APPLICATION No. 9174/80

MOHAMMED ZAMIR

v.

the United Kingdom

REPORT OF THE COMMISSION
(adopted 11 October 1983)

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INTRODUCTION

1. The following is an outline of the case as submitted to the European Commission of Human Rights and of the procedure before the Commission.

The Substance of the Application

2. The application concerns the detention of the applicant as an illegal entrant under the Immigration Act 1971 and court proceedings taken by him to challenge the lawfulness of his detention under English law.

3. The applicant, who is a citizen of Pakistan, was granted a visa to enter the United Kingdom in 1975 bearing the words "settlement to join father". In accordance with the immigration rules a son, aged over 18 but under 21, could be admitted to the country as a dependent of his father provided that he was unmarried. Prior to his coming to the United Kingdom the applicant married on 10 February 1976. When he arrived at London on 2 March 1976 he was granted leave by an immigration officer to enter the country for an indefinite period but was not asked if he was married and did not volunteer the information.

4. In October 1978 following his wife's application to be admitted to the United Kingdom, the applicant was detained pursuant to paragraph 16 (2) of Schedule 2 of the Immigration Act 1971 on the grounds that, by not revealing the fact of his marriage, he had gained leave to enter the country by deception. Accordingly his leave to enter was a nullity.

5. The applicant was granted leave to apply for habeas corpus on 24 October 1978. He was released on bail on the 19 December 1978 pending the decision of the Divisional Court. His application was heard and dismissed by this court on the 14 March 1979. An appeal to the Court of Appeal was also dismissed on 21 December 1979. A further appeal to the House of Lords was dismissed on 17 July 1980. In the course of its decision the House of Lords found that leave to enter which has been obtained by deception is a nullity. It also rejected the applicant's submission that his detention could be considered lawful only if the court was satisfied that he was in fact guilty of deception. The test for the Court was whether there were no grounds on which the Secretary of State could have acted or that no reasonable person could have acted as he did. Moreover it held that an alien seeking entry into the United Kingdom owed a positive duty of candour on all material facts which denote a change of circumstances since the issue of the entry clearance. In this regard it found that the applicant did not reveal the fact of his marriage and that the immigration officer had ample grounds for deciding that there had been deception.

6. The applicant complained to the Commission that he was a victim of a practice of summary detention of illegal entrants, without adequate judicial control, in violation of his right to "security of person" under Article 5 (1) of the Convention. In addition he claimed that the legal rules governing his arrest and detention were uncertain and not reasonably foreseeable. In this regard he claimed that his detention was not in accordance with a procedure prescribed by law within the meaning of Article 5 (1) or "lawful" within the meaning of Article 5 (1) (f). Finally he invoked Article 5 (4) of the Convention complaining that the proceedings before the Courts did not involve a decision as to the "lawfulness" of his detention because they did not examine the question whether he was actually guilty of deception and, in addition, were not conducted "speedily".

PROCEEDINGS BEFORE THE COMMISSION

7. The application was lodged with the Commission on 23 October 1980 and registered on 28 October 1980. On the 9 March 1981 the Commission decided to give notice of the application to the United Kingdom Government in accordance with Rule 42 (2) (b) of the Rules of Procedure, and to request the Government to submit its observations on the admissibility and merits of the application. The respondent Government submitted their observations on the 9 September 1981 after having obtained two extensions of the time limit amounting to twelve weeks. The applicant's observations in reply were received on 26 November 1981 after the granting of one extension of the time limit.

8. On 7 December 1981, after having received the applicant's declaration of means and the Government's comments thereoen, the Commission granted legal aid in respect of his legal representation in accordance with the Addendum to the Commission's Rules of Procedure.

9. On 9 March 1982 the Commission decided, in accordance with Rule 42 (3) of its Rules of Procedure, to invite the parties to make further submissions at a hearing on the admissibility and merits of the application. The hearing was held on 12 July 1982. The applicant was represented by Mr Louis Blom Cooper QC, Mr Andrew Nicoll, Counsel, and Mr S Grosz, Solicitor (Messrs Bindman and Partners). The respondent Government were represented by Mrs A Glover, Agent, Foreign and Commonwealth Office, Mr N Baker, Counsel, Mr John Jones, Treasury Solicitor, and Mrs Sally Evans, Mr Alan Cogdill and Mr Brian Johnson, all of the Home Office.

Following the hearing the Commission declared the application admissible insofar as it raised issues under Article 5 of the Convention. (1)

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(1) See decision on Admissibility, Appendix II.

10. On 15 December 1982 the Government indicated that they would like to submit further observations on the merits of the application after having time to consider a decision of the House of Lords raising related issues to the present application. The decision of the House of Lords in this case was handed down on the 10 February 1983 and after the granting of a three week extension the Government's supplementary observations were submitted on 26 April 1983. The applicant's observations in reply, due on the 4 June 1983, were finally submitted on 20 June 1983.

11. After declaring the case admissible, the Commission, acting in accordance with Article 28 (b) of the Convention, also placed itself at the disposal of the parties with a view to securing a friendly settlement. In the light of the parties written response, the Commission finds that there is no basis in which such a settlement can be made.

The present Report

12. The present Report has been drawn up by the Commission in pursuance of Art. 31 of the Convention and after deliberations and votes in plenary session the following members being present:

MM. C. A. NØRGAARD, President
G. SPERDUTI
J. A. FROWEIN
J. E. S. FAWCETT
G. TENEKIDES
S. TRECHSEL
B. KIERNAN
J. SAMPAIO
A. S. GOZUBUYUK
A. WEITZEL
J. C. SOYER
H. G. SCHERMERS

13. This Report was adopted by the Commission on and will now be sent to the Committee of Ministers in accordance with Art. 31(2) of the Convention.

14. A friendly settlement of the case not having been reached, the purpose of the present report, pursuant to Article 31 of the Convention, is accordingly:

1. To establish the facts; and

2. To state an opinion as to whether the facts found disclose a breach by the respondent Government under the Convention.

