

13, 1969

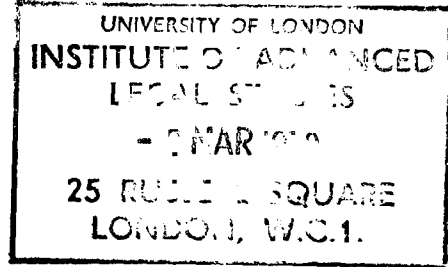
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No.20 of 1968.

IN THE PRIVY COUNCIL

ON APPEAL FROM THE COURT OF APPEAL

FOR SIERRA LEONE.



B E T W E E N :

JOHN JOSEPH AKAR (Plaintiff)  
Appellant

- and -

THE ATTORNEY GENERAL OF  
SIERRA LEONE (Defendant)  
Respondent

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CASE FOR THE APPELLANT

Record

1. This is an appeal from a Judgment and Order of the Court of Appeal for Sierra Leone dated the 5th April, 1968, allowing an appeal from a Judgment dated the 26th October, 1967, and an Order dated the 1st December, 1967, of the Supreme Court of Sierra Leone, whereby it had been adjudged and declared that certain purported amendments of the Constitution of Sierra Leone (hereinafter called "the Constitution"), relating to citizenship (hereinafter called "the impugned amendments"), were ultra vires the Constitution and void.

pp.98-117

pp.25-52  
pp.55-56

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2. The effect of the impugned amendments, if valid, is to withdraw citizenship of Sierra Leone from certain persons, including the Appellant, with retrospective effect; and the principal issues which arise for consideration on this appeal are whether such amendments are contrary to entrenched provisions of the Constitution, in particular a provision designed to prevent the making of laws which are discriminatory on grounds of race, and whether certain purported legislative alterations of those entrenched provisions are valid.

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3. On the 27th April, 1961, the Sierra Leone Colony and the Sierra Leone Protectorate together became an independent state, part of Her Majesty's dominions, under the name of Sierra Leone, by virtue of the Sierra Leone Independence Act, 1961.

4. The Constitution came into operation immediately before the 27th April 1961, by virtue of the Sierra Leone (Constitution) Order in Council, 1961, and is contained in the Second Schedule to the said Order in Council. 10

5. Prior to the introduction of the impugned amendments, section 1 subsection (1) of the Constitution read as follows :-

"1. - (1) Every person who, having been born in the former Colony or Protectorate of Sierra Leone, was on the twenty-sixth day of April, 1961, a citizen of the United Kingdom and Colonies or a British protected person shall become a citizen of Sierra Leone on the twenty-seventh day of April, 1961: 20

Provided that a person shall not become a citizen of Sierra Leone by virtue of this subsection if neither of his parents nor any of his grandparents was born in the former Colony or Protectorate of Sierra Leone."

6. The Appellant was born in the former Protectorate of Sierra Leone, of an indigenous Sierra Leone mother belonging to the Temne tribe, and a Lebanese father, and was on the 26th April, 1961, a British protected person. He therefore became a citizen of Sierra Leone on the 27th April, 1961, by virtue of the provisions of the said Section 1 subsection (1). 30

7. The provisions of the Constitution relating to the composition of the Parliament of Sierra Leone include the following :-

"29. There shall be a Parliament of Sierra Leone which shall consist of Her Majesty and a House of Representatives." 40

8. The Appellant by virtue of his citizenship

of Sierra Leone (together with certain other prescribed qualifications relating to age and language) was - and, as he contends, still is - qualified to be elected as a member of the House of Representatives, under the provisions of section 31 of the Constitution.

10 9. The Constitution confers upon the Parliament of Sierra Leone power to "make laws for the peace, order and good government of Sierra Leone" (section 42) and contains provisions for the alteration of the Constitution in terms as follows:-

"43. (1) Parliament may alter any of the provisions of this Constitution or (in so far as it forms part of the law of Sierra Leone) any of the provisions of the Sierra Leone Independence Act, 1961:

Provided that in so far as it alters -

(a) this section;

20 (b) sections 11 to 25 (inclusive) .....  
.....

a bill for an Act of Parliament under this section shall not be submitted to the Governor-General for his assent unless the bill has been passed by the House of Representatives in two successive sessions, there having been a dissolution of Parliament between the first and second of those sessions.

