

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

No. 27 of 1969

O N    A P P E A L  
FROM THE LESOTHO COURT OF APPEAL

---

B E T W E E N :

JOSEPH SALLIE POONYANE MOLEFI                      Appellant

and

THE PRINCIPAL LEGAL ADVISER  
in his capacity as representing the  
Government of Lesotho

and

THE PRIME MINISTER OF LESOTHO

and

THE COMMISSIONER OF POLICE

Respondents

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CASE FOR THE APPELLANT

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~~Officer's Report~~  
P177 LL 11-15

~~Officer's Report~~

P.152 LL 40-43

P.159 LL 8-9

P.176 LL 2-3

~~Officer's Report~~

P.79 LL 38-43

1. This is an appeal by leave of the Court of Appeal of Lesotho from a judgment of that Court (Roper, P., Schreiner, J.A., Maisels, J.A.) given at Maseru on the 30th May, 1969, dismissing the Appellant's appeal from a judgment of the High Court of Lesotho (Jacobs, C.J.) given at Maseru on the 17th January, 1969.

P1-19

P8 LL 21-19 LL

2. On the 12th October, 1968, the Appellant sought a rule by petition to the High Court of Lesotho calling upon the Respondents to show cause why the Government of Lesotho or any of its servants and in particular the Prime Minister of Lesotho and the Commissioner of Police should not be interdicted from expelling the Appellant from Lesotho in terms of an expulsion order shown to the Appellant on the 11th October, 1968, and why the Respondents should not pay the costs of the Petition, the rule to serve as an interim interdict restraining the Respondents from expelling the Appellant from Lesotho or keeping him in custody for the purposes of such expulsion, pending the final determination of the issues raised in the proceedings.

P2 LL 17-32

P46

P22 - P23 LL 5

3. On the 12th October, 1968, the High Court of

Lesotho (Jacobs, C.J.) granted such rule and interim interdict.

4. On the 29th November, 1968, the Appellant applied to the High Court of Lesotho for leave to supplement his petition with further affidavits in support of prayers that the Appellant be declared a refugee in terms of section 38 of the Aliens Control Act No. 16 of 1966, that the provisions of the United Nations' Convention relating to the Status of Refugees be declared to apply to the Appellant, and that it be declared that the Appellant's expulsion from Lesotho is not permitted by that Convention.

5. On the 29th November, 1968, the High Court of Lesotho (Jacobs, C.J.) granted the Appellant leave to supplement his petition thus, and the Appellant accordingly filed further affidavits in support of the prayers aforesaid.

6. The Respondents opposed the granting of the relief sought. The matter was argued on the 12th and 13th December, 1968, and on the 17th January,

P47-P40

P47 R 18-22

High Court

Final Judgment

P40 R 32-43

P41 R 1-5

~~Final Judgment~~

P41 R 6-14

High Court

Final Judgment

P41 R 14-16

1969 the High Court of Lesotho (Jacobs, C.J.) discharged the rule (the interim interdict ceasing to operate accordingly), refused the declaratory orders prayed, and ordered the Appellant to pay the costs.

~~Final Judgment~~  
App ll 38-43

7. The Appellant thereupon appealed to the Court of Appeal of Lesotho. Pending the decision on the Appellant's appeal, the interim interdict was renewed. On the 30th May, 1969, the Court of Appeal dismissed the Appellant's appeal. On the 30th May, 1969, the Court of Appeal granted provisional leave, and on the 28th October, 1969, final leave to appeal to Her Majesty in Council. That Court again renewed the interim interdict until the decision of this appeal to ~~Her Majesty in Council.~~ *The Judicial Committee of the Privy Council*

P100-P102  
(Notice of appeal)

~~Appellant's appeal~~  
P152 ll 40-43  
(Propr P.)

P159 ll 5-9  
(Advocate J.A.)

P176 ll 2-3  
(Mandulo J.A.)

P177 ll 11-15  
(Propr P.)

THE ISSUES

8. The Appellant, who fled from the Republic of South Africa to Basutoland (as the territory of Lesotho was then called) in October, 1961, asserts that he is a refugee in terms of the United Nations Convention on the Status of Refugees (signed at Geneva on the 28th

P5 ll 19-29

P69 ll 27-45  
~~P81 ll 35~~  
~~P85 ll 36~~



July, 1951) and that as such he is protected from expulsion from Lesotho. The main issues in this appeal accordingly are:-

- (a) whether at the date when the expulsion order was shown to the Appellant, namely the 11th October, 1968, Lesotho was bound by the Convention;
- (b) whether on the undisputed facts the Appellant was a refugee as defined by the Convention;
- (c) whether he was therefore protected from expulsion from Lesotho in terms of section 38 of the Aliens Control Act, No. 16 of 1966;
- (d) whether, apart from the provisions of section 38 of the Aliens Control Act, he is protected by the Convention.

*Basket*  
*Document No. 8*

9. Article 32 of the Convention provides that Contracting States shall not expel a refugee from their territory, save on grounds which have no application to the Appellant.

The relevant portion of the definition of the term "refugee" is in paragraph A.(2)

of Article 1 of Chapter I of the Convention,  
and it reads as follows:-

"For the purposes of the present  
Convention, the term 'refugee' shall  
apply to any person who: ...