15. A schedule setting out the history of proceedings before the Commission is attached hereto as Appendix I and the Commission's decision on the admissibility of the application forms Appendix II.

16. The full text of the pleadings of the parties, together with the documents lodged as exhibits, are held in the archives of the Commission and are available to the Committee of Ministers, if required.

ESTABLISHMENT OF THE FACTS

17. In general, save as otherwise indicated, the relevant law and practice and the particular facts of the case are not in dispute between the parties.

RELEVANT DOMESTIC LAW AND PRACTICE

The Immigration Rules

18. The rules relevant to the present application made under Section 3 (2) of the Immigration Act 1971, are contained in HC 81.

19. Paragraph 9 of HC 81 requires that a person seeking admission as the child or other dependent of a person settled in the United Kingdom should hold a current visa (ie an entry clearance) issued for that purpose. Paragraph 10 states inter alia that a passenger who was in possession of a valid entry clearance was not to be refused leave to enter unless the immigration officer was satisfied that a change of circumstances since the entry clearance had been issued had removed the basis of the holder's claim to admission.

20. Paragraph 38 provides that children under 18 are to be admitted for settlement to join a parent.

21. Paragraph 39 concerns the position of children over 18 and states as follows:

> "generally, children aged 18 or over must qualify for admission in their own right but, subject to the requirements of paragraphs 34 and 35 an unmarried and fully dependent son under 21 or an unmarried daughter under 21 who formed part of the family unit overseas may be admitted if the whole family are settled in the United Kingdom or are being admitted for settlement".

Illegal Entrant

22. Section 33 (1) of the 1971 Act defines an illegal entrant as

> "a person illegally entering or seeking to enter in breach of a deportation order or the immigration laws, and includes also a person who has so entered".

The term "immigration laws" is also defined in Section 33 (1) as including the 1971 Act.

A person unlawfully enters the United Kingdom in breach of the immigration laws if he is not given leave to enter in accordance with the Act (Section 3 (1) (a)).

Fraud

23. Section 26(1)(c) of the 1971 Act provides that a person shall be guilty of an offence if he makes or causes to be made a "return, statement or representation" which he knows to be false or does not believe to be true, on an examination by an immigration officer.

Arrest and detention of illegal entrants

24. Paragraph 16 (2) of Schedule 2 of the 1971 Act provides that "an illegal entrant, in respect of whom directions may be given under paragraphs 8 to 14, may be detained by an immigration officer pending the giving of such directions and pending his removal from the United Kingdom under them". Paragraphs 8 to 14 concern the powers of immigration officers and the Secretary of State to remove persons refused leave to enter and illegal entrants.

25. A person who is liable to be detained under paragraph 16 (2) may be arrested without a warrant by a constable or by an immigration officer (paragraphs 17 (1) of Schedule 2).

26. A person liable to detention under paragraph 16 may be temporarily admitted to the United Kingdom subject to residence and reporting restrictions (paragraph 21 of Schedule 2).

Appeals

27. A right of appeal against directions for a person's removal from the United Kingdom as an illegal entrant on the grounds that the person is not an illegal entrant is provided by Section 16 of the 1971 Act. The appeal is to an adjudicator who, under Section 19 of the Act, must allow the appeal if he considers that the decision is not in accordance with the law or any immigration rules applicable to the case. A further appeal lies from the decision of the adjudicator to the Immigration Appeal Tribunal. An appeal under Section 16 can only be made from abroad.

THE PARTICULAR FACTS OF THE CASE

28. The applicant, Mr Mohammed Zamir, was born on 3 March 1957 in Lahore and is a citizen of Pakistan. On 27 November 1980 he was removed from the United Kingdom to Pakistan where he now lives.

29. On 11 December 1972, when he was fifteen years of age an application was made on his behalf to the British High Commission in Islamabad for an entry certificate to the United Kingdom. He indicated in the application form that he sought to join his father who had lived in the United Kingdom since 1962. At the top of the form there appeared an exhortation to read the notes before filling in the form. Note B stated as follows:-

"The holders of entry certificates will be presumed by the immigration officer in the United Kingdom to be qualified for admission unless he discovers: a. that the entry certificate was obtained by fraudulent representations or by concealment of facts which the applicant knew to be material; or b. that a change of circumstances after issue has removed the basis of the holder's claim to admission; ...."

30. The applicant was provided with a handout in English, which at the time he could not read, concerning the admission of children under the age of 18 seeking admission for settlement in the United Kingdom.

31. His application was finally granted on the 25 November 1975 and his passport was stamped with a "visa" bearing the words "settlement to join father". On 10 February 1976 the applicant married in Pakistan.

32. On the 2 March 1976 he arrived in the United Kingdom on the basis of the visa and was given indefinite leave to enter at Heathrow Airport. He was not asked by the immigration officer if he was married and did not volunteer the information.

33. In July 1978 by which time a son had been born to the applicant in Pakistan, his wife applied for an entry certificate for herself and her son to join the applicant. The Entry Clearance Officer in Islamabad informed the Home Office of the application and queried whether the applicant had lawfully entered the United Kingdom in March 1976.

34. The applicant was interviewed on 30 August 1978 with the help of an Urdu-speaking interpreter. He stated that he had not informed the entry clearance officer in Pakistan when he married since he was already in receipt of his visa and because he did not think it was necessary. Nor did he inform the immigration officer of his marriage, on his arrival in the United Kingdom because, he had not been asked any questions regarding this. On being asked on how he could regard himself as a dependent of his father when he had undertaken marriage, he stated that he had come to the United Kingdom purely for work for himself and his wife.

35. Following this interview the authorities concluded that by not revealing the fact of his marriage the applicant had gained leave to enter the country by deception. Accordingly his leave to enter was a nullity and he was regarded as an illegal entrant under (Section 33 (1) of the 1971 Act.) He was subsequently arrested on 2 October 1978 and detained pursuant to paragraph 16 (2) of Schedule 2 of the 1971 Act pending the giving of directions for his removal from the United Kingdom. He was booked on a flight to Rawlpindi departing on the 5 October 1978.

