AS TO THE ADMISSIBILITY OF

Application No. 26285/95
by Vida McKENZIE
against the United Kingdom

The European Commission of Human Rights (First Chamber) sitting in private on 9 April 1997, the following members being present:

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

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 12 September 1994 by Vida McKENZIE against the United Kingdom and registered on 25 January 1995 under file No. 26285/95;

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 21 March 1996 and the observations in reply submitted by the applicant on 14 June 1996;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a Ghanaian citizen born in 1957 and resident in London. She was initially represented before the Commission by Ms Jennifer Horne-Roberts, a barrister practising in London and by Messrs Graham's Solicitors, London. As from 16 May 1996, the applicant is represented by K.D. Peiris & Co. Solicitors, London.

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

On 26 August 1980, the applicant arrived in the United Kingdom as a visitor with leave to stay one month.

On 22 November 1983, notice of intention to deport the applicant

was served on her last known address but was returned undelivered.

On 3 April 1984, the applicant married D.M., a British citizen. On 31 August 1984, she applied for leave to remain on the basis of her marriage. She failed, however, to respond to invitations from the immigration authorities for an interview in connection with her application.

By letter of 23 August 1985, the immigration authorities informed the applicant's solicitor of the notice of 22 November 1983, that the Secretary of State could make a deportation order against the applicant and that, unless she would contact the Immigration Department for a review of her case, consideration would be given to enforcing her departure.

At some point in time in 1985, the applicant's marriage broke down and the applicant and D.M. separated.

On 31 December 1985, a deportation order was signed in relation to the applicant. Attempts to locate her, however, remained unsuccessful.

In early 1986, the applicant met O.A., a Ghanaian man settled in the United Kingdom. The applicant and O.A. had two children, K. born on 21 June 1987 and Y. born on 24 November 1988. O.A. had regular contact with the children and contributed towards their maintenance.

On 22 October 1992, the applicant applied for indefinite leave to remain in the United Kingdom based on the length of her stay in the United Kingdom. This was rejected on 29 June 1993 and a notice of directions for removal was issued.

The applicant's appeal, which concerned only the directions as to removal, was heard by the Adjudicator on 27 October 1993. The appeal was rejected on 6 January 1994 and removal directions were set for 4 January 1995.

The applicant instituted judicial review proceedings of the decision to remove her, in which reference was made to Article 8 of the Convention and the compassionate circumstances arising out of the situation of the family and the children's contact with their father. Leave to apply for judicial review was refused by the Divisional Court on 15 April 1994, which held that it was not arguable that the decision to remove was unlawful and that irrationality and other matters relevant to judicial review did not arise in this case. The renewed application to the Court of Appeal was rejected on 18 July 1994.

By letter dated 29 November 1994, the Secretary of State declined to alter his decision in the absence of any new or compelling circumstances.

Directions for the applicant's removal from the United Kingdom were set for 23 July 1995 and, most recently, for 5 January 1996.

The applicant works as a nursing home assistant and her children attend schools locally. Their father has regular contact with them, collecting them from school when his work permits and the children occasionally stay with him over holidays.

COMPLAINTS

The applicant invokes Article 8 of the Convention in respect of the proposed removal on her own behalf and on behalf of her children. She has lived in the United Kingdom for over 14 years, her children have been born there and lived their entire lives there. She submits that she has no remaining relatives or contacts in Ghana and that if

removed, her daughters will be deprived of contact with their father and it will difficult to enforce or arrange financial support from him. He generally provides £100 per month towards the children's upkeep. The applicant refers to the principle that contact between a father and children should be maintained, which principle should apply irrespective of their status as having been born in or out of wedlock.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 12 September 1994.

On 21 October 1994, the President declined to indicate measures to the United Kingdom regarding the proposed removal of the applicant pursuant to Rule 36 of the Commission's Rules of Procedure.

The application was registered on 25 January 1995.

On 29 November 1995 the Commission decided to communicate the application to the respondent Government, requesting the Government to submit their written observations on the admissibility and merits of the case.

The Government's observations were submitted on 21 March 1996 after an extensions of the time-limit fixed for this purpose. The applicant's observations in reply were submitted on 14 June 1996 after also after an extensions of the time-limit.

On 10 September 1996, the Commission granted the applicant legal aid.

THE LAW

1. The applicant complains that the decision to deport her constitutes an unjustified interference with the right to respect for their family life within the meaning of Article 8 (Art. 8) of the Convention as regards herself as well as her children.

Article 8 (Art. 8) of the Convention 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 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 applies to cases where children are concerned. The Government point out that the applicant's children have no right to remain in the United Kingdom and are, like the applicant, liable to deportation.

The Government are of the opinion that it is not unreasonable to expect the applicant and her children to continue their family life in Ghana. They submit in this respect that the children are young, of an adaptable age and that, according to information provided by the applicant's representative by letter of 13 January 1993 to the immigration authorities, the applicant's mother and two of her sisters live in Ghana.

The Government further submit that the father of the applicant's children does not form part of the applicant's family unit in that he does not live with them, that at present there are ad hoc arrangements in place regarding his access to the children and that his position regarding future contact with his children has been always precarious as he and the applicant had the children at a time when they were fully aware that a decision to deport the applicant had been taken.

The Government finally submit that, insofar as there is family life between the father and the applicant's children, their family life can be continued after the applicant's deportation in the absence of any substantiated obstacles to the father's rejoining his children in Ghana and as there are no reasons why the applicant's children could not apply for entry clearance as visitors to the United Kingdom. As regards the father's voluntary financial support for his children, the Government see no reason why this could not continue when the children would reside in Ghana.

