AS TO THE ADMISSIBILITY OF

Application No. 28021/95
by Rehmet KHAN
against the United Kingdom

The European Commission of Human Rights (First Chamber) sitting in private on 27 November 1996, the following members being present:

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

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 7 July 1995 by Rehmet KHAN against the United Kingdom and registered on 25 July 1995 under file No. 28021/95;

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 applicant is a Pakistani national, born in the Khaiyan District of Pakistan in about 1945. At the time of the application he was incarcerated in Strangeways Prison, Manchester awaiting deportation, but has now been deported. The applicant is represented before the Commission by Malik Adams Solicitors. The facts as submitted by the applicant can be summarised as follows.

The applicant entered the United Kingdom some time in 1990 with a six month visitor's visa. In December 1990 he applied for political asylum on the basis that members of his family were actively engaged in the Pakistan People's Party ("PPP") and that he feared further persecution as a result of their activities. He contended that he had been subjected to physical and psychological torture and had been imprisoned on numerous occasions by the Pakistani authorities. He stated that his wife and uncle were tortured and murdered in political circumstances and that he feared for his life should he return to Pakistan. His application was acknowledged by the Immigration and Nationality Department by letter dated 7 January 1991 giving him reference number K424842. On 10 January 1991, the Immigration and Nationality Department wrote to Rochdale Pakistani Welfare Association, which was dealing with the applicant's case, asking for further details so that his application for asylum could be processed.

In March/April 1994 the applicant wrote to the Home Office requesting permission to take up employment and was informed that there

was no legal prohibition preventing him from doing so. On 12 May 1994 he was allocated a national insurance number and began part time employment.

On 27 October 1994 the applicant was detained and interviewed by the immigration authorities. He was issued with a notice from the Immigration Officer in the following terms:

> "I have considered all the information available to me and I am satisfied that you are an illegal entrant as defined in Section 33(1) of the Immigration Act 1971.
> A. You are therefore a person who is liable to be detained pending the completion of arrangements for dealing with you under the Act* I propose to give directions for your removal from the United Kingdom in due course and details will be given to you separately.
> B. I hereby authorise your detention in police cells/Group 4.
> * paragraph 16 of Schedule 2 to the Act"

The applicant commenced habeas corpus proceedings on 1 November 1994. On 11 November 1994 leave was granted for a full hearing of the writ and a hearing date was fixed for 24 November 1994. That date was vacated by agreement between the parties and the hearing eventually took place on 19 December 1994. On 16 January 1995 judgment was given in favour of the applicant, the Judge ordering his release. The Secretary of State and the Immigration Officer appealed that decision and the matter was heard before the Court of Appeal on 20 January 1995. On 3 February 1995 the Court of Appeal allowed the appeal and overturned the decision of the Court below. On 4 July 1995 the House of Lords refused leave to appeal.

By a letter dated simply "November 1994", the Secretary of State refused the applicant's application for asylum. The applicant appealed against the refusal of the Secretary of State to grant him asylum on 12 October 1995. On 17 April 1996, the day before the hearing before the adjudicator, the applicant's representative applied for an adjournment of the hearing. It was refused on the basis that conflicting reasons had been given for it and it was not therefore considered a genuine application. The hearing before the adjudicator therefore took place on 18 April 1996 in the absence of both the applicant and his representative. On 26 April 1996 the adjudicator dismissed the applicant's appeal against that decision. The adjudicator concluded the following:

> "Overall, this case appears to relate to a series of civil issues between the appellant and members of the village community where he was living in Pakistan. It does not in my view reach the status of that of a person seeking Political Asylum.....I have considered carefully the points set out in the grounds of appeal submitted on behalf of the appellant but I do not feel that these change in any way the decision which I reach concurring with that of the Secretary of State."

On 10 May 1996 the Immigration Appeal Tribunal refused leave to appeal from the decision of the adjudicator. The Tribunal held that the adjudicator had been entitled to proceed in the circumstances, that he had considered all the evidence, that he had properly directed himself as to the proper standard of proof, that he had come to clear findings of fact giving to each element of the evidence the weight he considered appropriate and that his conclusions were fully supported by the evidence. On 13 May 1996 the applicant was notified of that decision.

The applicant's representative stated that the applicant was liable to be deported on the expiry of 28 days after 21 May 1996. The applicant was deported on 25 July 1996.

COMPLAINTS

1. The applicant complained that his deportation to Pakistan would expose him to a risk of inhuman and degrading treatment within the meaning of Article 3 of the Convention.

2. The applicant submits that his detention in the United Kingdom pending the determination of his application for asylum, and following his experiences of torture and imprisonment whilst in Pakistan, constituted inhuman and degrading treatment within the meaning of Article 3 of the Convention.

3. The applicant complains that he was deprived of his right to liberty as guaranteed by Article 5 of the Convention, his detention not falling within any of exceptions set out in Article 5 paragraph 1(a)-(f). As regards Article 5 para. 1(f), the applicant submits that he was a refugee seeking political asylum and that his application was still under consideration when he was detained. As such, he submits that no action in relation to deportation or extradition was pending against him and his detention could not therefore fall within Article 5 para. 1(f).

