

J. S. P. Molefi - - - - - *Appellant*
v.
The Principal Legal Adviser and others - - - *Respondents*

FROM
THE LESOTHO COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 17TH JUNE 1970

Present at the Hearing :

LORD MORRIS OF BORTH-Y-GEST
LORD GUEST
LORD DONOVAN
LORD DIPLOCK
SIR GORDON WILLMER

[*Delivered by* LORD MORRIS OF BORTH-Y-GEST]

In August 1961 the appellant who had always lived in South Africa was arrested. He was charged before the Regional Court at Johannesburg with being a member of an unlawful organisation, namely the Pan Africanist Congress, and with furthering its aims. He was charged with contravening certain provisions of the South African Suppression of Communism Act No. 44 of 1950. The charges against him related to alleged activities between 8th April 1960 and July 1961. Being (on 28th August 1961) released on bail and being due to appear in Court on 26th October 1961, he left South Africa and went to Maseru in the territory then known as Basutoland. After that time he resided in Maseru.

On 4th October 1966 the independent sovereign Kingdom of Lesotho came into being. (See the Lesotho Independence Act 1966.) The Constitution of Lesotho, which was set out in the Schedule to the Lesotho Independence Order (S.I. 1966 No. 1172) came into effect.

The appellant continued to reside in Lesotho. In October 1968 by which time he had been seven years in the country he was informed that, being an "alien" as defined in the Aliens Control Act (No. 16 of 1966), he was required to leave the country. The Aliens Control Act was enacted by the Parliament of Basutoland and was assented to on 30th September 1966. It was to come into operation on a date or dates to be fixed. It was an existing law on the "appointed day" (4th October 1966). It was brought into operation on 1st March 1968.

The provisions of sub-sections 1 and 2 of section 38 of the Aliens Control Act are as follows:

" 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;
- (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.”

On being required to leave Lesotho the appellant invoked the provisions of s. 38. He presented a Petition to the High Court of Lesotho. The Court granted a rule *nisi* calling upon the respondents to show cause why an order should not be granted interdicting them from expelling the appellant. An interim interdict was granted. After hearing argument the Chief Justice (on 17th January 1969) discharged the rule (with the consequence that the interim interdict would cease to operate) and refused the declaratory orders for which the appellant had prayed.

The appellant appealed to the Court of Appeal of Lesotho. Pending the determination of the appeal the interim interdict was renewed. On 30th May 1969 the appeal was dismissed. On that date the Court of Appeal gave provisional, and on 28th October 1969 final, leave to appeal to the Judicial Committee of the Privy Council. The interim interdict was renewed pending the determination of the appeal by the Judicial Committee of the Privy Council.

In the appeal before their Lordships the appellant claims that he is protected from expulsion from Lesotho on the ground that though he is an “alien” he is a “refugee” within the meaning of an international treaty or convention relating to refugees which “is or has been acceded to by or on behalf of the Government of Lesotho” and that accordingly he can rely on the provisions of s. 38 of the Aliens Control Act 1966.

The international convention upon which the appellant relies is the “Convention Relating to the Status of Refugees”. In the course of the Preamble to that Convention the High Contracting Powers, though noting that the grant of asylum may place unduly heavy burdens on certain countries, considered that international co-operation was needed to achieve a satisfactory solution of the problems relating to refugees. It was noted that the United Nations had manifested its concern for refugees so that, without discrimination, they should enjoy the widest possible exercise of fundamental rights and freedoms. One provision of the Treaty (see Article 32) is that the Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

It is not necessary to consider the provisions of the Convention in great detail. The protection from expulsion upon which the appellant relies is the protection which he claims is given to him by s. 38 of the Aliens Control Act. Save to the extent that the provisions of the Convention are introduced into the municipal law of Lesotho the appellant asserts no separate and independent reliance upon them.

