

23 October – 6 November 2000
Communication No. 97/93

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

Twenty-Eighth Ordinary Session
23 October – 6 November 2000

JOHN K. MODISE

v.

BOTSWANA

DECISION

BEFORE: CHAIRMAN: E.V.O. Dankwa
VICE CHAIRMAN: K. Rezag-Bara
COMMISSIONERS: A. Badawi El Sheikh, Isaac Nguema, N. Barney Pityana,
H. Ben Salem, Florence Butegwa, A. Raganayi Chigovera, Vera M. Chirwa,
Jainaba John

Citation: Modise v. Bots., Comm. 97/93, 14th ACHPR AAR Annex V (2000-2001)
Publications: IHRDA, Compilation of Decisions on Communications of the African
Commission On Human and Peoples' Rights Extracted from the Commission's
Activity Reports 1994-2001, at 23 (2002); Documents of the African
Commission on Human and Peoples' Rights, Vol. 2, at 244 (Malcolm D. Evans
& Rachel Murray eds., 2009); (2000) AHRLR 30 (ACHPR 2000)

RAPPORTEUR

17th Session: Commissioner Umozurike

18th Session: Commissioner Umozurike

19th Session: Commissioner Umozurike

20th Session: Commissioner Umozurike

21st Session: Commissioner Umozurike

22nd Session: Commissioner Dankwa

23rd Session: Commissioner Dankwa

24th Session: Commissioner Dankwa

25th Session: Commissioner Dankwa

26th Session: Commissioner Dankwa

27th Session: Commissioner Dankwa

28th Session: Commissioner Dankwa

SUMMARY OF FACTS

1. The Complainant is claiming the right to Botswana citizenship, under the following circumstances: his father, a Botswana citizen, immigrated to South Africa to work there. During his stay, he got married and the Complainant was born of that marriage. His mother died shortly after his birth, and he was thus brought to Botswana, where he grew up. The Complainant is therefore claiming Botswana nationality by ancestry.
2. He alleges that in 1978, he was one of the founders and leaders of an opposition party called Botswana National Front. He is of the view that it is because of his political activities that he was declared an “undesirable immigrant” in Botswana by the government.
3. On 17th October 1978, he was arrested and handed over to the South African police without being brought before a tribunal. He already had a judicial action pending before a Botswana court, regarding a temporary work permit, but with his deportation, he was unable to follow the case.
4. Having returned to Botswana, he was once again arrested and deported without trial. After his third attempt at returning, he was charged, convicted of illegal entry and declared an undesirable immigrant. He was serving a ten-month prison term and had filed an appeal when he was deported for the fourth time to South Africa, before the case was concluded.
5. Since the Complainant did not have South African nationality, he was obliged to settle in the homeland of Bophutatswana. He lived there for seven years until the government of Bophutatswana issued a deportation order against him and he found himself in the no-man’s land between Bophutatswana and Botswana, where he remained for five weeks, when he was admitted into Botswana on a humanitarian basis. He obtained a three-month entry permit, renewable at the entire discretion of the competent Ministry, until June 1995.
6. The Complainant does not and has never held a South African passport or citizenship of Bophutatswana.
7. He claims to have suffered heavy financial losses, since the government of Botswana confiscated his belongings and property. He cannot work, since he does not have the relevant permit, and he is constantly under threat of deportation. He has gone to great lengths to try to prove his Botswana nationality, and the appeal against his prison sentence is still pending. He presently has no funds to prosecute his claims in court.

8. He is asking the government to concede him his nationality by birth.

COMPLAINT

The Complainant alleges that he has been unjustly deprived of his real nationality and claims violation of articles 3(2), 5, 7(1)(a), 12(1) and (2), 13(1) and (2), 14, 16(1) and (2) and 18(1) of the African Charter.

PROCEDURE

9. John K. Modise presented the communication on 3rd March 1993.
10. The Commission was seized of it at its 13th Session, held in March 1993.
11. The government was notified of it on 12th April 1993 without any reaction coming from its side.
12. On 13th May 1993, a letter was addressed to Mr. John K. Modise informing him that the communication had been examined at the 13th Session, and that the Commission required some clarifications from him regarding the exhaustion of local remedies.
13. A second notification was addressed to the government on 12th August 1993, with the same result.
14. On 7th September 1993, the Complainant replied to the Secretariat's letter dated 13th May 1993 emphasising that he had exhausted the available local remedies. He added that he could no longer pursue his case before the national jurisdictions due to lack of financial resources.
15. Another notification was sent to the government on 29th January 1994, with a copy to the Complainant.
16. On 30th January 1994, the Secretary to the Commission received correspondence from the spouse of the Complainant, stressing that Mr. John K. Modise had no more money to pursue the case brought before the national jurisdiction, since he had been forced into exile and that he had suffered heavy financial losses due to the confiscation of his belongings by the Botswana Police.
17. On 22nd February 1994, the Complainant acknowledged receipt of the copy of the notification addressed by the Secretariat to the government on 29 January 1994. He also called on the Commission to consider his case, as he believed that he had exhausted all the available local remedies. A short chronicle of the case was attached to the said correspondence.
18. The Complainant wrote again on 24th October 1994 in reply to the Secretariat's correspondence dated 8th August 1994, to confirm having exhausted local remedies.

