Application No. 22414/93
by Karamjit CHAHAL, Darshan Kaur CHAHAL,
Kiranpreet Kaur CHAHAL
and Bikaramjit Singh CHAHAL
against the United Kingdom

The European Commission of Human Rights sitting in private on 1 September 1994, the following members being present:

MM. C.A. NØRGAARD, President
S. TRECHSEL
F. ERMACORA
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
H.G. SCHERMERS
MM. F. MARTINEZ
C.L. ROZAKIS
Mrs. J. LIDDY
MM. J. C. GEUS
M.P. PELLONPÄÄ
B. MARXER
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
D. ŠVÁBY

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 27 July 1993 by Karamjit CHAHAL, Darshan Kaur CHAHAL, Kiranpreet Kaur CHAHAL and Bikaramjit Singh CHAHAL against the United Kingdom and registered on 4 August 1993 under file No. 22414/93;

Having regard to:

reports provided for in Rule 47 of the Rules of Procedure of the Commission;

the observations submitted by the respondent Government on 23 December 1993 and the observations in reply submitted by the applicant on 7 April 1994;

- the parties' oral submissions at the hearing on 1 September 1994;

Having deliberated;

Decides as follows:

THE FACTS

The first and second applicants are Indian nationals, man and wife, born in 1948 and 1956 respectively. They are Sikhs. The first applicant is a prominent religious leader and activist. The third and fourth applicants are their children, daughter and son, born in 1977 and 1978 respectively, and have British nationality. They are represented before the Commission by Messrs. Winstanley Burgess, solicitors, London.

The facts of the present case, as submitted by the parties, may be summarised as follows:

A. The particular circumstances of the case

The first applicant entered the United Kingdom in 1971 without seeking leave to do so from British immigration authorities. In 1974 he applied to the Home Office to regularise his stay and on 10 December 1974 was granted indefinite leave to remain under the terms of an amnesty for illegal entrants who arrived before 1 January 1973.

The second applicant settled in the United Kingdom in 1975 and the third and fourth applicants have been resident there since their birth.

From 1 January to 27 May 1984 the first applicant was in India and whilst there met prominent Sikh religious and political leaders. Since 1984 the applicant has propagated a belief in a purer form of Sikh religious practices and supported the movement for a Sikh independent homeland. He has been a prominent religious figure in the affairs of British Sikhs since 1984, a member of the governing committees of a number of Sikh temples (gurdwaras) and has toured the United Kingdom with other militants, baptising and counselling Sikhs. He has supported the International Sikh Youth Federation (ISYF), which in turn supports the All Indian Sikh Student Federation.

The first applicant has been arrested by the British police in connection with his activities and associates in the United Kingdom. He has twice been charged with criminal offences of a violent order relating to disputes in the affairs of two Sikh temples. He has been acquitted by a jury in one case. The other case resulted in his conviction in May 1987, but it was quashed by the Court of Appeal in July 1992 after the applicant had served the nine month prison sentence which had been imposed at first instance. He has never been charged with offences relating to conspiracy to injure or kill, whether in the United Kingdom or India, and matters incidental thereto, despite the provisions of British criminal law that enable agreements to commit violence in India to be prosecuted in the United Kingdom if the agreement is intended in part to be executed in the United Kingdom.

A request by the first applicant for British nationality was refused on 4 April 1989.

On 14 August 1990 the Home Secretary decided that the first applicant should be deported from the United Kingdom because his continued presence there was deemed unconducive to the public good for
reasons of national security and other reasons of a political nature, namely the international fight against terrorism. A notice was issued to this effect. On 16 August 1990 the first applicant was detained for deportation purposes and has remained in custody since, pursuant to para. 2 (2) of Schedule III of the Immigration Act 1971.

The first applicant applied for political asylum.

The first applicant claims to be a victim of threatened torture and persecution in India on the following basis:

a) his personal experiences in India between January and May 1984, during which time it is accepted that he was detained for over three weeks and tortured by a number of Indian police officers in two different police stations;

b) the consistent evidence of a real risk of torture, murder, and detention at the hands of the Indian authorities faced by those who either are, or are perceived to be, Sikh militants and adherents of the cause of a Sikh state in India. The evidence extends throughout the period 1984 to 1992 and is continuing. It is most comprehensively expressed in the reports of Amnesty International, their letters to the Secretary of State in the present case, the evidence of other experts, and the evidence relied on by the Home Office, namely a report prepared by the British Foreign Office;

c) the evidence of a certain Kharnail Singh Khaira, who visited India in 1989, was detained and tortured there after visiting the first applicant's relatives, and was questioned about the applicant by his torturers;