The date of the Convention was 28th July 1951. On that date (see Article 39) it was opened for signature at Geneva. Thereafter it was to be deposited with the Secretary-General of the United Nations. Provisions concerning Signature, Ratification and Accession are contained in Article 39. Provisions concerning entry into force are in Article 43. There was ratification by the United Kingdom. The ratification was deposited on 11th March 1954. There were certain reservations as permitted by Article 42. For present purposes they have no materiality. Under the provisions of Article 40 of the Treaty the United Kingdom later, by notification addressed to the Secretary-General of the United Nations, extended the Convention (with reservations) to Basutoland as territory for the international relations of which the United Kingdom was responsible. The effective date of such extension was 9th February 1961.

In Article 1 of the Convention is a Definition of the Term "Refugee". So far as material for present purposes the term applies to any person who:

"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;

In the case of a person who has more than one nationality, the term 'the country of his nationality' shall mean each of the countries of which he is a national."

The Article also contains the following important provision:

"For the purposes of this Convention the words 'events occurring before 1 January 1951' in Article 1, Section A, shall be understood to mean either

- (a) 'events occurring in Europe before 1 January 1951'; or
- (b) 'events occurring in Europe or elsewhere before 1 January 1951'; and each Contracting State shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of its obligations under this Convention."

In signing the Convention the United Kingdom declared that for the purposes of its obligations the words "events occurring before January 1 1951" were to be understood as referring to events occurring in Europe or elsewhere before January 1 1951.

The claim of the appellant to have the protection of s. 38 of the Aliens Control Act gives rise to two main questions. The first question is whether the Convention Relating to the Status of Refugees is one that "is or has been acceded to by or on behalf of the Government of Lesotho". The second question is whether the appellant is an alien who is a refugee within the meaning of such a treaty.

The argument in favour of an affirmative answer to the first question was advanced on alternative lines. It was contended that the validity of the extension of the Convention to Basutoland, as recorded above, could not be questioned and that all that s. 38 requires is that there shall have been an accession to a convention so that if there has been an accession then s. 38 makes the convention *pro tanto* a part of the municipal

law. An alternative submission was that as the Convention had been extended to Basutoland (as it had been in 1960 with the effective date of 9th February 1961) the Convention was within the terms of s. 38 "acceded to by or on behalf of the Government of Lesotho". It was said that in the context of s. 38 the phrase "Government of Lesotho" denoted any Government which was at any relevant time the Government of the territory which is now known as Lesotho.

A further alternative submission was developed. It was said that the words "acceded to . . . on behalf of the Government of Lesotho" were words which were apt to refer to an accession by a predecessor government. Once Lesotho became a sovereign independent state any accession, so it was argued, would not be "on behalf of" but would be "by" the Government of Lesotho. So the words "on behalf of the Government of Lesotho" as found in the section should be understood to cover an accession to a convention or treaty which had taken place before Lesotho was in existence with the consequence that Lesotho would become a party to the convention as a result of the operation of principles of international law relating to succession to treaties.

In their Lordships' view these various contentions place a strained and unnatural meaning upon the words in s. 38. It is important to remember that the Aliens Control Act was enacted just before Lesotho came into existence. It was to come into operation on a date to be fixed. Its language must have been designed to relate principally to the period when there would be a Government of Lesotho. There was such a Government as from 4th October 1966. The Act was not brought into operation until 1st March 1968.

In s. 37 s.s. 8 is the provision—"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." It followed that when applying the Act while Basutoland still continued the words "the Government of Lesotho" would be read as "the Government of Basutoland". There could in that period have been an accession "on behalf of the Government of Basutoland". As from 4th October 1966, but effectively as from the date when the Act was brought into operation, there could be no reason for construing s. 38 other than according to the clear meaning of its words. An international treaty or convention relating to refugees is drawn into the municipal law if the treaty or convention "is or has been acceded to by or on behalf of the Government of Lesotho". Some positive manifestation of intention is indicated.