Application for Habeas Corpus

Conduct of proceedings

36. Following the applicant's arrest his solicitors wrote to the Home Office on 4 October 1978 seeking a stay on his removal from the United Kingdom. They denied that he had practiced any deception and requested an early reply in view of the urgency of the matter.

37. On 11 October his solicitors wrote to the Home Office enquiring whether he could be released on bail pending enquiries subject to whatever conditions the Home Office thought fit to impose. In a reply dated 18 October 1978 the Home Office stated that it was not possible to accede to the request that he be allowed temporary admission to the United Kingdom while his case was being considered.

38. On 23 October his solicitor made an ex parte application to the Queens Bench Division of the High Court for the writ of habeas corpus. The affidavit filed with the Court referred to the urgency of the application and requested:

> "that Mohammed Zamir be granted leave to issue a writ of habeas corpus directing the Governor of the said Winson Green Prison to show cause why he should not be released immediately on bail pending the termination of the proceedings with respect to the matter".

39. The application came before the Divisional Court on 24 October and was adjourned until the 3 November so that notice could be given to the Secretary of State for the Home Office.

40. Notice of motion was served on the Home Office on 26 October. The Treasury Solicitor was informed that further affidavit evidence would be served and it was agreed between the parties that the Home Office would not file its affidavit evidence on behalf of the Secretary of State until the applicant's further evidence was received. The applicant's solicitors were then unable to file this evidence because of difficulties which had arisen in connection with legal aid as described below.

41. These difficulties were made clear to the Treasury Solicitor in a letter dated 29 November when it was suggested that the Home Office might proceed to file their evidence. This letter stated as follows:

"We find ourselves in difficulty in this matter, in that the Legal Aid Committee still have not decided whether to grant Mr Zamir legal aid. We are pressing them to deal with the matter. You will appreciate that until a decision has been reached, we cannot incur any further costs. In the circumstances you might consider it advisable that you serve upon us your evidence".

It would appear that the Treasury Solicitor did not respond to this suggestion.

42. On 4 December the applicant's solicitors telexed the Home Office stating that although no decision had yet been taken concerning legal aid it was hoped following an interview with the applicant to submit the further affidavit. On 5 December they informed the Treasury Solicitor that the hearing of the application for habeas corpus was fixed for 18 December. On 11 December they informed the Treasury Solicitor that they would not file further evidence and asked for the respondent's affidavit. This was served on them on the 14 December.

43. The applicants considered that they did not have enough time to transmit the affidavits to Birmingham where the applicant was detained, obtain his instructions and prepare an affidavit in reply for the hearing on the 18 December. Accordingly they sought an adjournment of the hearing.

44. On 19 December the Divisional Court granted the applicant bail on two securities of £1,000 and subject to the conditions that he resided at a particular address and report twice weekly to a police station. The application for habeas corpus was adjourned until the first convenient date of the next law term which started in January 1979.

45. A further affidavit in reply to the Home Office evidence was filed by the applicant's solicitors on 20 February 1979. The case finally came before the Divisional Court on 14 March 1979 when his application was dismissed.

Legal Aid

46. An application for emergency legal aid was made some time before 24 October 1978. The Law Society initially refused legal aid on the basis of a decision of the Court of Appeal in another case (1). On the 7 November 1978 the applicant's solicitors forwarded a detailed

(1) R. v. the Secretary of State for the Home Department, ex parte Choudhary [1978] 3 ALL ER 790, Court of Appeal.

opinion in support of the legal aid application to the Law Society requesting the Legal Aid Committee to reconsider its decision. The applicant's solicitors were informed by the Law Society that the application was to be considered by the Committee on the 21 November. However on enquiry they were told that the case had been taken out of the list for consideration on that day. They emphasised the urgency of the matter and were told that the case would be considered on the 14 December. Eventually an emergency certificate was granted on the 13 December. This was replaced by a full legal aid certificate on 25 January 1979.

Decision of the House of Lords

47. The application for habeas corpus was heard and dismissed by the Divisional Court on 14 March 1979. An appeal to the Court of Appeal was dismissed on 21 December 1979. A further appeal to the House of Lords was also dismissed on 17 July 1980. (1)

48. The House of Lords in a judgment delivered by Lord Wilberforce upheld the view of both the Divisional Court and the Court of Appeal that leave to enter which has been obtained by deception is vitiated as not being "leave given in accordance with this act" within the meaning of Section 3 (1) (a) of the 1971 Act. Reference was made to the case of R v. the Secretary of State for the Home Department, ex parte Hussain (1978) 1 W.L.R. 700 C.A.)

49. The Court decided that the decision to remove the applicant and his consequent detention can only be attacked if it could be shown that there were no grounds upon which the Secretary of State, through his officers, could have acted, or that no reasonable person could have decided as he did. It rejected the applicant's submission that a stricter standard of judicial control was appropriate and that the Court should examine whether he was in fact guilty of deception and thus an illegal entrant. Lord Wilberforce in this regard stated as follows:

(1) R. v. Secretary of State for the Home Department, ex parte Zamir, [1979] 2 ALL ER 849 (Divisional Court), 1980 1 ALL ER 641 (Court of Appeal); [1980] 2 ALL ER 768 (House of Lords).

"My Lords, for the reasons I have given I am of the opinion that the whole scheme of the Act is against this argument. It is true that it does not, in relation to the decisions in question, use such words as "in the opinion of the Secretary of State" or "the Secretary of State must be satisfied", but it is not necessary for such a formula to be used in order to take the case out of the "precedent fact" category. The nature and process of decision conferred upon immigration officers by existing legislation is incompatible with any requirement for the establishment of precedent objective facts whose existence the Court may verify." (op.cit., at p.772)

50. Having regard to the difficulties confronting immigration officers in the exercise of their discretion under the Act Lord wilberforce did not consider that the Court could act as a Court of Appeal as to the facts on wich the immigration officer decided. His power was limited to discovering whether there was evidence on which the immigration officer acting reasonably, could decide as he did.

