AS TO THE ADMISSIBILITY OF

Application No. 14507/89
by B.
against the United Kingdom

The European Commission of Human Rights sitting in private on 2 April 1990, the following members being present:

MM. C.A. NØRGAARD, President
S. TRECHSEL
G. SPERDUTI
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.C. SOYER
H.G. SCHERMERS
H. DANELIUS
G. BATLINER
J. CAMPINOS
H. VANDENBERGHE
Mrs. G.H. THUNE
Sir Basil HALL
MM. F. MARTINEZ
C.L. ROZAKIS
Mr. L. LOUCAIDES

Mr. H.C. KRÜGER, Secretary to the Commission

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 20 October 1988 by B. against the United Kingdom and registered on 5 January 1989 under file No. 14507/89;

Having regard to:

- reports provided for in Rule 40 of the Rules of Procedure of the Commission;

- the Commission's decision of 20 January 1989 to bring the application to the notice of the respondent Government and invite them to submit written observations on its admissibility and merits;

- the observations submitted by the respondent Government on 5 April 1989 and the observations in reply submitted by the applicant on 7 August 1989;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a citizen of Bangladesh, born in 1959. She was resident in London when introducing the application and now resides in Bangladesh. She is represented before the Commission by Ms. Jaqueline Bhabha, Solicitor, of the North Islington Law Centre, London.

The facts of the case, as submitted by the parties, and which may be deduced from documents included in the application, may be summarised as follows:

The applicant married a citizen of Bangladesh in that country in 1975. The applicant had always lived in Bangladesh but her husband lived in the United Kingdom for some years before the marriage. For some four years, until 1979, she lived at his family's home. The husband was living in England but visited Bangladesh from time to time and a son was born to the couple on 22 September 1976 and a daughter on 12 August 1979. Just before the daughter's birth the couple separated after the husband had purported to divorce the applicant by pronouncing the "Talak", according to Muslim law, on one of his trips home. The applicant claims that she is not validly divorced from her husband, but she was nevertheless obliged to return to her brother's household. Until that time she had had full care of the son. After the separation the son spent part of his time with her and part with her husband's family. Her main financial support was from her own father and brother. She also has a married sister in Bangladesh and a married sister in the United Kingdom. The applicant is illiterate.

In or about 1981 or 1982 the son started school in the village where his father's family lived, thus spending more time with the father's family, except for weekend and holiday visits to the applicant. The daughter was in the applicant's care exclusively until 1986, after which she also went to the same school as her brother and lived with her paternal grandparents. The applicant remained in regular contact with the children and paid for their books and clothes.

In March 1984 the husband was registered as a British citizen and in August 1985 remarried. At this stage the applicant apparently received formal written notice of her divorce. In 1986 the husband applied for entry clearance for the two children to join him in the United Kingdom with his second wife. The applicant had purportedly signed an affidavit relinquishing her rights to the children. She then wrote to the British Entry Clearance Officer in Dhaka that she and the children all wanted to go to the United Kingdom as she could not live without them. However a month later, on 29 November 1986, she allegedly wrote supporting the husband's application for the children only. (The applicant denies any knowledge of this letter or having signed it.)

The Entry Clearance Officer considered that the applicant had consented to the two children being granted entry clearance alone. This officer thought he had been dealing with a person called Minara Begum, date of birth 10 May 1959, the details featuring in a passport provided by the applicant's husband to the immigration authorities.

In April 1987 the applicant applied for a visa to visit her sister, who was unwell, and her family settled in the United Kingdom. The Entry Clearance Officer did not associate the applicant with the lady with whom he had corresponded the year before and the applicant had produced a passport with her name, Mina Begum, date of birth 1 August 1959.

On 10 May 1987 the applicant arrived at Heathrow Airport in the United Kingdom where she and her brother-in-law, the sponsor for her visa application, were interviewed by two immigration officers. Certain of their statements disclosed discrepancies so the applicant was only granted temporary admission while further inquiries were made of the Entry Clearance Officer in Dhaka. He replied that the applicant had informed him that her husband and children were living in Bangladesh. He now realised that they were all living in the United Kingdom after settlement visas had been issued to the children and the second wife in February 1987. The Officer stated that he would not have granted the applicant's visa if he had known that the applicant's

ex-husband was a United Kingdom resident and that the children had also recently settled there. As a result of the discrepancies disclosed at the interview and the information from the Dhaka Visa Officer, the Immigration Officer in Heathrow London formally refused the applicant leave to enter as he was satisfied that false representations were used or material facts not disclosed for the purpose of obtaining a visa.

On appeal to an adjudicator the applicant conceded that she had lied to the Dhaka Visa Officer, on her ex-husband's suggestion, as to the divorce and custody of the children. She informed the adjudicator that she had only just found out that the children had settled in the United Kingdom with their father. He would not let her see or speak to the children. Evidence of the applicant's assistance to her sister's household was presented. However, the adjudicator upheld the refusal of the immigration officer on 9 June 1988, commenting that he was unable to decide where the truth lay in the applicant's statements. The applicant stayed on in the United Kingdom and instituted proceedings for custody of and access to her children.

