AS TO THE ADMISSIBILITY OF

Application No. 13669/88
by D. and E. S.
against the United Kingdom

The European Commission of Human Rights sitting in private on 7 March 1990, the following members being present:

MM. C.A. NØRGAARD, President
J.A. FROWEIN
S. TRECHSEL
F. ERMACORA
G. SPERDUTI
E. BUSUTTIL
A. WEITZEL
J.C. SOYER
H. DANELIUS
G. BATLINER
H. VANDENBERGHE
Sir Basil HALL
MM. F. MARTINEZ
C.L. ROZAKIS
Mrs. J. LIDDY
Mr. L. LOUCAIDES

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 20 January 1988 by D. and E. S. against the United Kingdom and registered on 16 March 1988 under file No. 13669/88;

Having regard to the reports provided for in Rule 40 of the Rules of Procedure of the Commission;

Having regard to the written observations submitted by the respondent Government on 9 May 1989 and by the applicants on 24 August 1989;

Having regard to the submissions made at the oral hearing on 7 March 1990;

Having deliberated;

Decides as follows:

THE FACTS

The applicants, who are brothers, are citizens of the United Kingdom and were born in New York in 1952 and 1955 respectively. They are resident in London. The facts of the case, as submitted by the parties, may be summarised as follows.

On 24 April 1986, the applicants were sentenced to six years and four and a half years imprisonment respectively. They are both members of a group known as Orthodox Jews who do not accept the authority of the Chief Rabbi. They adhere strictly to Jewish dietary laws which require that only Kosher food is eaten and that the food be prepared, cooked and served in a prescribed manner. Jews of other groups observe the dietary requirements only partially or even reject

them completely. As far as is known there were three Orthodox Jews in prison in England and Wales during the period of the applicants' detention.

When first arriving in prison to serve their sentences, the applicants applied to follow the vegan diet provided. Since however the vegetables and pulses provided for in the vegan diet are often cooked together in the same pots with food for other diets, mixed in the same pots and margarines containing animal fats often substituted for Tomor margarine, the applicants were unable to eat the cooked items in the vegan diet. In a letter dated 4 August 1988, the catering officer recalled that on the applicants' arrival in Ford Prison the "Rabbi" had made a request for an oven to be set aside for the sole purpose of cooking Kosher food but stated that this had been impossible in view of the oven capacity. The applicants were therefore only able to eat the following items per week:

250 grams Kosher margarine,
4 ozs. peanuts,
2 litres soya milk,
180 grams sugar,
150 grams peanut butter,
112.5 grams Marmite,
approx. 50 grams dried assorted fruit,
2 eggs,
2 portions (bowls) cornflakes,
7 fresh fruits,
Black tea daily and black coffee at weekends.

In addition, the Society for the Welfare of Jewish Prisoners (SWJP), which in October 1986 was authorised by the Home Office to look after the religious and spiritual needs of strictly orthodox Jewish prisoners and which has acted on behalf of the applicants in respect of their dietary claims since the outset of their imprisonment, was permitted to supply to the applicants a litre of grape juice and two large loaves of white bread every week for sacramental and religious purposes on the Sabbath.

The applicants also received special food for the celebration of the Passover and other festivals and were allowed to visit a synagogue for services once per month on which occasion the SWJP provided an evening meal of soup from a flask, cold meat, salad and fresh fruit.

Throughout the period of the applicants' detention, the SWJP has indicated that it is prepared to supply to all strictly orthodox Jewish prisoners Kosher food identical in content to that received by other prisoners at no cost to the prison authorities, to supply freezers and any other equipment necessary for this purpose and, furthermore, to meet any additional staff costs incurred. The food supplied would have consisted mainly of two pre-packed frozen meals per day, together with Kosher bread and Kosher milk. The SWJP had been able to supply Kosher food to an orthodox prisoner at Finnamore Wood (a young offenders institution) where the catering officer accepted delivery of a freezer from the SWJP and weekly deliveries of pre-packed food and grape juice. The SWJP was not allowed to carry out a similar arrangement in respect of the applicants.

