

Communication: 97/93 John K. Modise/Botswana

FACTS

The complainant claims citizenship of Botswana under the following circumstances: His father was a citizen of Botswana who went to work in South Africa. While in South Africa, he married and the complainant was an issue of that marriage. Complainant's mother died shortly after birth and complainant was sent to Botswana where he grew up. Complainant therefore claims Botswana citizenship by descent.

The complainant alleges that in 1978 he was one of the founders and leaders of the Botswana National Front opposition party. He alleges it was as a result of these activities that he was declared a "prohibited immigrant" by the Botswana government.

On 17 October 1978, complainant was arrested and handed over to the South African Police, without being brought before any tribunal. He already had a court action in process in Botswana concerning a Temporary Occupation Permit, but due to his deportation was unable to attend the hearing.

When he returned to Botswana, he was arrested and deported again without hearing. After his third entry back into Botswana he was charged and convicted of unlawful entry and being a prohibited immigrant. He was serving a ten-month sentence and appealing his conviction when he was deported for a fourth time to South Africa, before his last appeal could be heard.

Because the complainant was not a citizen of South Africa, he was forced to live in the "homeland" of Bophuthatswana. He remained there for seven years, until the government of Bophuthatswana issued a deportation order against him, which landed him in the no-man's land between Bophuthatswana and Botswana, where he remained for five weeks before he was admitted to Botswana on a humanitarian basis. He lived there on three-month resident permits, renewable at the absolute discretion of the minister concerned, until June 1995.

Complainant does not possess, nor has he ever possessed, a South African passport or Bophuthatswanan nationality.

Complainant alleges he has suffered financial losses, since much of his property and possessions was confiscated by the government. He cannot work because he is not permitted to, and is in constant danger of being deported. Complainant has made several efforts to assert his Botswana nationality and an appeal from his prison sentence is still pending, but has not been heard. He presently has no funds to continue in the courts.

He is asking the Government of Botswana to recognise him as a citizen by birth.

PROCEDURE

The communication is dated 3 March 1993 and is sent by John K. Modise. At the 13th Session in March 1993, the Commission was seized of the communication. On 12 April 1993, a notification of the communication was sent to the Botswana government.

At the 17th session the communication was declared admissible. It was found to be a fit subject for settlement by the Commissioner responsible for Botswana, that is, Commissioner Janneh. The parties were notified of this decision.

The government of Botswana was invited to consider the possibility of an amicable resolution.

On 19 October 1995 the Commission received a note verbale by fax from the Ministry of Foreign Affairs of Botswana, stating that Mr. Modise had been granted citizenship by the President. The citizenship certificate was posted to him on 26 June 1995.

On 30 November 1995 a copy of this note verbale was sent to Mr. Odinkalu with a letter asking if the granting of citizenship could be considered an amicable resolution of the case.

On 14 December 1995 the Commission received a letter from Mr Chidi Odinkalu, the complainant's counsel, indicating that he did not consider that a friendly settlement had been reached and requesting further action on the part of the Commission.

On 9 October 1996 the Secretariat of the Commission received a fax from Interights with a copy of a letter from Mr. Modise stating that all local remedies have been exhausted, and that even though the Government of Botswana had promised Commissioner Dankwa that they would issue a passport to Mr. Modise, his application to get a passport had still not been approved by the authorities.

LAW

Admissibility

Article 56.5 of the African Charter requires that communications shall be admissible only if the complainant has exhausted the remedies available domestically, provided these are not unduly prolonged. Other international human rights instruments have similar provisions.

The complainant affirms that he has been trying without success to establish his Botswana nationality legally since 1978 and his final appeal is still pending, 16 years later.

In this case the complainant brought his first action over 16 years ago, and the legal process was repeatedly interrupted the summary deportations of which he was the victim. The national legal procedures were willfully obstructed.

All the preceding elements lead to the conclusion that the complainant has exhausted all local remedies.

For all these reasons the Commission declared the communication admissible.

Merits

The Republic of Botswana ratified the African Charter on 17 July 1986. Although some of the events described in the communication took place before ratification, their effects continue to the present day. The current circumstances of the complainant is a result of a present policy decision taken by the Botswana government against him.

The complainant argues that he has been unjustly denied Botswana citizenship. In the brief submitted by the complainant's representative, it is explained that the complainant was born in Cape Town to a father and mother both from the Goo-Modultwa Ward in Kanye of the Bangwaketse in the former Protectorate of Bechuanaland.

The complainant furthermore alleges that in 1978 he was one of the founding members and leaders of the opposition party, National Front of Botswana. As a consequent of his activities he was declared an prohibited immigrant and expelled to South Africa, which also expelled him several times, with all the disturbing consequences described above.

Botswana became an independent country in 1966. Section 20 of its Constitution states:

"Every person who, having been born in the former Protectorate of Bechuanaland, is on 29 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."

The complainant thus alleges that as a matter of law, by birth, he is a citizen of Botswana. The Government has nowhere contested the facts on which the complainant bases his claim.

Article 7 of the African Charter specifies:

"1. Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;..."

To this day, no court has remedied the effects of the complainant's original deportation, which constitutes a flagrant violation of Article 7.

The complainant's defence against deportation rests on the fact that he is by law a citizen of Botswana. In his trial for illegal re-entry into Botswana, this defence was not considered by the court. To this day, there is no resolution in the courts of this essential issue. This constitutes another violation of Article 7.

Article 5 of the African Charter states:

"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 or degrading punishment and treatment shall be prohibited."

The complainant was deported to South Africa and 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. Not only did this expose him to personal suffering, it deprived him of his family, and it deprived his family of his support. Such inhuman and degrading treatment offends the dignity of a human being and thus violates Article 5.

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.

However, subsequent information from the complainant indicates that the citizenship granted is in several ways inferior to citizenship by birth. Citizenship by birth is a right which cannot be taken away, whereas citizenship by registration is a privilege that is granted only at discretion of state officials.

When the complainant applied for an international passport to enable him to travel abroad for medical treatment, the Government of Botswana issued him a "Local Passport", #L213968, on 6 July 1995. This passport restricted his travelling to countries on mainland Africa south of Latitude 15 South. It expired on 5 January 1996.

Furthermore, a person who acquires citizenship under section 9(b) of the citizenship act, rather than by birth, is considered a citizen from the time of granting only. This means that prior to his registration the complainant was a stateless person, and his children are in the same situation.

Article 13 of the African Charter stipulates:

"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 citizen shall have the right of equal access to the public service of his country."

Citizens by registration cannot be candidates for the presidency of the Republic. Taken together with his first deportation, soon after he founded an opposition political party, it appears that this is an action designed to hamper his political participation. Granting the complainant citizenship by registration has effectively deprived him of what is for him, one of the most valuable rights that Botswana citizenship affords.

Elements in the file show that the complainant did obtain Botswana nationality, but he is not satisfied. The Commission considers, however, that the other rights which the complainant is seeking, could be obtained through local judicial action.

If issues related to the acquisition of full citizenship are not resolved by competent domestic judicial authorities, or in the event of new facts coming to light, Mr. Modise can resort once more to the Commission.

FOR THE ABOVE REASONS, THE COMMISSION

Takes note of the granting of Botswana citizenship to Mr. Modise calls upon the Government of Botswana to continue with its efforts to amicably resolve this communication in compliance with national laws and with the provisions of the African Charter on Human and Peoples' Rights.