The applicant's representatives requested the Secretary of State to grant the applicant exceptional leave to remain in the United Kingdom in the light of her children's settlement, the needs of her sister's family and the generally compassionate circumstances of her case. This was refused by the Minister of State on 5 October 1988. He considered that the applicant's sister could receive help from other sources and that the pending litigation was not a sufficient reason to make an exception in the applicant's case.

On 23 November 1988 the applicant was granted "reasonable" access to the children by the High Court in the context of her precarious immigration status. A Court Welfare Officer had found the children happy and well settled with their father, second wife and half sister. During periods of supervised access the children had withdrawn from the applicant. At the hearing it was anticipated that the applicant would voluntarily leave the United Kingdom on 25 February 1989. According to the applicant's representative, the Court was therefore endorsing an arrangement whereby the applicant would see the children three times before she left and that they would keep in touch with letters, school reports and photographs. However, the applicant's representatives expressed scepticism whether the ex-husband would observe his undertakings to this effect as he seemed determined to sever the link between the applicant and the children. The applicant did not leave the United Kingdom on 25 February 1989 as she had agreed with the immigration authorities.

By letter of 31 December 1988 the applicant applied to the Home Office for permission to remain in the United Kingdom to remarry. An immigration officer reported that the proposed marriage appeared to be intended primarily to obtain settlement in the United Kingdom. The applicant's brother-in-law had conceded that there would be no marriage if the applicant were not allowed to remain in the United Kingdom. The application was accordingly refused by the Home Office Minister of State on 14 March 1989 and the applicant was removed from the United Kingdom on 25 March 1989.

COMPLAINTS

The applicant complains that the refusal to allow her to remain in the United Kingdom was in breach of her right to respect for family life, ensured by Article 8 of the Convention. She contends that the refusal was not necessary in a democratic society having regard to the compassionate circumstances of her case. The applicant claims that she has no future in Bangladesh. As an estranged wife without children her situation is unbearable. She has no social role or place, no ability to provide for herself and would be quite alone and helpless as her father, now in his 80's, is in poor health and her

only protector. She is deeply attached to the children but she has only been granted access to them. She does not have the financial resources to visit England on a regular basis. The children are still young (13 and 10) and need to have regular access to restore their former warm and loving relationship. The applicant cannot exercise her right to family life in Bangladesh. In addition to her own children, the applicant has real ties with her sister and family. She has established an independent role for herself in the 18 months she resided in the United Kingdom.

The applicant alleges that the United Kingdom Government failed to strike a proper balance between their immigration policy and her right to respect for family life. The means employed to refuse and exclude the applicant disproportionately limited her rights.

The applicant also alleges that she has suffered violations of Articles 3 and 13 of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 20 October 1988 and registered on 5 January 1989. After a preliminary examination of the case by the Rapporteur, the Commission considered the admissibility of the application on 7 August 1989. It decided to give notice of the application to the respondent Government pursuant to Rule 42 para. 2 (b) of the Rules of Procedure and to invite the parties to submit their written observations on admissibility and merits. The Government's observations were submitted on 5 April 1989, to which the applicant replied on 7 August 1989.

THE LAW

1. The applicant has complained to the Commission that the refusal of British immigration authorities to allow her to remain in the United Kingdom was in breach of her right to respect for family life ensured by Article 8 (Art. 8) of the Convention, the relevant part of which provides as follows:

> "1. Everyone has the right to respect for his ... family life ...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society ... for the prevention of disorder ..."

2. The Government have first contended that the applicant has failed to exhaust domestic remedies, as required by Article 26 (Art. 26) of the Convention, because she did not put the substance of her Convention complaint to the adjudicator. It could have been categorised as compassionate circumstances to be taken into account with a view to the adjudicator possibly making a recommendation in her favour which the Secretary of State would consider carefully. Moreover, the applicant did not appeal against the adjudicator's decision to an Immigration Appeal Tribunal and did not seek judicial review of the Minister's decision of 14 March 1989.

The applicant replied that the remedies suggested by the Government were ineffective. She had not appealed against the adjudicator's decision because she had no arguable point of law to raise before the Immigration Appeal Tribunal. Moreover, the adjudicator's appeal was limited to the validity of her original visa, not her subsequent application for settlement outside the scope of the Immigration Rules. The applicant's solicitors had submitted representations to the Secretary of State asking him exceptionally to grant the applicant leave to remain in the United Kingdom, but he consistently refused to change his original decision. Judicial review

would not effectively lie against his refusal to exercise his extra-statutory discretion in the applicant's favour, there being nothing perverse or irrational or contrary to the "Wednesbury principles" in the Minister's decisions in this case. The applicant thus submitted that she has exhausted all effective remedies at her disposal.