51. Lord Wilberforce also added that an immigrant seeking entry into the United Kingdom owes a positive duty of candour on all material facts, including those which denote a change of circumstances after the issue of the entry clearance since the decision to allow him to enter is based upon a broad appreciation by immigration officers of a complex of considerations. Such an appreciation could only be made fairly if the entrant acts with openness and frankness.

52. He further considered that the present case was "disposable under any test". In the first place by not revealing the fact of his marriage, a clear change of circumstances which was material to the immigration officer's decision, the immigration officer had ample grounds for deciding that there had been deception. However even if the Court were to judge the matter for itself, it would still find that the applicant was guilty of deception since he had presented his passport with the visa stating "settlement to join father" although the applicant had admitted that he had come to the United Kingdom "purely for work for himself and his wife".

53. Finally the Court rejected the applicant's submission that illegal entrants within the meaning of the 1971 Act are limited to clandestine entrants i.e. those who avoid coming in through official ports of entry. The Court stated that an illegal entrant as defined Section 33 (1) as a person unlawfully entering or seeking to enter in breach of a deportation order or of the immigration laws. Under Section 3 of the Act a non-patrial may not enter the United Kingdom unless given leave to do so in accordance with the Act. Accordingly a person who has entered on a vitiated leave to enter, enters in breach of the immigration laws.

54. The applicant was removed from the United Kingdom on 22 November 1980 to Pakistan. An appeal from there to an Adjudicator under Section 16 (1) of the 1971 Act was rejected on 4 December 1981. He found that in all the circumstances the applicant must have known that marriage was a material factor in the granting of entry clearance. Leave to appeal to the Immigration Appeal Tribunal was refused on 11 May 1982.

SUBSEQUENT CASE-LAW

55. On 10 February 1983 the House of Lords gave judgment in two appeals which had been heard together in the cases of KHERA v. Secretary of State for the Home Department and KHAWAJA v. the Secretary of State for the Home Department. (1)

56. In the course of its judgment the House of Lords reconsidered its decision in the case of Zamir. It reaffirmed its view that the expression "illegal entrants" is not limited to persons who have entered the country clandestinely but also includes any person who has obtained leave to enter by practising fraud or deception in contravention of Section 26 (1)(c) of the 1971 Act. However it could not consider that an immigrant owed a positive duty of candour on all material facts in the sense referred to by Lord Wilberforce in the Zamir case.

57. In this respect Lord Fraser stated as follows,

" ... further reflection, in the light of the arguments in the present appeals, has convinced me that it would be wrong to construe the Immigration Act as if it imposed on persons applying for leave to enter a duty of candour approximating to uberrima fides. But, of course, deception may arise from silence as to a material fact in some circumstances;" (infra cit., p.772)

Where such silence constitutes a representation of fact within the meaning of Section 26 (1) (c) of the 1971 Act depended upon the conduct of the person concerned in all the circumstances of the case.

58. The House further considered that the scope of judicial review was wider than that enunciated in Zamir. The Court has power to examine whether the immigrant was an illegal entrant and not limit its enquiry to whether the immigration officer had reasonable grounds for such a belief. In this respect Lord Fraser stated as follows:

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(1) See (1983) 1 ALL ER, 765 - 795.

"On this question I agree with my noble and learned friends, Lord Bridge and Lord Scarman, that an immigration officer is only entitled to order the detention and removal of a person who has entered the country by virtue of a ex facie valid permission if the person is an illegal entrant. That is a "precedent fact" which has to be established. It is not enough that the immigration officer reasonably believes him to be an illegal entrant if the evidence does not justify his belief. Accordingly the duty of the Court must go beyond enquiring only whether he had reasonable grounds for his belief." (Op. cit., p.772)

On the question of the burden of proof, the House considered that once the applicant has shown a prima facie case the burden of justifying the legality of his detention shifts to the executive. This was in accordance with established precedent. The standard of proof was that of a balance of probabilities although because the liberty of the individual was at stake a high degree of probability would be required.

SUBMISSIONS OF THE PARTIES

ARTICLE 5 (1) (f)

Certainty of the Law

The Government

60. It is submitted that the relevant legal rules concerning (1) the scope of the concept of illegal entrants, (2) the material date for the determination of eligibility for an entrance certificate, (3) the materiality of marriage, satisfied the test of legal certainty.

61. As to (1) it is argued that anyone guilty of deceit was in a good position to regulate his conduct. It is irrelevant that he may in theory have contemplated the risk of a deportation order following a criminal conviction rather than the administrative process of removal as an illegal entrant under the second Schedule. The House of Lords had clearly expressed the view that with a visa marked "settlement to join father" the applicant's silence amounted to deception. The evidence available points inexorably toward deception and in such circumstances any uncertainty in the law cannot properly be used as a shield to defend a deceiver.

62. As to (2) it is pointed out that the form of application for an entry certificate makes it clear that a change of circumstances after issue may remove the basis of the holder's claim to admission. No applicant or adviser reading the form in 1972 could be in doubt as to the date which the authorities in the United Kingdom would regard as the relevant date for the purpose of judging eligibility to enter.

63. As to (3), it is accepted by the Government that at the time he applied for an application form he was given a handout which contained the rule concerning the admission of children under 18. The document referred to "unmarried children" aged 16 and under 18. The applicant must therefore have been on notice that marriage was a material factor. Even if no handout was given the applicant should have known from the entry clearance application form that what mattered was his eligibility at the date of entrance.

The Applicant

64. It is argued that the law was so uncertain that an individual could only have foreseen either that he would be prosecuted under Section 26 if his deception amounted to a representation which he knew to be false or that he would be deported under Section 3(5) on the grounds that the Secretary of State would consider that his deportation was conducive to the public good. Prior to the applicant's entry (2 March 1976) the concept of illegal entrant only referred to those who entered the country clandestinely. This understanding of the concept of illegal entrant was expressed by Government ministers in various public statements. The Hussain case was the first time that the concept of illegal entrant was extended to cover immigrants who had obtained leave to enter by deception. It was decided on 4 May 1976 - two months after the applicant had entered the United Kingdom. As Lord Widgery stated in the case of R v. Secretary of State for the Home Department, ex parte Ram [1979], 1WLR 148, this area of law was "a fast developing branch of the law".