19. At its 16th Session held in October 1994, the Commission re-examined the communication and decided to defer its decision until it received information on the manner in which other human rights bodies handle cases involving Complainants who are lacking financial means.
20. At the 17th Session, the communication was declared admissible. It was considered appropriate to assign the case to the Commissioner covering Botswana to deal with under his human rights promotion activities. Consequently, responsibility was assigned to Commissioner Janneh. However, no concrete measures were taken.
21. On 20th April 1995, a correspondence was dispatched to the Complainant to inform him of the decision regarding the admissibility of the communication.
22. On 18th May 1995, a letter was received from the European Commission on Human Rights in reply to the Secretariat's request regarding the issue of financial difficulties.
23. On 26th May 1995, a correspondence was sent to the Botswana government to inform it of the decision on admissibility taken by the Commission and to request it to consider an amicable settlement of the case. There was no response from the government of Botswana.
24. On 23rd September 1995, the Commission received a correspondence dated 15 May 1995 from the non-governmental organisation, Interights informing it that it had been designated by Mr. Modise to represent him at the next session of the Commission. Mr. Modise's letter to Interights dated 2nd December 1994 in this regard was annexed to the said correspondence.
25. The same envelope contained a second letter from Interights dated 15th May, stating that the NGO had just been informed of the decision on admissibility taken by the Commission at its 17th Session and requesting, therefore, that a formal notification of the said admissibility be addressed to it. Interights also enclosed an explanatory note on the case and the demands of the Complainant, and indicated its intention to be present at Praia, at the 18th Session, to argue the case.
26. At the 18th Session held in October 1995, the Commission heard the counsel of the Complainant, Mr. Odinkalu. It was decided to defer the decision on the merits in order to allow some time for the efforts at arranging an amicable settlement and, if necessary, the case would be re-examined at the 19th Session.
27. On 19th October 1995, the Secretariat received by fax a Note Verbale from the Ministry of Foreign Affairs of Botswana with the information that the Head of State had granted Botswana nationality to Mr. Modise, and that his certificate of nationality had been sent to him by post on 26th June 1995.
28. On 30th November 1995, a copy of this Note Verbale was dispatched to Mr. Odinkalu with a letter informing him that if the Commission did not receive any contrary

information before its next session, the granting of nationality would be considered an amicable settlement.

29. On 14th December 1995, the Secretariat received a letter from Mr. Odinkalu, counsel to the Complainant, indicating that he did not consider the granting of nationality as an amicable settlement and asking the Commission to continue the examination of the case.
30. On 28th December 1995, the Secretariat received correspondence from Commissioner Dankwa asking for copies of all documentation relevant to the case for his use during a mission to Botswana.
31. On 25th January 1996, the Secretariat received faxed correspondence from Mr. Odinkalu indicating his intention to send some supplementary information to the Commission.
32. On 13th February 1996, the Secretariat received a letter from Commissioner Dankwa asking for copies of certain pages of Mr. Modise's passport. The Secretariat forwarded them to him by fax.
33. On 23rd February 1996, the Secretariat sent a fax message to Commissioner Dankwa inquiring about the results of his mission to Botswana.
34. On 28th February 1996, Mr. Odinkalu, counsel for the Complainant presented an additional note describing the special conditions of the nationality by naturalisation granted to Mr. Modise.
35. On 1st March 1996, the Secretariat received a fax message from Commissioner Dankwa informing it that he had not been able to carry out his mission to Botswana before the 19th Session.
36. During the 19th Session, the communication was not examined.
37. On 8th May 1996, a letter was sent to the Botswana government, acknowledging receipt of its Note Verbale of 19th October 1995, and informing it that the communication was not examined at the 19th Session, but that it would be done at the 20th Session slated for October 1996.
38. On 8th May 1996, a letter was sent to the Complainant giving him the same information as above. A copy of the Note Verbale addressed to the Commission by the government on 19th October 1995 was attached to the letter.
39. On 9th October 1996, the Secretariat of the Commission received a fax message from Interights mainly to transmit a copy of Mr. Modise's letter stating that all domestic remedies had been exhausted, and that even though the government of Botswana had promised Commissioner Dankwa that Mr. Modise would be issued with a passport, his application had still not been approved by the competent authorities.
40. On 10th October 1996, the Secretariat acknowledged receipt of Interights' correspondence.

