CASES

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

JOHN JOSEPH AKAR *v.* ATTORNEY-GENERAL OF SIERRA LEONE

(Sierra Leone. P.C. Appeal No. 20 of 1968. Judgment delivered on 30th June, 1969.)

Lord MORRIS OF BORTH-Y-GEST, Lord HODSON, Lord GUEST, Lord WILBERFORCE and Sir Gordon WILLMER

Constitutional law—Constitutionality of legislation amending citizenship law—Retrospective amendment—Whether legislation in conflict with fundamental rights provisions of the Constitution.

Editorial Note:—This is the final chapter in the *Akar* case, of which the previous history in the Supreme Court and the Sierra Leone Court of Appeal have been given at [1968] J.A.L. 89, together with an explanatory note by J. P. W. B. McAuslan, *q.v.* The facts and the legal problems involved are sufficiently set out there and in the advice of the Board, given below. It remains to note that the majority judgment of the Privy Council agreed with the judgment of the Chief Justice, though the manner of reaching this conclusion was by no means the same. In particular, the Board declared that the argument that any amendment of the Constitution which was not an improvement was invalid was unacceptable; and their Lordships also reserved the question of the retrospective effect of the amendment of the Constitution. The basic conclusion of the majority in the Privy Council was that the purported amendments to section 1 of the Constitution were void as being in violation of section 23, which prohibits the enactment of legislation which is discriminatory on grounds of race. Nor did their Lordships find that there were any special circumstances which made the discriminatory legislation "reasonably justifiable in a democratic society". Lord GUEST disagreed on this last point: there were sufficient circumstances to justify the legislation on the face of the Act. It was not a matter for the courts but the executive (or the legislature) to determine this.

Majority judgment:

On 27th April, 1961, Sierra Leone attained fully responsible status within the Commonwealth. On that date by virtue of the Sierra Leone Independence Act, 1961, the former Colony and the former Protectorate together became part of Her Majesty's dominions under the name of Sierra Leone. Immediately before that date the Constitution of Sierra Leone, which was set out in the Second Schedule to the Sierra Leone (Constitution) Order in Council, 1961, S.I. 1961, No. 741, came into effect in Sierra Leone.

It is beyond question that on 27th April, 1961, the appellant became a citizen of Sierra Leone. That was the result of s. 1 (1) of the Constitution which provides as follows:

> "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:
>
> 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."

The appellant was born in the former Protectorate on 20th May, 1927. He was on 26th April, 1961, a British protected person. He was born of an indigenous Sierra Leone mother (who belonged to the Temne tribe) and a Lebanese father. His father, who was born and bred in Senegal and who had never been to Lebanon, had lived in Sierra Leone for a period of 56 years prior to the commencement of the proceedings. At the time of the institution of the proceedings the appellant lived in Freetown and was the substantive Director of Broadcasting and Director of the National Dance Troupe and Secretary of the Hotels and Tourist Board.

The central issues which are raised in the proceedings concern the validity or otherwise of certain enactments which, if valid, materially affect (and undoubtedly adversely affect) the appellant's status as a citizen. In his action the appellant claimed a declaration "that the Amendments to Section (1) of the Constitution by Act No. 12 of 1962 and Act No. 52 of 1965 are *ultra vires* the Constitution and are void". It was held by the learned Chief Justice in the Supreme Court that certain purported amendments of the Constitution (*i.e.*, those resulting from Act No. 12 of 1962 and Act No. 39 of 1962) were *ultra vires* the Constitution and so were null and void. A different view was taken in the Court of Appeal who reversed the decision of the learned Chief Justice. Appeal is now brought from the Judgment and Order of the Court of Appeal.

