AS TO THE ADMISSIBILITY OF

Application No. 24865/94
by Andreas Felipe JARAMILLO
against the United Kingdom

The European Commission of Human Rights sitting in private on 23 October 1995, the following members being present:

MM. S. TRECHSEL, President
H. DANELIUS
C.L. ROZAKIS
E. BUSUTTIL
G. JÖRUNDSSON
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
Mrs. G.H. THUNE
Mr. F. MARTINEZ
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER
G.B. REFFI
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
I. BÉKÉS
J. MUCHA
E. KONSTANTINOV
D. SVÁBY
G. RESS
A. PERENIC
C. BÎRSAN
P. LORENZEN
K. HERNDL

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 12 May 1994 by Andreas Felipe JARAMILLO against the United Kingdom and registered on 9 August 1994 under file No. 24865/94;

Having regard to :

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

- the observations submitted by the respondent Government on 28 April 1995 and the observations in reply submitted by the applicant on 22 June 1995;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a British citizen born in 1990 and resident in

London. He is represented before the Commission by Ms. Nuala Mole, a lawyer working for the AIRE Centre in London.

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

The applicant is the son of Colombian citizens who at the time of his birth were married but at the present time M., the applicant's mother, has initiated divorce proceedings.

M. last entered the United Kingdom on 1 May 1990 as a visitor, whereas in fact she intended to remain with her husband J. who was at this time "settled" in the United Kingdom, i.e. he had indefinite leave to remain. However having been convicted of a drug offence in the United Kingdom, J. was subsequently deported to Colombia on 13 April 1994.

The applicant was born on the 4 October 1990. He was a British citizen by virtue of his birth in wedlock to a father who was at the time a permanent legal resident of the United Kingdom. Since his birth he and his mother have lived continuously in the United Kingdom. They are dependent on public funds.

All of the applicant's paternal relatives are living in the United Kingdom. The family of M. live in Colombia. The applicant is visited frequently by his paternal grandfather and has developed a close and loving relationship with him. Prior to his father's removal, M. and the applicant visited him in prison on a sporadic basis. Since his father's removal, there has been no contact between them.

On 13 September 1993, the decision was taken by the Secretary of State to remove M. as an illegal entrant.

On 20 April 1994, the High Court rejected her application for judicial review of the Secretary of State's decision.

On 17 May 1994, directions were issued for the removal of M.

On 20 May 1994, an application to be granted "asylum" in the United Kingdom has been lodged on behalf of the applicant in which he is seeking the protection of the law to prevent him from being removed from the United Kingdom to accompany his mother to Colombia.

COMPLAINTS

The applicant alleges that the consequences of the removal measure constitute inhuman and degrading treatment contrary to Article 3 of the Convention. He is, it is claimed, being effectively forced into exile in a foreign country. It is alleged that if he is obliged to follow his mother to Colombia he will be constructively exiled during childhood and adolescence and will miss out on all the advantages that accrue to him on account of his British citizenship. It is alleged that M. is frightened to bring the applicant to Colombia because she will not be able to conceal his presence from his father and she believes that he will be sucked into the criminal underworld. On the other hand if he were to remain in the United Kingdom without his mother, it is claimed that this too would result in a violation of Article 3, as it would involve the harsh, sudden and permanent separation of the child from his mother.

The applicant also invokes Article 8 in respect of the threat of removal. He submits that he has lived with his mother in the United Kingdom since his birth. If the applicant remains in the United Kingdom, he will probably be placed in local authority care. In this event his family life with his mother will be severed, as there is no provision in the United Kingdom's Immigration Rules which would entitle her to return to the United Kingdom to join her son at any stage in the

future. The applicant complains that it is unreasonable to expect him to live in prolonged exile from the United Kingdom because of the irregular immigration position of his mother. It is submitted that his British citizenship gives him the right to reside in the United Kingdom and that his proposed removal is contrary to the spirit of the general principles of international law which forbid the use of exile in any form. It is alleged that the applicant's right to respect for family and private life is not outweighed in this case by the United Kingdom government's need to maintain immigration control. The applicant submits that the proposed permanent exclusion of his mother and by consequence his forced exile render the decision disproportionate.

The applicant invokes Article 2 of Protocol No. 1 of the Convention. He submits that if he is removed to Colombia, he will be deprived of education in British schools and will be unable to afford education of a similar standard in Colombia. If, when he is of an age to return, he does so it is doubtful that he will qualify to attend university.