65. Nor could he have reasonably foreseen, even with expert legal advice, that by remaining silent as to his marriage he would be regarded as an illegal entrant. First, Section 26 of the 1971 Act makes it an offence for any person to make a false statement to an immigration officer. There is no offence for failing to disclose a material fact. By contrast, in the British Nationality Act (1948) dealing with a comparable situation for aliens who seek citizenship improperly, Section 20 (2) expressly refers to "fraud, false representation or the concealment of any material fact". In this context Parliament did not consider that non disclosure was encompassed in the concept of fraud. Second, prediction by a lawyer as to the scope of the duty of candour would have been virtually impossible. For example, was the duty to disclose limited to those facts which the immigrant knew were material or was he bound to disclose his life history because something might be regarded by the authorities as material?

66. As to the materiality of marriage the applicant could not have known even with legal advice that he was doing anything wrong in failing to mention his recent marriage. He would have been told by a legal adviser that since he had applied for entry when he was fifteen, the relevant immigration rules were those relating to children under 18. Further, the relevant rule makes no mention of marriage. An adviser might have added that if he wanted to delay his marriage until after he had arrived in the United Kingdom he would be entitled to bring his fiancée into the United Kingdom.

Detention

The Government

67. It is submitted that the applicant's detention is covered by Article 5 (1) (f) as "the lawful arrest or detention of a person ... against whom action has been taken with a view to deportation ...". The applicant, by withholding the fact of his marriage, was guilty of deception. Accordingly his leave to enter was a nullity and he was detained as an illegal entrant under the 1971 Act.

The applicant

68. It is submitted that in order to be "lawful" within the meaning of Article 5 detention must be lawful both under domestic law and in accordance with the Convention. It is now clear in the light of a recent House of Lords decision in Khera and Khawaja that a person is an illegal entrant by deception only if he has obtained leave to enter by committing a criminal offence contrary to Section 26 (1) (c) of the 1971 Act. In the light of this decision it is clear that the Courts which heard the applicant's case adopted the wrong approach both as to the definition of "illegal entrant" and as to the scope of the procedure for reviewing the lawfulness of his detention. The conclusion that the applicant was an illegal entrant could be justified only if the Court had been satisfied, to a high degree of probability, that he had entered by committing a criminal offence and that he made a continuing representation which he knew to be false or did not believe to be true.

ARTICLE 5 (4)

The respondent Government

Lawfulness

69. It is submitted that to satisfy the requirements of Article 5 (4) it is not necessary that the Court should be able to determine objectively the underlying justification for the administrative decision, ie whether the applicant is or is not an illegal entrant. The Court should only have to determine the justification for the interim detention pending the implementation of the administrative decision of removal. Such detention is lawful provided that the Secretary of State has reasonable grounds for concluding that the applicant is an illegal entrant and proposes to remove him as soon as practical for that reason. The correctness of this approach is illustrated by the case of a person who is detained as an illegal entrant but is found not to be an illegal entrant prior to his removal. Such a person could not claim that his detention is ipso facto unlawful.

70. The applicant's contention that he bears the burden of proof to show that his detention was unlawful is false. When a detained person applies for a writ of habeas corpus his custodian has to make a return to the writ stating the causes for his detention. To this extent the burden of proof at this stage is upon the custodian. If the return does not disclose, on its face, a ground for detention the writ will issue and the applicant must be released. Were, however, the return is prima facie valid, the burden shifts to the applicant.

The Applicant

71. Article 5 (4) requires the body determining the lawfulness of the detention to have jurisdiction to enable it to control all aspects of the decision, whether relating to fact or to law. The applicant's habeas corpus proceedings provided him with an inadequate means of challenging the lawfulness of his detention since the Courts declined to enquire as to whether the applicant was in fact an illegal entrant.

72. If the principle of respect for personal liberty is to be presumed the burden of proving that a detention comes within one of the permitted categories should rest on the detainer. This interpretation is supported by reasons of a practical nature. For example a person who is detained is hampered in gathering evidence or in instructing lawyers. Moreover, Art. 5(1) refers to categories such as the mentally disordered, vagrants or inebriates who would have particular difficulty in presenting their case.

73. The applicant accepts that under English law he must make out a prima facie case of unlawfulness. The granting of leave to the applicant on his ex parte application shows that he had raised sufficient doubt to satisfy this evidential burden. However once a prima facie case has been made out the burden should rest on the detainor to justify the imprisonment.

SPEED

The Government

74. The applicant could have applied for bail much earlier than 18 December 1978. The possibility of being granted bail at an earlier stage is an important circumstance to consider when examining the requirement of speed. This is so because a grant of bail clearly operates to relieve the need for an urgent hearing.

75. In addition the applicant's legal advisers were responsible for delays throughout the handling of the case.

The Government point out that:

- after leave to move for habeas corpus was granted on the 24 October 1978 the applicant's legal advisers informed the Treasury Solicitor that further affidavit evidence would be served. It was agreed between the Treasury Solicitor and the applicant's solicitor that affidavits from the Secretary of State would not be served until the applicant's further affidavit evidence was available. The affidavits had not been provided by the 27 November 1978 when the Treasury Solicitor wrote to the applicant's solicitors asking for them. It was only on 11 December 1978 that they informed the Treasury Solicitor that they did not intend to file further evidence themselves.

- on the 12 December 1978 the applicant's solicitors asked for an adjournment of the hearing of 18 December. No further affidavit in reply was served by the applicant's solicitors until the 20 February 1979. The 14 March 1979 was the first convenient hearing date for the parties.

- the delay in the service of the further affidavit helped the applicant in that it insured that the case would not come on for hearing in the meantime and so prolonged his stay at liberty in the United Kingdom.