It is not contended on behalf of the appellant that he can claim protection merely by bringing himself within the terms of an international treaty or convention. Nor is it now contended that by extending the convention to Basutoland, Her Majesty had performed a legislative act in regard to Basutoland with the result that such act had the force of law in Basutoland. The appellant's reliance is and must be upon the terms of s. 38. The indications are that that section was drafted so that in the period after 3rd October 1966 and after the Act was brought into force its provisions would be applicable if any international treaty "is or has been acceded to by or on behalf of the Government of Lesotho". As therefore the appellant only claims protection if he can bring himself within a positive provision of the municipal law of Lesotho and as therefore it has to be considered whether he is a refugee within the meaning of an international treaty or convention which within the meaning of s. 38 has been "acceded to", it becomes unnecessary to consider the various views which have been held by international lawyers as to the circumstances under which there may be succession to treaties or conventions by a new state. Nor does it become necessary to consider whether or not the effect of s. 17 of The Lesotho

Independence Order 1966 (S.I. 1966 No. 1172) would be that Lesotho would not be bound by any obligations which were formerly those of Her Majesty in respect of the Government of Basutoland and which arose under a convention with another country or with any international organisation. The terms of s. 17 are as follows:

- “17. (1) All rights, liabilities and obligations of
- (a) Her Majesty in respect of the Government of Basutoland; and
 - (b) Motlotlehi 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 that Government accordingly.

(2) In this section, rights, liabilities and obligations include rights, liabilities and obligations arising from contract or otherwise (other than any rights referred to in sub-sections (1), (2) and (3) of section 16 of this Order and any rights, liabilities or obligations of Her Majesty in respect of the Government of Basutoland arising under any treaty, convention or agreement with another country or with any international organisation).”

The question therefore arises whether the 1951 Convention Relating to the Status of Refugees (it being common ground that there is no other international convention to which s. 38 could apply) has been acceded to by or on behalf of the Government of Lesotho. On behalf of the appellant it is contended that there was such an accession on 22nd March 1967. If there was, then as from 1st March 1968 (when the Aliens Control Act 1966 came into operation) an “alien” in Lesotho who was a “refugee” could claim statutory protection.

On 22nd March 1967 a letter was sent by the Prime Minister to the Secretary-General of the United Nations. Lesotho has at all material times been a member of the United Nations. The letter was in the following terms:

“ 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, legal continuity between Lesotho and the several States with which, through the action of the Government of the United Kingdom the country formerly known as Basutoland enjoyed treaty relations. Accordingly, the Government of the Kingdom of Lesotho takes the present opportunity of making the following declarations.

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 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 Members of the United Nations.

Please accept, Sir, the assurance of my highest consideration.

(sgd.) LEABUA JONATHAN

Prime Minister."

On behalf of the respondents it was contended that the letter was not an executive act but was a mere statement of policy not having the effect of accession to, or confirmation of, treaties binding upon Basutoland. Attention was directed to the words "on basis of reciprocity". It was contended that the language of paragraph 4 of the letter is very limited and that the effect of the paragraph was that an offer was being made voluntarily to accept reciprocal obligations contained in multilateral treaties which had affected Basutoland. So it was contended that the letter amounted to no more than an offer voluntarily and on a reciprocal basis to observe certain terms of some treaties or conventions.

If the letter did amount to an accession it is no longer contended that the letter was not written on behalf of the Government of Lesotho or that there was a lack of executive authority on the part of the Prime Minister in writing it.

Their Lordships consider that the question whether the Prime Minister's letter is to be treated as an accession to the convention must be decided by an examination and interpretation of the letter itself. It is to be remembered that the second part of the letter deals comprehensively with multilateral treaties. It follows from this that the letter should not be construed in an unduly restricted manner. Rather should its purport and intention be gathered from the opening passages in the letter itself. The point is made that though the Kingdom of Lesotho has emerged into full independence yet it is clearly desirable to maintain legal continuity between Lesotho and the various countries with which Basutoland had enjoyed treaty relations. The "declarations" which followed were therefore made "accordingly". They were made with the desirability of legal continuity in mind. The first "declaration" set out what was to happen in regard to bilateral treaties: the second "declaration" concerned multilateral treaties. In regard to those the Government wanted time to consider how it wanted to deal with them. There was to be an "interim period of review". What then was to be the position in

that period? It was that "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 Lesotho on the terms of such treaty". The request was made that the text of the declaration should be circulated to members of the United Nations.