- (2) As a result of events  
occurring before 1 January  
1951 and owing to well-founded  
fear of being persecuted for  
reasons of race, religion,  
nationality, membership of a  
particular social group or  
political opinion, is outside  
the country of his nationality  
and is unable or, owing to such  
fear, is unwilling to avail  
himself of the protection of  
that country; or who, not having  
a nationality and being outside  
the country of his former habitual  
residence as a result of such  
events, is unable or, owing to  
such fear, is unwilling to return  
to it."

10. The relevant portions of section 38 of the Aliens Control Act, No. 16 of 1966, are subsections (1) and (2) thereof and they read as follows:-

"(1) If any international treaty or convention relating to refugees is or has been acceded to by or on behalf of the Government of Lesotho, an alien who is a refugee within the meaning of such a treaty or convention shall not be refused entry into or sojourn in Lesotho, and shall not be expelled from Lesotho in pursuance of the provisions of this Act except with his consent or except to the extent that is permitted by that treaty or convention, subject to any reservation that may be in force at the material time.

"(2) If any question arises -

(a) whether an alien is a refugee;

(b) / ...

- (b) whether any provision of an international treaty or convention relating to refugees, applies to that alien; and
- (c) whether the expulsion of that alien from Lesotho is permitted by that treaty or convention,

the High Court may on the application of that alien declare that he is a refugee, that that provision of the international treaty or convention applies to him, and may declare that his expulsion from Lesotho is, or is not, permitted by that treaty or convention, or may decline to make any such declaration".

#### THE FACTS

##### 11. THE CONSTITUTIONAL HISTORY OF LESOTHO

This is set out hereunder, in so far as it is relevant to the above issues.

(a) / ...



- (a) Upon the request made by Mosesh, the Paramount Chief, and other Headmen of the Tribe of Basutos, Her Majesty Queen Victoria was graciously pleased to admit the said tribe into the allegiance of Her Majesty. Proclamation 14 of 1868 by the Governor of the Cape of Good Hope declared that -

"From and after the publication hereof, the said Tribe of the Basutos shall be, and shall be taken to be, for all intents and purposes, British subjects; and the Territory of the said Tribe shall be, and shall be taken to be, British territory."

- (b) By Order in Council dated the 3rd November, 1871, Her Majesty was pleased to declare Her special confirmation of an Act passed by the Governor of the Cape of Good Hope, with the advice and consent of the Legislative Council and House of Assembly thereof, entitled "An Act for the annexation to the Colony of the Cape of Good Hope of

the territory inhabited by a tribe of people called Basutos" (Act No. 12 of 1871).

(c) In 1883 the said Legislative Council and House of Assembly passed a Bill repealing the said Act and entitled "An Act to provide for the Disannexation of Basutoland from the Colony of the Cape of Good Hope".

(d) By Order in Council dated the 2nd February, 1884, Her Majesty declared Her assent to the said Bill and was further pleased to order as follows:-

"So soon as Part II of this Order takes effect, Basutoland shall again come under the direct authority of Her Majesty and the person for the time being exercising the function of Her Majesty's High Commissioner for South Africa (hereinafter styled the High Commissioner) shall have and may exercise, in the name and on behalf

of Her Majesty, all legislative  
and executive authority in and  
over the territory of Basutoland  
....

"The Governor of the Colony of the  
Cape of Good Hope shall cause this  
Order to be proclaimed at such  
place or places as he shall think  
fit, and upon such proclamation  
Part II of this Order shall take  
effect and come into operation."

The Order was proclaimed by Proclamation  
No. 75A, 1884, on the 18th March, 1884.

- (e) The Basutoland (Constitution) Order in  
Council, 1959, established, inter alia,  
an Executive Council and a Legislative  
Council for Basutoland and, subject to  
certain saving clauses, revoked the  
Order in Council dated the 2nd February,  
1884, relating to Basutoland.

Section 99 of the Basutoland (Constitution)  
Order in Council, 1959, is as follows:-

"99. (1) Her Majesty hereby reserves to Herself power, with the advice of Her Privy Council, to revoke or amend this Order.

(2) Nothing in this Order shall affect the power of Her Majesty in Council to make laws from time to time for the peace, order and good government of Basutoland."

(f) The Basutoland Order, 1965, revoked the Basutoland (Constitution) Order in Council, 1959, and granted a Constitution for Basutoland which established a Parliament for Basutoland, consisting of Her Majesty, a Senate and a National Assembly.

(g) On the 3rd August, 1966, the Parliament of the United Kingdom passed the Lesotho Independence Act, 1966, section 1 of which stated:-

"On / ...



"On the 4th October 1966 ... the territory which immediately before that day constitutes the Colony of Basutoland shall become an independent Kingdom under the name of Lesotho."

- (h) The Lesotho Independence Order, 1966, revoked the Basutoland Order, 1965, and granted a Constitution to Lesotho as a sovereign democratic Kingdom. The Constitution declared that there shall be a King of Lesotho who shall be the Head of State, and it established a Parliament consisting of the King, a Senate and a National Assembly.

Section 17 of the Lesotho Independence Order, 1966, is as follows:-

"17. (1) All rights, liabilities and obligations of -

- (a) Her Majesty in respect of the Government of Basutoland; and

(b) / ...

(b) Motlotlehi [i.e. the Paramount Chief of Basutoland] or the British Government Representative or the holder of any other office under the Crown in respect of the Government of Basutoland on behalf of that Government

shall, from the commencement of this Order be rights, liabilities and obligations of the Government of Lesotho and, subject to the provisions of any law, shall be enforceable by or against the Government accordingly.