4. The applicant contends that if his arrest and detention is found to fall within the scope of Article 5 para. 1(c), which he denies, he was deprived of his rights under Article 5 para. 3. He submits that he was arrested and detained by reason of an administrative decision and that no tribunal held jurisdiction to determine the matter on which he had allegedly been arrested. He contends that the authorities did not intend to bring him before a Judge or judicial officer authorised by law to exercise judicial power.

5. The applicant also complains that he was detained from 27 October 1994 to 15 January 1995 and that the lawfulness of his detention was not therefore determined speedily within the meaning of Article 5 para. 4 of the Convention.

6. The applicant further complains that he has been deprived of his right to compensation under Article 5 para. 5 in respect of the alleged violations of Article 5 paras. 1-4 referred to above

7. The applicant invokes Article 6, submitting that because he was not charged with any criminal offence, but detained as a result of an administrative act, he was deprived of all the rights guaranteed in Article 6. Further, he submits that by virtue of the arbitrary nature of the decision he must have been presumed guilty, contrary to Article 6 para. 2 of the Convention.

THE LAW

1. The applicant complained that his deportation to Pakistan would expose him to inhuman and degrading treatment within the meaning of Article 3 (Art. 3), which provides as follows.

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

The Commission recalls that according to the case law of the Convention organs, the Convention does not guarantee an alien the right to reside in a particular country . However, 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 subjected to torture or to inhuman or degrading treatment or punishment in the country to which he 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 observes that the applicant claimed that he was at risk of being subjected to torture or inhuman and degrading treatment because members of his family were active in the Pakistan People's Party ("the PPP"). The Commission observes that since the applicant entered the United Kingdom in 1990, the PPP has been returned to power in Pakistan. In view of this fact and the fact that the applicant has provided no further grounds for believing that he was or is under a continued threat of suffering harm on his return to Pakistan, the Commission considers that the applicant has not shown substantial grounds for believing that he was exposed to a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 3 (Art. 3) of the Convention on his return to Pakistan in July 1996.

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 applicant further complains under Article 3 (Art. 3) that his detention pending deportation to Pakistan constituted inhuman and degrading treatment.

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 e.g. Eur. Court H.R., Ireland v. The United Kingdom judgment of 18 January 1978, Series A no. 25, p. 65, para. 162).

The Commission notes that the applicant was refused asylum some time in November 1994, that is within a month of his detention. It is unable from the information supplied to know exactly how long the applicant was detained before his application for asylum was refused. However, the Commission notes that the applicant has not alleged or shown that he suffered inhuman or degrading treatment in the course of detention, but claims only that detention pending the outcome of his application for asylum was in itself inhuman and degrading. The Commission considers that without more, such treatment cannot be regarded as reaching the threshold required to establish inhuman and degrading treatment under Article 3 (Art. 3) of the Convention.

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

3. The applicant complains that he was deprived of his liberty contrary to Article 5 (Art. 5) of the Convention. Article 5 (Art. 5) provides so far as relevant.

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> f. the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to

deportation or extradition.

2. ...

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

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

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

The Commission recalls that the exception provided by Article 5 para 1(f) (Art. 5-1-f) extends to cover circumstances in which an individual, originally detained with a view to deportation, challenges the decision to deport or claims asylum and is kept in detention pending the outcome of that challenge or claim (see Eur. Court HR, Chahal v. United Kingdom judgment of 15 November 1996, para. 112 (Reports 1996)).

The Commission notes that the applicant was served with a deportation notice on 27 October 1994, on which date he was detained. The Commission therefore considers that, in principle, the applicant has been lawfully detained under Article 5 para. 1 (f) (Art. 5-1-f) of the Convention as a "person against whom action is being taken with a view to deportation".

The Commission recalls that detention pending deportation may be rendered unlawful if the deportation proceedings are not conducted with the requisite diligence (cf. Eur. Court H.R., Kolompar v. Belgium judgment of 24 September 1992, Series A no. 235, p. 55, para. 36, Application No. 7317/75, D.R. 6 p. 141).

In that regard the Commission observes that the applicant has been detained since 27 October 1994, when he was served with a notice of intention to deport, making a total period of detention of over 20 months, with a period of liberty of 18 days between 18 January 1995 and 3 February 1995.

In determining whether the total period of detention is such as to render the detention unlawful within the meaning of Article 5 para. 1(f) (Art. 5-1-f) the Commission considers the following facts to be relevant:

(a) The applicant was informed of the decision of the Secretary of State to refuse him asylum some time in November 1994, that is within a month of his being detained.

(b) The applicant commenced habeas corpus proceedings on 1 November 1994 pursuant to which he was released on 16 January 1995 for 18 days, having been successful at first instance but the decision having been overturned on appeal. The proceedings were only finally determined on 4 July 1995 when the House of Lords refused leave to appeal. Under domestic law, deportation could not take place while habeas corpus proceedings were outstanding.