d) evidence relating to the fate of other relatives or acquaintances of the first applicant, eg. the deaths at the hands of the police of his cousin's son-in-law (1983), his cousin's son (October 1989), a relative by marriage (February 1990), and his second cousin (March 1990), and the arrest and torture of his sister, brother-in-law and two nephews (October 1989), by the police;

e) the arrest of the first applicant's parents, brothers, sister and cousins in October 1989, and the arrest of another cousin in October 1990;

f) the accounts given by the applicant's village headman and family in India as to the interest in the applicant shown by the security forces;

g) the interest in the first applicant's proposed expulsion from the United Kingdom on national security grounds and his Sikh militancy expressed by the national press in India, including misrepresentations as to the extent of and reasons for the police interest in the applicant in India;

h) the circulation by the Indian national press and some pro-government agency in the United Kingdom (which the applicants believe to be the Indian High Commission) of inaccurate speculation purporting to come from an identified British senior police officer that the first applicant had been found in possession of explosives and had targeted prominent Sikhs in the United Kingdom;

i) a warning on behalf of the Canadian police given to the first applicant before the deportation proceedings began that he was in danger in India;

j) evidence relating to the general events in the Punjab, the scale of the problems, the inadequacy of the response of the authorities or their inability to respond;

k) the decisions of judicial authorities in the United Kingdom and elsewhere considering the application of the relevant legal criteria of risk of persecution to credible accounts of fears of persecution given by Sikh militants with respect to their treatment in India.

On 27 March 1991 the Home Secretary refused the first applicant's request for asylum. Given the national security elements in the case, the first applicant had no right of appeal to an independent tribunal against the Home Secretary's notice of intention to deport him. However, the matter was considered by an advisory panel on 10 July 1991. In preparation of the hearing before the advisory panel, the Home Office produced a statement on 5 April 1994 about the first applicant. In pararagraph 3 of this statement it was said:

"Chahal has a public history of violent involvement in Sikh terrorism. In 1986 he was involved in disturbances at the East Ham Gurdwara and was convicted of asault and causing an affray - he received concurrent prison sentences of six and nine months.

While on remand for these offences he was involved in further disturbances at the Belvedere Gurdwara; he was later acquitted of charges in this connection. These disturbances were related to the aim of gaining control of the Gurdwara's funds in order to finance support and assistance for terrorist actions in the Punjab."

The statement continued:

"4. The Home Office is in possession of other information of a confidential nature concerning Chahal. This relates to his activities in the faction of ISYF (International Sikh Youth Federation) in which he has played a leading role; and shows him to have been centrally involved in the organisation, planning and financing of terrorism.

5. Having regard to the above facts and to other information of a confidential nature, the Home Secretary concluded that Chahal's continued presence in the United Kingdom was not conducive to the public good for reasons of national security and other reasons of a political nature, namely the fight against international terrorism."

A supplementary statement was issued by the Home Office on 23 May 1991 which included the following:

"Involvement with the ISYF

1. Chahal has played a leading role within a faction of the (ISYF), which supports the activities of the Second Panthic Committee. Although not himself an ISYF office holder Chahal has been the centre figure in directing this faction's support for terrorism. Chahal has also played a leading role in the faction's programme of intimidation directed against the members of other groups within the Sikh community.

Supply of Funds and Equipment to the Punjab

2. Chahal has been involved in supplying funds and equipment to terrorists in the Punjab since 1985. Specific examples of funds sent to terrorist groups will be presented to the three advisers. Information will also be presented that relates to the faction's role in supplying equipment to Sikh terrorists. There is good reason to believe that the equipment supplied by the faction has been for use in actual terrorist operations.

Direction and Control of International Sikh Terrorist Activities

3. Chahal has been involved in planning and directing terrorist attacks in India, the UK and elsewhere. Of particular importance has been Chahal's role in attempting to direct terrorist activities in the Indian sub-continent. Chahal has also been involved in planning parallel activity within the United Kingdom."

The applicant was not informed of the basis for these statements which were put to the advisory panel. He was not allowed to be represented by a lawyer and he was not informed of the advice which the panel gave to the Home Secretary. The latter subsequently signed a deportation order against the first applicant on 25 July 1991.

The applicant sought judicial review of the Home Secretary's decision. Leave was granted by the High Court on 2 September 1991 and the asylum refusal quashed on 2 December 1991 because the reasoning behind it was considered inadequate. Mr. Justice Popplewell expressed "enormous anxiety" about the case.

After further consideration of the first applicant's situation, the Home Secretary adhered to his previous decision (renewed decision 1 June 1992).