(2) In this section, rights, liabilities and obligations include rights, liabilities and obligations arising from contract or otherwise (other than ..... any rights, liabilities or obligations of

Her / ...

Her Majesty in respect of the Government of Basutoland arising under any treaty, convention or agreement with another country or with any international organisation).

(i) On the 30th January, 1970, the Prime Minister of Lesotho declared that he had suspended the Constitution. But he did not make any declaration which suggests that Lesotho's international obligations, as they stood on that date, have been modified. Nor did he purport to suspend or modify the operation of the law relating to aliens.

(i)  
(j) By Proclamation 2B of 1884 dated the 29th May, 1884, the High Commissioner for South Africa provided, inter alia, as follows:-

"2. In all suits, actions or proceedings, civil or criminal, the law to be administered shall as nearly as the circumstances of the country will permit, be the same

as / ...

as the law for the time being  
in force in the Colony of the  
Cape of Good Hope ..."

12. (a) (i) (aa) At the date of the independence  
of Lesotho the United Kingdom  
was a party to the United  
Nations Convention relating to  
the Status of Refugees signed  
at Geneva on the 28th July,  
1951. On signing the Convention  
the United Kingdom declared that  
for the purpose of its obligation  
thereunder the words "events  
occurring before 1 January, 1951"  
in Article I, section A, shall  
be understood as referring to  
events occurring in Europe or  
elsewhere before 1 January, 1951.

- (bb) By a communication received on  
the 11th November, 1960, the  
Permanent Representative of the  
United Kingdom to the United  
Nations notified the Secretary  
General of the United Nations

of / ...

*PA 86-87  
(Mr. Underwood)*

*PA 222- PA 5 222  
(Dr. JAHN  
- Annexure C)*



*High Court*

*Judgment*

*P92 LL 32-40*

*P93 LL 10-13*

of the extension of the Convention to Basutoland in accordance with Article 40 of the Convention.

*Appeal Judgment*

*P161 LL 39-42*

*(Mandato J.A.)*

*P141 LL 35-38*

*(Chapman P.)*

(cc) The Convention accordingly took effect for the territory of Basutoland on the 9th February, 1961.

*Appeal Judgment*

*P141 LL 10-17*

*(Chapman P.)*

(ii) The Court of Appeal of Lesotho took notice of Command Paper 1346, which was presented to Parliament in April, 1961, by the Secretary of State for Foreign Affairs. It records the extension (with reservations not here relevant) of the Status of Refugees Convention (Treaty Series 39/1954 Command Paper 9171) to Basutoland, the effective date being the 9th February, 1961.

*Appeal Judgment*

*P160 LL 17-23*

*(Mandato J.A.)*

(iii) It is common cause that the only international treaty or convention relating to refugees which is relevant in this matter is the

United Nations Convention relating  
to the Status of Refugees.

- (b) It is common cause that on the 22nd  
March, 1967, the Prime Minister of  
Lesotho addressed the Secretary-General  
of the United Nations in the following  
terms:

*P.6 ll 10-24 (Petition)*  
~~*P.4 ll 15-20*~~  
*P.29 ll 44-46*  
*(First Respondent)*

"OFFICE OF THE PRIME MINISTER

MASERU

LESOTHO

E.X.13

22nd March, 1967.

Your Excellency,

The Government of the Kingdom of  
Lesotho is mindful of the desirability  
of maintenance, to the fullest extent  
compatible with the emergence into full  
independence of the Kingdom of Lesotho,  
(of) legal continuity between Lesotho  
and the several States with which,  
through the action of the Government of  
the United Kingdom the country formerly

known / ...

known as Basutoland enjoyed treaty relations. Accordingly, the Government of the Kingdom of Lesotho takes the present opportunity of making the following declaration:

2. As regards bilateral treaties validly concluded by the Government of the United Kingdom on behalf of the country formerly known as Basutoland, or validly applied or extended by the said Government to the country formerly known as Basutoland, the Government of the Kingdom of Lesotho is willing to continue to apply within its territory, on a basis of reciprocity, the terms of all such treaties for a period of twenty-four months from the date of independence (i.e. until October 4, 1968) unless abrogated or modified earlier by mutual consent. At the expiry of that period, the Government of the Kingdom of Lesotho will regard such of these treaties which could not by the application of the rules of customary international law be regarded as otherwise surviving, as having terminated.

3. It is the earnest hope of the Government of the Kingdom of Lesotho that during the aforementioned period of twenty-four months, the normal processes of diplomatic negotiations will enable it to reach satisfactory accord with the States concerned upon the possibility of the continuance or modification of such treaties.

4. The Government of the Kingdom of Lesotho is conscious that the above declaration applicable to bilateral treaties cannot with equal facility be applied to multilateral treaties. As regards these, therefore, the Government of the Kingdom of Lesotho proposes to review each of them individually and to indicate to the depositary in each case what steps it wishes to take in relation to each such instrument - whether by way of confirmation of termination, confirmation of succession or accession. During such interim period of review, any party to a multilateral treaty which has, prior to independence, been applied or extended to the country formerly known as Basutoland, may, on a basis of reciprocity rely as

against / ...



against Lesotho on the terms of such treaty.