A Home Office Working Party which was reviewing the overall question of diets for Jewish prisoners considered the SWJP's proposals in 1987. The Working Party concluded however that the provision on a regular basis of full Kosher diets for Jewish prisoners was not practicable. In a letter to the SWJP dated 27 July 1987, the Home Office explained its policy as follows:

"The most important point to make is that although the issue of kosher food was originally raised in the context of

> provision only for ultra-orthodox Jewish prisoners, we came to the conclusion that it would not be realistic to seek to limit any facility to individuals amongst the Jewish prison population who were identified by certain rabbis as requiring special treatment. Although most of the 300 or so Jewish prisoners in the system at the moment may be prepared to accept the existing position on diet, that is not to say that they would not wish to have a kosher diet were one available. We do not think that it would be in keeping with a declared policy of equality of opportunity to discriminate between members of a particular faith in the level of provision offered, by reference to degrees of orthodoxy or on any other similar ground. Any solution to the problems caused by the strict requirements of a particular small sub-set of Jews in custody must be capable of extension to the whole of the Jewish inmate population. But that, as you will appreciate, puts a different complexion on the whole issue. Arrangements which might be relatively cost-free where only a handful of prisoners were concerned would inevitably not be so if introduced on a wider scale, both on the catering side and in terms of other incidental costs, for example to provide the level of supervision necessary to maintain security. Additionally, we have to look at the provision of facilities for particular minority groups within the broader context of the Department's responsibilities towards the prison population as a whole. We do not have the resources to meet in full all the needs of all the religious groups we have to cater for. The most equitable approach, and the one which has traditionally guided our policy, is to seek to provide a roughly equivalent level of provision. As you will, I hope, understand, any decision to make special arrangements for one individual group within the system can have implications for the treatment of other prisoners, and we need not only to ensure that there are no perceived inequalities between groups but also to be alert to the possibility that the diversion of resources to meet a minority interest may be detrimental to the welfare of prisoners generally.
> In the light of these considerations, at present we see no option but to continue making provision for Jewish prisoners on the basis of a pork-less diet using kosher margarine or, if non-kosher meat is unacceptable, a vegetarian or vegan diet. We did look closely at whether it would be possible to provide an enhanced diet by supplying kosher milk and cheese but, on examination, costs were high relative to any likely benefit and since the substitution of dairy products would not, in any case, satisfy the strict requirements of the ultra-orthodox, it did not seem to offer a solution to the problem."

On 30 September 1988, the second applicant was released on parole. A letter from his doctor dated 16 June 1989 states that he is suffering from piles and an irritable bowel syndrome probably brought on by his not having kosher food supplied to him whilst in prison.

On 13 February 1989, the responsible Home Office Minister wrote to the Chief Rabbi Lord Jakobovits outlining an experimental scheme for the provision of kosher food at selected prison establishments:

> "Jewish prisoners may apply to the Governor of the establishment for the extended dietary provision.
> The Governor will satisfy himself as to the genuineness of the claim of long-standing orthodoxy usually by referring to the visiting Rabbi or the Jewish Visitation Committee.
> If satisfied on this point, the Governor will arrange with the Jewish Visitation Committee for the delivery

and installation of satisfactory storage facilities.
The Governor will inform the Jewish Visitation Committee of the menu and nutritional and hygiene requirements that need to be met during the trial period.
The Governor will satisfy himself as to the security arrangements for the preparation and delivery of the food.
There will be no added cost to the Prison Service."

This pilot scheme has or is about to be brought into effect. The details have been the subject of discussion between the Home Office and the Jewish Visitation Committee, who will be responsible for the preparation and supply of kosher food.

The first applicant was released from prison in October 1989.