- there is no reason to suppose that the applicant's legal advisers did not adopt a relaxed attitude to their client's application for legal aid prior to his release on bail on the 19 December 1978. Delays of the kind which occurred in the legal aid funding of the present case were unusual among cases concerned with habeas corpus.

76. The Government state that the hearing of the habeas corpus application would have taken place more quickly had the applicant been detained subsequent to a change in 1980 in the Rules of the Supreme Court dealing with habeas corpus applications. Under Order 54 Rule 2 the Court can adjourn the application so that notice of it can be given to the detainor. In the event that no application is made for bail, a short time limit (at least 8 days) is imposed upon the parties for the production of evidence and an early date is given for hearing. (Rule 2 (2)).

77. The judge hearing the application may enquire whether an application for bail is to be made. If an application for bail is made and refused it is normal for the Court to order a speedy hearing of the matter, normally within about one week in order that the respondent might have time to prepare and deliver his affidavit evidence and in order that the detainee might have time to consider such evidence and file a reply.

The applicant

78. The opportunity to apply for bail has no relevance to the issue of "speed". Bail is only relevant to Article 5 (3) where it is expressly mentioned. Moreover, bail is not a permissible alternative to a speedy determination of lawfulness. In any event an application for bail was made to the Court in the applicant's application for the writ on 23 October 1978.This application was adjourned along with the application for habeas corpus.

79. The relevant period in determining the speed of the proceedings is from the 24 October 1978 when the applicant first applied for habeas corpus until the 14 March 1979 when the hearing of the action took place before the Divisional Court. Although the applicant was released on bail on 19 December 1978 his personal liberty was clearly restricted since he was required to live at a particular address and to report regularly to the police. Moreover he was still liable to be detained and uncertain as to his status and his future liberty depended upon that determination of his application. Technically he was still under detention until the date of his hearing on 14 March 1979.

80. The applicant denies that his legal advisers were responsible for the delays which occurred. He argues that:

- his inability to proceed was due to the difficulties he experienced in obtaining legal aid. His lawyers put continuous pressure on the Law Society to grant Legal aid and made them fully aware of the urgency of the matter.

- that the Treasury Solicitor was requested to serve his evidence in a letter dated 28 November 1978.

- that the applicant's affidavit of 23 October 1978 raised a *prima facie* case of unlawful detention. Under the proper procedure as set out by the House of Lords in *Khera & Khawaja* the Home Office ought to have put forward their case immediately. There should have been no further obligation on the applicant until after they had done so. A period of two months elapsed before the Home Office put forward evidence to justify his detention.

OPINION OF THE COMMISSION

Points at Issue

81. The main points at issue in the present case are as follows:

1. Was the applicant lawfully detained as a person against whom action is being taken with a view to deportation within the meaning of Art. 5 (1) (f)?

2. Was the applicant able to challenge the lawfulness of his detention before a court as required by Art. 5 (4)?

3. If so, were the proceedings conducted speedily within the meaning of Art. 5 (4)?

As regards Art. 5 (1) (f)

82. The relevant part of Art. 5 (1) states as follows:

"Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(f) the lawful arrest or detention of a person .... against whom action is being taken with a view to deportation ...

83. The applicant submits that there has been a breach of his right to "security of person" or alternatively that his detention was neither "in accordance with a procedure prescribed by law" nor "lawful" within the meaning of Art. 5 (1) (f). In support of the above submissions he claims that he was not in fact guilty of deception and thus an illegal entrant within the meaning of paragraph 16(2) Schedule 2 of the 1971 Act. He further contends that the legal rules governing his arrest and detention as an illegal entrant were not formulated with sufficient precision to enable him to regulate his conduct. The Government submit that the relevant rules concerning the concept of an illegal entrant under United Kingdom law, which constituted the basis for his detention, satisfied the requirement of legal certainty. Moreover he was lawfully detained as a person against whom action was being taken with a view to deportation within the meaning of this provision.

84. The applicant's complaint that he is a victim of a breach of his right to security of person is based on the contention firstly that the rules governing his detention as an illegal entrant were not reasonably foreseeable and secondly that there was inadequate judicial

control of the legality of his detention. However, the Commission considers that it is not necessary to examine this complaint separately since it raises identical issues to those raised and examined under the headings of Art. 5 (1) (f) and Art. 5 (4) below.

85. The applicant was arrested pursuant to paragraph 16 (2) of Schedule 2 of the 1971 Act which empowers an immigration officer to detain an illegal entrant pending his removal. There can be no doubt, therefore, that his detention was in accordance with a procedure prescribed by law as required by the first paragraph of Art. 5.

86. The question, however, arises whether the applicant's detention was justified under Art. 5 (1) (f) as the lawful detention "of a person against whom action is being taken with a view to deportation".

87. The use of the words "person against whom action is being taken with a view to deportation" in Art. 5 (1) (f) indicates that the Commission should examine whether the person is detained in accordance with national law with the intention of being deported (1). However a legal situation may occur, where, as in the present case, national law makes the lawfulness of detention dependent on the lawfulness of the deportation. While Art. 5(1)(e), requires that the substantive conditions justifying detention are met (2), Art. 5(1)(f) does not require the Commission to provide its own interpretation on questions of national law concerning the legality of the detention or deportation. The scope of the Commission's review is limited to examining whether there is a legal basis for the detention and whether the decision of the courts on the question of lawfulness could be described as arbitrary in light of the facts of the case.

88. In the present case the Divisional Court, the Court of Appeal and the House of Lords considered that the applicant was lawfully detained under the 1971 Act in that the Secretary of State had reasonable grounds for considering him to be an illegal entrant. Moreover it is clear from the decision of the House of Lords that even if the Court was to have applied a stricter standard of review and judge the matter for itself, it would have found that the applicant was in fact guilty of deception. (see para 52).

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(1) See Caprino v. United Kingdom, Report of the Commission, D.R. 22, pp. 5-24.

(2) i.e. the existence of a mental disorder warranting compulsory confinement; See X v United Kingdom, Eur. Court H.R. judgment, of 5 November 1981, Series A No. 46, para 40, p. 18.