41. At its 20th Session, held in Grand Bay, Mauritius in October 1996, the Commission heard a presentation made by Interights. Following the hearing, it decided to defer a decision on the merits to its next session in order to give more time to explore the avenue of an amicable settlement.
42. On 12th December 1996, the Secretariat addressed a Note Verbale to that effect to the government.
43. On 12th December 1996, the Secretariat addressed a letter to that effect to Interights.
44. At its 21st Session in April 1997, the Commission decided to close the case, by considering that Mr. Modise's naturalisation constituted an amicable settlement of the matter.
45. On 11th June 1997, the Secretariat notified the Complainant, the State Party and Counsel to the Complainant.
46. On 16th June 1997, the Secretariat received a fax message from Interights, indicating that it was not satisfied with the Commission's decision and that it was consequently calling for the matter to be reopened.
47. On 19th June 1997, the Secretariat acknowledged receipt of Interights' letter of 16th June 1997, while also explaining the decision taken by the Commission.
48. On 26th June 1997, a letter was written to Mr. Modise on the subject, with a copy to Interights.
49. On 18th July 1997, the Secretariat received a letter from Interights subtitled "Reopening of Communication 97/93" with a nine-page explanatory note.
50. On 29th July 1997, the Secretariat wrote a letter to Commissioner Dankwa, with Interights' explanatory note attached, calling for his opinion as rapporteur on the communication.
51. At its 22nd Session, held from 2nd to 11th November 1997, the Commission decided to accede to Interights' request, to reopen the case and therefore to re-examine the reasons that led its previous decision which considered that the communication had been closed on the basis of an amicable settlement. The Commission further requested Botswana to provide it with information on the terms of the settlement reached between the two parties, the directives regarding its implementation, as well as the type of citizenship granted to Mr. Modise.
52. On 18th November 1997, the Secretariat wrote to the parties to inform them of the Commission's decision.

53. On 11th February 1998, the Secretariat addressed a reminder Note Verbale to Botswana's Ministry of Foreign Affairs.
54. By the 23rd Session, the government of Botswana had not yet reacted to the abovementioned request. The Commission consequently requested the Secretariat to remind the government about the request.
55. On 10th August 1998, the Respondent State responded to the request.
56. At its 24th Ordinary Session held from 22nd to 31st October 1998, the Commission heard Mr. Botsweletse Kingsley Sebele, Secretary General of the Botswana Ministry of Labour and Home Affairs. He stated that the laws of his country could not give Mr. Modise any status other than that which he has already been granted, adding that Mr. Modise had obstinately refused to co-operate with the government of Botswana. The Commission thereafter deferred a decision on the merits to its 25th Session.
57. On 10th November 1998, the Secretariat wrote to the parties concerned informing them of the Commission's decision.
58. By two Note Verbales dated 6th October 1998 and 9th December 1998, the Government of Botswana reiterated its position as contained in its earlier Note of 27th May 1998.
59. On 16th April 1999, Interights, wrote to the Commission requesting a deferral of the hearing of the case to the 26th ordinary session due to Mr. Odinkalu's illness.
60. At the 25th ordinary session of the Commission held in Bujumbura, Burundi, the Commission deferred hearing of the communication to its 26th ordinary session.
61. On 6th July 1999, the Secretariat of the Commission wrote letters to the parties informing them of the Commission's decision.
62. On 29th September 1999, the Government of Botswana replied through fax confirming its position contained in its Note Verbale of 9th December 1998, and requesting that the information therein be brought to the attention of the Commissioners and the Legal representatives of the Complainant.
63. On 1st October 1999, the Secretariat of the Commission replied to the said Note Verbale. A copy of the government's response was forwarded to Interights for information and necessary action.
64. On 20th October 1999, Interights sent to the Secretariat of the Commission its written response to the observations of the government of Botswana.
65. At its 26th ordinary session held in Kigali, Rwanda, the Commission reviewed the case and noted that the government of Botswana had indicated that if it did not hear anything contrary to its position, it would consider the case closed. Since Interights had submitted a brief to the contrary, the Commission, therefore, decided to bring it to the attention of the

government of Botswana. A final decision on the merits was deferred to the next ordinary session.

66. The above decision was conveyed to parties on 18th January 2000. A copy of Interights' brief was attached to the letter sent to the government of Botswana. No response has been received from the competent authorities of Botswana.