30 (2) .....

(3) A bill for an Act of Parliament under this section shall not be passed by the House of Representatives in any session unless at the final vote thereon in that session it is supported by the votes of not less than two-thirds of all the members of the House.

40 (4) The provisions of this Constitution or (in so far as it forms part of the law of Sierra Leone) the Sierra Leone Independence Act, 1961, shall not be altered except in

Record

accordance with the provisions of this section.

(5) In this section -

(a) references to any of the provisions of this Constitution or the Sierra Leone Independence Act, 1961, include references to any law that amends, modifies, re-enacts with or without amendment or modification or makes different provision in lieu of, that provision; and

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(b) references to the alteration of any of the provisions of this Constitution or the Sierra Leone Independence Act, 1961, include references to the amendment or modification, or re-enactment, with or without amendment or modification, of that provision, the suspension or repeal of that provision and the making of different provision in lieu of that provision."

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10. The entrenched sections 11 to 25, referred to in the said section 43, constitute Chapter II of the Constitution, which is entitled "Protection of Fundamental Rights and Freedoms of the Individual". They include section 23, the relevant parts of which at all material times until the 3rd October, 1962, read as follows:-

"23. - (1) Subject to the provisions of subsection(s) (4).....of this section, no law shall make any provision which is discriminatory either of itself or in its effect.

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(2) .....

(3) In this section, the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not

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made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

(4) Subsection (1) of this section shall not apply to any law so far as that law makes provision -

.....

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(f) whereby persons of any such description as is mentioned in subsection (3) of this section may be subjected to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society.

.....

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11. Apart from the entrenched clauses of the Constitution, section 9 thereof contains a limitation upon the powers of the Parliament of Sierra Leone to make provision for depriving persons of citizenship. The relevant parts of that section read as follows:-

"9. Parliament may make provision -

.....

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(b) for depriving of his citizenship of Sierra Leone any person who is a citizen of Sierra Leone otherwise than by virtue of sub-section (1) of section 1 or section 4 of this Constitution;

.....

(Section 4 of the Constitution relates to persons born in Sierra Leone after the 27th April, 1961).

12. The impugned amendments were introduced by the Constitution (Amendment) (No.2) Act, 1962, No. 12 of 1962 (hereinafter called "Act No.12 of 1962") the relevant parts of which read as follows:-

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"1. This Act ..... shall be deemed to have come into operation on the 27th day of April, 1961.

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2. Section 1 of the Constitution is hereby amended -

(a) by the insertion immediately after the words "Every person" in the first line of subsection (1) thereof of the words "of negro African descent"; and

(b) by the addition at the end thereof of the following new subsections -

"(3) For the purposes of this Constitution the expression "person of negro African descent" means a person whose father and his father's father are or were negroes of African origin. 10

(4) Any person, either of whose parents is a negro of African descent and would, but for the provisions of subsection (3), have been a Sierra Leone citizen, may, on making application in such manner as may be prescribed, be registered as a citizen of Sierra Leone, but such person shall not be qualified to become a member of the House of Representatives or of any District Council or other local authority unless he shall have resided continuously in Sierra Leone for twenty-five years after such registration or shall have served in the Civil or regular Armed Services of Sierra Leone for a continuous period of twenty-five years". 20 30

.....

"Passed in the House of Representatives this 17th day of January, in the year of our Lord one thousand nine hundred and sixty-two."

The date of the Royal assent, as it appears on the face of the said Act, was the 17th March, 1962.

13. The Appellant contends that the impugned amendments are contrary to the provisions of subsection (1) of the entrenched section 23 of 40

the Constitution, as being discriminatory of themselves and/or in their effect; and that as Act No.12 of 1962, by which they were introduced was not passed in accordance with the special procedural requirements of section 43 of the Constitution, it is ultra vires and void. If that contention is wrong, and the impugned amendments are valid and effective, they would appear to have the effect that the Appellant was thereby deprived retrospectively of his citizenship although given the option of applying for registration as a citizen without the right to become a member of the House of Representatives and certain other bodies, that is (as the learned trial Judge in this suit, the Chief Justice of Sierra Leone, said) "to accept the status of what might be called 2nd class citizen."

p.30,1.14.