Part of the first applicant's case was based on reports by Amnesty International and other material showing that a great number of Sikhs have been persecuted in India. Amnesty International, convinced that the first applicant, if sent to India against his will, would be at risk of torture, "disappearance" or extrajudical execution, made representations about the

present case to the Home Secretary. The latter examined Amnesty's documentation, but stated as follows:

"... that the emergency powers in force in the Punjab, including the Terrorist and Disruptive Activities Act 1987 (TADA), are lawful powers, properly enacted by the Indian Parliament, which have been instituted in response to the very serious threat to the life and safety of the community posed by the activities of Sikh terrorists in the Punjab. He (noted) that the judiciary in India is independent of the Government and that there is an effective system of appeals in criminal matters ranging from District Courts to the Supreme Court."

Concerning human rights violations by the Indian security forces in the Punjab, the Home Secretary commented as follows:

"... he considers that these actions arise from failures of discipline and supervision and not from any concerted policy on the part of the Indian authorities. Moreover, he considers that the breakdown of law and order of which these violations are a part results directly from the activities of Sikh terrorists and in particular their strategy of intimidation and provocation of members of the security forces. He does not accept that they are evidence of persecution within the terms of the UN Refugee Convention against Sikhs generally in the Punjab, nor against supporters of an independent Sikh homeland, nor against alleged Sikh terrorists ... [he] notes that these violations have not been condoned by the Indian or State Governments ...".

The Home Secretary also examined what might happen to the first applicant on his return to India:

"He accepts that, in view in particular of Mr. Chahal's admitted involvement in an extremist faction of the ISYF, Mr. Chahal might be arrested and charged with terrorist offences on his return to India, under the TADA or other provisions of Indian criminal law. Were he to be charged, the Secretary of State believes that Mr. Chahal would be subject to prosecution for alleged criminal activities not for his political beliefs or expressions. If Mr. Chahal were so charged, the Secretary of State is satisfied that he would receive full protection by the Indian Government from mistreatment while held in custody.

The Secretary of State has also considered what might happen to Mr. Chahal if he were not arrested by the Indian authorities, but remained at liberty in India. The Secretary of State accepts that Mr. Chahal or any other person visiting or living in the Punjab faces some risk of violence both from being caught up in a terrorist outrage or from the activities of members of the security forces acting outside the law, but for reasons earlier explained does not regard this as persecution within the meaning of the 1951 UN Convention on the Status of Refugees. In addressing the risk of returning Mr. Chahal to India, however, the Secretary of State has had regard to the risks which might be faced by Mr. Chahal in India as a whole, particularly major urban centres such as Delhi and Bombay. The Secretary of State notes that Sikhs live safely in most parts of India outside the

Punjab. Mr. Chahal would be returned to any International Airport of his choice within India and would have no obligation to go to the Punjab if he did not wish to do so. The Secretary of State notes that Mr. Chahal left the Punjab twenty years ago and, subject to any further representations which he might wish to make on this matter, the Secretary of State

does not consider it unreasonable that Mr. Chahal should continue to remain outside the Punjab if he fears to return there, should he be returned to India."

The applicants' solicitors responded to the last point by a letter of 18 June 1992, in these terms:

"... Mr. Chahal does not regard a location in India outside the Punjab as an area in which he does not face a real risk of persecution for a Refugee Convention reason. Furthermore he does not regard any point of re-entry to India as safe for him. Lastly he reserves the right to request a particular point of re entry to India if compelled to return at some point in the future."

By letter of 2 July 1992, the Home Secretary accepted this last point and promised that Mr. Chahal would be deported to any international airport of his choice in India.

The applicants' solicitors' letter of 18 June 1992 also contained detailed representations concerning the first applicant's fears of return to a part of India outside the Punjab. The Home Secretary addressed these fears in his letter of 2 July 1992:

"... the Secretary of State believes that were Mr. Chahal to be arrested and charged by the Indian authorities it would be in respect of alleged criminal activities and not for his political beliefs or expressions. He does not therefore, consider that, wherever he were arrested in India, the possibility of Mr. Chahal's arrest in itself gives rise to issues under the 1951 Refugees Convention."

And later in the same letter:

"... the Secretary of State has subsequently sought and received assurances from the Indian Government a copy of which is attached and which further satisfy him as to this matter. The Secretary of State therefore remains of the view that Mr. Chahal would be safe from ill treatment if taken into custody by the Indian authorities wherever he might be held in custody."

The assurances mentioned are contained in a letter dated 29 June 1992 from the Indian High Commission to the Under-Secretary of State at the Foreign Office:

"... if Mr. Chahal were to be deported to India, he would enjoy the same legal protection as any other Indian citizen, and ... he would have no reason to expect to suffer ill-treatment of any kind at the hands of the Indian authorities."