The first Act to be considered is the Constitution (Amendment) (No. 2) Act, 1962, which was Act No. 12 of 1962. For convenience their Lordships will refer to it as "Act No. 12". It was entitled "An Act to provide for the amendment of certain sections of the Constitution". It was assented to by the Governor-General in Her Majesty's name on 17th March, 1962. By section 1 it is provided that it "shall be deemed to have come into operation on the 27th day of April 1961". At the end of the Act are the statements:

> "Passed in the House of Representatives this 17th day of January, in the year of Our Lord one thousand nine hundred and sixty-two.
>
> S. V. WRIGHT
>
> Clerk of the House of Representatives."
>
> "THIS PRINTED IMPRESSION has been carefully compared by me with the Bill which has passed the House of Representatives and found by me to be a true and correctly printed copy of the said Bill.
>
> S. V. WRIGHT
>
> Clerk of the House of Representatives."

Section 2 is of prime importance. It is as follows:

> "2. Section 1 of the Constitution is hereby amended—
> (*a*) by the insertion immediately after the words 'Every person' in the first line of sub-section (1) thereof of the words 'of negro African descent'; and
> (*b*) by the addition at the end thereof of the following new sub-sections—
>
> '(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.
>
> (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.' "

If the amendments to section 1 of the Constitution by Act No. 12 are valid the results are startling. As a result of the carefully designed provisions of the new Constitution which came into operation immediately before 27th April, 1961, the appellant became a citizen of his country on that date. The provisions of Act No. 12 would now deny him and deprive him of that citizenship. If the Act, apart from s. 1, was valid, and if s. 1 could also have validity then the amendment of the Constitution would be deemed to have come into operation on 27th April, 1961, so that as a result of such deeming process the appellant would be denied his citizenship as on the very day that he actually acquired it. Yet in truth and in fact he would have been a citizen in the intervening period between 27th April, 1961, and 17th March, 1962. The reason for this purported retroactive deprivation would be that he was not a person "of negro African descent". In turn the reason would be that his father and his father's father could not be described as "negroes of African origin". No occasion now arises to consider the meaning of the vague words "of African origin". It is conceded and it was common ground that the appellant's father was not a "negro". If the amendments to section 1 of the Constitution by Act No. 12 were valid then under the provisions of the new s. 1 subs. (4) the appellant would be entitled to register as a citizen of a status aptly described by the learned Chief Justice as "second class". He could be a citizen who would have to wait for 25 years (and also during that period be continuously resident or continuously serving in the civil or regular Armed Services) before he would be qualified to become a member of the House of Representatives or of any District Council or other local authority.

When the appellant was faced with the personal situation arising for him on the passing of Act No. 12 he did in fact decide to register. It is not now suggested that by so doing he in any way debarred himself from making effective challenge to the validity of the legislation.

Their Lordships are not concerned with the wisdom or desirability or fairness of passing such a measure as Act No. 12 but only with its validity. To that aspect their Lordships now turn.

One Chapter of the Constitution (Chapter II) bears the heading "Protection of Fundamental Rights and Freedoms of the Individual". Section 11 contains declarations of the fundamental rights and freedoms of the individual to which "every person in Sierra Leone" is entitled. Later provisions of the Chapter were designed for the purpose of affording protection to those rights and freedoms. Thus there was to be protection (*a*) of the right to life, (*b*) from arbitrary arrest or detention, (*c*) of freedom of movement, (*d*) from slavery and forced labour, (*e*) from inhuman treatment, (*f*) from deprivation of property, (*g*) for privacy of home and other property, (*h*) of a nature that would secure the protection of the law, (*i*) of freedom of conscience, (*j*) of freedom of expression, (*k*) of freedom of assembly and association, and (*l*) from discrimination on the grounds of race or of similar grounds.