67. At the 27th ordinary session of the Commission held in Algeria from 27th April to 11th May 2000, the Commission examined the case and deferred its further consideration to the next session.

68. Parties were informed of the said decision on 12th July 2000.

LAW

ADMISSIBILITY

69. This communication has a long history before the Commission. It was declared admissible at the 17th ordinary session of the Commission on grounds that local remedies were unduly prolonged and the legal process wilfully obstructed by the government through repeated deportations of the Complainant. The case was later closed because the Commission considered that the Complainant's naturalisation constituted an amicable settlement of the matter. It was however re-opened upon the application of Interights on behalf of the Complainant.

MERITS

STATE PARTY'S RESPONSE

70. The Respondent State later responded to the Commission's request on the terms of the settlement reached with the Complainant. It submitted, among others, that Mr. Modise had been naturalised as a Botswana citizen on 28th February 1995. By virtue of that, he enjoyed all the rights inherent to his status as provided in chapter II of the country's constitution. Furthermore, a document attached to the note from the Respondent State contained the relevant constitutional provisions regarding Botswana citizenship as at the time of the country's independence. The document provides explanatory details on the birth and parentage of the Complainant, who was born in the territory of what was then the Union of South Africa (which became the Republic of South Africa in 1961), of a father who had the status of a protected person of the British crown, though originating from the protectorate of Bechuanaland (present day Botswana). The Respondent State points out that Mr. Modise and his counsel had probably innocently misunderstood and misinterpreted section 20(2) of the Botswana constitution. The Respondent State avers that the place of birth of an individual immediately confers its nationality on that person. This nationality-by-birth may later be rejected or given up by that person, his parents or legal custodian. To avoid a child being born stateless, the law operates in such a way that the place of birth confers its nationality to an individual. It is not necessary to take any

legal steps to guarantee that nationality. Section 20(2) of the constitution concerns those individuals born outside the protectorate of

Bechuanaland and who were at the time of their birth either subjects of Her Majesty or crown protected persons and whose fathers had acquired Botswana citizenship in compliance with the provisions of section 20(1). John K. Modise could have benefited from the provisions of section 20(1) of the constitution if his father, born in the protectorate territory and having the status of a crown protected person were alive at the time of Botswana's independence. John K. Modise does not meet the conditions of section 20(2) because, having been born in South Africa, he is by that fact a South African citizen by simple application of the law and without him having to take any legal steps to prove his nationality. Hence, in 1966, he was not a subject of Her Britannic Majesty and of her colonies, nor a protected person of the English crown. South Africa was not, in 1966, a British colony. Consequently, he did not meet the conditions required for acquiring Botswana nationality under section 20(2).

71. Section 23(1) concerns the case of those individuals who found themselves in a similar situation to that of Mr. Modise: in the sense that it provided the possibility of acquiring Botswana nationality to those persons whose fathers had acquired that nationality in compliance with section 20(1); but even the children of such persons were excluded in the light of the provisions of section 20(2). Since Mr. Modise, by virtue of the legal provisions, could not lay claim to the nationality of the new State of Botswana either by birth or by parentage [section 20(2)], the law gave him the possibility of choosing that nationality by naturalisation, section 23(1). This text provides that all those who had reached the age of majority should apply for their naturalisation before 1 October 1968. It seems that Mr. Modise who was 33 years old as of that date had not taken advantage of that possibility which was open to him for a period of two years. This explains his present difficulties, for since he had not taken the steps necessary for his naturalisation, in the eyes of the law he was considered as not being interested.

72. The argument of Mr. Modise and his counsel that he was a Botswana citizen by birth and by parentage does indeed seem tenuous. In terms of the legal provisions in force in September 1966, he could not lay claim to the said nationality. He was born in South Africa and not in the protectorate of Bechuanaland. He could not claim Botswana nationality by parentage because he was explicitly excluded therefrom by section 20(2). The proposition that he has never claimed any other nationality is entirely immaterial – for he did not have any reason to do so. Having been born in South Africa, he automatically enjoyed the nationality of that country. That automatically disqualified him from holding Botswana nationality in compliance with section 20(2). He could, however, by virtue of the provisions of section 23(1), have opted for the said nationality, but he did not. The State of Botswana has offered all and sundry the possibility of making a conscious choice between keeping their nationality-by-birth and naturalisation as citizen of the new State of Botswana. Mr. John Modise could not, in this regard, hide behind the excuse of ignorance, because no one is expected to be ignorant of the law.

73. In reaction to the above claims by the Respondent State, the Complainant's legal representative submitted that such claims contained several adverse claims of facts, law, and of mixed facts and law that were untrue, self-contradictory and contested.