Subsequent to this correspondence, further material (in particular from Amnesty International) was made available to the Home Secretary. In response he stated that he did not substantially dispute Amnesty's reports insofar as they related in a limited way to the general situation in the Punjab, but he commented that he did not accept that the material used in the compilation of these reports was necessarily independent or objective. Nor did he draw the same inferences as the applicants' solicitors from those reports.

The Home Secretary's description of the security risk which the first applicant is deemed to present has been cited above (pp. 5-6). The quashing of the first applicant's

conviction was not thought to significantly change this evaluation, which was reiterated in 1992 as follows:

"... the Secretary of State is satisfied - as was made clear in the information given to Mr. Chahal for his appearance before the Secretary of State's Advisory Panel - that Mr. Chahal has been actively involved in terrorism in the United Kingdom and India. He has been the central figure in the International Sikh Youth Federation's (Southern faction) support for terrorism and has played a leading role in this faction's programme of intimidation directed against other groups within the United Kingdom Sikh community. He has also been involved in supplying funds and equipment to terrorists in the Punjab since 1985. The Secretary of State is also satisfied that there is good reason to believe that the equipment supplied by Mr. Chahal has been for use in actual terrorist operations. Mr. Chahal has also been involved in planning and directing terrorist attacks in India and the United Kingdom ...

He [the Secretary of State] notes in addition, that in view of the substantial risk which Mr. Chahal poses to the national security of the United Kingdom, he would not benefit from the protection of Articles 32(1) and 33 of the UN (Refugee) Convention even if he were to satisfy the Secretary of State as to his claim to refugee status."

The first applicant applied for judicial review to challenge the Home Secretary's second refusal of asylum and the maintenance of the deportation decision. He also applied for bail, which was refused on 23 July 1992.

On 12 February 1993 the judicial review application and a renewed bail request were refused, the High Court holding that the Home Secretary's decisions had not been irrational. A renewed application for judicial review to the Court of Appeal was heard on 28 July 1993 and dismissed unanimously by all three judges on 22 October 1993.

The Court of Appeal held that it was impossible to say that the Home Secretary's decision in the present case on grounds of national security was irrational, perverse or based on a misdirection. Whilst the evidence on which the Home Secretary considered that the first applicant was heavily involved with the Sikh terrrorist movement was not before the Court, the applicant's evidence of the alleged risks to his life if returned to India was.

However, one of the Court's judges considered that much of that evidence from the past was second-hand, or even more remote, and could in part be said to be evidence of impression rather that fact. Another judge considered that there was a clear case to consider that the first applicant has a well-founded fear of being persecuted, within the meaning of Article 1 of the 1951 Convention on the Status of Refugees, if returned to India. It was deemed irrelevant that some of the victims of police violence in India were guilty of terrorist acts. The possibility that the first applicant would suffer unauthorised ill-treatment in the hands of Indian security forces was left open.

Nevertheless, the Court of Appeal was impressed by the assurance given by the Indian Government that the applicant's rights would be protected on return to India. The Court was informed that such assurances are seldom sought or given.

The Court concluded, first, that it had power to examine the grounds on which a deportation order was made, even where the interests of national security are relied upon, although in practice its scrutiny will be limited. Secondly, the Home Secretary has a duty to balance the gravity of the risk to national security, if the person were to remain, against all the other circumstances and any likely risk of persecution if that person were deported. Thirdly, on the facts of the present case, the grounds of national security could not be challenged and there was sufficient evidence that the Home Secretary had carried out the necessary balancing exercise.

The first applicant's petition to the House of Lords for leave to appeal was rejected on 2 March 1994.

B. The relevant domestic law and practice

By section 3(5)(b) of the Immigration Act 1973 ("the Act"), the Home Secretary has the power to deport persons who are not British citizens, including those such as the first applicant who have indefinite leave to remain in the United Kingdom, on the ground that their deportation is conducive to the public good. The first applicant was granted indefinite leave to remain in the United Kingdom on 10 November 1974, but he had arrived there clandestinely in 1971 and is not able to benefit from the immunity accorded to Commonwealth citizens ordinarily resident in the United Kingdom on 1 January 1973 as bestowed by section 7 of the Act.

By section 15(1) of the Act, there is a right of appeal to an independent tribunal against a decision to deport, but by section 15(3):

"A person shall not be entitled to appeal against a decision to make a Deportation Order against him if the ground of the decision was that his deportation is conducive to the public good as being in the interests of national security or of the relations between the United Kingdom and any other country or for other reasons of a political nature."

This exception was maintained in the Asylum and Immigration Appeals Act 1993, which came into force in July 1993. It provides a right of appeal to an independent adjudicator in all but national security cases where expulsion would be contrary to the United Kingdom's obligations under the 1951 Convention on the Status of Refugees.