One of the main grounds of the appellant's attack upon section 2 of Act No. 12 was based upon the last of these. He became a citizen of a country whose Constitution proclaimed that there should be no discrimination on the grounds of race. Yet it is just such forbidden discrimination which, so the appellant contends, constitutes the very basis and essence and substance of Act No. 12. To lack "negro African descent" as in that Act defined will bring about deprivation and disability. It is s. 23 of the Constitution which gives protection from discrimination on the grounds of race. Subsections (1) and (2) and (3) of section 23 are as follows:

> "(1) Subject to the provisions of subsections (4), (5) and (7) of this section, no law shall make any provision which is discriminatory either of itself or in its effect.
>
> (2) Subject to the provisions of sub-sections (6), (7) and (8) of this section, no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.
>
> (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 made subject or are accorded privileges or advantages which are not accorded to persons of another such description."

It is to be observed that subs. (1) is direct and prohibitive: subject to certain exceptions "no law shall make any provision which is discriminatory". No provision which offends can therefore be valid.

The first question which arises is whether the content of section 2 of Act No. 12 is "discriminatory" within the meaning of subs. 3 of section 23 of the Constitution. As to this it is beyond dispute and indeed it was very properly conceded that the adoption of the word "negro" involved a description by race. Their Lordships have no doubt that the effect of Act No. 12 was discriminatory. Different treatment would be afforded to different people. Some persons but

not others would have disabilities or restrictions. The differentiations would be attributable wholly or mainly to respective descriptions by race. It is not suggested that the exceptions set out in subsections (5), (6), (7) or (8) of section 23 have applicability in this case. It is said, however, that the exception set out in subs. (4) (*f*) is applicable and that the result is that the general prohibition against discrimination (see subs. (1)) does not apply.

Though only subs. (4) (*f*) is said to be applicable its context will best be seen if the subsection is set out. It is as follows:

> "(4) Sub-section (1) of this section shall not apply to any law so far as that law makes provision—
>
> (*a*) for the appropriation of revenues or other funds of Sierra Leone or for the imposition of taxation (including the levying of fees for the grant of licences); or
>
> (*b*) with respect to persons who are not citizens of Sierra Leone; or
>
> (*c*) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law; or
>
> (*d*) for the application in the case of members of a particular race or tribe of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons; or
>
> (*e*) for authorising the taking during a period of public emergency of measures that are reasonably justifiable for the purpose of dealing with the situation that exists during that period of public emergency; or
>
> (*f*) whereby persons of any such description as is mentioned in sub-section (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 such description, is reasonably justifiable in a democratic society."

The question which falls to be considered therefore is whether the provisions of subs. (4) (*f*) gave warrant for the making of the discriminatory provisions contained in Act No. 12. It may be accepted that questions as to who are to be citizens of a country are normally questions for the country to decide. When Sierra Leone on 27th April, 1961, attained fully responsible status it attained it with a Constitution, no doubt very carefully planned and negotiated, which set out who were to be its citizens and which contained detailed and specific provisions in regard to making alterations of the Constitution and also specific provisions giving certain protections to "every person" (and *a fortiori* to every citizen) in Sierra Leone: one of such protections was from discrimination on the ground of race. Their Lordships will later refer to the provisions enabling alterations of the Constitution to be made. At the date when Act No. 12 was passed no alteration of s. 23 had been made. So the question which arises is whether subs. (4) (*f*) gave any authority for the passing of Act No. 12. Immediately before it was passed the appellant was, under the terms of the Constitution, a Sierra Leone citizen. He had been one throughout the period since 27th April, 1961. If the Act is valid then because his father and his