In agreement with Maisels J.A. their Lordships consider that so far as concerns multilateral treaties the reasonable meaning of the letter is that they are to continue in existence and to be considered as binding on Lesotho until such time as decisions could be made in regard to them and as to which of them should be terminated and which should be continued. A powerful argument was addressed to their Lordships founded upon the words "on a basis of reciprocity". In this connection it is again to be remembered that the letter was dealing generally with all multilateral treaties and not with the Refugee Convention or any other treaty or convention in particular. Although there are some provisions in the Refugee Convention which have inter-state reciprocal effect (such for example as the article relating to the issuing of travel documents) the general scope of the Convention is such that it involves individual acceptance by the contracting parties within their own territories of the principle that refugees should be assured of the widest possible exercise of fundamental rights and freedoms without discrimination. There might be some multilateral treaties or conventions where reciprocity would be required to make them effective. The words "on a basis of reciprocity" in the letter were probably necessary for that reason. As applied in the present case the words are not to be read as meaning more than that if there are any reciprocal obligations in a treaty or convention which Lesotho is, at least for the time being, acceding to and if another state failed to adhere to one of those reciprocal obligations then Lesotho was reserving the right not to adhere to that obligation either. The Prime Minister's letter was therefore, as Maisels J.A. held, a declaration that pending individual examination (which would take time) of those multilateral treaties which had resulted in treaty relations between the country formerly known as Basutoland and other states, Lesotho would adhere to those treaties. The Refugee Convention was one of them. When therefore the Aliens Control Act 1966 came into operation the appellant, an "alien", could rely upon s. 38 if he was a "refugee" within the meaning of the Convention. To that question their Lordships must now turn.

It was not disputed that if the Prime Minister's letter is to be treated as bringing the Refugee Convention within the applicability of s. 38 it would do so on the basis that the words in Article I of the Convention *i.e.* the words "as a result of events occurring before 1 January 1951" were to be understood to cover events occurring elsewhere than in Europe and accordingly in Africa.

Was the appellant then a "refugee" within the meaning of the words cited above which are contained in Article I of the Convention? It was not doubted that he is "outside the country of his nationality": nor that owing to "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion" he is unwilling to avail himself of the protection of the country of his nationality; nor that it is owing to such a fear that he is outside such country. The question to be decided is therefore whether the appellant is outside South Africa as a result of events occurring before 1st January 1951. The appellant's case is that he is outside South Africa as a result of two events. The two events are stated to be (1) that in 1948 the National Party was elected to power in South Africa, and (2) that in 1950 the South African Parliament passed

the "Suppression of Communism Act" No. 44 of 1950, which gave extensive powers to the Minister of Justice to restrict the freedom of persons whom the Minister believed were likely to further the objects of "communism" as defined in the Statute. The contention was advanced that a consequence of the first of the two stated "events" was that the administration of certain laws which discriminated against Africans "became harsher".

On behalf of the appellant it was pointed out that the question whether the appellant is outside South Africa as a result of pre-1951 events is not to be solved merely by considering what was the immediate cause of his leaving South Africa in 1961. It was contended that the words of definition of a "refugee" were satisfied if some definite event (occurring not too long before 1951) could be found which had a significant causal connection with the absence of the "refugee" from his country: the words of the definition did not denote a sole cause nor did they stipulate that a result must be a direct result. The immediate cause of the appellant's absence was undoubtedly that he was due to appear on a criminal charge and decided to leave: on his behalf it was said that he had a fear that he might be convicted and imprisoned and a fear that even if he were acquitted of the charge against him, he was likely to suffer disabilities under the Suppression of Communism Act. Furthermore he believed from reports that he had read that he was "banned" in terms of certain provisions of the Act and if returned to South Africa he would suffer disabilities such as confinement to an area and a prohibition against publishing anything which as a journalist he might write. It was submitted that if the appellant's position had been considered in 1961 he would then, as now, have been within the description of a person who "is" outside his country as a result of pre-1951 events and that it would be enough if his presence in Lesotho was "a" result of those events.