The first applicant's case was considered by a non-statutory advisory panel (presided over by a Lord Justice of Appeal, now a Law Lord) instituted in 1971 for national security cases of this type. The existence of this procedure is vouchsafed by paragraph 157 of the Statement of Charges in Immigration Rules (House of Commons Paper 251).

By paragraphs 161 and 173 of the Home Secretary's current Rules governing immigration control and practice in the United Kingdom (HC 251), deportation orders may not be made in breach of the United Kingdom's obligations under the 1951 Convention and Protocol Relating to the Status of Refugees.

The relevant Articles of the Refugee Convention are Articles 32 and 33. Article 33 provides:

"1. No contracting state shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

The first applicant was detained following the service on him of the Home Secretary's Notice of intention to deport. The power to detain, pending the making of an Order, derives from paragraph 2(2) of Schedule III to the Act, which reads:

"Where notice has been given to a person in accordance with Regulations under Section 18 of this Act of a decision to make a Deportation Order against him, and he is neither detained in pursuance of the sentence or order of a Court nor for the time being released on bail by a Court having power so to release him, he may be detained under the authority of the Secretary of State pending the making of the Deportation Order."

The power to detain after the making of an order derives from paragraph 2(3), which provides:

"Where a Deportation Order is in force against any person, he may be detained under the authority of the Secretary of State pending his removal or departure from the United Kingdom (and if already detained by virtue of sub-paragraph (1) or (2) above when the order is made, shall continue to be detained unless the Secretary of State directs otherwise)."

The Home Secretary has a practice of not removing asylum seekers from the United Kingdom pending the resolution of any judicial review proceedings they might bring (Muboyayi case (1992) IQB 244 at 259C).

The High Court has power to review the Home Secretary's decision to maintain an asylum seeker in detention (R v. Governor of Durham Prison, Ex-Parte Hardial Singh (1984) IWLR 704), but it is incumbent on an applicant to demonstrate that the Home Secretary was acting for a collateral purpose or irrationally.

The decisions of the Home Secretary are liable to challenge by way of judicial review and may be quashed by reference to the ordinary principles of English public law. The High Court's supervisory function in relation to the lawfulness of the asylum decision is not displaced merely because national security issues are also engaged. This remedy was explained before the European Court of Human Rights in the case of Vilvarajah and Others (Eur. Court H.R., Vilvarajah and Others judgment of 30 October 1991, Series A no. 215, pp. 29-31, paras. 89-93, and pp. 38-40, paras. 117-127).

COMPLAINTS

The first applicant complains that his deportation to India will expose him to a real risk of torture or other inhuman or degrading treatment, contrary to Article 3 of the Convention. He also complains that it will create an unjustified interference with his right to

respect for private and family life ensured by Article 8 of the Convention, and that his lengthy detention awaiting deportation has given rise to breaches of Article 5 paras. 1(f) and 4 of the Convention. Finally he complains of an absence of effective or fair remedies for his claims and invokes Articles 6 and 13 of the Convention.

The second, third and fourth applicants complain that the first applicant's deportation would involve violations of their rights under Articles 8 and 13 of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 27 July 1993 and registered on 4 August 1993.

On 30 July 1993 the President of the Commission decided to indicate a stay in the first applicant's deportation under Rule 36 of the Commission's Rules of Procedure unless an undertaking could be obtained from the United Kingdom Government that the applicant would not be deported without adequate notice to the Commission to enable a review of the indication.

On 2 August 1993 the Government informed the Commission that the Home Office have no immediate plans to deport the first applicant whilst domestic proceedings, such as the awaited reasoned judgment of the Court of Appeal, are still pending. They undertook to provide the Commission with at least two weeks' notice of any intended deportation of the applicant.

On 8 September 1993 the Commission decided, pursuant to Rule 48 para. 2 (b) of its Rules of Procedure, to communicate the application to the respondent Government and to invite the parties to submit their written observations on admissibility and merits.

The Government's observations were submitted, after an extension of the time-limit set for this purpose, on 23 December 1993. The applicants' observations were submitted, after two extensions of the time-limit, on 7 April 1994.

On 16 May 1994 the Commission decided to invite the parties to make oral submissions at a hearing, which was fixed for 1 September 1994. Prior to the hearing the parties submitted additional documents: the Government submitted various press cuttings on 17 August 1994, and on 23 August 1994 the applicants submitted a decision of an Immigration Appeal Tribunal.