74. He contended the claim that when Mr. Modise was deported to South Africa, the authorities there accepted him as a citizen. He pointed out that Mr. Modise was first deported to South Africa from Botswana on 17 October 1978, pursuant to a directive issued on 16 October 1978 by the Permanent Secretary in the Office of the President of the Respondent State. Upon returning to Botswana four days later on 21 October 1978, he was arrested and charged with re-entering Botswana, while being a prohibited immigrant.
75. The question as to whether or not South Africa accepted Mr. Modise as a national was directly addressed in the decision of Hayfron-Benjamin (Chief Justice) in the appeal of Mr. Modise against his conviction in the case of John K. Modise v The State, decided by the High Court of the Republic of Botswana on 20th September 1979. The relevant part of the said decision reads:

The acceptance warrant, Exhibit P2, was issued at the Kopfontein Border Post and was dated 18th December 1978, i.e. two months after the Immigration Officer says he handed the accused over to the South African authorities. Cross-examination of the witness (the Immigration Officer, testifying for the Prosecution) disclosed that he was mistaken as to which document the South African authorities had signed that day.

He said: " the document P2, the acceptance warrant, is not the one which was signed by the Immigration Post in South Africa at the time I handed the accused to the border post..." The prosecution, therefore, closed its case without clearing up a matter, which apart from any other considerations, would be a factor in the assessment of the sentence to be imposed. If the South African authorities were only prepared to accept the appellant in December, the indications are that he was bundled out of the country before the necessary preparation for his acceptance had been completed and before the accused, who had been in the country (Botswana) from infancy had settled his affairs here.

76. From the above therefore, he claims that this decision, which is still uncontested, shows that the government of Botswana has never shown and was unable to show that Mr. Modise had indeed been accepted by the South African authorities as a national of South Africa. On the contrary, he submits that South Africa did not accept Mr. Modise, but that Mr. Modise was then banished to the defunct South African Homeland of Bophuthatswana, whose then government by a letter to Mr. Modise (Ref. No. 4/6/2/8/818/78) of 6 October 1986 wrote that:

Modise does not appear in the population register of the Citizens of Bophuthatswana. And that the subject of citizenship is a matter between you (Mr. Modise) and the Botswana government.

To validate their point, in the same year, the then government of the defunct Homeland of Bophuthatswana deported Mr. Modise back to Botswana.

77. Regarding the claim that there is no citizenship that can be offered or granted to Mr. Modise, he averred that such is contradicted by the other claim in the letter to the Commission by Mr. B. K. Sebele, Permanent Secretary, Ministry of Foreign Affairs dated 9 December 1998 that: Mr. Modise registered as a citizen under special circumstances at the

direction of the President of the Republic of Botswana, although he failed to indicate the date on which Mr. Modise was so registered.

He submits that it is impossible to reconcile the claim that the Complainant registered as a citizen under special circumstances at the direction of the President of Botswana with the claim by Mr. B. K. Sebele in his letter aforesaid that "There is no citizenship that can be offered or granted to Mr. Modise". He attested that Mr. Modise had reported that sometimes in 1998, immigration officials in Lobatse, Botswana visited him and invited him to sign a document to facilitate the renewal of his residence permit in Botswana that had expired. When he tried to verify the document, he was warned that he risked immediate and prompt deportation unless he signed the document, whereupon he promptly signed. Although he is physically in Botswana, he has not received any documentation or indication on his current nationality status from the Respondent State.

78. He disputes as factually untrue the claim that Mr. Modise is responsible for his failure to enjoy his rights as a citizen of Botswana, by refusing to produce the necessary documents as proof of his citizenship. In any case, he points out that their production would not remedy the violations asserted by him in this case.

79. On the issue that Mr. Modise could not and did not become a citizen by descent under the repealed section 20(2) of the Constitution of Botswana, because he was neither a British Protected Person nor a citizen of the United Kingdom and colonies on 29th September 1966, the counsel submits as follows:

The repealed section 20 of the Constitution of Botswana referred to in the letter of Mr. B. K. Sebele provides:

(1) Every person who, having been in the former Protectorate of Bechuanaland, is on 29th September, 1966, a citizen of the United Kingdom and Colonies or a British Protected Person, shall become a citizen of Botswana on 30th September 1966.

Every person who having been born outside the former Protectorate of Bechuanaland, is, on 29th September, 1966, a citizen of the United Kingdom and Colonies or a British protected person, and is not a citizen of any other country, shall, if his father becomes, or would, but for his death have become a citizen of Botswana in accordance with the provisions of sub-section (1) of this section, become a citizen of Botswana on 30th September, 1966.