5. It would be appreciated if Your Excellency would arrange for the text of this declaration to be circulated to all Members of the United Nations.

Please accept, Sir, the assurance of my highest consideration. (signed)

Leabua Jonathan  
Prime Minister."

13. (a) The Respondents did not dispute, nor did they seek to cross-examine the Appellant upon the following evidence, contained in his affidavits:-

*Pg 11 19-21 (Petition)*  
*P28 243- P29 22 (first respondent)*  
*P65 245*  
*P74 22 32*

(i) The Appellant was born in Winburg, Orange Free State, South Africa, he grew up in the Union of South Africa and lived in that country until his arrival in Basutoland in October, 1961.

(ii) / ...

(ii) At an early age he became interested in the conditions of the African people, his people, living in the Union of South Africa, and became aware of the impact upon Africans of the laws of that country.

P65 l45 - P66 l5

P67 l4-5

P74 ll 32-34 (First  
proposal)

P66 l12<sup>5</sup>

P66 l43 - P67 l4

P74 ll 32-34 (First proposal)

Official Judgment

P.152 l32 (Proposal P)

Official Judgment

P155 l4-12

(Admiral J.A.)

(iii) Many of such laws discriminated seriously against Africans, inter alia, in not giving them a place in the legislative machinery or the right to participate in collective bargaining for the same scale of wages as was enjoyed by white people.

P54 ll 28 - P55 l5

P55 ll 21 - 31

P74 ll 18-22 (First proposal)

P67 ll 15-19

P74 ll 32-34 (First proposal)

(iv) The "pass laws" discriminated against Africans by requiring them alone to carry an identity document and the laws relating to urban areas restricted the right of Africans to live and work in urban areas. Many thousands of Africans were, over the years, sent to prison for contraventions of these laws.

*P67-139-P6828*  
*P74 ll 32-34 (First*  
*Paragraph)*

(v) Much resentment was felt against these laws, in particular because they had been enacted without the consent of the black people.

*P67 ll 25-38*  
*P74 ll 32-34 (First*  
*Paragraph)*

(vi) In 1948 the National Party was elected to power in South Africa, and thereupon the administration of the aforesaid laws became harsher. That Party's policy of apartheid formed the basis for a considerable amount of further legislation discriminating against Africans.

*P56-P6328*  
*P74 ll 18-22 (First*  
*Paragraph)*

(vii) In 1950, the South African Parliament passed the "Suppression of Communism Act", No. 44 of 1950, which gave the Minister of Justice arbitrary powers to restrict the freedom of persons whom the Minister believed were likely to further the objects of "communism" as defined in the statute.

(viii) In consequence of the cumulative effect of these laws and other laws

upon / ...

upon the African people, the Pan Africanist Congress came into existence in 1959, having as its aim "government of the Africans by the Africans with everyone who owes his loyalty to Africa and is prepared to accept the democratic rule of an African majority being regarded as an African".

28  
P68 ll 8-10  
P74 ll 32-34 (Frank  
& Kuper)

(ix) In 1960 the Pan Africanist Congress was declared to be an unlawful organisation.

P68 ll 29-32  
P74 ll 34-36 (Frank  
& Kuper)

(x) Prior to this declaration the Appellant had been a member of the Pan Africanist Congress.

P68 ll 33-35  
P74 ll 32-34 (Frank  
& Kuper)

(b) It is common cause that:

(i) In October, 1961, the Appellant fled to Basutoland from South Africa before the conclusion of a criminal prosecution in Johannesburg, in which he was charged with being a

ll  
P5 ll 22-25  
P29 ll 10-17 (Frank & Kuper)  
P37-40 (Mr Kennedy)



member and furthering the aims  
of an unlawful organisation,  
namely the Pan Africanist Congress;

(ii) After his arrival in Basutoland  
there was issued to the Appellant,  
in terms of the Basutoland Entry  
and Residence Proclamation No. 13  
of 1958, a temporary permit which  
was extended from time to time until  
the 31st March, 1967, and not renewed  
thereafter;

*P3 ll 20-27  
P27 ll 24-25 (First Respondent)*

(iii) On the 11th October, 1968, at Maseru,  
an officer of the Lesotho Mounted  
Police showed the Appellant a document  
bearing that date, addressed to the  
Commissioner of Police, by the Prime  
Minister of Lesotho. The document  
recited that the presence within  
Lesotho of the Appellant was unlawful,  
and it authorised and required the  
Commissioner of Police to cause the  
Appellant to be removed from Lesotho  
and directed that the Appellant be  
kept in prison or in police custody  
while awaiting expulsion and while

*P2 ll 20-32  
P27 ll 12-13 (First Respondent)  
P46 (Expulsion Order)*

being / ...

being conveyed to the place  
of departure.

(c) It is not denied and nor was it sought to cross-examine the Appellant in regard thereto, that:

(i) When the Appellant fled South Africa he had a fear of being persecuted because of the political opinions that he had entertained as a member of the Pan Africanist Congress prior to its having been declared unlawful; and a fear that even if he were acquitted of the charge preferred against him he was likely to suffer disabilities under the Suppression of Communism Act, No. 44 of 1950; and that he is unwilling and fears to return to South Africa for the same reason;

(ii) Such fears were well founded because at that time many political leaders had been banned from attending gatherings or had been confined to restricted areas in terms of that Act.