14. The Parliament of Sierra Leone sought to overcome objections to the validity of Act No.12 of 1962 by means of a further enactment later in the same year. This was the Constitution (Amendment) (No.3) Act, 1962, No. 39 of 1962 (hereinafter called Act No. 39 of 1962) described as "An Act to Amend the Constitution in order to Effect the Avoidance of Doubts", and it provides as follows:-

"1. This Act ..... shall be deemed to have come into operation on the 27th day of April, 1961.

"2. Subsection (4) of section 23 of the Constitution is hereby amended by -

(a) the substitution of a semi-colon and the word "or" for the fullstop at the end of paragraph (f); and

(b) the addition immediately thereafter of the following new paragraph -

"(g) for the limitation of citizenship of Sierra Leone to persons of negro African descent, as defined in subsection (3) of section 1 of this Constitution, and for the restrictions placed upon certain other persons by subsection (4) of the said section."

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This Act contains words indicating compliance with the special procedural requirements of section 43 of the Constitution prescribed for the alteration of the entrenched provisions, viz:-

"Passed in the House of Representatives for the second time and in accordance with the provisions of subsections (1) and (3) of section 43 of the Constitution this 3rd day of August, in the year of our Lord one thousand nine hundred and sixty-two."

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The date of the Royal assent, as it appears on the face of this further Act, was the 3rd October, 1962.

15. The Appellant contends that Act No. 39 of 1962 does not have the effect of rendering valid Act No. 12 of 1962, and that the latter remains without any force in law. (There was a later Act, purporting to consolidate the provisions of Act No. 12 of 1962 with other amendments of the Constitution. This is Act No. 52 of 1965 which, however, does not take the matter any further, if Act No. 12 of 1962 is void.)

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p.4,1.13.

16. On the 7th January, 1964, the Appellant was registered as a citizen of Sierra Leone under the provisions of section 1 of the Constitution as purported to be amended by Act No. 12 of 1962.

p.1.

p.5, 1.6.

p.13.

p.3, 11. 7-

21.

p.13.

17. On the 20th February, 1967, by a Writ of Summons bearing that date, the Appellant instituted this suit, in which he claims a declaration that the impugned amendments are ultra vires the Constitution and void, and a further declaration the substance of which is that the said amendments, disqualifying him from eligibility for election as a member of the House of Representatives, are an infringement of his entrenched rights conferred by section 23 of the Constitution, and that he is a fit and eligible person to be voted for as a member of the said House at any elections held in Sierra Leone.

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pp.6-7

18. The Defendant, on behalf of the Government of Sierra Leone, by a Defence dated 7th March,



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1967, pleaded inter alia that the Appellant's Lebanese father "is not of African origin nor a Negro", and advanced the following contention:-

p.6,1.24

10 "The Defendant will contend that the Plaintiff not being a person of negro African descent and being registered as a citizen only pursuant to Section 1 (4) of the Constitution, has not in law any entrenched right conferred by Section 23 of the Constitution as alleged in his Statement of Claim unless after continuous residence in Sierra Leone for twenty-five years after the date of his registration to wit the 7th January, 1964."

p.6,1.29.

19. The suit was tried in the Supreme Court of Sierra Leone (Coram Tejan-Sie, C.J.) on the 1st and 4th July, 1967. No evidence was adduced on either side, save that the Appellant's passport dated 1947 was put in by consent. The case was by agreement argued as a point of law, upon the basis of paragraph 10 of the Appellant's Statement of Claim which, in substance, claimed that the impugned amendments, depriving him of his citizenship "because of his race", are ultra vires and void. The Judgment of the Court was delivered on the 26th October, 1967.

pp.21-24

p.22,1.9.

p.21,11.4

-8.

pp.4-5

pp.25-52

20. The learned Chief Justice by his said Judgment held that the impugned amendments were ultra vires and void, and that the Appellant should be granted a declaration in his favour. The principal reasons upon which the said decision rested were as follows:-

p.52,11.4

-23

(i) That any purported alteration of the Constitution must be jealously examined.

p.27,1.42

(ii) That on the 27th April, 1961, when Sierra Leone attained independence, the provisions of the Constitution concerning citizenship, contained no racial element :-

p.28,11.

