AS TO THE ADMISSIBILITY OF

Application No. 28627/95
by Meera DABHI and Chandrika DABHI
against the United Kingdom

The European Commission of Human Rights (First Chamber) sitting in private on 17 January 1997, the following members being present:

Mrs. J. LIDDY, President
MM. M.P. PELLONPÄÄ
E. BUSUTTIL
A. WEITZEL
L. LOUCAIDES
B. MARXER
B. CONFORTI
N. BRATZA
I. BÉKÉS
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL
M. VILA AMIGÓ
Mrs. M. HION

Mrs. M.F. BUQUICCHIO, Secretary to the Chamber

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

Having regard to the application introduced on 3 July 1995 by Meera DABHI and Chandrika DABHI against the United Kingdom and registered on 21 September 1995 under file No. 28627/95;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The first applicant is a British citizen born on 28 May 1990. The second applicant is the first applicant's mother. She was born in 1965 in India and presently resides in Birmingham, England. They are represented before the Commission by Ms. Nuala Mole, a lawyer working for the AIRE Centre in London.

The facts as submitted by the applicants may be summarised as follows.

In 1987 the second applicant left India for Kenya. In May 1989 she entered the United Kingdom to visit her grandparents and was given leave to stay as a visitor for six months. On 26 August 1989 she married Mr. Dabhi and on 13 September 1989 applied for leave to remain in the United Kingdom as a spouse. In November of the same year the second applicant was thrown out of the matrimonial home by Mr. Dabhi's mother, despite the fact that she was pregnant with Mr. Dabhi's child. She went to live with her maternal grandparents.

On 12 March 1990 the second applicant was refused leave to remain on the grounds that she and Mr. Dabhi were no longer living together. On 28 May 1990 the first applicant was born. On 2 August 1991 the

applicant's appeal against the denial of further leave to remain on an exceptional basis was refused. On 3 October 1991 the Immigration Appeal Tribunal refused leave to appeal.

On 20 December 1991 a decision to deport was issued. At the same time, the second applicant and her husband, Mr. Dabhi, attempted a reconciliation and the first and second applicant moved back into the matrimonial home. The second applicant sought further leave to remain on the basis of her reconciliation with her husband. That application was refused on 1 June 1994, by which time the applicants had already left the matrimonial home following an assault on the second applicant by Mr. Dabhi's mother on 12 February 1994.

The second applicant's appeal against the decision to deport was heard on 22 August 1994 and dismissed on 26 September 1994. On 11 November 1994 the Immigration Appeal Tribunal refused leave to appeal.

On 22 December 1994 the second applicant applied for leave to move for judicial review, which was refused on 15 February 1995.

On 10 February 1995, in response to continued pleas by the second applicant and her representatives, the Secretary of State agreed to reconsider the case. Mr. Dabhi was interviewed by the immigration authorities on 23 April 1995 and again on 7 May 1995 and the second applicant was interviewed on 2 May 1995. The authorities concluded that Mr. Dabhi was, for the most part, indifferent to the possible deportation of his wife and daughter. By decision of 18 May 1995, the Secretary of State therefore maintained the deportation order made against the second applicant. The second applicant again applied for leave to move for judicial review, this time by way of an oral application. Leave was denied on 24 May 1995 after an oral hearing.

Since his statements to the contrary, Mr. Dabhi has expressed an interest in renewing relations with his wife and daughter. In July 1995 the second applicant's mother contacted a local community leader with the aim of arranging for Mr. Dabhi to see his daughter and to set up mediated negotiations with the second applicant. The local community leader has seen Mr. Dabhi, who, it appears, has now expressed an interest in seeing his daughter, the first applicant.

COMPLAINTS

1. The applicants complain under Article 3 of the Convention that the deportation of the second applicant would constitute inhuman and degrading treatment. As regards the first applicant it is claimed that to force a British citizen child into exile in a foreign country with the parent with custody of the child constitutes inhuman and degrading treatment when it is imposed as a consequence of that child being rejected by her legal father. It is further claimed that to subject a person to prolonged exile from the country of citizenship is, in international law, only permitted in exceptional circumstances as a punishment for serious crime and as an alternative to a long prison sentence.

2. The applicants further complain of an unjustified interference in their family and private lives contrary to Article 8 of the Convention. It is claimed that the deportation of the second applicant will interfere with the family life between the applicants and between the applicants and their family in the United Kingdom, with whom they have established close links and on whom they depend for emotional and financial support. It is further claimed that should the second applicant take the first applicant to India, they would suffer social and economic hardship that would itself undermine family life. It is claimed that if the second applicant goes to India without the first applicant, the separation is likely to be final since there are no provisions in the immigration rules that would entitle the second

applicant to return to reside with her daughter at any stage in the future. If the first applicant accompanies the second applicant to India she will lose her entitlement, which derives from her British citizenship, to education, health care and welfare benefits. It is thus claimed that by conferring on the first applicant British citizenship the Government has created a bundle of private life rights, not least of which is the right to live in the country of citizenship.

