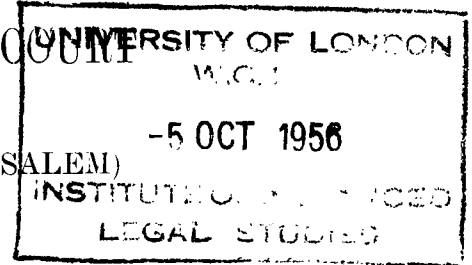


In the Privy Council.

No. 36 of 1947.

ON APPEAL FROM THE SUPREME COURT
OF PALESTINE
(SITTING AS A COURT OF APPEAL JERUSALEM)



BETWEEN

NAIM MOLVAN, the Owner of the Motor Vessel " ASYA " (Respondent) APPELLANT

AND

10 THE ATTORNEY-GENERAL, PALESTINE (Applicant) RESPONDENT.

CASE FOR THE RESPONDENT.

RECORD

1.—This is an Appeal by the owner of the motor vessel " Asya " from the Judgments of the Supreme Court of Palestine sitting as a Court of Civil Appeal, dated the 11th November, 1946, which dismissed an Appeal from an Order of the District Court of Haifa, dated the 14th June, 1946. The District Court by that Order confirmed and ordered the forfeiture of the " Asya."

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2.—The Appeal raises questions about the validity and the construction of the legislation under which the forfeiture was confirmed and ordered, and the application of that legislation to the facts established by the evidence. A list of relevant legislative provisions and other legal documents is printed at the end of this Case.

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3.—The evidence showed that the " Asya " is a small freighter with little accommodation for passengers, the hold of which is crowded with tiers of bunks. On the 27th March, 1946, His Majesty's Ship " Chequers," a destroyer, intercepted the " Asya " about 100 miles south-west of Jaffa. The " Asya " made no reply to a signal enquiring to what port she was bound, but hoisted a Turkish flag. On the approach of a boarding party, the Turkish flag was hauled down and a Zionist flag was hoisted in its

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place. The "Asya" had 733 passengers on board, but no ships papers or passenger list were found. Four charts were found in the wheelhouse, which appeared to have on them a course with fixes from La Ciotet Bay in France to a point just north of Tel Aviv. The "Asya" was escorted to Haifa where, on the 28th March, 1946, police and immigration authorities came on board. The passengers were put ashore and taken to Athlit Clearance Camp, where they were detained. None of them produced a passport or any travel document or had a visa entitling him to enter Palestine. The Judge of the District Court found, as the evidence justified him in finding, that the passengers intended to enter Palestine illegally, and were prohibited immigrants under the Immigration Ordinance, 1941. 10

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4.—By summons, dated the 18th April, 1946, the Respondent applied for an order of the District Court of Haifa confirming the forfeiture of the vessel on the ground that 733 persons were on board within the territorial waters of Palestine at Haifa in circumstances in which the master, owner or agent of the "Asya" were deemed to have abetted the unlawful immigration of those persons, so that the "Asya" was accordingly subject to forfeiture under Section 12 of the Immigration Ordinance, 1941, as amended by Regulation 107 of the amended Defence (Emergency) Regulations, 1945. The relevant amendment of those regulations was made by Regulation 11 of the Defence (Emergency) (Amendment) Regulations, 1946. These regulations were made under the powers conferred on the High Commissioner by Sections 2 and 6 of the Palestine (Defence) Order in Council, 1937. 20

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5.—To support the forfeiture the Respondent relied on the provisions of Section 12, sub-section 3 (i) (b) and sub-section 3 (iii) of the amended Immigration Ordinance of 1941.

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6.—It was argued by the Appellant in the Court of Appeal (but not in the District Court) that the High Commissioner has no power to legislate by ordinance or otherwise in respect of the territorial waters of Palestine, and that neither the Court of Appeal nor the District Court has any jurisdiction in any part of such waters. In support of this contention the Appellant relied (*inter alia*) on Section 1 and Section 14 of the Foreign Jurisdiction Act, 1890, on the Preamble to the Palestine Order in Council, 1922, on Section 2 of the Palestine (Amendment) Order in Council, 1939, and on Articles 4 and 6 of the Mandate for Palestine. The Respondent submits that the above contention is not well-founded, and that the power so to legislate is vested in the High Commissioner, and that both the District Court and the Court of Appeal have jurisdiction within the territorial waters of Palestine, and, in particular, have jurisdiction to deal with the present case. Nothing in the Foreign Jurisdiction Act, the Mandate or any other provision on which the Appellant relied is inconsistent with such powers or rights of legislation or jurisdiction. The Respondent submits that on proper construction such powers and rights should be held to belong to the High Commissioner and to the Palestinian Courts respectively. Further, the 30 40