RELEVANT DOMESTIC LAW AND PRACTICE

a) The prison regime

The prison system in England and Wales is governed by the Prison Act 1952 (hereinafter referred to as "the 1952 Act"). All prisoners in England and Wales are under the control of the Secretary of State, who is responsible for the general administration of prisoners (sections 1 and 4 of the 1952 Act).

Section 47(1) of the 1952 Act empowers the Secretary of State to "make rules for the regulation and management of prisons ... and for the classification, treatment, employment, discipline and control of persons required to be detained therein". This power is exercisable by statutory instrument, a form of delegated legislation (section 52).

In the exercise of his powers under section 47 the Secretary of State has made the Prison Rules 1964 (S.I. 1964/388, as amended).

Rule 21 of the Prison Rules 1964 (as amended with effect from 1 March 1988) provides as follows:

"(2) Subject to any directions of the Secretary of State, no prisoner shall be allowed, except as authorised by the medical officer, to have any food other than that ordinarily provided.

(3) No prisoner shall be given less food than is ordinarily provided, except under an award of restricted diet or upon the written recommendation of the medical officer.

(4) The food provided shall be wholesome, nutritious, well prepared and served, reasonably varied and sufficient in quantity.

(5) The medical officer shall regularly inspect the food both before and after it is cooked, and shall report any deficiency or defect to the governor.

(6) In this Rule "food" includes drink."

b) Judicial review

The exercise by public authorities of statutory powers and duties is subject to review by the courts. In particular, an exercise of discretionary power may be challenged in judicial review proceedings on the grounds that the authority concerned has acted arbitrarily, in bad faith, unreasonably, for an improper purpose or otherwise outside its statutory powers (see, for example, the speech

of Lord Diplock in Council of Civil Service Unions v. Minister for the Civil Service <1985> Appeal Cases 374 at 410 and <1984> 3 All England Law Reports 935 at 950-951, as quoted in the Weeks judgment of 2 March 1987, Series A no. 114, p. 18, para. 30).

Examples of the courts adjudicating on the lawfulness of prisoners' treatment in the light of the statutory powers and duties of the prison authorities include the following. In the case of Raymond v. Honey (<1983> Appeal Cases 1 and <1982> 1 All England Law Reports 759), the House of Lords held that the English Prison Rules and the relevant Standing Orders would be ultra vires and invalid in so far as they purported to restrict a prisoner's right to unimpeded access to the courts since that right could only be taken away by express enactment. In R. v. Deputy Governor of Camphill Prison, ex parte King (<1984> 3 All England Law Reports 897), the Court of Appeal decided that a prison Governor's decision on disciplinary matters was not open to judicial review. The Court of Appeal explained that if a prisoner has a well-founded complaint that a Governor has misconstrued a Prison Rule the appropriate method to seek redress is to petition the Secretary of State inviting attention to the misconstruction, and then if the Secretary of State rejects the petition he may apply for judicial review of the Secretary of State's decision in the form of a declaration as to the correct construction (ibid., pp. 902, 904 and 905).

In R. v. Secretary of State for the Home Department, ex parte Simmons (The Times, 25.10.88), the High Court considered the argument of the applicant, a remand prisoner, that the Home Secretary in amending the Prison Rules to remove the privilege of remand prisoners to receive food from outside sources, acted perversely, disproportionately and unreasonably. The Court held in dismissing the application that while the Secretary of State must not act perversely in the making of prison rules, they found nothing perverse in the change complained of nor such lack of proportionality as would entitle a court to interfere.

COMPLAINTS

The applicants complain that the refusal of the prison authorities to facilitate the supply of an adequate Kosher diet in prison constitutes a violation of their right to freedom of religion, contrary to Article 9 of the Convention.