father's father could not be described as "negroes" of African descent the effect would be that his citizenship was taken away from him and in effect he would be deemed never to have had it though undoubtedly in fact he had had it. Leaving aside the separate question, to which their Lordships will refer, whether in any event Act No. 12 could have retrospective force, it has to be considered whether the "disability or restriction" of deprivation of citizenship is something which "having regard to its nature and to special circumstances pertaining to" the appellant and those similarly placed is "reasonably justifiable in a democratic society". It seems very doubtful whether it could be said that to impose a disability on the ground that someone's father and paternal grandfather were not "negroes of African descent" was something which having regard to its "nature" was reasonably justifiable in a democratic society. But apart from this it is to be observed that to justify (under subs. (4) (*f*) making discriminatory legislation not only must the disability be of itself of a nature that makes it reasonably justifiable but there must also be "special circumstances pertaining" to the persons subjected to the disability which make the legislation reasonably justifiable in a democratic society. Their Lordships can see no trace of any "special circumstances" pertaining to the appellant or to those similarly placed to him whose fathers and grandfathers were not negroes of African descent. If s. 23 provides that no law shall make any provision which treats some people differently from others merely because of differences in race it cannot be that such differences in race would alone constitute "special circumstances" pertaining to those being treated differently. The special circumstances would have to be additional to the differences of race (or of tribe or of place of origin or political opinions or colour or creed as the case may be). It was contended that "special" circumstances pertaining to the appellant and others similarly placed were to be found in the fact that they could be said to belong to an immigrant community whose links with the country were formed more recently than those of others. But the essence of the change that Act No. 12 would effect would be to eliminate those who were not negroes of African descent. Under subsection 1 of section 1 of the Constitution, as it came into effect, a person became a citizen on 27th April, 1961, if (*a*) he was born in the former Colony or Protectorate and (*b*) he was on 26th April, 1961, either a citizen of the United Kingdom and Colonies or a British protected person and (*c*) one of his parents or one of his grandparents was born in the former Colony or Protectorate. Under the designed amended subsection 1 of section 1 a person would become a citizen if (*a*) his father and his father's father are or were negroes of African origin and (*b*) he was born in the former Colony or Protectorate and (*c*) he was on 26th April, 1961, a citizen of the United Kingdom and Colonies or a British Protected Person and (*d*) one of his parents or grandparents was born in the former Colony or Protectorate. No change would be made in the provisions of subsection 2. It will be seen therefore that the designed change was not one that added anything in regard to having links with Sierra Leone or long family associations with Sierra Leone. The essential change did not involve

that a person's father or father's father should have lived in Sierra Leone: what the change involved was that a person's father and father's father had to be "negroes" and also negroes of "African origin". The new added qualification in subs. 1 was essentially a racial one. The only circumstance which was to exclude those who under the provisions of subsection 1 of section 1 had already become citizens was that they would not satisfy a description which was essentially a description by race. In their Lordships' view Act No. 12 offends against the letter and flouts the spirit of the Constitution. Nor have their Lordships heard any reason assigned which could seem to justify the enactment. The circumstances pertaining to the appellant (or to any others similarly placed)were no different on 17th January, 1962, when Act No. 12 was passed, from the circumstances pertaining on 27th April, 1961. Nothing had changed. There was no reason why the appellant should be deprived of his citizenship. There were no special circumstances pertaining to the appellant or to others similarly placed.

It is to be observed that Act No. 12 does not even purport to amend s. 23 (4) not could it have done so. Section 23 is a section referred to in the proviso to s. 43 and Act No. 12 admittedly did not result from a Bill 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.

Before proceeding to consider an Act which was passed for the second time on 3rd August 1962, Act No. 39 of 1962 (which will be referred to as Act No. 39) their Lordships must refer to the provisions of the Constitution relating to its amendment and to certain additional submissions which were made in regard to Act No. 12.

Chapter IV of the Constitution deals in Part 1 with the composition of Parliament, in Part II with Legislation and Procedure in the House of Representatives and in Part III with the summoning, prorogation and dissolution of Parliament. It is to be noted (see s. 31) that included in the qualifications for membership of the House of Representatives is that a person must be a citizen of Sierra Leone.

The provisions of sections 42 and 43 of the Constitution are of the utmost importance. They are as follows:

> "42. Subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of Sierra Leone.
>
> 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;
>
> (*b*) sections 11 to 25 (inclusive), section 29, section 44, subsection (2) of section 54, section 55, sections 56, 73, 74, 75, 76, 79, 80, 81, 84, 85, 86, 87 to 93 (inclusive), 94, 95, 96, 97, 98, 99, 102 or 103;
>
> (*c*) section 107 in its application to any of the provisions specified in paragraph (*a*) or (*b*) of this subsection; or
>
> (*d*) any of the provisions of the Sierra Leone Independence Act, 1961.
>
> 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.