P68 240-269 215  
P74 232-34 (First  
Proposed)

P69 216-26  
P74 232-34 (First  
Proposed)

P.152 210-20  
(Proposed P.)

THE APPELLANT'S CASE IN THE COURTS BELOW

14. The Appellant (in addition to certain other arguments no longer persisted in) submitted in the Courts below -

(a) That the Convention had been "acceded to by or on behalf of the Government of Lesotho", in terms of section 38(1) of the Aliens Control Act, 1966, by reason of

(i) the Prime Minister's letter of 22nd March, 1967, to the Secretary General of the United Nations

(ii) alternatively the United Kingdom Government's extension of the Convention to Basutoland in 1960.

(b) Alternatively, that the United Kingdom Government's extension of the Convention to Basutoland in 1960 had in itself

conferred / ...

*Chief Justice*  
*P/92-21-194/215*  
*P/107*  
*P/103 - P/07/215*  
*P/119 - P/139*

conferred rights on the Appellant which were not derogated from by any subsequent legislation.

- (c) That he was a refugee in terms of the Convention in that he was outside the country of his nationality (namely South Africa) as a result of events occurring before 1 January, 1951 and owing to a well-founded fear of being persecuted for reasons of political opinion and was, owing to such fear unwilling to avail himself of the protection of that country.

15. Jacobs, C.J. in the High Court, held -

- (a) that the United Kingdom's extension of the Convention to Basutoland in 1960 was not an accession "on behalf of the Government of Lesotho". That expression which is used in section 38(1) of the Aliens Control Act,

was / ...

~~7-1-1961~~  
P9422 12-16



was not to be read as including "the Government of Basutoland";

~~2~~  
P96 ~~22~~  
22-25

(b) that in the light of section 17 of the Lesotho Independence Order, 1966, the Government of Lesotho was not bound by the United Kingdom's extension of the Convention to Basutoland;

P97 29-16

(c) that the Prime Minister's letter of 22nd March, 1967, was not an accession to the Convention, but merely a promise, subject to certain qualifications, to accede if and when the occasion arose;

P98 <sup>20</sup> ~~26~~ - P99 32

(d) that the only event, for the purposes of the definition of "refugee" in the Convention, which could be said to have occurred before 1 January, 1951, was the passing of the Suppression of Communism Act, 1950, but this, while perhaps a causa

sine / ...

sine qua non, was not "the causa" of the Appellant's flight from South Africa. There was no causal relation between pre-1951 events and the Appellant's flight, so that he was not a refugee in terms of the Convention.

16. Roper, P., in the Court of Appeal,

*Appellate Judgment*  
P143 ll 2-4  
~~P145 ll 17-19~~  
P144 R44 - P145 R19.

(a) held that the Prime Minister's letter was on a proper interpretation not an accession to the Convention, but rather the reverse;

*Appellate Judgment*  
P145 ll 20-34

(b) left open the question of the effect of section 17 of the Lesotho Order-in-Council, 1966;

*Appellate Judgment*  
P145 ll 35 - P147 ll 42

(c) held that the central issue on this part of the case was whether the United Kingdom extension of the Convention to

Basutoland in 1960 was valid in view of the provisions of the Basutoland (Constitution) Order-in-Council, 1959, relating to the legislative process in Basutoland but held further that on the material before the Court the issue could not be decided;

- ~~Appellant~~  
P149 @ 29-31
- (d) held that the words "as a result of" in section 1 of the Convention implied a degree of causality, and that the Appellant's flight was not "caused" by events occurring before 1951, but by "his membership of the Pan Africanist Congress (which could not have begun before 1958), his resulting prosecution in 1961, and his fear of conviction and the direct and indirect penalties which might and probably would result from it. Properly regarded, the pre-1951 South African legislation and the repressive Government policy referred to by the appellant were merely the background to these events, or, as it was put by Lord Wright (in Smith Hogg & Co. Ltd. v. Black Sea & Baltic General Insurance Co. Ltd. [1940] A.C. 997) a part of the history or narrative". He was therefore not a

~~Appellant~~  
P152 @ 26-36

refugee / ...

refugee.

17. Schreiner, J.A., in the Court of appeal

~~Appellant's case~~  
P154 U 25-2540

(a) found it unnecessary to decide whether the Government of Lesotho had acceded to the Convention;

~~Appellant's case~~  
P158 U 27-29

(b) held that the Appellant migrated because of events in 1960, namely his "prosecution and its accompanying risks";

~~Appellant's case~~  
P158 l 36 - P159 l 6

(c) held that "Acts 44 of 1950 and 50 of 1951 are the pieces of legislation that most nearly meet the appellant's case but even they do not amount to an event or events that could in themselves have resulted in the appellant's migrating ten years later. [Emphasis supplied]. ..... There is no evidence to show that the appellant came to a decision to leave South Africa for Basutoland before 1961, let alone

before / ...



before 1 January 1951. There is no evidence that anything that happened before the latter date resulted in the appellant's migration." Appellant was therefore not a refugee for the purposes of the Convention.