The applicant invokes Article 13 of the Convention in that there is no effective remedy in respect of the removal. He submits, finally, in respect of Article 14, that he is being discriminated against as a result of his status as the child of foreign parents.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 12 May 1994 and registered on 22 June 1994.

On 22 February 1995, the Commission decided to communicate the application to the respondent Government, pursuant to Rule 48 para. 2 (b) of the Rules of Procedure.

The Government's written observations were submitted on 28 April 1995. The applicant replied on 22 June 1995.

On 17 October 1995, the Plenary Commission decided to transfer the case to it from the First Chamber.

THE LAW

1. The applicant complains that the threatened removal of his mother to Colombia is in violation of Article 3 (Art. 3) of the Convention since he will either be obliged to accompany her or, if he remains in the United Kingdom, be separated from his mother.

Article 3 (Art. 3) provides:

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

The case-law of the Convention organs establishes that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 (Art. 3). The assessment of that minimum is relative and depends on all the circumstances of the case, such as the duration of the treatment and its physical or mental effects (see eg. Eur. Court H. R., Ireland v. the United Kingdom, judgment of 18 January 1978, Series A no. 25, p. 65, para. 162).

The Commission recalls that the applicant's mother M. is a Colombian citizen who lived in Colombia before her arrival in the United Kingdom. The Commission notes M.'s fear that her son may be drawn into the criminal world as a result of renewed contact with his father if he goes to Colombia, and of her concern that the applicant will miss out on all the benefits which he is entitled to by virtue of his British citizenship. Nevertheless the Commission recalls that the applicant is at present four years' old and that his mother's family

still reside in Colombia. The Commission does not consider that the possibility of accompanying his mother to her country of origin exposes the applicant to the risk of treatment, physical or mental, which would fall within the scope of Article 3 (Art. 3).

If, on his mother's departure, the applicant in fact remained in the United Kingdom, the Commission notes that this would be as the result of arrangements pursued on his behalf with the apparent approval of his mother. The Commission does not consider that in the circumstances of the case the resulting separation from his mother would reveal treatment contrary to Article 3 (Art. 3) of the Convention, given that the applicant had the possibility of accompanying her.

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

2. The applicant complains that he will be required to leave the country of which he is a citizen and in which he has the right to reside as a result of the proposed removal of his mother. Alternatively, he submits that by remaining in the United Kingdom he will have to suffer being permanently separated from his mother. Either way he claims that his right to respect for his family and private life is infringed.

Article 8 (Art. 8) of the Convention provides as relevant:

> "1. Everyone has the right to respect for his private and family life...
>
> 2. There shall be no interference by a public authority with the exercise of this right except 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 applicant claims that he is being constructively exiled from the United Kingdom. The Commission notes that the United Kingdom has not ratified Protocol No. 4 (P4), which in Article 3 (Art. 3) provides that no-one shall be expelled from the territory of a State in which he is a national. The Commission may therefore only examine the extent to which the removal of the applicant's mother could affect the applicant's right to family or private life under Article 8 (Art. 8) of the Convention.

The Government refer to previous case-law to the effect that there is no breach of Article 8 (Art. 8) if it is reasonable for the family unit to be maintained abroad. This must also be the position where children are involved. The Government submit it would be reasonable to expect the applicant to follow his mother for the following reasons: he is young and can adapt, his mother is a Colombian citizen and they have no close family ties with anyone in the United Kingdom.

Even supposing there was any interference, the Government submit that the expulsion would be justified under the second paragraph having regard, inter alia, to his mother's bad immigration record and her dependence on public funds. Further, as regards alleged discrimination, the Government consider that a legitimate distinction is made between British citizens who have parents with the right to remain here and others who do not, a distinction justified by the need to maintain the integrity of the State's immigration policy. An effective remedy as required by Article 13 (Art. 13) of the Convention is furnished by the possibility of judicial review of the proposed expulsion.

The applicant seeks to distinguish the earlier Commission case-law. It is pointed out that the earlier decisions often involved alleged violations of the rights of the parent who was an illegal immigrant and that no detailed consideration was given to the child's rights. Also, previous cases concerned children who had acquired British citizenship by being born on British soil while their parents were both there illegally: in this case, pursuant to a change in legislation, the applicant obtained his citizenship by virtue of his birth in wedlock to his father who was a permanent legal resident of the United Kingdom.