89. In the Commission's opinion, there is no indication that the findings by the courts that the applicant was lawfully detained were in any respect arbitrary.

90. The applicant has also submitted that his detention was not lawful because the legal rules relating to the concept of "illegal entrant" were not sufficiently precise or foreseeable. The European Court of Human Rights in the Sunday Times Case interpreted the expression "prescribed by law" in the second paragraph of Art. 10 in the following way.

> "In the Court's opinion, the following are two of the requirements that flow from the expression "prescribed by law". Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which to a greater or lesser extent, are vague and whose interpretation and application are questions of practice."
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> (judgment of 26 April 1979, Series A, Vol. 30, para 49, p 31).

91. The Commission considers that the same principles apply to the expression "lawful" where it occurs in Art. 5. As the Court has recognised in the above quotation, while the law must be certain there must also be room for the gradual development of the law by the courts in the light of changing conditions. While particular decisions of the courts may be seen as unexpected within the legal community, it does not follow that the legal rule in question was not sufficiently certain in the manner described above by the Court. The Commission's approach must be to examine whether the margin of uncertainty that surrounds legal rules in this field of law, exceeds acceptable boundaries. (See also, X. Ltd. & Y. v. United Kingdom, Application No. 8710/79, to be published in D.R. 28)

92. The applicant has submitted that even with legal advice he could not have foreseen that fraud would vitiate his leave to enter and that he would be liable to detention and removal as an illegal entrant. He points out that this doctrine was first developed in the case of Hussain (op. cit., para 48) which was decided after he had entered the United Kingdom and that prior to this decision the concept of illegal entrant was thought to extend only to those persons entering the country clandestinely. An adviser could only have foreseen, it is submitted, that he would be liable to prosecution under S. 26 (1) (c) of the 1971 Act. Nor could he have foreseen that he was subject to a duty of candour on all material facts and that marriage would be regarded as material in this respect. Finally he submits that he could not have foreseen that the date of eligibility for entry would be the date of entry as opposed to the date on which he applied for an entry certificate.

93. The Commission does not consider that these rules were so uncertain that the applicant could not have foreseen, with appropriate legal advice, the consequences of remaining silent concerning his marriage. The notes on the application form that had been completed on behalf of the applicant when he originally applied for an entry certificate would have put the applicant or his adviser on notice that a change of circumstances, if discovered by an immigration officer might result in his being refused entry. In addition it must have been clear to the applicant or his adviser from these notes that the applicant's eligibility to enter the United Kingdom would be assessed at the date of entry. The Commission further considers that an immigrant who has been given leave to enter "to join his father" as was stated on his visa must be taken to be aware of the materiality of marriage to his immigration status. This is particularly so in the present case where the applicant married less than one month prior to his arrival in the United Kingdom and therefore must have, at some stage, considered whether this affected his right of entry.

94. Finally the Commission does not consider that the development in the law which occurred in the Hussain case concerning the impact of fraud on leave to enter, was so unusual or out of step with legal principle that it fails to satisfy the test of legal certainty. It does not find it necessary to take into account the subsequent decision of the House of Lords in Khera & Khawaja v. the Secretary of State for the Home Department (see paras 55-58), although it notes that the House of Lords in this decision reaffirmed the principle that fraud would vitiate leave to enter. The Commission recognises that the principle may have been regarded as novel to many practitioners in the field of immigration law but it does not consider that such a development in the law could be described as in breach of the principle of reasonable foreseeability as developed above.

Conclusion

95. The Commission concludes that the applicant was lawfully detained under Art. 5(1)(f) as a person against whom action was taken with a view to deportation and that therefore, by eleven votes with one abstention, there has been no breach of Art. 5(1).

As regards Art. 5 (4)

96. It was argued on behalf of the applicant that in the habeas corpus proceedings brought by him, he was not able to challenge the lawfulness of his detention and that these proceedings did not satisfy the requirement of 'speed' in this provision.

97. Art. 5 (4) provides as follows:-

"Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

Lawfulness

98. The applicant submits that since he could only be detained if he was an illegal entrant judicial review of the lawfulness of his detention under this provision requires the courts to examine whether he was in fact guilty of deception and thus an illegal entrant. The lesser standard of review actually carried out by the court namely whether the Secretary of State had reasonable grounds for considering that the applicant was an illegal entrant, was insufficient. It was further argued that in proceedings concerning the lawfulness of detention Art. 5 (4) required the burden of proof of legality to be on the detainor i.e. the Secretary of State. The Government contended that Art. 5 (4) only required the courts to determine whether there were reasonable grounds for his detention as an illegal entrant. Furthermore, in proceedings for habeas corpus the main burden of justifying the lawfulness of detention did, in fact, rest on the Secretary of State.

99. The Commission notes that the European Court of Human Rights has held that Art. 5 (4)

> "does not embody a right to judicial control of such scope as to empower the court, on all aspects of the case, to substitute its own discretion for that of the decision - making authority. The review should, however, be wide enough to bear on those conditions which, according to the Convention, are essential for the "lawful" detention of a person .....

(see X v. the United Kingdom, judgment of 5 November 1981, para 58, p 25 also the Van Droogenbroeck Case, judgment of 24 June 1982, para 49, p 20).

100. The Commission recalls its view that detention is justified under Art. 5 (1) (f) where a person is detained in accordance with national law with the intention of deporting him. Accordingly Art. 5 (4) is satisfied if the courts are empowered to examine the lawfulness under domestic law of the applicant's detention and whether he is being detained with a view to deportation or removal. It is not a requirement of this provision, as indicated by the court, that judicial control of detention under Art. 5 (1) (f) extend to a complete review on all questions of fact of the exercise of the power to detain.

101. In the instant case, the courts, when considering the lawfulness of the applicant's detention in habeas corpus proceedings, examined the statutory basis for the applicant's detention and whether there were reasonable grounds for the Secretary of State to consider that the applicant was an illegal entrant. The Commission finds that this standard of judicial review is wide enough to encompass the conditions in Art. 5 (1) (f) justifying detention.