(c) From 12 October 1995 until 13 May 1996 the applicant was detained pending the determination of his appeal against the decision of

the Secretary of State to refuse him asylum ("the asylum proceedings"). The applicant could have commenced the asylum proceedings as early as November 1994, that is at the same time the habeas corpus proceedings were being pursued, but waited until October 1995 to do so.

The Commission finds that a total period of 20 months elapsed before the applicant was deported, for the greater part of which period he was detained. However, during eight of those months habeas corpus proceedings were pending (1 November 1994 to 4 July 1995), during a further seven months asylum proceedings were pending (12 October 1995 to 13 May 1996), and during eighteen days of that period the applicant was at liberty.

The Commission does not consider that the length of the two sets of proceedings referred to above to have been unreasonably long or that the State can be expected to have carried out the deportation of the applicant while they were still pending.

Having regard to these circumstances the Commission considers that the overall length of proceedings was partly caused by the applicant's own conduct of the matter and that there is no appearance of any lack of diligence on the part of the authorities in handling the applicant's case (see No. 8081/77, Dec. 12.12.77, D.R. 12 p. 207).

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.

4. As regards the applicant's complaint that he has been deprived of his rights under Article 5 para. 3 (Art. 5-3) of the Convention, the Commission recalls that these rights only relate to detention within the meaning of Article 5 para. 1(c) (Art. 5-1-c) of the Convention. The Commission notes that the applicant was detained for the purposes of deportation and not with a view to bringing him before a competent legal authority on reasonable suspicion of his having committed an offence or to prevent his committing an offence or fleeing after having done so. The Commission does not therefore consider that the applicant's detention fell within Article 5 para. 1(c) (Art. 5-1-c) and Article 5 para. 3 (Art. 5-3) is therefore not applicable in the circumstances of this case.

This part of the complaint must therefore also be dismissed as manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

5. The applicant further complains under Article 5 para. 4 (Art. 5-4) that he was detained from 27 October 1994 until 16 January 1995 and that the lawfulness of his detention was not therefore determined speedily within the meaning of Article 5 para. 4 (Art. 5-4).

The Commission notes that the applicant commenced habeas corpus proceedings on 1 November 1994 and was heard by the Court on 11 November 1994 when leave was granted for a full hearing of the writ. The matter was adjourned to 24 November 1994 and then again to 15 December 1994 by agreement of the parties, on which date it was consolidated with the applications of two other asylum seekers (see. Nos. 28022/95, 28023/95). A full hearing took place on 19 December 1994. Judgment was given in favour of the applicant on 16 January 1995 when the applicant was released. On 20 January 1995 the matter came before the Court of Appeal and on 3 February 1995 the appeal of the Secretary of State was allowed pursuant to which the applicant was again detained.

The Commission considers that the initial delays in the hearing of the habeas corpus application were caused by decisions of the applicant or his representatives. Further, the Commission observes

that the basis for the applicant's habeas corpus application was that it was unlawful to detain asylum seekers pending the outcome of their asylum applications. The question raised complex issues of domestic and international law, the outcome of which would have affected the position of all asylum seekers held in detention, indeed, had it been upheld, it would have led to the release of all asylum seekers detained pending the outcome of their applications. In the circumstances, the Commission does not consider that it was unreasonable for the judge to take time to determine the complex issues of law that had been raised. Indeed, the fact that his decision was overturned by the Court of Appeal supports the contention that the answer to the legal arguments raised was not clear cut. The Commission therefore considers that the delay in determining the lawfulness of the applicant's detention cannot, in the very particular circumstances of this case, be considered unreasonable.

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

6. Insofar as the applicant invokes Article 5 para. 5 (Art. 5-5) in respect of his complaints under Article 5 paras. 1 to 4 (Art. 5-1, 5-2, 5-3, 5-4), the Commission recalls that the right to compensation under this provision presupposes that a violation of one of the other paragraphs of Article 5 (Art. 5) has been established either by a domestic organ or by the Convention organs (see eg. No. 7950/77, Dec. 4.3.80, D.R. 19 p. 213). In the present case however, the Commission has found above that the applicant's complaints disclose no appearance of a violation of Article 5 paras. 1 to 4 (Art. 5-1, 5-2, 5-3, 5-4) of the Convention.

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

7. The applicant further complains that he was detained pursuant to a purely administrative act and was therefore deprived of all his rights under Article 6 (Art. 6). Article 6 (Art. 6), so far as relevant, provides as follows.

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

The Commission recalls its previous case law which establishes that Article 6 (Art. 6) is inapplicable to deportation proceedings since a decision as to whether an alien should be allowed to stay in a country is a discretionary act of a public authority and therefore of an administrative nature. The exercise of the discretionary powers of the immigration authorities or, as in this case, the Secretary of State, does not involve the determination of civil rights or obligations or of a criminal charge within the meaning of Article 6 (Art. 6) of the Convention (see No. 8118/77, Dec. 19.3.81, D.R. 25 p. 105, No. 9990/82, Dec. 15.5.84, D.R. 39 p. 119).

It follows that Article 6 (Art. 6) is not applicable in the present case and this part of the application must be dismissed as incompatible ratione materiae with the provisions of the Convention 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