18. Maisels, J.A., in the Court of Appeal,

- ~~Appellants' Arguments~~  
P164 L16 - P165 L13
- (a) left open the question whether the United Kingdom's extension of the Convention to Basutoland gave it the force of law in Basutoland;
- ~~Appellants' Arguments~~  
P162 L21 - P164 L15
- (b) held that the extension of the Convention to Basutoland was not an accession "on behalf of the Government of Lesotho" in terms of section 38(1) of the Aliens Control Act, but
- ~~Appellants' Arguments~~  
P168 LL25 - 30
- (c) held that the Prime Minister's letter of 22nd March, 1967, manifested "a plain desire on the part of the Government of Lesotho not to denounce but rather to adhere, albeit for a limited time and

perhaps / ...

perhaps subject to certain conditions, to pre-independence treaties made by the Government of the United Kingdom in respect of Basutoland". The "reciprocity" proviso in the letter must be read as limited to cases where reciprocity is required to make a convention effective. In cases where this is not so (as in the Convention) the words are to be treated as surplusage. The letter was accordingly an accession by the Government of Lesotho to the Convention.

- (d) concurred with Roper, P., and Schreiner, J.A., on the question whether the Appellant was a refugee in terms of the Convention.

APPELLANT'S / ...

~~Appellant's / ...~~  
P173 U35-38

~~Appellant's / ...~~  
P175 U15-24

~~Appellant's / ...~~  
P175 U28-36

APPELLANT'S SUBMISSIONS

19. (a) The Appellant submits that Maisels, J.A. was correct in holding that the Prime Minister's letter constituted an accession to the Convention. His judgment on this point is respectfully adopted. It is submitted that the letter manifests an intention to be bound by multilateral treaties concluded by the United Kingdom and extended to Basutoland, and that Roper, P., was, with respect, wrong in holding that the letter was "the reverse" of an adherence to such conventions.
- (b) It is submitted further that it is beyond dispute that it was within the competence of the United Kingdom Government to extend the Convention to Basutoland. The Queen's treaty-making powers in 1960 extended to ceded colonies such as Basutoland, and were unaffected by the legislative provisions of the Basutoland (Constitution)

Order-in-Council, 1959. Indeed in the Courts below the validity of the extension of the Convention to Basutoland was conceded by Respondent's counsel.

~~Final Judgment~~  
P. 92 231-193212  
(James C. J.)

(c) It is submitted, with respect, that in the portion of his judgment referred to in paragraph 16(c) above, Roper, P. confused the question of the validity of the extension of the Convention to Basutoland with the question whether it became part of the municipal law of that colony - a very different issue. All that section 38(1) requires is that there shall have been an accession to a Convention. If there has been, section 38(1) itself makes it pro tanto a part of the municipal law.

~~Final Judgment~~  
P. 145 235-1147242  
(Roper P.)

20. Alternatively it is submitted that when the Convention was extended to Basutoland in 1960, it was "acceded to by or on behalf of the Government of Lesotho", in terms of section 38(1) of the Aliens Control Act.

(a) / ...



- (a) The term "Government of Lesotho" in this context means any Government which was at any relevant time the government of the territory now known as Lesotho.
- (b) Alternatively the words "acceded to... on behalf of the Government of Lesotho" in the section must be intended to refer to an accession to a convention by a predecessor government, to which the Government of Lesotho has succeeded in international law. On any other interpretation the words "on behalf of" would have no meaning, as accession is the act of a government itself. There cannot be an accession "on behalf of" a sovereign independent state, such as Lesotho has been since 4th October, 1966.
- (c) The United Kingdom's extension of the Convention to Basutoland was effected in terms of Article 40 of the Convention, and there has been no declaration under Article 44(3) revoking the extension.

If the 1960 extension to Basutoland was, as submitted above, an accession "by or on behalf of the Government of Lesotho" the terms of section 17 of the Lesotho Independence Order, 1966, did not undo that fact. The doubts expressed by Roper, P. and Maisels, J.A. on the Respondent's argument to the contrary were, with respect, well founded.

~~affidavit~~  
P 145 Q 20-23 (Roper P)  
P 145 Q 3-20 (Maisels J.A.)

21. (a) Further alternatively, it is submitted that the extension of the Convention to Basutoland in 1960 must be regarded as an act conferring rights on refugees in that territory. No legislative act was necessary: alternatively, in view of the full legislative power over Basutoland vested in Her Majesty-in-Council at the relevant time, the extension amounted to a legislative act. The Appellant was thus given the right to remain in Lesotho, subject to the terms of the Convention.
- (b) The right so conferred on the Appellant has not been removed by the Aliens Act,

1966.

22. On the issue whether the Appellant is a refugee in terms of the Convention, the Appellant submits that the learned Judges in the Courts below misinterpreted paragraph A.(2) of Article 1 of the Convention, and so misdirected themselves in their consideration of the Appellant's affidavits.

23. (a) It is respectfully submitted that the learned Judges wrongly read paragraph A.(2) as requiring that the fear of persecution should have arisen before 1st January, 1951, and that the intention to leave the country of nationality should have been formed before that date. But the paragraph does not require this. It contemplates that the fear of persecution may arise after that date, and possibly at a time when the affected person is already outside his country.

*Appeal Judgments*

*P152 ll 10-<sup>30</sup> (Refer P)*

*P156 ll 17-37 (Section A)*

*P157 ll 21-24 } Section  
ll 36-41 } J.A.*

*P159 ll 1-6*

(b) / ...