The applicants consider that the diet provided in the prison was not in conformity with their strictly orthodox faith, and that they were consequently being deprived of a wholesome, sufficient and nutritious diet solely on account of their religious beliefs.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 20 January 1988 and registered on 16 March 1988. On 14 December 1988, the Commission decided to invite the respondent Government to submit observations on the admissibility and merits of the applicants' complaints. The Government submitted their observations on 9 May 1989 and the applicants replied on 24 August 1989.

On 9 November 1989, the Commission decided in accordance with Rule 42 para. 3 (b) of the Rules of Procedure to hold an oral hearing.

On 16 February 1990, the Commission granted the applicants legal aid.

On 7 March 1990, the Commission held an oral hearing. The parties were represented as follows:

For the Government

Mr. M. WOOD, Agent, Foreign and Commonwealth Office
Mr. J. EADIE, Counsel
Mr. S. BRAMLEY, Adviser, Home Office
Mr. D. WRIGHT, Adviser, Home Office

For the applicants

Mr. E. TABACHNIK, Queen's Counsel
Mr. A. LYNCH, Counsel
Mr. M.A. VENITT, Society for the Welfare of Jewish Prisoners

The applicants were also present.

THE LAW

The applicants have complained that the refusal of the prison authorities to provide, or to allow the SWJP to provide them with a Kosher diet constitutes a violation of their right to freedom of religion contrary to Article 9 (Art. 9) of the Convention.

The respondent Government have contended however that the applicants have not exhausted domestic remedies in respect of their complaints since they did not apply for judicial review of the Secretary of State's decision not to provide additional facilities for Kosher food or to allow the SWJP to deliver Kosher food. The applicants have submitted that judicial review would not have constituted an effective remedy. They referred in this regard to the Simmons case, which was unsuccessful. They also submitted that there was no ground on which to base an application for judicial review, since the decision could not have been said to have been unreasonable, arbitrary or otherwise outside the legitimate scope of the Secretary of State's discretion.

The Commission recalls that Article 26 (Art. 26) of the Convention only requires the exhaustion of such remedies which relate to the breaches of the Convention alleged and at the same time can provide effective and sufficient redress. An applicant does not need to exercise remedies which, although theoretically of a nature to constitute a remedy, do not in reality offer any chance of redressing the alleged breach (cf. n° 9248/81, Dec. 10.10.83, D.R. 34, p. 78). It is however also established case-law that the existence of doubt as to the chances of success of a domestic remedy does not exempt an applicant from the obligation to exhaust (cf. n° 9559/81, Dec. 9.5.83, D.R. 33, p. 158).

The Commission notes in the present case that Rule 21(4) of the Prison Rules requires that the food provided to prisoners "shall be wholesome, nutritious, well prepared and served reasonably varied and sufficient in quantity". The applicants have stated that this should be interpreted as applying only in the context of Rule 21(2), that is, to the food ordinarily provided to prisoners and thereby excluding a Kosher diet. The Commission considers however that the duty of the Secretary of State to provide nutrition to prisoners could arguably be interpreted as requiring the taking into account of the special dietary requirements of prisoners and, further, that the reference to "food" in Rule 21(4) should be interpreted as a reference to food which prisoners are able to consume having regard to the existence of any impediment on religious or other grounds.

The Commission finds therefore that the applicants, who complained that as a result of the failure to provide Kosher food they were restricted to a limited and unbalanced diet, could have challenged the Secretary of State's decision in judicial review proceedings on the basis that he had misinterpreted and misapplied the relevant provisions governing the supply of food to prisoners. The fact that there may exist doubt whether the application would have

been successful does not, as stated above, affect the availability of the remedy for the purposes of Article 26 (Art. 26) of the Convention and the obligation to have recourse to it.

The Commission consequently finds that the applicants have not complied with the condition as to the exhaustion of domestic remedies and their application must in this respect be rejected under Article 27 para. 3 (Art. 27-3) of the Convention.

It follows that the application is manifestly ill-founded.

For these reasons, the Commission

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Commission	President of the Commission
(H.C. KRÜGER)	(C.A. NØRGAARD)