(2) For the purposes of subsection (1) of this section, a bill passed by the House of Representatives in one session shall be deemed to be the same bill as a bill passed by the House in the preceding session if it is identical with that bill, or contains only such alterations as are certified by the Speaker to be necessary owing to the time that has elapsed since that bill was passed in the preceding session.

(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.

(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 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

(*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."

It will be seen that section 1 of the Constitution is not one of the sections referred to in the proviso to s. 43. A bill to amend s. 1 did not therefore have to be passed by the House of Representatives in two successive sessions but it did require at the final vote upon it (see subs. (3)) to be supported by the votes of not less than two-thirds of all the members of the House.

In regard to Act No. 12 a point was taken that it had not been "passed" in accordance with the provisions of the Constitution in that it had not been supported by the votes of two-thirds or more of all the members. It was argued that the endorsement of the Clerk of the House of Representatives on Act No. 12 was merely that the Bill had been passed and that it did not record that the Bill had been passed in accordance with the provisions of subs. (3) of s. 43. Comparison was made with the endorsement on Act 39. That is an Act which is designed to amend s. 23 of the Constitution. As s. 23 is one of the sections referred to in the proviso to s. 43 (1) it was necessary that a Bill for an Act to amend s. 23 should have been passed by the House of Representatives in two successive sessions, there having been a dissolution between the first and the second of them. The printed endorsement on Act No. 39 (over the name of the Acting Clerk of the House of Representatives) is in these terms: "Passed in the House of Representatives for the second time and in accordance with the provisions of subsection (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." There appears to be no statutory requirement that an endorsement should be in any particular form (though there are requirements in regard to authentication and assent and date of operation (see Act No. 63 of 1961)) but it will be seen that an endorsement could, according as would be appropriate, record (*a*) that a Bill had been passed or (*b*) (if the Constitution was being altered) passed with the necessary voting support or (*c*) (if the sections or provisions referred to in the proviso to section 43 (1) were being altered) passed for a second time and in accordance with the provisions of subsections (1) and (3). It was argued that, because the endorsement on Act No. 12 merely records that the Bill was "passed", it should be inferred that it was passed in an ordinary manner and not in the special manner (under subsection 3) of having the support of the votes of not less than two-thirds of all the members of the House. Their Lordships do not think it right to draw any such inference. There is no reason to suppose that there was any irregularity. It is recorded by the Clerk of the House of Representatives that the Bill was passed. There is no basis for any suggestion that the Bill was not properly passed or for supposing that a procedural requirement was forgotten or ignored.

A further submission in regard to the invalidity of Act No. 12 was based upon a consideration of section 9 of the Constitution. That section, which is not one referred to in the proviso to s. 43, provides as follows:

> "9. Parliament may make provision—
> (*a*) for the acquisition of citizenship of Sierra Leone by persons who do not become citizens of Sierra Leone by virtue of the provisions of this Chapter;
> (*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; or
> (*c*) for the renunciation by any person of his citizenship of Sierra Leone."