(b) What must be shown is that the person concerned is outside his country of nationality as a result of events occurring before that date. This does not mean, as Jacobs, C.J. appeared to hold, that a pre-1951 event must be the causa causans of the emigration; nor, as Schreiner, J.A. held, that the pre-1951 events must "in themselves" have been the cause of it. Nor does the paragraph warrant the assumption of Roper, P. that if the immediate cause of the migration was an event occurring after 1st January, 1951, any finding that it was nonetheless "as a result of" events occurring before that date is automatically excluded. A person may be a refugee under the Convention whatever the immediate cause of his <sup>being out of</sup> leaving his country of nationality, provided that <sup>his exile</sup> it has resulted, even indirectly, from pre-1951 events. The Convention should receive a broad interpretation, in the light of its humanitarian intentions. The concept of causation applied by the learned Judges

~~Final Judgment~~

P 99 ll 3-7  
(Jacobs C.J.)

~~Final Judgment~~

P 158 ll 36-41  
(Schreiner J.A.)

~~Final Judgment~~

P 152 ll 24-35  
(Roper P.)



is appropriate to the analysis of physical events, e.g. in a negligence action, but is inappropriate to the analysis of the inevitably complex political situations with which the Convention is designed to deal.

24. Thus a political event may take place in a country before 1st January, 1951. It may impinge on an individual citizen only much later, and may only then cause a well-founded fear of persecution and impel him to leave, or remain outside, the country. On a proper interpretation of the Convention such a person would be a refugee.

25. In the case of the Appellant it is not disputed that his "well-founded fear of persecution" arose after 1st January, 1951, and possibly not until the Pan Africanist Congress was declared unlawful in 1960. In that year his fear was that, by reason of his political opinions (expressed by his membership of his political organisation), he would not only be prosecuted, but also subjected to the grave disabilities which the government of his country was entitled to

impose / ...

impose on him without process of law. This fear led him to leave South Africa in 1961, *and Frederick's <sup>or Kappelman</sup> <sub>outside</sub> this return.*

But his migration was nonetheless a result of events occurring before 1951, namely the intensification from 1948 onwards of the resented discriminatory laws and the passing of the Suppression of Communism Act, 1950. The former event led to the formation of the Pan Africanist Congress and to the Appellant's joining it. This in turn led to his exposure to the administrative penalties first created in 1950 by the Suppression of Communism Act. These events are not merely (in the words adopted and used by Roper, P.) "a background" to his migration or "a part of the history or narrative": they are events "as a result of" which he is outside South Africa.

26. The Appellant humbly submits that this appeal should be allowed for the following among other

REASONS

(a) BECAUSE the United Nations Convention

on / ...

*Appellant's argument*  
*P152 234*  
*(Roper P.)*

on the Status of Refugees was acceded to by the Government of Lesotho on the 22nd March, 1967,

- (b) BECAUSE the said Convention was acceded to by or on behalf of the Government of Lesotho on the 11th November, 1960,
- (c) BECAUSE the Appellant is outside his country of nationality as a result of events occurring before 1st January, 1951, and owing to a well-founded fear of being persecuted for reasons of political opinion, and is owing to such fear unwilling to avail himself of the protection of that country and is accordingly a "refugee" in terms of the said Convention,
- (d) BECAUSE the said Convention read with the Aliens Control Act protects the Appellant against expulsion from Lesotho,
- (e) BECAUSE the decision of the Court of

Appeal was wrong and should be  
reversed.

S. KENTRIDGE.

J. UNTERHALTER.



MOLEFI v. PRINCIPAL LEGAL ADVISER

NOTES FOR ARGUMENT

SUBMISSION THAT THE APPELLANT IS A REFUGEE  
WITHIN THE MEANING OF THE CONVENTION:

1. It is submitted that on a proper interpretation of the Convention and in particular paragraph A (2) of Article 1 of Chapter 1 thereof, read with the undisputed facts as these appear from the record of the proceedings, the Appellant is a refugee within the meaning of the Convention.
  
2. (a) In interpreting the first sentence of paragraph A (2) of Article 1 of the Convention a number of elements must be analysed and discussed.
  
- (b) The term 'refugee' should apply to any person who
  - (i) is outside the country of his nationality;

/ (ii) ...

- (ii) as a result of events occurring before 1 January 1951;
  
- (iii) and owing to well-founded fear of being persecuted for reasons, inter alia, of political opinion;
  
- (iv) (aa) and is unable to avail himself of the protection of that country  
  
(bb) or owing to well-founded fear of being persecuted for reasons, inter alia, of political opinion, is unwilling to avail himself of the protection of that country.
  
- (c) Elements b (i), (ii) and (iii)

These, read together, may be construed in four ways.

/ (i) ...

(i) That the person concerned is outside the country of his nationality because he fled the country as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons, inter alia, of political opinion.

(ii) That the person concerned, having the nationality of a particular country, and not having fled it, but having departed from it and being outside it, decides not to return because of events that occurred before 1 January 1951 and because he has a well-founded fear of being persecuted for reasons, inter alia, of political opinion, should he return.

(iii) That the person concerned, having the nationality of a

/ particular ...

particular country, and having fled it, either for the two reasons set out in elements b (ii) and b (iii), or for other reasons, decides not to return to it because of events that occurred before 1 January 1951 and because he has a well-founded fear of being persecuted for reasons, inter alia, of political opinion, should he return to it.

(iv) That the person concerned, having the nationality of a particular country, and never having been in that country, decides, while outside it, not to enter it because of events that occurred before 1 January 1951 and because he has a well-founded fear of being persecuted for reasons, inter alia, of political opinion, should he enter it.