At the hearing on 1 September 1994 the parties were represented as follows:

The Government:

Mr. I. Christie,	Foreign and Commonwealth Office, Agent
Mr. M. Beloff, QC	Counsel
Mr. R. Jay	Counsel
Miss T. Callman	Counsel
Mr. D. Seymour	Adviser

Mr. D. Cooke Adviser
Mr. A. Cunningham Adviser

The applicants:

Mr. N. Blake, QC Counsel
Mr. D. Burgess Solicitor , Messrs. Winstanley-Burgess

Three of the applicants attended the hearing: Mrs. D.K. Chahal, Miss K.K. Chahal and Mr. B.S. Chahal.

THE LAW

1. The applicants complain that the proposed deportation of the first applicant to India and his continued detention pending the execution of that measure violate his rights under Articles 3, 5 and 6 of the Convention and the whole family's rights under Article 8 of the Convention. They also complain that they have no effective remedy for their Convention claims, contrary to Article 13 of the Convention.

Article 3 of the Convention prohibits torture or inhuman or degrading treatment or punishment. Article 5 secures various rights related to the liberty and security of person. Article 6 guarantees the right to a fair hearing in the determination of a criminal charge or civil rights and obligations. Article 8 ensures the right to respect for family life, subject to certain exceptions such as the interests of national security. Article 13 guarantees the right to an effective domestic remedy for a breach of Convention rights or freedoms.

2. In their observations on admissibility and merits submitted in December 1993, the respondent Government raised a preliminary objection to the admissibility of the application: non-exhaustion of domestic remedies pursuant to Article 26 of the Convention. At that time the first applicant's request for leave to appeal was still pending before the House of Lords and the Government contended that, until this request was decided, domestic remedies were not exhausted. However, since that time the House of Lords has refused the request for leave (2 March 1994). The Commission concludes, therefore, that the applicants have complied with Article 26 of the Convention.

3. As regards the first applicant's complaint under Article 6 of the Convention about the fairness of remedies at his disposal, the Commission recalls its constant case-law that this provision has no application to asylum, expulsion, deportation proceedings or the like (cf. No. 8118/77, Omkarananda v. Switzerland, Dec. 19.3.81, D.R. 25 p. 105, and No. 9990/92, Bozano v. France, Dec. 15.5.84, D.R. 39 p. 119). It follows that this part of the application must be rejected as being incompatible ratione materiae with the provisions of the Convention, pursuant to Article 27 para. 2.

4. As regards the substantive issues in the present case under Articles 3, 5, 8 and 13 of the Convention, the parties have made various submissions, which may be summarised as follows:

The Government contend that, contrary to the view of the Court in the Soering and Vilvarajah cases (Eur. Court H.R., Soering judgment of 7 July 1989, Series A no. 161, pp.

32-36, paras. 81-91, and Vilvarajah and Others judgment of 30 October 1991, Series A no. 215, p. 34, paras. 102-103), Article 3 of the Convention has no extra-territorial effect, but should be construed as a prohibition on a Member State exposing persons within its own jurisdiction to torture or to inhuman or degrading treatment.

Alternatively, the Government contend that, even if Article 3 of the Convention has extra-territorial effect, the first applicant's return to India would not involve a breach of the Article. They place particular reliance on the assurances provided by the Indian High Commission (p. 8 above) and on the view of one Court of Appeal judge that much of the evidence of persecution and torture in the past provided by the applicant is second-hand or even more remote, and can in part be said to be evidence of impression rather than fact. They assert that the Sikh troubles have considerably calmed down and that this applicant could avoid involvement in possible future incidents by living outside the Punjab.

On the basis of the test laid down in the Vilvarajah judgment (Eur. Court H.R., Vilvarajah and Others judgment of 30 October 1991, Series A no. 215, p. 34, paras. 102-103), the Government contend that the first applicant does not face a real risk of torture or persecution in the Punjab or elsewhere in India for the following reasons:

(a) Sikhs are not a persecuted group per se; India has a secular constitution which guarantees freedom of religious belief and practice to all, as well as an independent judiciary;

(b) the principal events upon which the first applicant based his claim for asylum occurred in India before 1985;

(c) the events of early 1984 should be viewed in the context of a significant increase of terrorist activity in the Punjab in 1984, heightened tension in that region and ill-discipline on the part of the members of the Indian security forces;

(d) whereas the Amnesty International reports are substantially accurate in the sense that they demonstrate that serious human rights violations have been committed by individual members and groups within the Indian Security Forces in the Punjab, it is not accepted that each and every aspect of those reports is true: the majority of the alleged incidents are not capable of independent or objective verification;

(e) furthermore, the Amnesty International reports fail to recognise what, in the Government's view, is the principal reason for the presence of the Indian security forces in the Punjab, namely the combating of serious terrorist activity and the maintenance of law and order;

(f) if the first applicant were returned to India, there is a prospect that he would be arrested and charged with terrorist offences according to Indian law;

(g) if so charged, the first applicant would receive full protection by the Indian Government from mistreatment while held in custody;

(h) if the first applicant were not arrested by the Indian authorities on his return to India, but remained at liberty, then he faces a risk (as does any other person in the Punjab) of violence from terrorist outrage;

(i) insofar as the first applicant faces a risk from the activities of members of the security forces acting outside the law, such violations of Indian law have not been condoned by the Indian or state Governments, and the first applicant will benefit from the High Commissioner's assurance.