In reliance upon paragraph (*b*) it was submitted that Parliament was not entitled to make provision for depriving of his citizenship of Sierra Leone a person who is a citizen by virtue of subsection 1 of section 1 or section 4 of the Constitution. The appellant became a citizen of Sierra Leone on 27th April, 1961, by virtue of subsection 1 of section 1 and was a citizen on 17th January, 1962: it was submitted therefore that on that latter date Parliament was not entitled to pass a Bill which would have the effect of depriving him of his citizenship. As their Lordships are clearly of the opinion for the reasons that have already been set out that the amendments to section 1 of the Constitution by Act No. 12 were invalid it is not necessary to express a final view in regard to this additional submission. Linked with a consideration of it is the question whether, assuming that the provisions of s. 2 of Act No. 12 were otherwise valid, the Act could in any event validly be deemed to have come into operation on 27th April, 1961. If it could and if therefore section 1 of the Constitution was amended on 27th April, 1961, could it be said that there was any moment of time on that date during which

the appellant became a citizen? Or was the result, albeit by a deeming process, that the appellant never became a citizen? If so, then he was not deprived of citizenship and the provisions of section 2 of Act No. 12 would not violate s. 9 of the Constitution. If however, retroactive operation of Act No. 12 could not be effected, then was it an effect of the passing of Act No. 12 that section 9 (*b*) of the Constitution was impliedly repealed? Or was section 9 (*b*) impliedly amended? If it was what was the amendment?

If, as their Lordships conclude, the amendments to section 1 of the Constitution by Act No. 12, when passed, were in violation of the provisions of section 23 of the Constitution and so were invalid, it is contended by the respondent that that consequence was nevertheless avoided by the passing of Act No. 39 of 1962. Act No. 39 has the title—"An Act to amend the Constitution in order to effect the Avoidance of Doubts." It does not set out what the doubts were but as the purpose of the Act is to amend s. 23 of the Constitution in a particular way it is a reasonable assumption that the doubts were doubts in the minds of some persons as to the validity of Act No. 12. As section 23 is one of the sections mentioned in the proviso to s. 43 a Bill for the amendment of it required to be passed in accordance with the provisions both of subsection 1 and of subsection 3 of s. 43. The Bill was so passed. It was passed for the second time on 3rd August, 1962. It was assented to in Her Majesty's name on 3rd October, 1962. The Act has but two sections. They are as follows:

> "1. This Act may be cited as the Constitution (Amendment) (No. 3) Act, 1962, and shall be deemed to have come into operation on the 27th day of April, 1961.
>
> 2. Sub-section (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 sub-section (3) of section 1 of this Constitution, and for the restrictions placed upon certain other persons by sub-section (4) of the said section'."

It is to be observed that Act No. 39 does not refer to Act No. 12. It does not attempt any process of re-enactment. It purports to amend subsection 4 of s. 23 of the Constitution by adding a new paragraph. The new paragraph refers to subsection 3 and subsection 4 of section 1. In the Constitution unless it had been validly amended there were no such subsections of section 1. Had the provisions of s. 2 of Act No. 12 been valid, then there would have been the addition to section 1 of the Constitution of such subsections. Act No. 39 needed as a basis an assumption that Act No. 12 was valid and so was an existing Act. That was an incorrect assumption. Their Lordships are quite unable to accept the contention that Act No. 39 should be regarded as impliedly reviving or re-enacting any invalid provisions of Act No. 12. The provisions of s. 2 of Act

No. 12 were invalid when the Act was passed and assented to and the provisions must be treated as having been non-existent. There is no provision in Act No. 39 which purports or sets out to give them life. Though Act No. 39 was passed in accordance with the provisions of s. 43, it becomes meaningless once the provisions of s. 2 of Act No. 12 are ignored as they must be.

A viewpoint (which found favour with the learned Chief Justice) that it was not open to the legislature to make any alteration (whatever its form) to the Constitution which did not amount to an improvement of the existing law was not advanced before their Lordships and would not have been acceptable.

Their Lordships' conclusions make it unnecessary to express any final opinion as to whether if Act No. 12 had otherwise been valid its purported retroactive operation could have validity. The terms of the Constitution must have been drafted after consultations and agreement. It probably was not in fact contemplated that an important provision concerning citizenship which came into operation on 27th April, 1961, would be altered other than prospectively. Parliament in Sierra Leone was however (by s. 42 of the Constitution) given the plenitude of power to make laws which results from the use of the words "make laws for the peace, order and good government of Sierra Leone" and also the power (see s. 43) (subject to the proviso) to "alter" the provisions of the Constitution.