The applicant submits that it is not reasonable to expect her and her children to live in Ghana. In her opinion, there are elements concerning respect for family or private life which outweigh all and any valid consideration relating to the proper enforcement of immigration controls. She submits that throughout her stay in the United Kingdom she has been employed whilst there is no likelihood for her to be able to earn a living in Ghana sufficient to support her and her children, even with the continued support of the children's father.

The applicant argues that her children's interests have insufficiently been considered in her case, as their regular and substantial contacts with their father would be effectively terminated by their departure from the United Kingdom upon the applicant's deportation. Neither parent has the resources to enable the children to visit their father in the United Kingdom or the father to visit his children in Ghana.

According to the applicant there are insurmountable obstacles in the way of the family living in Ghana. The father of her children is employed in the United Kingdom and there is no realistic prospect of his obtaining any employment in Ghana. He has furthermore other contacts and commitments in the United Kingdom impeding him from leaving that country.

The Commission recalls its established case-law that, although 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 or her close relatives reside or have the right to reside (cf. 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. 14852/89, Dec. 7.4.93, D.R. 74, p. 29).

However, the Commission further recalls that the State's obligation to admit to its territory alien relatives of settled immigrants will vary according to the particular circumstances of the persons involved and the general interest. The Court has held that, as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory and that, where immigration is concerned, 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. the United Kingdom judgment of 28 May 1985, Series A no. 94, p. 94, para. 68 and Ahmut v. the Netherlands judgment of 28 November 1996, to be published in Reports 1996, para. 67).

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 (cf. No. 9285/81, Dec. 6.7.82, D.R. 29, p. 205; No. 11970/86, Dec. 13.7.87 unpublished; No. 23938/94, Dec. 23.10.95, unpublished and No. 26985/95, Dec. 15.5.96, unpublished).

The Commission notes that the applicant and her children are not British citizens and cannot claim any right to remain in the United Kingdom under the relevant domestic immigration rules. The applicant first entered the United Kingdom in 1980 with permission to remain for one month only. She was refused leave to remain in the United Kingdom and a deportation order was issued on 31 December 1985.

The applicant's two children, who are eight and nine years old, are likely to follow her mother on removal. As a result they may have to leave the society where they were born and face certain economic hardships and the difficulties of living in a country that is new to them. The Commission considers that the applicant's children can be expected to be able to adapt to the change in environment, in view of their young age and the cultural background of their parents. The Commission recalls that the applicant is an overstayer and its findings as to her deportation set out above. The Commission further recalls that in previous cases it did not find it incompatible with Article 8 (Art. 8) of the Convention to expect children of unlawful overstayers to follow their parents even if these children had acquired theoretical rights of abode in the deporting country (cf. No. 23938/94, Dec. 23.10.95, unpublished and No. 24865/94, Dec. 23.10.95, unpublished).

While it is true that the applicant has found employment in the United Kingdom and that the father of her children resides there, the Commission considers, in the light of the case law referred to above, that the applicant's deportation cannot be considered to be an interference in her family or private life.

As regards the links between the applicant's children and their father, the Commission accepts that this link constitutes "family life" within the meaning of Article 8 para. 1 (Art. 8-1) of the Convention.

The Commission notes that, although no formal arrangements in this respect have been made, there are regular contacts between the children and their father. These contacts would be rendered difficult in the likely situation that the children will accompany their mother. However, the Commission considers that this situation flows from a choice exercised by the children's parents rather than from any direct interference by the State with these links. In this respect, the Commission notes that, already before she met the children's father in early 1986, the applicant had failed to respond to several invitations from the immigration authorities and, in view of the contents of the letter of 23 August 1985 from the immigration auhtorities to her solicitor, must be considered as having been informed of the consequences of this failure. Unlike the situation in the Berrehab case (Eur. Court HR, Berrehab v. the Netherlands judgment of 21 June 1988, Series A no. 138), the father must accordingly be taken to have been aware of the applicant's precarious immigration status and the probable consequential effects on his relation with any children resulting from a relationship with her of the enforcement of the deportation order (cf. No. 26985/95, Dec. 15.5.96, unpublished). The Commission does not find it established that it is impossible for the father to remain in contact with his children abroad.

In these circumstances, the Commission finds that there are no

elements concerning family or private life which in this case outweigh the valid considerations relating to the proper enforcement of immigration controls. It concludes that the applicant's deportation does not disclose a lack of respect for 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.

2. The applicant further complains under Article 14 of the Convention in conjunction with Article 8 (Art. 14+8) of the Convention of a discriminatory difference in treatment in the application of immigration measures as regards children born in and out of wedlock.

Article 14 (Art. 14) of the Convention 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."

The Commission notes at the outset that the applicant's deportation was ordered before she gave birth to her children and that, consequently, the status of her children cannot be regarded as having influenced this decision.

Insofar as this complaint may be understood as relating to a request for leave to remain by the applicant's children, the Commission finds no indication that such a request has in fact ever been made.

Even assuming that such a request has been made and rejected, 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. the United Kingdom judgment of 8 July 1986, Series A no. 192, pp. 66-67, para. 177).

The Commission notes that the alleged discriminatory difference in treatment between children born in and out of wedlock as regards the application of immigration measures has remained unsubstantiated.

In these circumstances, and recalling that Article 8 (Art. 8) of the Convention does not guarantee a right to choose the most suitable place to develop family life (Eur. Court HR, Ahmut v. the Netherlands judgment of 28 November 1996, to be published in Reports 1996, para. 71), the Commission finds that the facts of the case do not disclose a discriminatory difference in treatment contrary to Article 14 (Art. 14) of the Convention.

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.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

M.F. BUQUICCHIO
Secretary
to the First Chamber

J. LIDDY
President
of the First Chamber