their status, such as the independent and impartial judiciary which serves as a beacon of hope for those whose rights have been violated, the Human Rights Commission and the Judicial Complaints Authority, to mention a few. In the same vein, the DOI has embraced the appeal system which ensures that the aggrieved illegal immigrants have recourse. The DOI also believes that co-operation between itself and the willing and able partners is crucial in realising the human rights based approach and culture to immigration control and has therefore, partnered with other organisations such as the IOM which has been instrumental in both capacity building and direct assistance<sup>3</sup> to the illegal immigrants who voluntarily prefer to go back to their country.

## **5.2: Recommendations:**

For the illegal immigrants to effectively enjoy their human rights, the study recommends the following measures which will not only ensure that immigration officers are equipped with the

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<sup>2</sup> Act no.18 of 2010

<sup>3</sup> [www.iom.int/internationalmigrationlawseries](http://www.iom.int/internationalmigrationlawseries) (accessed on 02.02.2012)

requisite knowledge of what it takes to take a human rights based approach to immigration control, but will also ensure that illegal immigrants are equipped with information to enable them make informed decisions:

#### 5.2.1: Training Programmes:

The mindset of Immigration Officers has been identified as a limitation to the illegal immigrants' enjoyment of human rights. Therefore, the training programmes should be realigned to suit specific human rights requirements for immigration officers to appreciate that illegal immigrants are human beings who deserve to have their human rights respected despite their immigration status. The officers should be adequately inducted into the requirements of the new Act so that their approach to duty should be in consonance with the spirit of the Act that recognises the need for a human rights based approach to duty.

#### 5.2.2: Language barrier:

As one of the barriers to effective realisation of human rights for illegal immigrants, it is suggested that foreign language training in languages such as French, Portuguese and Chinese should form part of the training curriculum for immigration officers. In the same vein, it is suggested that the Immigration Website, [www.zambiaimmigration.gov.zm](http://www.zambiaimmigration.gov.zm) should have some programmes in these languages as well rather than English alone to allow those intending to travel to Zambia to know what is expected of them in the language they best understand.

#### 5.2.3: Safe houses:

The realisation that not all illegal immigrants find themselves illegal by choice, there is need to establish safe houses from which all arrested illegal immigrants can be interviewed before those

that are illegal immigrants per se, once identified can be prosecuted and sent to prison on a court warrant. This can help in protecting the illegal immigrants' right to personal liberty and security.

#### 5.2.4: Co-operation in promoting the rights of illegal immigrants:

The existing co-operation between DOI and IOM should be extended to other organisations and Embassies at the instigation of the DOI so as to encourage them to offer logistical support in terms of transport, interpreting staff in times of need and funds for speedy removals of illegal immigrants.

#### 5.2.5: Permits:

The current system which gives the officers discretionary power to decide when to place an illegal immigrant on a permit<sup>4</sup> is susceptible to abuse and therefore, should be changed in order to enable an immigrant to demand to be placed on a permit as a matter of right.

#### 5.2.6: Law Reforms:

The laws dealing with immigration should clearly provide for such rights of illegal immigrants as to challenge their arrest, detention and removal from the country. The law should also clearly prohibit mass expulsions in line with the provisions of international human rights instruments.

It is envisaged that if the above suggestions are put in place, illegal immigrants would enjoy their human rights more than they currently do. Immigration Officers can carry out their duties in a more humane manner and will be conscious of the fact that they are dealing with human beings who deserve to have their human rights respected even when they lose their liberty due to being in conflict with the law.

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<sup>4</sup> Act no.18 of 2010, sections 27 and 31.

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