The Constitution laid it down that if it is desired to alter the provisions contained in the sections referred to in the proviso to s. 43 there must be a Bill passed in two successive sessions with a dissolution of Parliament between those sessions: and all other requirements of subsections 1 and 2 and 3 must be satisfied. This points to the view that the normal expectation would be that Parliament would decide that alterations to the entrenched clauses of the Constitution would operate prospectively after a new Parliament was in being. But whether this be so or not the power of Parliament is only restricted to the extent which is set out in the Constitution. The general power of Parliament must include a power to enact that legislation (if valid and validly passed) is to have retrospective effect. An intention so to enact would have to be shown by clear and definite words. So also Parliament is entitled to have recourse to deeming provisions. It is not for the Court to decide as to the wisdom or the desirability of exercising such powers. It is to be observed however that whatever Parliament might, by some deeming provisions, have succeeded in doing in the early part of 1962, it could not have altered any of the facts of history. Whatever the position could have been deemed to be, the fact would remain that the appellant had become a citizen. He would continue to be one until some valid enactment brought about a change. In view of the conclusions which their Lordships have expressed they need not refer further to the problems which have been raised. The circumstances that they are posed (as well as those already noted in reference to s. 9) is commentary enough of the difficulties which have been created by the scheme of legislation which it was thought appropriate to attempt to adopt.

Their Lordships are therefore in agreement with the result which

was reached by the learned Chief Justice. On the basis of that result the wording of the appropriate declarations was left to be settled by Counsel on both sides between them. In the first declaration which Counsel jointly drafted there is a reference to Act No. 52. That was an Act with the short title "The Constitution (Consolidation of Amendments) Act, 1965". As the reference to Act No. 52 was included by reason of the agreement of Counsel on both sides in drafting the declaration it has not been necessary for their Lordships to examine that Act. Three declarations were made in the Supreme Court. They were 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;
>
> (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;
>
> (3) That all consequential amendments to other sections of the Constitution—e.g.,—the inclusion of the figure '1' on line 1 of section 31 of the Constitution are *ultra vires* and void."

In view of what their Lordships have held they do not restore the second declaration.

For the reasons which they have set out their Lordships will humbly advise Her Majesty that the appeal should be allowed and that the judgment of the learned Chief Justice dated 1st December, 1967, be restored (subject to the omission of the second declaration). The respondent must pay the costs of the appellant before their Lordships' Board and in the Court of Appeal.

Dissenting Judgment by Lord Guest:

With a great deal of the advice tendered to Her Majesty in the majority judgment delivered by Lord MORRIS OF BORTH-Y-GEST I find myself in complete agreement. It is only on one point, but a critical point, that I wish to dissent from the advice tendered.

I find it unnecessary to repeat the background and facts relating to this appeal which have already been set out in the majority judgment.

Law No. 12 of 1962 was challenged on various grounds by the appellant as being *ultra vires* of the Constitution. I agree with the advice tendered as regards the procedural point, the point as affected by section 9 (*a*) of the Constitition and also as to the powers of Parliament to pass retrospective legislation that the challenge of *ultra vires* fails. It is with the point as affected by section 23 that, with respect, I disagree.

No. 12 of 1962 provides in effect that as from 27th April, 1961, it is a prerequisite of Sierra Leone citizenship in addition to the requirements of section 1 (1) of the Constitution that a person should be of "negro-African descent" as there defined. This is purported to be effected by a retrospective amendment of section 1 (1) of the Constitution, which came into effect on 27th April, 1961. The challenge made by the appellant against this legislation is that *inter alia* it is "discriminatory" having regard to the terms of

section 23. The respondent admits that No. 12 of 1962 is discriminatory and as such offends section 23. Section 23 is one of the specially entrenched sections of the Constitution which requires the special procedure enjoined by section 43 (1) of the Constitution. It is agreed that this special procedure was not carried out. No. 12 of 1962 can therefore only be saved if it comes within the exemption under section 23 (4) (*f*). Under this section the law on discriminatory legislation is excluded where any law makes provision:

> "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."

