No. 27 of 1969

IN THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL

ON APPEAL FROM THE LESOTHO COURT OF APPEAL

B E T W E E N :

JOSEPH SALLIE POONYANE MOLEFI Appellant

- and -

THE PRINCIPAL LEGAL ADVISER
THE PRIME MINISTER, and
THE COMMISSIONER OF POLICE Respondents

CASE FOR THE RESPONDENTS

Record

1. This is an appeal from a judgment of the Lesotho Court of Appeal (Roper,P., Schreiner and Maisels, J.J.A.) dated the 30th May 1969, which dismissed the Appellant's appeal from a judgment of the High Court of Lesotho (Jacobs, C.J.) dated the 15th January 1969, which dismissed an application by the Appellant for an order interdicting the Respondents from expelling him from Lesotho, and for a declaration that he was a refugee within the meaning of section 38(2) of the Aliens Control Act and that his expulsion was accordingly not permitted.

pp. 140-176

pp. 88-99

2. The relevant statutory provisions are:-

The Aliens Control Act, Lesotho, No.16 of 1966.

s.32 The onus of proving or disproving any facts the proving or disproving of which is required to establish ... that a person is entitled to the

Record

benefit of section 38 ..... shall lie upon that person.

s.37 (8) In this Act a reference to Lesotho shall, up to the expiry of the 3rd day of October, 1966, be construed as a reference to Basutoland.

s.38 (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.... the High Court may on the application of that alien declare ..... that his expulsion from Lesotho is or is not permitted by that treaty or convention, or may decline to make any such declaration.

pp. 2-9 3. On the 12th October, 1968, the Appellant presented a petition to the High Court of Lesotho praying for an interdict to restrain the Respondents from expelling him from Lesotho. He stated in the petition that he had been served with an expulsion order on 11th October, 1968, and said that he had lived in Basutoland under a temporary permit renewed from time to time; in 1962 he had applied for permission for permanent residence; that application was only refused in September 1968. In January 1968 he had been led to believe that he would be granted

Record

permanent residence, but in August 1968 he was served with an expulsion order which was later withdrawn; he had made representations about his expulsion, but had received no answer. He further stated that he had arrived in Basutoland in October 1961 as a refugee from South Africa, having been charged in the Regional Court of Johannesburg as being a member of an illegal organisation, the Pan Africanist Congress. If he had to return to South Africa, he was in jeopardy of a long prison sentence or other restrictions. He submitted that he was a refugee within section 38(1) of the Aliens Control Act, and so not liable to expulsion. He further alleged that the expulsion order had been made maliciously.

4. On 12th October, 1968 the High Court made ex parte a rule nisi restraining the Appellant's expulsion pending a hearing of the petition. pp. 22-23

5. The Respondents filed evidence in answer to the Appellant's petition, which denied that he had been led to believe that he would be granted permanent residence, and denied that the expulsion order had been made maliciously. pp. 27-44

There was also filed an affidavit by a South African police officer, which showed that the Appellant had been arrested in South Africa on the 5th August, 1961 charged with offences connected with the Pan Africanist Congress, an organisation founded in 1959 and declared to be illegal on the 8th April, 1960; the Appellant had been granted bail on the 28th August, 1961 by the Regional Court in Johannesburg, but had not again appeared before the court. pp. 37-40

6. On 28th November, 1968 the Appellant filed a further affidavit. He exhibited a letter from the United Nations office of the High Commissioner of Refugees which referred to the United Nations Convention on Refugees; it stated that the personal scope of the Convention itself was limited to refugees as a result of events occurring before the 1st January, 1951; a Protocol removing the time limitation had been pp. 47-72 pp. 71,72

Record

adopted, but Lesotho was not a party to the Protocol. The Convention had been acceded to by the United Kingdom in 1954, and it had been extended to Basutoland on the 11th November 1960. After independence, Lesotho had made a general declaration concerning acceptance of multi-lateral agreements, which had been taken as having the effect that Lesotho continued to be bound by the 1951 Convention.

pp.49-65 7. The Appellant's affidavit also referred to an affidavit sworn by Gerald Josman, a South African barrister, which summarised the effects of a number of South African statutes passed between 1853 and 1960; the Appellant concluded that the legislation referred to was made without the active participation of the 'Native' population; from an early age he had interested himself in the conditions of Africans in South Africa, and the extent to which discrimination existed; in 1958 the Pan Africanist Congress had been formed as a direct result of the cumulative effect since 1910 of the legislation upon Africans. The Appellant had become a member, and, after the organisation was banned, he was prosecuted for being a member. He had fled from South Africa because even if he had been acquitted he feared he would still be subject to restrictions; he submitted that when he arrived in Basutoland in October, 1961 he was then a refugee within the United Nations Convention which was a status which remained, so that he could not be expelled from Lesotho.

p.65 L.27

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pp.88-99 8. After a hearing in the High Court (Jacobs, C.J.) on the 12th and 13th December, 1968, judgment was given on the 15th January, 1969, dismissing the application of the Appellant.