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Respondent will rely upon Sections 2 (3), and 6 (1) and (2) (g) (v) of the Palestine (Defence) Order in Council, 1937, and the definition of Palestine in the Interpretation Ordinance, 1945. The Respondent submits also that such powers and rights form part of and are derivable from the Royal Prerogative, and that on this ground also the above provisions conferring such powers and rights on the High Commissioner and Courts of Palestine are valid and effective.

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7.—In both Courts the Appellant argued that the Immigration Ordinance and the amending Defence Regulations are void as being repugnant to and inconsistent with the Palestine Mandate and in particular with Articles 4 and 6 thereof. The Appellant also relied on Section 17 (1) (c) of the Palestine Order in Council 1922, as amended by Section 3 of the Palestine (Amendment) Order in Council, 1923. The Respondent contends that this issue is not justiciable in the courts. Assuming the issue to be justiciable, however, the Respondent submits that the said articles do not prevent the enactment of an ordinance such as the Immigration Ordinance for the regulation of immigration, and that the Immigration Ordinance has not been shown to be inconsistent with the Mandate and in fact is not inconsistent with it in any respect.

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8.—Another contention of the Appellant, rejected by both Courts, was that forfeiture of the "Asya" cannot be ordered under Section 12 (3) (iii) of the Immigration Ordinance as amended unless the owner was within the limits of Palestine at the material time. No such limitation is imposed on the word "owner" by the words of the section, which do not require that the owner shall be within Palestine or the territorial waters of Palestine before forfeiture of the vessel can be ordered. The Respondent submits that the facts of this case satisfy the requirements of Section 12 (3) (i) and (iii) as regards the forfeiture of the vessel. The Applicant also argued in the Court of Appeal that the words "any vessel" in Section 12 (3) (iii) must be construed as referring to a Palestinian vessel, and not to a vessel of any other nationality, alleging that this interpretation is necessary in order to avoid a conflict between this part of the Immigration Ordinance and the rules of international law. The Respondent submits that such an interpretation is not required by any rule of international law, and, further, that it is contrary to the true and proper construction of the words.

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9.—It was also contended by the Appellant that the provision of Section 12 (3) (i) (b) about the master, owner and agent of a vessel being deemed to have abetted unlawful immigration cannot apply here, because the "Asya" was brought into territorial waters by a British naval vessel. It is submitted that this contention cannot be reconciled with the express words of Section 12 (3) (i) (b), viz. :—"the master, owner and agent of a vessel . . . are all deemed to have abetted the unlawful immigration of any person . . . who is proved to have been on board

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“ the vessel in Palestine or the territorial waters thereof,
“ whether that person or the vessel came there voluntarily
“ or not.”

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10.—Further, the Respondent contends that by virtue of Section 11 of the Foreign Jurisdiction Act, 1890 and of Sections 6 (4) and 12 of the Palestine (Defence) Order in Council, 1937, the validity of the provisions of the Immigration Ordinance, 1941, and the Defence (Emergency) Regulations, 1945 and 1946, relating thereto cannot be called in question in any court.

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11.—It was also argued by the Appellant that the Respondent had so conducted his case as to take upon himself the burden of proving affirmatively that the passengers did not come within any of the exceptions set out in Section 12, sub-section 3 (i) (b). This contention was rejected by the District Court in Palestine, and also, so far as it was raised there, by the Court of Appeal. It is submitted that the Appellant never became and is not liable to discharge this burden of proof.

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12.— None of the above-mentioned contentions of the Appellant was successful in the Palestinian Courts, and the Respondent submits that the judgments of the Palestinian Courts should be upheld and the Appeal dismissed for the following amongst other

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REASONS.

1. Because the Government and Courts of Palestine have executive, legislative and judicial jurisdiction in respect of the territorial waters of Palestine.
2. Because the Immigration Ordinance, 1941 and the relevant amendments thereof are valid and effective.
3. Because on the facts proved the “ Asya ” was forfeit to the Government of Palestine by virtue of Section 12 of the amended Immigration Ordinance, 1941.
4. Because the judgments of the District Court and of the 30 Supreme Court, sitting as a Court of Appeal, are right.

C. T. LE QUESNE,
FRANK GAHAN.