10-44

40 "It will be noticed that at this stage race has not entered into the matter. The intention appears to be that anyone born in Sierra Leone and who could show long enough family

p.28,1.31

Record

- connection with Sierra Leone automatically became a citizen of Sierra Leone even though he had no trace of African blood, in other words the intention appears to be the settling up of a multi-racial society with persons having equal rights whatever their racial origins - a principle which is in accord with progressive thinking throughout the world, but to which, alas in too many cases, only lip service is paid." 10
- p.29,1.7            1    (iii) That it was admitted that on the 27th April, 1961, the Appellant fell within the scope of section 1(1) of the Constitution.
- p.30,11.  
10-34                (iv) That the fact that the Appellant had chosen to register under the provisions of section 1 of the Constitution, as purported to be amended by Act No.12 of 1962, did not preclude him from challenging the validity of the said Act. 20
- p.30,11.  
35-46                (v) That although section 1 of the Constitution is not itself one of the entrenched provisions which can be altered only by the special procedure laid down in section 43 thereof, nevertheless any alteration (i.e. of section 1)"must be one which does not conflict with any provision of the Constitution which limits the scope of the legislative power." 30
- p.30,1.43  
  
p.31,1.1.            Therefore the alteration must be considered in the light of two other provisions of the Constitution, viz. sections 9 and 23.
- p.29,1.15  
p.30,1.10            (vi) That the impugned amendments, if valid, would deprive the Appellant of the citizenship which he already had, but that Parliament had no power to deprive the Appellant of his citizenship, by reason of the limitation on its powers contained in section 9 of the Constitution. 40
- p.31,11.  
6-26

- The Defendant's answer to this argument, viz. that the amendments were retrospective, was rejected on the ground that making the same retrospective was unjustified and contrary to the spirit of sections 42 and 43 of the Constitution and they were ultra vires so that section 9 of the Constitution has its full effect.
- 10 (vii) That the impugned amendments appear to contravene subsection (1) of the entrenched section 23 in that they are discriminatory by affording treatment to persons like the Appellant attributable to his description by race. And that although prima facie Act No.39 of 1962 seemed to "put matters right" procedurally so far as this contravention is concerned, it did not in fact
- 20 do so because, upon a proper construction of section 43 of the Constitution, with particular reference to subsection 5(b) thereof, it was not open to the legislature to make any alteration (whatever its form) which does not amount to an improvement of the existing law.
- 30 (ix) That the "pith and substance" of the legislation under consideration was to exclude certain persons, particularly of Lebanese origin, from being elected to the House of Representatives; that if that object were sought to be achieved by amending section 31 of the Constitution to some such effect that for the purpose of that section the expression "citizen should include only citizens of "Negro African descent", it would fall within the provisions of
- 40 section 23(4) (f) of the Constitution and not pass the test of "reasonably justifiable in a democratic society"; that therefore Parliament by this legislation was "trying to do indirectly what it feels it cannot do directly" (referring to Pillai v. Mudanavake, (1953) A.C.514, at p.582) and the taking away from the Appellant his
- Record  
p.31,1.27  
p.50,1.28  
-p.51,1.7  
p.34,11.  
28-34  
p.35,1.30  
p.37,1.34  
pp.37,1.  
40-p.41,  
1.5.  
p.39,1.17  
p.48,11.7  
-33  
p.51,1.36  
-p.52,1.3.  
p.49,1.37

Record

right to stand for election to the House of Representatives (and other bodies) without having to wait for the lapse of 25 years is ultravires the Constitution.

p.49,1.46-  
p.50,1.27

(x) That even if the "pith and substance" of the legislation was simply to legislate in relation to citizenship the impugned amendments are contrary to the Constitution having regard to the provisions of sections 42 and 43 thereof.

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p.50,11.28  
-47

(xi) That the making of the impugned amendments by Act No.12 of 1962, and the amendments to section 23 of the Constitution by Act No.39 of 1962, retroactive, was completely unjustified and contrary to the spirit of sections 42 and 43 of the Constitution.

p.41,1.6-  
p.42,1.32

(xii) That the Court has jurisdiction to pronounce upon the validity of legislation.