(d) Element b (ii)

Events occurring before 1 January 1951

/ may ...



may have the following consequences.

- (i) They may, while the person concerned is within the country of his nationality, result directly or indirectly in his deciding to depart or flee that country

either (aa) before 1 January 1951  
or (bb) after 1 January 1951.

- (ii) They may, while the person concerned is outside the country of his nationality, result directly or indirectly in his deciding not to return to, or make a first visit to that country, he taking that decision

either (aa) before 1 January 1951  
or (bb) after 1 January 1951.

/ (e) ...

(e) (i) From the record of the proceedings the two situations that are relevant to this argument are those set out in (c) (i) and (c) (iii).

(ii) In both cases the Convention requires an explanation of the flight from the country or an explanation of the fact that the person concerned does not return to it, apart from the explanation that he has a well-founded fear of being persecuted for reasons, inter alia, of political opinion.

(iii) Such explanation is to be sought in "Events occurring before 1 January 1951".

(iv) The word 'explanation' is used to paraphrase the words 'as a result of' as these occur in the opening sentence of Paragraph A (2) of Article 1 of

/ the ...

the Convention. This is done to emphasise that the relation between the events and the fact of the person concerned being outside, is not a causal one in the scientific sense but that such relation must be considered in an historical context.

(v) In such context events may be considered, not as having "caused" the flight or the fact that the person concerned does not return to his country of nationality, but as explaining by way of significant background such that it can be properly said that the flight or the failure to return are indeed the result of the events mentioned.

(vi) Considered in this way, it is submitted that the remarks of Jacobs C.J. at pages 98 and 99, Roper P. at page 149 and Schreiner J.A. at pages 157 and 158 are not correct approaches to the problem.

/ (vii) ...

- (vii) In Hart and Honoré's "Causation in the Law", there is at P a discussion of the context in which the phrase "as a result of" is appropriate. It refers to a complex of facts that precede a situation and explain how that situation came about - the example being what followed as a result of a trial.
- (viii) If such preceding complex of facts is significant and meaningful in explaining the situation then it may properly be said that the situation in the context is "as a result of" such complex. If it is not significant and meaningful then it cannot be said that the situation, in the context, is "as a result of" such complex.
- (ix) Tested in this way it can be said that the landing of Jan van Riebeeck at the Cape in 1652, although it preceded in time the flight of the Appellant from South Africa in 1968,



has no significance or meaning in explaining the flight. The preceding complex of events assumes its earliest significance with the description of the South African franchise laws from 1853 (Pages 49-54) and their effect upon the rights of the African to sit in Parliament and to vote for Parliamentary representatives. Again, if there were no development beyond this, the degree of significance would be such that it could not be meaningfully said that the flight and failure to return came about as a result of these events. But the significance increases as the history of the discriminatory legislation is developed and the relationship is explained between the virtual lack of franchise by the African, and the oppressive laws affecting him as enacted by white people. Again it may be said that the degree of significance is not such as to explain the flight and failure to return. However, the narrative proceeds, and describes the reaction of the African people to these laws, the existence of the African National Congress as a major African

/ political ...

political group expressing resentment of these laws, the coming to power of the National Party in 1948, the harsher administration of the laws and the passing of the Suppression of Communism Act in 1950. It is submitted that at this stage, the significance of these events is such that cumulatively they serve as meaningful explanation of what followed thereafter, namely the formation of the Pan Africanist Congress, the Appellant's membership of it, Sharpeville, the enacting of the Unlawful Organisations Act, the banning of the Congress, the Appellant's prosecution and his flight. They also serve as meaningful explanation as to why, now being outside South Africa, he does not return.

- (x) Yet another test is to see whether a history of events from 1 January 1951, with a rigorous exclusion of pre-1951 events, would adequately explain the coming into being of the Pan Africanist Congress, Sharpeville, and the Unlawful Organisations Act. It is submitted that it would not.

/ (xi) ...

- (xi) It may be said that the simple explanation of the flight is the Appellant's decision not to be tried for the offence charged; and the simple explanation of his failure to return to South Africa is his fear of the trial. But it must be remembered that the offence charged is not for a crime such as theft, where the above simple explanation for flight and non-return would serve. It is for a political offence. A history explaining why an offence of this nature was created is meaningful. It was as a result of such history that the offence was created, and, it is submitted, that it was as a result of the pre-1951 events in that history that the Appellant fled and does not return.
- (xii) Thus, viewed objectively, it may be said, that as a result of the events occurring before 1 January 1951, and as stated in the record of proceedings, the Appellant is outside the country of his nationality.

(f) Elements(b)(iii) and (b) (iv)

(i) The Appellant states that when he fled South Africa he had a fear of being persecuted because of his political opinions. (Page 68 line 40 - Page 69 line 15).

(ii) He says that if he is returned to South Africa he will suffer the disabilities of a banned person under the Suppression of Communism Act, as he believes he is banned in terms of it. (Page 5 line 40). It is implicit that he fears persecution because of his political opinions.

(Section                      of Act 44 of 1950 as amended provides for service of notice of banning by publication in the Gazette).

/ (iii) ...



(iii) He says that the fears were well founded and gives his reasons (Page 69 paragraph (o)).

(iv) It is submitted that these elements are clearly proved on a balance of probabilities.

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