3. The Government also contended, assuming that the applicant has complied with the requirements of Article 26 (Art. 26), that the applicant's tie with her children was substantially weakened when they went to live with their paternal grandparents (the boy from 1979 onwards and the girl from 1986). The Government are convinced that the applicant agreed to the children emigrating to the United Kingdom without her. Neither child has expressed the desire to see the applicant. The decision of the British courts to grant the applicant "reasonable access" to the children was taken in recognition of the fact that the applicant was about to leave the United Kingdom. Nothing prevents the applicant from visiting her children from time to time or from the children visiting her in Bangladesh. She is to receive letters and school reports from them. The Government also contended that the applicant's sister in the United Kingdom can obtain help from elsewhere and that the applicant's family ties are not exclusively with the United Kingdom as she has her father, brother and another married sister in Bangladesh. In these circumstances the Government submitted that the applicant has no "family life" with her children or, alternatively, that there has been no interference with her right to respect for family life, within the meaning of Article 8 para. 1 (Art. 8-1) of the Convention. In the further alternative, any interference with her Article 8 (Art. 8) right was in accordance with the law and necessary in a democratic society for the prevention of disorder under which notion falls the general interest in maintaining a firm but fair immigration policy.

The applicant refuted the Government's contentions. She claimed that it is unlikely that she would ever again be granted leave to enter the United Kingdom as a visitor in view of the present events, and, anyway, the travel costs are beyond her means. Her ex-husband is unlikely to let the children visit her as he has tried to sever their ties completely. She is unable to maintain contact with the children outside the United Kingdom. She contended that family life between her and the children existed until her removal from the United Kingdom in March 1989 and was recognised by the High Court's access order. The right of a divorced parent to have access to the children has been established by the Court in the Berrehab case (Eur. Court H.R., Berrehab judgment of 21 June 1988, Series A no. 138). She claimed also to have a close family life with her sister and her family in the United Kingdom, who urgently need her help. Accordingly she submitted that the interference with her family life was not justified, the refusal to allow her to remain in the United Kingdom being a disproportionate measure for immigration control.

4. The Commission considers that the applicant may be said to have exhausted domestic remedies in the circumstances of her case. She applied from Bangladesh for leave to enter to visit her sister, failing to disclose her marital status and the situation of her children. She subsequently applied within the United Kingdom for settlement to facilitate access to the children and to provide permanent help for her sister who was unwell. The proceedings before the adjudicator concerned the validity of the original entry clearance as a visitor and no purpose would have been achieved pursuing them further when the purpose of the visit had fundamentally changed. There is no provision in the Immigration Rules to allow entry and settlement to a divorcee wishing to establish regular access to her children. Whether the applicant should have been allowed to settle in the United Kingdom was left to the extra-statutory discretion of the

Secretary of State. The Commission does not consider that the applicant would have had any prospects of success if she had applied for judicial review of the Minister's refusal to exercise that discretion in her favour.

5. The Commission has next considered whether there has been a failure to respect the applicant's family life, ensured by Article 8 (Art. 8) of the Convention.

The Commission notes that the applicant originally sought entry to the United Kingdom to visit her sister only. She gave the immigration authorities misleading details about her marital status and access to the children. It also notes that she renounced much of her contact with her children in allowing them to live with their paternal grandparents and apparently agreeing to them going to live in the United Kingdom with their father. As a result she has apparently become estranged from the children. (They are over 10 and 13 years old.) From the point of view of British immigration, the applicant's ex-husband has settled in the United Kingdom with a complete family unit, a wife and three children, including the applicant's two children. The Commission does not consider that Article 8 (Art. 8) of the Convention obliges a Contracting State to allow an ex-wife, who is a non-national never having lawfully resided in that country other than as a temporary visitor, to enter and settle in order to facilitate access to children. The Commission finds no elements in the present case which warrant a departure from this principle. The Commission concludes, therefore, that the United Kingdom Government have not failed to respect the applicant's right to respect for family life. Accordingly this aspect of the case must be rejected as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

6. The applicant has next complained that she has suffered a breach of Article 3 (Art. 3) of the Convention which prohibits torture or inhuman and degrading treatment. However, the Commission finds no evidence whatsoever that the applicant has suffered the kind of severe ill-treatment proscribed by this provision at the hands of any British authority. It follows that this aspect of the case is also manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

7. The applicant has finally complained that she has no effective remedy for her above Convention claims and that she has thereby suffered a breach of Article 13 (Art. 13) of the Convention. However, Article 13 (Art. 13) does not require a remedy in domestic law for unmeritorious claims ; the grievance must be an arguable one in terms of the Convention (Eur. Court H.R., Boyle and Rice judgment of 27 April 1988, Series A no. 131, p. 23, para. 52). In the light of its considerations and conclusions above that the applicant's complaints under Articles 8 (Art. 8) and 3 (Art. 3) of the Convention are manifestly ill-founded, the Commission finds that the applicant does not have an arguable claim of a breach of these provisions for the purposes of a remedy under Article 13 (Art. 13) of the Convention. Accordingly this part of the application is similarly to be rejected as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Commission — President of the Commission

(H.C. KRÜGER) — (C.A. NØRGAARD)