An alien on British territory enjoys absolute protection from ill-treatment contrary to Article 3 of the Convention. However it is argued that Article 3 is subject to implied limitations, qualifications or derogations, where it is proposed to deport an alien outside the jurisdiction of the Convention for reasons of national security.

The Government contend that it has been a constant theme in international jurisprudence over the centuries that the right of an alien to refuge is subject to necessary qualifications. Asylum is to be enjoyed by people "who suffer from undeserved enmity, not those who

have done something that is injurious to human society or to other men" (Hugo Grotius "De Jure Belli ac Pacis" (1623)). This is reflected in Articles 32 and 33 of the Convention relating to the Status of Refugees.

The Government submit that Article 3 was never intended to cover cases of the present kind. Contracting Parties have a right and duty to weigh the risk of torture against the harm caused to national security by the continued presence of an alien on its territory. However this balancing exercise is non-justiciable. It cannot be the role of the national courts or the Convention organs to make any searching judicial scrutiny of national security matters, once raised by the Member State in good faith. It is not possible to evaluate the evidence on which the Executive bases its decisions on national security.

The Government aver that their decision on national security in relation to the first applicant has been made in good faith and possesses substance. It has been weighed against his personal circumstances.

As regards the issues under Article 5 of the Convention, the Government contend that the first applicant has been lawfully detained since 14 August 1990 under Article 5 para. 1 (f) of the Convention pending the deportation proceedings. In the light of the national security considerations in the case, his release on bail was inappropriate. It is stated that the proceedings have been conducted with diligence. The applicant's requests for bail were dealt with speedily by the High Court on both occasions, in conformity with Article 5 para. 4 of the Convention.

On the question under Article 8 of the Convention, the Government accept that the decision to deport the first applicant constitutes an interference with the applicants' rights to respect for family life. However, they submit that the interference is necessary in the interests of national security, within the meaning of the second paragraph of Article 8. The Government consider that the Commission is not in a position to evaluate the extreme seriousness of the national security risk posed by the first applicant in the present case. It is further submitted that the strength of the national security case is by no means vitiated by the absence of any successful criminal prosecution against the first applicant: much of the

material upon which the Home Secretary has been acting is of a confidential nature and could not be deployed in criminal proceedings.

Finally as regards the issue under Article 13 of the Convention, the Government rely on the Court's case-law in the case of Soering and Vilvarajah for the proposition that judicial review provides an adequate remedy in cases of the present kind (Eur. Court H.R., Soering judgment of 7 July 1989, Series A no. 161, and Vilvarajah and Others judgment of 30 October 1991, Series A no. 215).

The Government conclude that no breach of either Articles 3 or 8 of the Convention is disclosed in the present case. They also contend that the other complaints made by the applicants are manifestly ill-founded or, alternatively, disclose no breach of the Convention.

The applicants note that the Government have not said that the claims under Articles 3 and 8 of the Convention are inadmissible or manifestly ill-founded.

As regards the first applicant's complaint under Article 3 of the Convention, it is contended that he has adequately shown that he runs a real risk of death or torture in custody if returned to India. He refers to the elements listed above (pages 4 and 5). He submits that he cannot be expected to prove such a prediction.

It seems likely that the first applicant would be arrested if returned to India. Whilst the assurances of the Indian Government are to be taken into account they are, according to the applicants, of little value. The fact is that the Indian Government have been unable to keep in check abuses by their security forces in the Punjab. No special precautionary measures or protection have been proposed for the first applicant. Neither the Indian legal system nor the Indian Constitution, given the emergency legislation in force, can offer sufficient protection against death and torture in custody in cases of terrorist suspects. The first applicant underlines that, unlike the applicants in the Vilvarajah case, he does not fear persecution from random terrorist violence in India, but from the State security forces.

The Home Secretary appears to accept the broad picture of deaths in custody and torture disclosed by Amnesty International reports on India. However he has concluded that such security force abuses have been provoked by terrorists. The first applicant disputes this reasoning and contends that the motives of the torturers are irrelevant to the Article 3 issue. Moreover he has not been able to challenge this reasoning before the domestic courts, despite the concerns expressed by the judges dealing with the case. These concerns were not assuaged by a mere finding that the United Kingdom Government is not acting illegally overall in deciding to deport the first applicant.