80. Counsel submits that since it is common ground that Mr. Modise was born in South Africa of parents from Botswana, section 20(1) is inapplicable to him. Section 20(2) is, therefore, the applicable provision. However, in determining whether or not Mr. Modise was a citizen of the United Kingdom and Colonies or a British Protected Person on 29th September 1966 can only be made in terms of the British nationality Act of 1948. The provision of that Act which applies to Mr. Modise is section 12(2), which provided that:

A person who was a British subject immediately before the date of the commencement of this Act shall, on that date become a citizen of the United Kingdom and Colonies and possessed any of the qualification specified in the last foregoing subsection

The last foregoing subsection referred to in this provision is section 12(1) of the same Act that provides:

A person who was a British subject immediately before the date of the commencement of this Act shall on that date become a citizen of the United Kingdom and Colonies if he possesses any of the following qualification, that is to say:

- (a) That he was born within the territories comprised at the commencement of this Act in the United Kingdom and Colonies, and would have been such a citizen if Section four of this Act had been in force at the time of his birth;
- (b) That he is a person naturalised in the United Kingdom and Colonies;
- (c) That he became a British subject by reason of the annexation of any territory included at the commencement of this Act in the United Kingdom and Colonies;

81. Counsel submits further that it is not in dispute that Mr. John Modise's father, Samuel Remaphoi Modise and his mother, Elizabeth Ikaneng Modise, were both born in GooModultwa ward in Kanye of the Bangwaketse in the former Protectorate of Bechuanaland (now Botswana). John Modise, their son and Complainant in this case, was born in Cape Town where his father, Samuel Remaphoi Modise was an immigrant worker, about 1943. Had he (Mr. Samuel Remaphoi Modise) been alive on 30th September 1966, Samuel

Remaphoi Modise who was born in 1912 would have fulfilled the requirement of Section 12(1)(a) of the British Nationality Act of 1948 and, thereby been a national of the United Kingdom and the Colonies. Thus, by the combined operation of Section 12(1) and (2) and Section 1 of the British Nationality Act, John Modise, his son, was both a British subject and a citizen of the United Kingdom and Colonies on the day preceding 30th September 1966. As a result, he became a citizen of Botswana by descent on 30th September 1966. The relevant provision of Section 1 of the British Nationality Act provides:

(1) Every person who under this Act is a citizen of the United Kingdom and Colonies or who under any enactment for the time being in force in any country mentioned in subsection (3) of this section is a citizen of that country, shall, by virtue of that citizenship have the status of a British subject...

(2) The following are the countries herein before referred to, that is to say, Canada, Australia, New Zealand, The Union of South Africa, Newfoundland, India, Pakistan, Southern Rhodesia (now Zimbabwe) and Ceylon (now Sir Lanka)

82. On the claim by the Respondent State that there are no classes of citizenship in Botswana for purposes of enjoying rights and privileges, the Complainant's counsel asserts that apart from the concession by Mr. B. K. Sebele, Permanent Secretary, Ministry of Foreign Affairs, that 'as a registered or naturalised citizen, one is not eligible for election as a President', there remain, in addition, in Botswana three more serious consequences of citizenship by registration. These are:

(a) Citizenship by descent arises by operation of law and by biological facts over which the claimant has no control. Citizenship by registration on the other hand arises by the interposition of an administrative act facilitated by acts and facts supplied by the beneficiary.

(b) Citizenship by descent can be transmitted down the line to the children; but citizenship by registration can only be transmitted to children born after it has been acquired. This is particularly relevant in this case as all the children of the Complainant are now adults (above 21 years) and would therefore remain stateless even if their father were granted citizenship by registration.

(c) The manner in which different classes of citizenship may be lost differs. While it takes a voluntary act of renunciation to lose citizenship by descent, citizenship by registration or naturalisation can be withdrawn by a directive issued by a Minister of the ruling party or government.

83. While the decision as to who is permitted to remain in a country is a function of the competent authorities of that country, this decision should always be made according to careful and just legal procedures, and with due regard to the acceptable international norms and standards. In order for the Commission to determine whether there have been violations of the Charter as alleged by the Complainant, it is incumbent on it to assess the nationality of the Complainant based on the facts presented before it. The current circumstances of the Complainant are a result of a policy decision taken by the Botswana government.