Jacobs, C.J. recited the relevant facts, stating that the Appellant had been in the country since October 1961 after failing to answer to his bail in Johannesburg on charges relating to membership of a prohibited organisation, and that on the 11th October 1968 an expulsion order signed by the Prime Minister was served on him. Two main arguments had been

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Record

put forward on his behalf. The first was that the Aliens Control Act had to be administered by a Minister of State; the Prime Minister was not a Minister of State, because Government Notice No. 78 of 1968, by which the King established offices of Minister, was invalid; and consequently the Prime Minister's order was invalid. There was no substance in this contention; section 72(2) of the Constitution meant that where Parliament had not provided for an office of Minister, the King could appoint Ministers, and he had validly done so by Government Notice No. 78 of 1968.

The second argument was that the Appellant was a refugee within the terms of section 38(1) of the Aliens Control Act. It was accepted by the Respondents that the United Nations Convention on Refugees of 1951 had been extended to Basutoland in 1960, but contested that the convention had been acceded to by Lesotho after independence, and further contested that in any event the Appellant was a refugee in the terms of the Convention. Jacobs, C.J. said that conventions to which Basutoland was a party before independence did not automatically continue to apply to Lesotho, owing to section 17 of the Lesotho Independence Order, 1966; any convention to which section 38 of the Aliens Control Act related had to be one binding upon Lesotho, and not merely one which had been extended before independence to Basutoland. Whether Lesotho had acceded to the United Nations Convention on Refugees, the learned Judge continued, depended on the construction of a letter of the Prime Minister to the Secretary General of the United Nations dated 22nd March 1967. The learned Judge concluded that the letter did not contain a general accession to all multilateral treaties to which Basutoland had been a party, and that the Convention could not be regarded as one which had been acceded to by Lesotho for the purposes of section 38 of the Aliens Control Act.

pp. 94,95

Even if that conclusion was wrong, the Appellant had not shown that he was a refugee

Record

in terms of the Convention, which was limited to persons outside their country of nationality 'as a result of events occurring before 1 January 1951'. That phrase connoted some causal relation between the events occurring before 1951 and the result. The cause of the Appellant's flight had been the charges made against him in 1961, and not the passing of the Suppression of Communism Act in 1950, under which he had been charged. There was no causal connection between certain laws passed in South Africa before 1951, upon which the Appellant relied, and his membership of the Pan Africanist Congress, which had led to the charges made against him; the various enactments were no more than incidents in the narrative of events and did not operate as a cause of the flight of the applicant. On this ground also the application failed, and it would be dismissed with costs.

103-111, 113-139

9. The Appellant appealed to the Lesotho Court of Appeal from this judgment. Written arguments were submitted by both parties, in particular in response to an Instruction by the Court of

p.112

Appeal dated the 25th February, 1969, which raised the issues of whether the United Nations Convention had ever become part of the municipal law of Basutoland, and whether the declaration extending the Convention to Basutoland had been notified to the High Commissioner.

10. The Lesotho Court of Appeal (Roper,P., Schreiner and Maisels, JJ.A.) gave judgment on the 30th May 1969, dismissing the appeal.

pp.140-152

Roper,P. began his judgment by summarising the issues raised in the appeal. The question of whether Lesotho had acceded to the Convention was difficult, but he agreed with the Chief Justice that the Prime Minister's letter of the 22nd March, 1967 was not an accession. On the question whether the extension of the Convention to Basutoland had been validly carried out before independence, Roper, P. reviewed the constitutional position of Basutoland in 1960, and said that there was little evidence as to what had happened at that time beyond a bare

Record

statement from the British High Commission in Maseru that the United Kingdom had declared the Convention to be extended to Basutoland under Article 40 of the Convention; there was nothing to show whether any constitutional requirements in Basutoland had been carried out. There was not, he concluded, sufficient material to decide the question whether the Convention was binding on Lesotho or not. The learned Judge then considered whether the Appellant was a refugee within the terms of Article 1A(2) of the Convention; to come within them, he must show a causal connection between events occurring before 1951 and his flight from South Africa; the Act of 1950 relied upon was only part of the history of events; his flight had resulted from his membership of the prohibited organisation, which could not have begun before 1958, his resulting prosecution in 1961, and his fear of conviction and other penalties. The Appellant had not shown that in terms of the Convention he was outside South Africa as a result of events occurring before January 1951, and the appeal would be dismissed.