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pp.55-56

21. The Supreme Court accordingly granted to the Appellant a declaration against the validity of the impugned amendments, and also against the purported amendment of section 23 of the Constitution by Act No. 39 of 1962, in terms as follows:-

"(1) That the amendments to Section (1) of the Constitution by Act 12 of 1962 and Act No. 52 of 1965 are ultra vires the Constitution and therefore null and void.

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(2) That the purported amendment by Act No. 39 of 1962 of Section 23 of the Constitution was ultra vires the Constitution and therefore null and void;

The Appellant was awarded his Costs of the action.

22. In the Court of Appeal (Sir Samuel Bankole Jones, P., Dove-Edwin and Marcus-Jones J.J.A.) a Judgment was delivered by the learned President, the other members of the Court agreeing. The said Judgment contains the following reasons for reversing the Judgment of the Supreme Court:-

Record  
pp.98-116

p.116

- 10 (i) That the joint effect of the Constitution and the Sierra Leone Independence Act, 1961, was to give to the Sierra Leone Parliament the full legislative powers of an independent sovereign state. p.103,1.42  
p.194,1.7
- 20 (ii) That Act No.12 of 1962 must be presumed to have been passed in accordance with the procedural requirements of section 43 of the Constitution, in accordance with the maxim omnia praesumuntur rite et sollemniter esse acta donec probetur in contrarium, and therefore the argument as to its invalidity fails. p.108,1.14  
p.110,1.6
- (iii) That apart from the said presumption, Act No.12 of 1962 complied with the provisions of Act No.63 of 1963. (The latter is an Act which prescribes the administrative procedure for the publication, authentication and recording of Acts of Parliament) p.108,1.23
- 30 (iv) That although section 9(b) of the Constitution contains a constitutional restriction on the power of Parliament to deprive of their citizenship persons who by virtue of section 1(1) of the Constitution became citizens of Sierra Leone on the 27th April, 1961, nevertheless Act No.12 of 1962 must be taken to have amended the said section 9(b) by necessary implication for the purpose of giving effect to the impugned amendments. p.113,1.34  
p.112,1.1.  
p.113,1.43
- 40 (v) That the "pith and substance" of Act No. 12 of 1962 was that it was legislation on citizenship, and the impugned amendments are not discriminatory as to race. p.114,11.  
5-36

Record

p.114,1.37

(vi) That even if the Act No.12 of 1962 was discriminatory as to race, there was no legal proof as to what race the Appellant belonged to.

p.115,11.6  
-29

(vii) That the contention that Act No.39 of 1962 could not revive the earlier Act No.12 of 1962, because the latter was void ab initio, failed because:-

p.115,1.23

(a) Act No.12 of 1962 was not discriminatory;

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p.115,1.25

(b) Alternatively, if Act No.12 was discriminatory, it was saved by section 23(4)(f), and "there was no necessity to have passed Act No. 39 of 1962, except ex abundantiae cautela".

p.115,1.28

The learned President stated his conclusion in the following terms:-

p.115,1.43

"The result is, that when Act No.12 of 1962 was passed retrospectively, it operated as if section 1 sub-section (1) had never been enacted. This means that on the 27th day of April, 1961 the respondent never acquired the status of the citizenship of Sierra Leone but was merely a person within the state who could, if he chose, acquire a Sierra Leone citizenship by registration, with all the limitations attached to such a status by law. The same principle applies to Act No. 39. It operated as if Section 23(4)(g) was in existence on the 27th April, 1961."