84. The Complainant argues that he has been unjustly deprived of Botswana citizenship. In the brief submitted by his counsel, it is claimed that the Complainant was born in South Africa of Samuel Remaphoi Modise (father) and Elizabeth Ikaneng Modise (mother) from Goo-Modultwa ward in Kanye of the Bangwaketse in the former Protectorate of Bechuanaland (now Botswana). His father went to work in South Africa as a migrant worker. These facts are not contested by the Respondent State (see a copy of a document outlining Botswana Citizenship Law attached to the Note Verbale of 27 May 1998). In fact, paragraph 3(a) and (b) of the said document emphatically assert concerning John Modise's father thus: "He was therefore a British Protected person...At all times he remained a British Protected person" (see also paragraph 6 of the said document). Paragraph 3(d) and (e) of the said document assert that John Modise's mother died when he was three months old and his father brought him to the then Bechuanaland Protectorate (Botswana) to ensure that relatives take care of him; while his boyhood days are outlined in paragraph 3(e) to the effect that John subsequently grew up in the Protectorate and regularly travelled in and out of the Protectorate. The attainment of independence by Botswana on 30th September 1966 changed things and a new citizenship law was incorporated into the new Constitution. The State Party reproduced some of the relevant provisions of the said Constitution. They are sections 20(1) and (2) and 23(1).

85. The main point of contention of the Respondent State is that Mr. Modise could not and did not become a citizen by descent under the repealed section 20(2) of the Constitution of Botswana because he was neither a British Protected Person nor a citizen of the United Kingdom and Colonies on 29th September 1966, being a person who was born outside the former Protectorate of Bechuanaland (now Botswana). Granted that John Modise's father was

at all times a British Protected person, the question for determination is what then was his son's (John Modise's) nationality? To successfully do this, it is necessary to look at the relevant provision of the Botswana Constitution. The government has cited three provisions, to wit: sections 20(1) and (2) and 23(1) of the Constitution. Section 20(1) provides:

(1) Every person who, having been born in the former Protectorate of Bechuanaland, is on 29th September, 1966, a citizen of the United Kingdom and Colonies or a British Protected Person, shall become a citizen of Botswana on 30th September 1966.

(2) Every person who having been born outside the former Protectorate of Bechuanaland, is, on 29th September, 1966, a citizen of the United Kingdom and Colonies or a British protected person, and is not a citizen of any of other country, shall, if his father becomes, or would, but for his death have become a citizen of Botswana in accordance with the provisions of sub-section (1) of this section, become a citizen of Botswana on 30th September, 1966.

86. Section 20(1) of the said Constitution is not applicable to this case, for the simple reason that Mr. John Modise was not born in the former Protectorate of Bechuanaland. Section 20(2) of the Constitution is the applicable law in this regard, since Mr. John Modise was born outside the former Protectorate of Bechuanaland of a British Protected person (his father). Had Mr. Samuel Remaphoi Modise lived on 30th September 1966, he would, of course, have been a citizen of Botswana by virtue of the provision of sub-section (1) of this section. The Respondent State does not dispute this fact. Following the clear wordings of the sub-section, Mr. John Modise having been born outside the former Protectorate of Bechuanaland of a British Protected person, would have become a citizen of Botswana but for his father's death. Mr. John Modise would therefore have become a citizen of Botswana by birth by the operation of this sub-section. The government's position, stated in its brief accompanying its

Note Verbale of 27th May 1998, and Mr. B. K. Sebele's statement contained in his letter of 9th December 1998 (Ref: CHA 4/19X(88)PS), that Mr. John Modise is not covered by section 20(2) of the Constitution of Botswana are neither convincing nor satisfactory. The Respondent State's Note Verbale referred to above assigns South African citizenship to Modise as at 30th September 1966 without proof. Nothing is produced about South African law that confers citizenship on Modise. It should not be assumed that it is a universal principle that a person automatically acquires citizenship of the place of birth. It is not Botswana law that determines South African law.

87. In any event, evidence abounds that the Complainant, Mr. John Modise is not and has never been accepted in South Africa as a citizen. If that had happened, Mr. Modise would not have suffered the fate of being deported four times. The refusal of South Africa to accept him as its citizen forced Mr. Modise to live for eight years in the "homeland" of Bophuthatswana, and then for another seven years in "No Man's Land", a border strip between the former South African Homeland of Bophuthatswana and Botswana. The then government of the defunct Homeland of Bophuthatswana deported Mr. Modise back to Botswana (see paragraph 75 and 76 above).

88. John Modise's father was a Tswana at the time of independence, 30th September 1966 and his son, the Complainant not having been shown to have any other citizenship, acquired

Botswana citizenship by virtue of section 20(2) of the Constitution of Botswana in force at the time. The denial of this right is in violation of Articles 3 (2) and 5 of the Charter. Article 3(2) provides:

Every individual shall be entitled to equal protection of the law

Article 5 on the other hand provides:

Every individual shall have the right to the respect ...to the recognition of his legal status

Having arrived at this, it is therefore not necessary to consider the other provisions of the Constitution cited by the State Party.