3. The first applicant also complains under Article 2 of Protocol No. 1 that her removal from the United Kingdom would threaten her ability to be fully educated. Further, if deprived of a British school education the first applicant claims that she would be unlikely to have obtain the necessary qualifications to get into a British university and would in any event be ineligible for financial assistance since she would not fulfil the residence requirements. She would also be deprived of the right accorded to other British children to take part in the cultural and language exchanges within the European Union.

4. The first applicant further complains under Article 14 of the Convention that the actions of the Government discriminate against her compared with other British children on the grounds of her birth and her status as the child of a divorced foreign mother. She claims that British citizen children who have one British citizen parent and whose parents' marriage still subsists are able to enjoy their private law rights. It is submitted that the fact that the applicant has been rejected by her legal father does not constitute an objective and reasonable justification for depriving her of the right to grow up in the United Kingdom and to enjoy all the attendant rights of Article 8 and Article 2 of Protocol No. 1.

5. The applicants further complain under Article 13 that since the Courts are unable to examine the merits of the decision of the Secretary of State, there is no means by which the first applicant could have the effects of her mother's removal examined. Further, the applicants claim that in view of the second applicant's poor immigration history, the second applicant would certainly be refused permission to enter the United Kingdom even for a visit.

THE LAW

1. The applicants complain that the deportation of the first and second applicant would amount to inhuman and degrading treatment within the meaning of Article 3 (Art. 3) of the Convention, which provides as follows.

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

The Commission recalls that the expulsion of an asylum seeker by a Contracting State may give rise to an issue under Article 3 (Art. 3) where substantial grounds have been shown for believing that the person concerned faces a real risk of being subject to torture or to inhuman or degrading treatment or punishment in the country to which he/she is to be deported (see. Eur. Court HR, Cruz Varas v. Sweden judgment of 7 July 1990, Series A no. 201, p. 28, paras. 69-70; Vilvarajah and others v. United Kingdom judgment of 30 October 1991, Series A no. 215 p. 34, paras. 102-103).

The Commission considers that neither of the applicants have shown that they face any risk of ill-treatment on return to India. Further, as regards the assertion that the first applicant is in effect being forced into exile and that this in itself amounts to inhuman and degrading treatment, the Commission considers that such a situation could not, without more, give rise to an issue under Article 3 (Art. 3) of the Convention. This is substantiated by the fact that were it to do so Article 3 of Protocol No. 4 (P4-3), which prohibits

the expulsion of nationals and which has not been ratified by the United Kingdom, would have no separate meaning. The Commission further notes that in any event the first applicant could stay in the United Kingdom.

It follows that this part of the application must be dismissed as manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicants further complain of an unjustified interference in their family and private lives contrary to Article 8 (Art. 8) of the Convention. In particular it is claimed that by conferring British citizenship on the first applicant, the Government has created private law rights, not least of which is the right to live in the United Kingdom. Article 8 (Art. 8) provides as follows.

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 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 in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The Commission recalls according to its established case-law that while Article 8 (Art. 8) of the Convention does not in itself guarantee a right to enter or remain in a particular country, issues may arise where a person is excluded, or removed from a country where his close relatives reside or have the right to reside (see eg. No. 7816/77, Dec. 19.5.77, D.R. 9, p. 219; No. 9088/80, Dec. 6.3.82, D.R. 28, p. 160, and No. 9285/81, Dec. 8.7.82, D.R. 29, p. 205).

However, the Commission notes that the State's obligation to admit to its territory aliens who are relative of persons resident there will vary according to the circumstances of the case. The court has held that Article 8 (Art. 8) does not impose a general obligation on States to respect the choice of residence of a married couple or to accept the non-national spouse for settlement in that country (Eur. Court HR, Abdulaziz, Cabales and Balkandali v. United Kingdom judgment of 28 May 1985, Series A no. 94, p. 94, para. 68). The Commission considers that this applies to situations where members of a family, other than spouses, are non-nationals. Whether removal or exclusion of a family member from a Contracting State is incompatible with the requirements of Article 8 (Art. 8) will depend on a number of factors: the extent to which family life is effectively ruptured, whether there are significant obstacles preventing the family living in the country of origin of one or more of them and whether there are factors of immigration control (eg. history of breaches of immigration law) or considerations of public order (eg. Nos. 9285/81, Dec. 6.7.82, D.R. 29 p. 205 and 11970/86, Dec. 13.7.87 unpublished).