102. As regards the burden of proof, the Commission considers that the state, as the detaining authority, should be required to prove that the individual is lawfully detained. If it were otherwise, there can be no doubt that the protection afforded to detained persons by the requirement of judicial control of the legality of the detention would be substantially weakened.

103. The Commission notes that in habeas corpus proceedings once the detainee has shown a prima facie case the burden of justifying the legality of the detention shifts to the executive. (see paras 59 & 70). Although the decisions of the courts did not, in the present case, deal explicitly with the question of the burden of proof, the Commission is satisfied that once the applicant showed that he had been granted leave to enter, the burden of proof rested on the Secretary of State to show that he had reasonable grounds for believing that the applicant was guilty of deception and thus an illegal entrant liable to detention. Accordingly the Commission is satisfied that no issue arises under Art. 5 (4) in this resepct.

104. The Commission finds that the applicant was able to challenge the lawfulness of his detention before a court as required by Art. 5(4).

Speed of the proceedings

105. The applicant complains that the proceedings for habeas corpus did not comply with the 'speed' requirement in this provision. The Government contend that the applicant could have applied for bail at an earlier stage in the proceedings and gained his release. They also submit that the applicant's legal representatives were primarily responsible for delays in the proceedings by not submitting further affidavit evidence in time as promised, and that such delays ultimately served the interests of the applicant since they had the effect of prolonging his stay at liberty in the United Kingdom.

106. The right of speedy judicial control of the lawfulness of detention contained in Art. 5 (4) constitutes an important safeguard against arbitrary and unlawful deprivation of liberty. In a case where detention ends within a short time after arrest, the right in Art. 5 (4) becomes devoid of purpose since the detained person has been speedily released (See e.g. Application 9403/81, to be published in D.R.28). However Art. 5 (4) clearly applies to detained persons such as the applicant who have been in detention for a lengthy period and subsequently released pending the outcome of proceedings concerning the lawfulness of detention.

107. In assessing the question of speed the Commission has stated that it "cannot be defined in the abstract but must be assessed in the light of the circumstances of the particular case". (see Christinet v. Switzerland, Report of the Commission, D.R. 17, p 35 at p 57).

108. The Commission would add that it must take account of the general conduct of the proceedings and the extent to which delays can be attributed to the behaviour of the applicant or his legal representatives. In principle, however, since the liberty of the individual is at stake, the State must organise its procedures in such a way that the proceedings can be conducted with the minimum of delay.

109. The Commission notes that Art. 5(4) requires a remedy that entitles a detained person to a judicial ruling on the lawfulness of his detention. However this right must be seen as independent of the possibility of applying to a court for release on bail. In any event the Commission observes that the applicant's solicitor asked the Home office that the applicant be released in a letter dated 11 October 1978 and, further, requested that the applicant be admitted to bail in the application for habeas corpus filed on 24 October 1978.

110. The applicant was arrested on 2 October 1978 and applied for the writ of habeas corpus about three weeks later, on 24 October 1978. The Commission agrees with the parties that this initial period should not be taken into consideration in assessing the question of speed since this delay is attributable to the applicant.

The applicant remained in detention until his release on bail on 19 December 1978 approximately seven weeks after applying for the writ of habeas corpus. The Divisional Court heard and rejected his application on 14 March 1979. The Commission considers that, in assessing the question of speed, it should mainly have regard to the period of seven weeks spent in detention.

111. It appears from the facts that the long delay is attributable in the main to the difficulties incurred by the applicant's legal representatives in securing legal aid to enable them to continue their representation of the applicant.

112. Legal aid was initially refused by the Law Society some time prior to the filing of the application for habeas corpus on 24 October 1978. A fresh application for legal aid supported by counsel's opinion was made to the Law Society on 7 November. The applicant states that his solicitor stressed the urgency of the matter to the Law Society and pressed for an early answer. In any event the urgency of the case must have been clear to the legal aid committee from the facts of the case particularly since the applicant had been in detention since 2 October. A decision was due to be taken on 21 November but appears to have been postponed. An emergency certificate was finally granted on 13 December.

113. In proceedings concerning the liberty of the individual Art. 5 (4) clearly requires that decisions concerning legal aid be taken speedily where such a decision is a prerequisite for the initiation of or the continued conduct of the proceedings. In the opinion of the Commission, it would have been unreasonable to expect the applicant to present his own case in the light of the complexity of the procedures involved and his limited command of English.

114. The Commission also observes that the Treasury Solicitor was informed of these difficulties by the applicants' solicitors in a letter dated 29 November and invited to serve his affidavit evidence. This was eventually received on 14 December.

115. As the Commission has stated above, Art. 5 (4) requires the State to organise its procedures in such a way that proceedings concerning lawfulness can be conducted with the minimum delay. In this respect the Commission notes that the Rules of the Supreme Court concerning habeas corpus were amended in 1980 in order to facilitate an early hearing. (see para 76).

116. In the present case the Commission notes that the applicant applied for habeas corpus on 24 October 1978 and that his application was rejected by the Divisional Court on 14 March 1979. The Commission is of the opinion, having regard to the length of these proceedings, that the requirement of speed in this provision was not complied with.

Conclusion

117. The Commission concludes that the proceedings in the present case were not conducted speedily and that, therefore, by a unanimous vote, there has been a breach of Art. 5(4) of the Convention in this respect.

118. The following constitutes a summary of the Commission's findings and conclusions in the present application:

1. The Commission concludes that the applicant was lawfully detained under Art. 5(1)(f) as a person against whom action was taken with a view to deportation and that therefore, by eleven votes with one abstention, there has been no breach of Art. 5(1). (Para 95).

2. The Commission finds that the applicant was able to challenge the lawfulness of his detention before a court as required by Art. 5(4). (para 104).

3. The Commission concludes that the proceedings in the present case were not conducted speedily, and that therefore, by a unanimous vote, there has been a breach of Art. 5(4) of the Convention in this respect (para 117).

Secretary to the Commission — President of the Commission

(H. C. KRÜGER) — (C. A. NØRGAARD)