89. The Commission takes notice of the fact that the Complainant, Mr. John Modise as indicated in the above judgement, had lived in the Republic of Botswana from his infancy. Mr. John Modise had also worked in Botswana and until 1978, without being subjected to the rigours of obtaining necessary nationality documents applicable to citizens by registration, whom the government claims he is. The Commission also takes notice that the government of Botswana, without acknowledging any responsibility did take some steps to remedy the Complainant's situation by granting him a certificate of citizenship in June 1995, under section 9(2) of the Citizenship Act of Botswana.

90. Deportation or expulsion has serious implications on other fundamental rights of the victim, and in some instances, the relatives. Having decided on the issue of Modise's citizenship, the Commission would now advert its mind to the other claims made by the Complainant, in order to determine whether his rights guaranteed under the Charter have been violated.

91. The Complainant contends that his incessant deportation, constant threats of deportation and the accompanying disastrous consequences constitute a violation of Article 5 of the Charter. The facts of this case reveal that the Complainant was deported four times to South Africa, and on all these occasions, he was rejected. He was forced to live for eight years in the "homeland" of Bophuthatswana, and then for another seven years in "No Man's Land", a border strip between the former South African Homeland of Bophuthatswana, and Botswana. These acts exposed him to personal suffering and indignity in violation of the right to freedom from cruel, inhuman or degrading treatment guaranteed under Article 5 of the Charter. Article 5 of the Charter provides:

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly...torture, cruel, inhuman and degrading punishment and treatment shall be prohibited.

92. The deportation also deprived him of his family, and his family, of his support. The Commission finds this in violation of the Complainant's right to family life enshrined under Article 18(1) of the Charter. Article 18(1) provides:

The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.

93. The Complainant alleges, and the State has not contested that he had been deported four times from Botswana. The Complainant also detailed his plights as a result of these acts. In this circumstance, the Commission finds that the said deportations had greatly jeopardised the Complainant's right to freedom of movement, as a citizen of Botswana in contravention of his rights under Article 12(1) of the Charter. It also infringed upon his right to leave and to return to his country guaranteed by Article 12(2) of the Charter. Article 12(1) and (2) provide:

(1) Every individual shall have the right to freedom of movement and residence within the borders of a state provided he abides by the law.

(2) Every individual shall have the right to leave any country, including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality

94. The Complainant also claimed to have suffered heavy financial loses, since the government of Botswana confiscated his belongings and property. The government of Botswana has not refuted this allegation. It is trite law that where facts go uncontested by a party, in this case, the Respondent State, such would be taken as given. The Commission therefore finds the above action of the government of Botswana an encroachment of the Complainant's right to property guaranteed under Article 14 of the Charter. Article 14 reads:

The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

95. The Complainant alleges that in 1978, he was one of the founders and leaders of an opposition party, the Botswana National Front. He alleges further that it was as a result of his political activities that he was declared an "undesirable immigrant" in Botswana by the government. He contends that citizenship by registration, which the Respondent government granted to him is in several ways inferior to citizenship by birth, which he deserves as of right. One of such consequences is that he cannot vie for the highest elected political office in the country, that is, the presidency of the Republic of Botswana. This fact has been admitted by B. K. Sebele, Permanent Secretary, Ministry of Labour and Home Affairs of the Respondent State to the effect that "Except for being barred to be elected or becoming President of Botswana, he enjoyed all other rights enjoyed by a citizen of Botswana." (see paragraph 2, page 3 of Mr. Sebele's letter of 9 December 1998)

96. While this may not seriously affect most individuals, it is apparent that for Mr. Modise such is a legal disability of grave consequence. Considering the fact that his first deportation came soon after he founded an opposition political party, it suggests a pattern of action designed to hamper his political participation. When taken together with the above action, granting the Complainant citizenship by registration has, therefore, gravely deprived him of one of his most cherished fundamental rights, to freely participate in the government of his country, either directly or through elected representatives. It also constitutes a denial of

his right of equal access to the public service of his country guaranteed under Article 13(2) of the Charter. Article 13 of the Charter provides:

(1) Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law

(2) Every person shall have the right of equal access to the public service of his country.

FOR THE ABOVE REASONS, THE COMMISSION

Finds the Republic of Botswana in violation of Articles 3(2), 5, 12(1) and (2), 13(1) and (2), 14 and 18(1) of the African Charter

Urges the government of Botswana to take appropriate measures to recognise Mr. John Modise as its citizen by descent and also compensate him adequately for the violations of his rights occasioned.

Done at the 28th ordinary session held in Cotonou, Benin from 23rd October to 6th November 2000.