On behalf of the respondents it was submitted that the two "events" relied upon by the appellant were not of the kind that the Convention designated and that in the Convention the word "events" contemplated such occurrences as invasions or revolutions or transfers of territory.

In this connection it may be mentioned that in the Report of the Ad Hoc Committee on Statelessness and Related Problems which was dated 17th February 1950 and which related to an earlier draft of Article 1 (which included the words "as a result of events in Europe after 3 September 1939 and before 1 January 1951") it was said: "The expression 'as a result of events in Europe' is intended to apply to happenings of major importance involving territorial or profound political changes, as well as systematic programmes of persecution in this period which are after-effects of earlier changes.

The second date 1 January 1951, excludes events which happen after that date, but does not exclude persons who may become refugees at a later date as a result of events before then, or as a result of after-effects which occurred at a later date."

No later report or record of any Committee proceedings was available for their Lordships. It was further contended that on an ordinary and sensible use of language it ought not to be said that there is such a causal link with pre-1951 events as to make it reasonable to say that the appellant is in Lesotho "as a result of events occurring before 1 January 1951".

Reference was made to the decision in the Hungarian Refugee (Austria) Case decided in 1957 (International Law Reports 1957 page 488) and to the decision in the Asylum (Algerian Refugee) Case 1961 (International Law Reports Vol. 32 page 230).

Their Lordships consider that the words in the definition of the term "Refugee" must be applied with common sense while remembering that one event may often lead to another which in turn may lead to another or others. The words do not call for legalistic or philosophical examination. A mean can be found between too much stiffness of interpretation and too much easiness of application. When the facts of a situation are ascertained and known then in a fair-minded way those facts must be surveyed and an answer given to the straightforward question which is posed. If after a fair-minded approach an answer is readily and clearly given it may not be one that requires or permits of detailed elaboration.

In considering the question whether the appellant is outside South Africa as a result of pre-1951 events one or two facts additional to those already mentioned must be in mind. The charges preferred against the appellant in 1961 referred to the period between 8th April 1960 and July 1961. The charges included charges of performing acts calculated to further some of the objects of "communism" by participation in the affairs of an unlawful organisation, *i.e.* the Pan Africanist Congress. That body did not come into existence until 1959. On 8th April 1960 it was declared to be an unlawful organisation. Roper P. states in his judgment that by the Unlawful Organisations Act, No. 34 of 1960, the Governor-General was given power specifically to declare that body an unlawful organisation without notice so that "it must have been fairly clear to its members, including the appellant, that an unfavourable climate lay ahead of them". The view of the learned President was that properly regarded "the pre-1951 South African legislation and the repressive Government policy referred to by the appellant" were merely the background to later events. On the undisputed facts the appellant remained in South Africa for some 13 years after the 1948 Elections and for some 11 years after the passing of the Suppression of Communism Act in 1950. The charges which were formulated in the prosecution proceedings related to 1960 and 1961.

With full appreciation of the standpoint of the appellant their Lordships pose the question whether the appellant is outside South Africa "as a result of events occurring before 1 January 1951" so as to be a refugee within the meaning of the 1951 Convention. Their Lordships' conclusion on this point, in agreement with the Chief Justice and with all the learned Judges in the Court of Appeal, is that it has not been shown that the appellant is outside South Africa as a result of pre-1951 events.

The Appeal must therefore be dismissed with costs.

In the Privy Council

J. S. P. MOLEFI

v.

**THE PRINCIPAL LEGAL ADVISER
AND OTHERS**

DELIVERED BY

LORD MORRIS OF BORTH-Y-GEST