11. Schreiner, J.A. in his judgment said that he did not find it necessary to decide whether the Convention was operative in Lesotho in 1968; the Appellant had to show that he was a refugee within the relevant definition; his evidence showed that he had left South Africa in consequence of his membership of the prohibited organisation, and there was no allegation that he left in consequence of the passing of any legislation before 1951; the evidence filed had referred to a number of statutes, but it was not specifically alleged that any events before 1951 had led to the Appellant's emigration; there was no evidence that the Appellant had considered leaving South Africa before 1960, and no evidence that anything occurring before 1951 had caused him to leave.

12. Maisels, J.A., in his judgment, rejected an argument that the Convention had been introduced into the municipal law by the Aliens

Record

Control Act, 1966 applicable to Basutoland, and that the Convention had become part of the law of Lesotho by the operation of section 37(8) of that Act. The letter of the Prime Minister to the United Nations Secretary-General dated the 22nd March, 1967 should be interpreted as an expression of the intention of the Government of Lesotho to be bound by multilateral treaties entered into on its behalf by the United Kingdom, pending a separate examination of each one. The terms of the letter made it a binding accession to the Convention, which thus by virtue of section 38(1) of the Aliens Control Act became part of the municipal law of Lesotho. However, upon the second question in the appeal, Maisels, J. said that he agreed with the other members of the Court of Appeal that the Appellant had not established that he had left South Africa because of events occurring before 1st January, 1951, and that accordingly the appeal should be dismissed.

13. The Respondents respectfully submit that the conclusion reached by the Court of Appeal was correct and that this appeal should be dismissed. It is submitted that the order made by the Prime Minister expelling the Appellant was validly made in the exercise of the powers conferred by section 25(1) of the Aliens Control Act, since, by virtue of sections 5 and 7 of the Act, the Appellant's presence in Lesotho was unlawful. The onus of proof is upon the Appellant to show that he comes within the terms of section 38 of the Act. In order to do so he must establish that there is an international treaty or convention which has been acceded to by or on behalf of the Government of Lesotho, and that he is a refugee within the meaning of that treaty or convention. The Convention on the Status of Refugees was acceded to by the United Kingdom on behalf of Basutoland, but not on behalf of Lesotho, although it never became part of the municipal law of Basutoland nor part of the municipal law of Lesotho. Upon independence pursuant to the Lesotho Independence Act, 1966, Lesotho became a separate entity as an international person, a party to, or bound by, the

and was not in international law

Record

Convention. Such a result is confirmed by the express terms of section 17 of the Lesotho Independence Order, S.1 No. 1172 of 1966, which specifically excluded from transfer to Lesotho any rights, liabilities or obligations incurred by Her Majesty in right of the Government of Basutoland which arose from treaties or conventions.

14. Lesotho has not acceded to the Convention on the Status of Refugees, and the letter from the Prime Minister to the Secretary General of the United Nations dated the 22nd March, 1967 was not, and was not intended to be, an accession to the Convention or any other multilateral treaty. The letter was not an executive act, but a mere statement of policy not having any effect of accession to, or confirmation of, treaties binding upon Basutoland. The proper meaning of the letter was that it was a denial, as opposed to an acceptance, of rights or liabilities under existing treaties.

15. In any event, the Appellant failed to adduce any evidence that he was a refugee within the definition in the Convention. It was accepted that he had to show that he was a refugee as a result of events occurring before the 1st January, 1951, and no such events were proved which had any causal link with the Appellant's arrival in Basutoland in October, 1961. It is submitted that such departure from South Africa was caused solely by his prosecution in connection with his membership of a prohibited organisation, and had no relation to any event occurring before 1951. It is further submitted that the Courts below have made concurrent findings of fact that the Appellant was not a refugee within the definition in the Convention.

16. The Respondents therefore respectfully submit that the judgment of the Court of Appeal should be upheld and that this appeal should be dismissed, with costs, for the following, among other,

Record

REASONS

1. BECAUSE the Appellant was never a refugee for the purposes of Section 38 of the Aliens Control Act.

2. BECAUSE the Appellant did not leave South Africa as a result of any event occurring before the 1st January, 1951.

3. BECAUSE the Appellant was served with a valid expulsion order.

4. BECAUSE Lesotho has never acceded to the Convention on the Status of Refugees. 10

5. BECAUSE the Prime Minister's letter of the 22nd March, 1967 was not an accession to the Convention.

6. BECAUSE Lesotho did not succeed to the rights and obligations of Basutoland under the Convention.

L. G. LeQUESHE

MERVYN HEALD

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Respondent

C A S E FOR THE RESPONDENTS

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