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p.117

Accordingly, the appeal was allowed, with no order as to Costs.

p.118

23. Final leave to Appeal to Her Majesty in Council was granted to the Appellant on the 22nd May, 1968.

24. The Appellant respectfully submits that the Judgment and Order of the Supreme Court were right, that the Judgment and Order of the Court of Appeal allowing the Appeal to that Court were wrong, and that this Appeal should be allowed

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with Costs, here and in the Courts below, for the following, amongst other

R E A S O N S

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- (1) BECAUSE the Judgment of the Supreme Court is right for the reasons therein appearing.
- (2) BECAUSE Act No.12 of 1962 is contrary to the relevant provisions of section 23 of the Constitution, and for that reason void.
- (3) BECAUSE Act No.12 of 1962 did not comply with the special procedural requirements of section 43 of the constitution relating to the entrenched provisions, and is for that reason void.
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- (4) BECAUSE the maxim omnia praesumuntur rite et sollemniter esse acta donec probetur in contrarium does not apply in the circumstances of this case so as to give validity to Act No.12 of 1962.
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- (5) BECAUSE (alternatively) if the said maxim has any application in this case, the suggested presumption in favour of the validity of Act No.12 of 1962 is displaced upon a proper examination of the relevant enactments, including in particular the said Act No.12 of 1962, Act No.39 of 1962 and Act No.52 of 1965.
- (6) BECAUSE if in the case of Act No.12 of 1962 there was compliance with the provisions of Act No.63 of 1963, such compliance could not and did not of itself give validity to the said Act No.12 of 1962, if otherwise for the Reasons herein stated or any of them the latter is void.

Record

- (7) BECAUSE section 9(b) of the Constitution contains a constitutional restriction on the power of the Parliament of Sierra Leone, i.e. it denies to that Parliament the power to deprive of their citizenship persons who by virtue of section 1(1) of the Constitution became citizens of Sierra Leone on the 27th April, 1961. 10
- (8) BECAUSE Act No.12 of 1962 did not amend the said section 9(b) by necessary implication, for the purpose of giving effect to the impugned amendments (i) because the said Act is void, (ii) alternatively (if it is valid) upon a proper construction thereof.
- (9) BECAUSE the "pith and substance" of Act No.12 of 1962 is discriminatory within the meaning of section 23 of the Constitution. 20
- (10) BECAUSE as regards the Appellant's race, it was common ground between the parties that he does not fall within the description "of negro African descent", and the case proceeded in both courts below upon that basis, and upon the basis that the impugned amendments, if valid, deprived him of his former citizenship because of his race. 30
- (11) BECAUSE Act No.12 of 1962 being void, it could not be and was not revived by Act No.39 of 1962.
- (12) BECAUSE the learned President of the Court of Appeal erred in rejecting the contention that Act No.39 of 1962 could not revive Act No.12 of 1962 on the ground that the latter was not discriminatory. 40
- (13) BECAUSE the learned President of the



Court of Appeal erred in rejecting the said contention on the further, alternative, ground that Act No.39 of 1962 was "saved" by section 23(4)(f) of the Constitution.

- 10 (14) BECAUSE Act No.12 of 1962 is not reasonably justifiable in, but repugnant to, a democratic society, and therefore would not pass the test of the said section 23(4)(f).
- 20 (15) BECAUSE upon a proper construction of the Constitution, read together with the Sierra Leone (Constitution) Order in Council, 1961, by which it was introduced, and the Sierra Leone Independence Act, 1961, section 43 of the Constitution precludes the Parliament of Sierra Leone from altering the provisions of the Constitution with retrospective effect.
- 30 (16) BECAUSE (alternatively) upon a proper construction of the Constitution, read together with the Sierra Leone (Constitution) Order in Council, 1961, by which it was introduced, and the Sierra Leone Independence Act, 1961, section 43 of the Constitution precludes the Parliament of Sierra Leone from altering any of the entrenched provisions, in particular section 23, of the Constitution with retrospective effect.
- (17) BECAUSE Act No.39 of 1962, in so far as the same is retrospective, is void and of no effect.
- 40 (18) BECAUSE (alternatively) Act No.39 of 1962, if valid, does not, upon a proper construction thereof, have the effect of validating the impugned amendments introduced by Act No.12 of 1962.

RALPH MILLNER

STEPHEN SEDLEY

No.20 of 1968.

IN THE PRIVY COUNCIL

ON APPEAL FROM THE COURT OF  
APPEAL FOR SIERRA LEONE.

B E T W E E N :

JOHN JOSEPH AKAR  
(Plaintiff) Appellant

- and -

THE ATTORNEY GENERAL  
OF SIERRA LEONE  
(Defendant) Respondent

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CASE FOR THE APPELLANT

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