As regards the second applicant, the Commission recalls that she first entered the United Kingdom in 1989 at 24 years old with permission to remain for six months only. She was refused leave to remain in March 1990 and a deportation order was issued on 20 December 1993. While it is true that she has found employment in the United Kingdom and has several relatives there, the Commission considers, in the light of the case law referred to above, that her deportation can not be considered to be an interference in her family or private life.

The first applicant, who is six years old, is likely to follow her mother on removal. As a result she may have to leave the society where she was born and face economic hardships and the difficulties of

living in a country that is new to her. The Commission recalls however that the second applicant is an overstayer who lived previously in India and Kenya and its findings as to her deportation set out above. The Commission considers that the first applicant can be expected to be able to adapt to the change in environment, in view of her young age.

As regards the first and second applicants' links with Mr. Dabhi, it does not appear from the material before the Commission that the removal would disrupt the relationship between them, there being no apparent established bonds. As regards the claim that Mr. Dabhi has now expressed an interest in seeing the first applicant following meetings with a local community leader, the Commission observes that the applicants have not provided any substantiation of that claim nor any elaboration as to the nature of Mr. Dabhi's interest.

While the applicant have argued that weight should be given to the first applicant's British citizenship, the Commission notes that in previous cases the factor of citizenship has not been considered of particular significance (eg. No. 11970/86, Dec. 13.7.87, unpublished, where the Commission found it compatible with Article 8 (Art. 8) to expect children of unlawful overstayers to follow their parents even if they had acquired theoretical rights of abode in the deporting county). The Commission does not find it a material factor that the first applicant obtained her British citizenship by ius sanguinis rather than ius soli where the child is nonetheless of an adaptable age and there are no effective obstacles to her accompanying the mother (see eg. No. 23938/94, Dec. 23 October 1995, unpublished).

It follows that this part of the application must be rejected as manifestly ill-founded within the meaning of article 27 para. 2 (Art. 27-2) of the Convention.

3. The first applicant also complains under Article 2 of Protocol No. 1 (P1-2) that her removal from the United Kingdom would threaten her ability to be fully educated. That provision provides as follows.

"No person shall be denied the right to education..."

The Commission notes its finding above and finds that the first applicant's departure from the United Kingdom to follow the second applicant who is being deported pursuant to a legitimate measure of immigration control cannot be construed as a deprivation of the right to education within the meaning of the provision above (see eg. No. 23938/94 referred to above).

4. The first applicant further complains under Article 14 (Art. 14) of the Convention that she is discriminated against on the grounds of her birth and her status as the child of a divorced foreign mother. That provision reads as follows.

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Even assuming that the first applicant can be said to be in a comparable position to other British minors whose parents are in a subsisting married relationship, the Commission recalls that whether or not a difference in treatment constitutes discrimination in the sense of Article 14 (Art. 14) of the Convention depends on whether there exists an objective and reasonable justification. This requires that the difference pursues a legitimate aim and that there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised. In this assessment of whether and to what extent differences in otherwise similar situations justify a

different treatment, Contracting States enjoy a margin of appreciation which will vary according to the circumstances, subject-matter and background (see eg. Eur. Court HR, Lithgow and others v. United Kingdom judgment of 8 July 1986, Series A no. 192, pp. 66-67, para. 177).

Having regard to the above, the Commission recalls that it has found the proposed measure to be compatible with the requirements of Article 8 (Art. 8) of the Convention in respect of the implementation by the United Kingdom of its immigration policy. It recalls the fact that the first applicant's mother was in breach of immigration regulations and that there are no obstacles preventing the first applicant, who is of an adaptable age, from continuing her family and private life with her mother in India. The Commission consequently finds that the proposed measure of deportation of the second applicant, which will probably require the first applicant to accompany her, falls within the margin of appreciation enjoyed by the domestic authorities.

It follows that this complaint must also be rejected as manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

5. The applicants further complain under Article 13 (Art. 13) that there is no means by which the first applicant could have the effects of her mother's removal examined by a judicial body. Article 13 (Art. 13) provides as follows.

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The Commission recalls that Article 13 (Art. 13) does not require a remedy under domestic law in respect of any alleged violation of the Convention. It only applies if the individual can be said to have an "arguable claim" of a violation of the Convention (Eur. Court HR, Boyle and Rice v. United Kingdom judgment of 27 April 1988, Series A no. 131, p. 23, para. 52).

The Commission finds that the applicant cannot be said to have an "arguable claim" of a violation of her Convention rights.

It follows that this complaint must be dismissed as manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

M.F. BUQUICCHIO	J. LIDDY
Secretary	President
to the First Chamber	of the First Chamber