It is said that the exemption does not apply because there is no averment or no statement by the Attorney General that there are "any special circumstances" within the meaning of that section which made Act No. 12 reasonably justifiable in a democratic society. Although the courts are the guardians of the Constitution I believe that in interpreting the Constitution the ground has to be trod warily and with great circumspection. My answer to the argument that no special circumstances were alleged is that it would not be to the point if they were. The Attorney General for Sierra Leone cannot speak for the Parliament of Sierra Leone. Parliament speaks only through the provisions on the statute book. The Courts cannot go behind the scenes and enquire what were the motives or policy behind a particular piece of legislation. They can only as a matter of construction decide whether the Act is or is not within the powers of the Constitution. This question must be decided on the terms of the Act in conjunction with the provisions of the Constitution.

Accordingly, the question which has to be considered is whether Act No. 12 of 1962 is a provision whereby persons who are discriminated against are subjected to any disability or restriction which having regard to the nature of the disability or restriction and to special circumstances pertaining to those persons is reasonably justifiable in a democratic society.

As a matter of construction I have no hesitation in holding that Act No. 12 dealing as it does with citizenship is having regard to its nature as affecting a disability as regards citizenship reasonably justifiable in a democratic society. Any democratic society must in the nature of things have control over the qualifications for citizenship of that society. Next there must be "special circumstances pertaining to the persons" discriminated against. I demur to the view expressed that what must be shown is "a change of circumstances" since the Constitution was enacted which would justify Act No. 12. There is no mention of "a change of circumstances" in the Constitution. If the Courts are, as I think they are, precluded from enquiring into the motives behind Act No. 12, I find it difficult to see how the Courts can decide whether there were any special circumstances which prompted the passing of Act No. 12. This is a matter for Parliament. All that is required in my view is that

special circumstances must appear *ex facie* of the Act impugned. If they do not then the Act would not be saved by section 23 (4) (*f*). In my view however there are sufficient special circumstances appearing on the face of Act No. 12 to show that it was reasonably justifiable in a democratic society. These circumstances are the requirement of negro-African descent for citizenship.

The matter can be tested by a reference to section 23 (4) (*e*) which provides exception where a law makes provision:

> "for authorising the taking during a period of public emergency of measures that are reasonably justifiable for the purpose of dealing with the situation that exists during that period of public emergency;".

A law which appeared on the face of it to be passed during a period of public emergency could not be challenged on the ground that it was not reasonably justifiable for the purpose of dealing with the situation. This is a matter for the executive and not for the courts. There is a whole tract of law dealing with the Defence (General) Regulations passed at the outbreak of the last war in respect of the powers of the executive. It is only necessary to give one quotation from Lord GREENE, M.R., in *Carltona, Ltd.* v. *Commissioners of Works and Others* [1943] 2 All E.R. 560, at p. 564, where he said:

> "All that the court can do is to see that the power which it is claimed to exercise is one which falls within the four corners of the powers given by the legislature and to see that those powers are exercised in good faith. Apart from that, the courts have no power at all to inquire into the reasonableness, the policy, the sense, or any other aspect of the transaction."

See also *Point of Ayr Collieries Ltd.* v. *Lloyd George* [1943] 2 All E.R. 546.

If the courts are precluded from enquiry into the justifiability of executive acts *a fortiori* it appears to me that the Court cannot enquire into the validity of an Act of Parliament which *ex facie* appears to be within the Constitution. (For the application of this doctrine to delegated legislation see *Riel* v. *Reg.*, 10 App. Cas 675.)

For these reasons I would hold that Act No. 12 was *intra vires* and I would be in favour of the appeal failing.