Not only does the first applicant assert that he faces a real risk of treatment contrary to Article 3 of the Convention, but he also asserts that the disputed national security question is irrelevant to the Article 3 issue. In his view Article 3 of the Convention, unlike the 1951 Convention on the Status of Refugees examined by the domestic courts in the present case, provides absolute protection against being sent to a country where such a real risk exists. This absolute protection is not subject to a qualification of proportionality.

Reliance for these propositions is placed, inter alia, on a comparison with Article 3 of the 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment

or Punishment, the absence of reciprocal obligations in asylum matters and the fact that the first applicant is not an alien in the United Kingdom but a Commonwealth citizen with strong ties to that country and, who, prior to 1971, would have had a right of abode there.

If there is a proportionality issue, the first applicant states that he has not violated English rules or regulations. There has been no credible allegation of terrorist activity endangering the security of the United Kingdom. He has been offered no opportunity to clear his name and there is evidence that he has been the victim of misinformation with respect to terrorism.

As regards his complaints under Article 5 of the Convention, the first applicant contends that his detention for much of the period since 14 August 1990 has not been "with a view to deportation" within the meaning of Article 5 para. 1 (f) of the Convention. Instead the proceedings have involved consideration of his asylum applications and judicial review.

The first applicant claims to be denied an opportunity to effectively contest the lawfulness of his detention under Article 5 para. 4 of the Convention because of the broad effect of the untested national security allegations against him. He also claims that the proceedings have not been determined speedily since he has been detained now for over four years, a period which is the equivalent of a substantial sentence for a serious crime. He states that it has never been alleged that he would abscond or not answer his bail if released from detention. His substantial family ties in the United Kingdom indicate that he would have no interest in doing so.

As regards the whole family's complaints under Article 8 of the Convention, the applicants contest the Government's assertion that the first applicant's deportation is justified on national security grounds. They rely on the same reasons as those put forward by the first applicant in refuting the national security allegations under Article 3 of the Convention. For example, they point out that the first applicant's membership of the International Sikh Youth Federation cannot be considered objectionable, given the recognition by Government Ministers that this organisation could not be branded as a terrorist organisation, but serves a legitimate representational function for the Sikh community.

The applicants underline the fact that if there was any cogent evidence against the first applicant of terrorist activities in the United Kingdom, a criminal prosecution could be instituted against him. The absence of such a prosecution casts grave doubts on the allegations and the material upon which the Home Secretary has based his decisions. This shows that the national security reasons cannot be serious or compelling. The first applicant is a victim of a sophisticated distortion of information perpetrated by or on behalf of the Indian Government and by untrue Indian newspaper reports. Information which is short of admissible evidence in a criminal case should not form the basis of a decision to expose someone to a risk of torture.

The applicants point out that the first applicant has strong, settled ties in the United Kingdom, having lived there for 19 years and founded a family. He should therefore not be treated differently from other Commonwealth citizens who, not so long ago, had a common law right of abode in that country. Reliance is placed on the Beljoudi judgment (Eur. Court H.R., Beljoudi judgment of 26 March 1992, Series A no. 234-A).

Finally, as regards the issue under Article 13 of the Convention, the applicants maintain that they had no effective remedy for their Convention claims. They contend that the evaluation by the European Court of Human Rights of the efficacy of judicial review in the Vilvarajah case is flawed, but that anyway their application is distinguishable.

It is contended that English courts have no jurisdiction to establish the existence of a risk of torture in the receiving State. The courts may not go beyond the terms of the immigration rules which make no reference to the Convention or the UN Convention against Torture. The national security allegations reduce even further the review which could be made by the domestic courts. Significantly, since the Vilvarajah case, a right of appeal to an independent adjudicator has been created by the Asylum and Immigration Appeals Act 1993 for those refused asylum, except in national security cases of the present kind.

The applicants conclude that their application should be declared admissible.

In the light of the parties' observations, the Commission finds that this part of the application raises serious questions of fact and law which are of such complexity that their determination should depend on an examination of the merits. This aspect of the case cannot, therefore, be regarded as being manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention and no other ground for declaring it inadmissible has been established.

For these reasons, the Commission,

unanimously,
DECLARES INADMISSIBLE the first applicant's complaint under Article 6 of the Convention about the fairness of remedies;

by a majority,
DECLARES ADMISSIBLE, without prejudging the merits, the applicants' complaint concerning their right to respect for family life under Article 8 of the Convention;

unanimously,
DECLARES ADMISSIBLE the remainder of the application, without prejudging the merits.

Secretary to the Commission President of the Commission

(H.C. KRÜGER) (C.A. NØRGAARD)