

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

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B E T W E E N :

JOSEPH SALLIE POONYANE MOLEFI                      Appellant

- and -

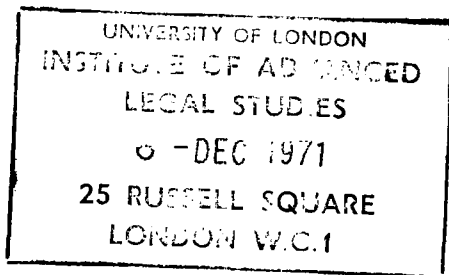
THE PRINCIPAL LEGAL ADVISER  
in his capacity as representing the  
Government of Lesotho

- and -

THE PRIME MINISTER OF LESOTHO

- and -

THE COMMISSIONER OF POLICE                      Respondents



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CASE FOR THE APPELLANT

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P177 11 11-15  
P152 11 40-43  
P159 11 8-9  
P176 11 2-3  
P99 11 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-P9

P8 1 21-P9 1 6

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 11 19-32

P46

(EXPULSION ORDER)

P22-P23 1 5

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

Lesotho / ...

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

P47-P70

P47 11 18-22

High Court  
Judgment

P90 11 32-43

P91 11 1-5

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.

P91 11 6-14

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.

High Court  
Judgment

P91 11 14-16

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,

P99 11 38-43

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.

P100-P102  
(Notice of Appeal)

P152 11 40-43  
(ROPER P.)

P159 11 8-9  
(SCHREINER J.A.)

P176 11 2-3  
(MAISELS J.A.)

P177 11 11-15  
(ROPER P.)

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 the Judicial Committee of the Privy Council.

#### THE ISSUES

P5 11 19-29  
P69 11 27-45

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

July / ...

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.

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 / ...

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 / ...

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 / ...

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. / ...

"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 Basuto-  
land] 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 Govern-  
ment of Lesotho and, subject to  
the provisions of any law, shall  
be enforceable by or against  
the Government accordingly.

(2) In this section, rights, liabili-  
ties and obligations include  
rights, liabilities and obliga-  
tions 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 inter-  
national organisation).

- (1) 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 proceed-  
ings, civil or criminal, the law  
to be administered shall be 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.

Pp 86-87

(MR. UNDERWOOD)

- (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

P84 1 22 - P85 1 22

(DR. JAHN - Annexure C)

of ./ ...



High Court Judgment

P92 11 32-40  
P93 11 10-13

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

Appeal Judgment

P141 11 35-38  
(ROPER P)

P161 11 39-42  
(MAISELS J.A.)

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

(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.

P141 11 10-19  
(ROPER P.)

Appeal Judgment  
P160 11 17-23  
(MAISELS 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 / ...

United Nations Convention relating  
to the Status of Refugees.

P6 11 10-24  
(Petition)

P29 11 44-46

(First Respondent)

- (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:

"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. / ...

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:-

P5 11 19-21  
(Petition)

P28 1 43 - P29 1 2  
(First Respondent)

(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 1 45 - P66 1 5  
P67 11 4-5  
P74 11 32-34 (First Respondent)

(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.

P66 1 5  
P66 1 43 - P67 1 4  
P74 11 32-34 (First Respondent)  
Appeal Judgment  
P152 1 32 (ROPER P)  
P158 11 4-12 (SCHREINER J.A.)

(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.

P54 1 28 - P55 1 5  
P55 11 21-31  
P74 11 18-22 (First Respondent)  
P67 11 15-19  
P74 11 32-34 (First Respondent)

(v) / ...

P67 1 39 - P68 1 8  
P74 11 32-34 (First Respondent)

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

P67 11 25-38  
P74 11 32-34 (First Respondent)

(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 - P63 1 8  
P74 11 18-22 (First Respondent)

(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 / ...

P68 11 8-28

P74 11 32-34 (First  
Respondent)

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".

P68 11 29-32

P74 11 34-36 (First  
Respondent)

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

P68 11 33-35

P74 11 32-34 (First  
Respondent)

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

(b) It is common cause that:

P5 11 22-28

P29 11 10-17 (First  
Respondent)

P37-P40 (MR. KENNEDY)

(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

member / ...



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

P3 11 20-27  
P27 11 24-25 (First  
Respondent)

(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;

P2 11 20-32  
P27 11 12-13 (First  
Respondent)  
P46 (EXPULSION ORDER)

(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

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:

P68 1 40 - P69 1 15

P74 11 32-34 (First  
Respondent)

(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 un-  
lawful; 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;

P69 11 16-26

P74 11 32-34 (First  
Respondent)

P152 11 10-30  
(ROFER P)

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

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 / ...

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,

P94 11 12-16

was / ...

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

P96 11 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 11 9-16

- (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 1 20 - P99 1 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,

- P143 11 2-4  
P144 1 44 - P145 1 19
- (a) held that the Prime Minister's letter was on a proper interpretation not an accession to the Convention, but rather the reverse;
- P145 11 20-34
- (b) left open the question of the effect of section 17 of the Lesotho Order-in-Council, 1966;
- P145 1 35 - P147 1 42
- (c) held that the central issue on this part of the case was whether the United Kingdom extension of the Convention to

Basutoland / ...

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;

(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

refugee / ...

P149 ll 29-31

P152 ll 26-36

P152 ll 37-40

refugee.

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

P154 11 28-40

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

P158 11 27-29

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

P158 1 36 - P159 1 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,

- (a) left open the question whether the  
P164 1 16 - P165 1 13 United Kingdom's extension of the Convention to Basutoland gave it the force of law in Basutoland;
- (b) held that the extension of the Conven-  
P162 1 21 - P164 1 15 tion 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
- (c) held that the Prime Minister's letter  
P168 11 25-30 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 / ...

P173 11 7-38

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.

P175 11 15-24

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

P175 11 28-36

APPELLANT'S / ...

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 / ...

P92 1 31 - P93 1 12  
(JACOBS C.J.)

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.

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(ROPER P)

- (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.

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 / ...

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.

P145 11 20-23  
(ROPER P)

P168 11 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.

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(ROPER P)

P156 11 17-37 )  
P157 11 36-41 }  
P159 11 1-6 }

(SCHREINER J.A.)

(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 being out of his country of nationality, provided that his exile 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

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(JACOBS C.J.)

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(SCHREINER J.A.)

P152 11 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 precludes his 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.

P152 1 34

(ROPER P)

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

#### REASONS

(a) BECAUSE the United Nations Convention

on / ...

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 / ...

Appeal was wrong and should be  
reversed.

S. KENTRIDGE.

J. UNTERHALTER.

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

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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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