In answer to the claim that it is reasonable to expect the applicant to follow his mother and that he is of an "adaptable age", the applicant argues that the question is rather whether it is reasonable for a Contracting State to expect its own citizen children, who have acquired that citizenship otherwise than by an accident of geography, to live in prolonged exile from the country of citizenship because of the irregular immigration position of the one parent who happens to have custody of them. As to justification and proportionality, the applicant states that he will be exposed to the criminal underworld with which his father has links and that while his mother's family are in Colombia, he has a close relationship with his paternal grandfather who is in the United Kingdom.

The applicant further submits that he is subject to an unjustifiable difference in treatment based on his status as a British citizen with a custodial parent with no right of abode in the United Kingdom and that, contrary to the Government's assertion, the possibility of judicial review, which allows only a limited examination of the Secretary of State's immigration decisions, does not provide the effective remedy required by Article 13 (Art. 13) of the Convention.

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 recalls that the State's obligation to admit to its territory aliens who are relatives 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 H.R., Abdulaziz, Cabales and Balkandali judgment of 28 May 1985, Series A no. 94, p. 94, para. 68). The Commission considers that this also 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 insurmountable obstacles in the way of the family living in the country of origin of one or more of them, whether there are factors of immigration control (eg. history of breaches of immigration law) or considerations of public order (eg. serious or persistent offences) weighing in favour of exclusion (see eg. Nos. 9285/81, Dec. 6.7.82, D.R. 29, p. 205 and 11970/86, Dec. 13.7.87, unpublished).

In the present case, the applicant is nearly four years old, young enough to adapt to the change in environment. The Commission is of the opinion that there are no insurmountable obstacles which prevent him from accompanying his mother to Colombia when she returns. It recalls that the applicant's mother entered without the necessary permission and that her family lives in Colombia. With reference to

the possibility that the applicant remain in the United Kingdom, the Commission finds that if this occurred it would be as the result of arrangements undertaken on his behalf and of which his mother apparently approves.

While the applicant has argued that weight should be given to his British citizenship, the Commission notes that in previous cases the factor of the 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 country). While, as the applicant points out, the children in that case had obtained British citizenship by ius soli whereas he derived his citizenship by ius sanguinis through his father, the Commission does not find that to be a material distinction where the child nonetheless is of an adaptable age and there are no effective obstacles to his accompanying his mother.

In short, the Commission finds that there are no elements concerning respect for family or private life which in this case outweigh the valid considerations relating to the proper enforcement of immigration controls. The proposed removal accordingly does not exhibit a lack of respect for the applicant's rights to family or private life as guaranteed by Article 8 para. 1 (Art. 8-1) of the Convention.

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 applicant submits that he will be deprived of his right to a British education and will receive an inferior education in Colombia if he accompanies his mother.

Article 2 of Protocol No. 1 (P1-2) of the Convention provides as relevant:

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

The Commission notes its findings above and finds that the applicant's departure from the United Kingdom to accompany his mother 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.

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

4. The applicant complains that he is being discriminated against contrary to Article 14 (Art. 14) of the Convention which provides:

> "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."

As regards alleged discrimination, the Government consider that a legitimate distinction is made between British citizens who have parents with the right to remain in the United Kingdom and others who do not, a distinction justified by the need to maintain the integrity of the State's immigration policy.

The applicant submits that, since as a minor British citizen with a non-national custodial parent he is effectively being deprived of his right to remain in the United Kingdom, he is the victim of a difference

of treatment which has no objective justification.

However, even assuming that the applicant can be said to be in a comparable position as regards other British minors who are in a different situation in respect of their parents, the Commission recalls that whether a difference in treatment constitutes discrimination in the sense of Article 14 (Art. 14) of the Convention depends on whether or not 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 H.R., Lithgow and Others judgment of 8 July 1986, Series A no. 102, 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 applicant's mother was in breach of immigration regulations and that there are no obstacles preventing the applicant, who is of an adaptable age, from continuing his family and private life with his mother in Colombia. The Commission consequently finds that the proposed measure of deportation of the applicant's mother, which will require the 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. Finally, the applicant also invokes Article 13 (Art. 13) of the Convention, which provides that:

> "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 however 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 H.R., Boyle and Rice judgment of 27 April 1988, Series A no. 131, p. 23, para. 52).

The Commission finds that the applicant cannot be said, in light of its findings above, to have an "arguable claim" of a violation of his 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 by a majority

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Commission	President of the Commission
(H.C. KRÜGER)	(S. TRECHSEL)