AS TO THE ADMISSIBILITY OF

Application No. 23938/94
by Jasmine SORABJEE
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.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
Mrs. G.H. THUNE
Mr. F. MARTINEZ
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
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 11 February 1994 by Jasmine SORABJEE against the United Kingdom and registered on 21 April 1994 under file No. 23938/94;

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 8 March 1995 and the observations in reply submitted by the applicant on 15 May 1995;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a British citizen born in 1992 and resident in Leicester. She 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.

In June 1989, the applicant's mother S., a Kenyan, married in Kenya D., a British citizen. A Hindu by birth and upbringing, her marriage to D who was a Parsi was regarded by her family as outside her caste and socio-religious group. S. entered the United Kingdom in April 1990 as a visitor without revealing to the Immigration Officer that her reason for coming to the United Kingdom was to join her husband. She had entered the United Kingdom on two previous occasions: in 1985 as a student and in 1989, also as visitor. She was convicted on two occasions of theft and fined £500 and given a two month suspended prison sentence.

On 2 March 1991, the decision was taken by the Secretary of State to remove S. as an illegal entrant.

On 26 March 1992, the applicant was born in the United Kingdom. She acquired the status of a British citizen by virtue of her birth in wedlock to her father, D., who was a British citizen.

In August 1992, S. and D. were divorced. D. originally denied paternity but finally accepted that DNA evidence proved otherwise.

On 21 December 1993, the High Court rejected the applicant's application for judicial review of the Secretary of State's decision.

On 14 February 1994, directions were issued for the removal of S.

Removal was deferred, pending further representations to the Secretary of State.

The applicant was diagnosed in or about June 1994 as suffering from a condition known as bilateral trigger thumb which means that she does not have the full use of her thumbs. She was placed under the care of a consultant who was monitoring whether in the absence of improvement surgery would be required.

In a letter dated 30 June 1994, the Home Office informed the Member of Parliament enquiring into the case that they were satisfied that if the applicant required an operation the necessary expertise would be available in Kenya. While this would entail cost there being no free health care, it was considered that it was not unreasonable to expect S. to be subject to the same social and economic conditions which affect other Kenyan nationals. It is estimated that the cost in Kenya of the necessary treatment would be 100,000 Kenya shillings (approx. £ 1000).

On 1 July 1994, arrangements were made for S. accompanied by the applicant to be removed from the United Kingdom to Kenya.

A further unsuccessful application for judicial review of her removal was made by S. in July 1994. S. had also claimed asylum, which was refused on 19 October 1994 and her appeal against that refusal is pending before the an adjudicator. S. has not yet been removed from the United Kingdom.

The surname carried by the applicant and her mother is a Parsi name, but not the name of the applicant's Parsi father. It appears that the applicant's mother has changed her original Hindu name without adopting that of her ex-husband.

COMPLAINTS

The applicant complains that the decision to remove her mother constitutes inhuman and degrading treatment contrary to Article 3 of the Convention. She alleges that this has the consequence of forcing

her into exile from the United Kingdom of which she is a citizen and in which she had a right of abode. Neither she nor her mother are ethnic Kenyans and as East African Asians will be marginalised in Kenyan society. They will also be excluded from the Hindu Asian socio-religious group because of the circumstances of S.'s marriage. They have no members of their immediate family in Kenya, most of S.'s family now resident in the United Kingdom. Further the applicant's mother suffers serious medical and psychiatric problems: a medical report indicates that S. suffers from epilepsy and had been undergoing treatment for that and psychotherapy in relation to serious personality difficulties. S. has no means of support in Kenya and will no longer benefit from the health care in the United Kingdom. The applicant, it is submitted, is put at risk by the difficulties to which her mother is now exposed. In addition, the applicant suffers from a condition which may require surgery which her mother cannot afford: the effect of denying her this treatment could lead to irreparable damage to the development of her manual and co-ordination skills.

The applicant invokes Article 8 of the Convention in respect of the removal. She submits that she has lived with her mother in the United Kingdom since her birth. Her British citizenship derives from her birth to a British national father who had acquired his nationality by birth and is not dependent on the fact that she happened to be born on British soil. Her mother would have qualified as resident as spouse of a British citizen but she did not complete the necessary formalities while the marriage subsisted. The removal will exclude her from enjoying the health education and welfare benefits to which she has a right as a British citizen and also from forming any contact with her father at a later stage. The decision faced her with the option of remaining in the United Kingdom probably in local authority care, to avail of her rights as a British citizen or the option of accompanying her mother to Kenya, where she will be unable to enter mainstream society, and sacrificing her private life right to grow up in the United Kingdom.

The applicant invokes Article 2 of Protocol No. 1 to the Convention. She submits that she will be deprived of education in British schools and will be unable to afford equivalent education in Kenya. It will therefore be unlikely that she could later qualify to attend university in the United Kingdom when she is of an age to return.

The applicant finally invokes Article 13 of the Convention in that there is no effective remedy in respect of the removal and Article 14 of the Convention in that the applicant is discriminated against as a result of her status as a child of a divorced foreign mother.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 11 February 1994. On the same date, the President refused to indicate interim measures pursuant to Rule 36 of the Commission's Rules of Procedure concerning the removal of the applicant's mother.

The application was registered on 12 April 1994.

On 30 June 1994, the applicant's lawyer requested that the Commission indicate interim measures concerning the removal pursuant to Rule 36 of the Commission's Rules of Procedure. On 1 July 1994, the Commission declined to do so.

On 12 October 1994, 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

8 March 1995, after three extensions of the time-limit fixed for that purpose. The applicant replied on 15 May 1995.

On 24 May 1995, the Commission granted the applicant legal aid.

THE LAW

1. The applicant complains that the removal of her mother to Kenya, obliging her to leave also, is in violation of Article 3 (Art. 3) of the Convention, which 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) of the Convention. Further, the Court has held that the suffering occasioned must attain a certain level before treatment can be classified as inhuman. 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 applicant refers to the hardship which she is likely to face due to her mother's isolation in Kenyan society and also to the risk of a lack of necessary medical treatment.

The Commission recalls that the applicant's mother is a Kenyan citizen who had lived in Kenya before her arrival in the United Kingdom. The Commission notes the circumstances surrounding her marriage and its possible effect, inter alia, on relations with family members but does not consider that this exposes the applicant or her mother to risk of treatment within the scope of Article 3 (Art. 3). It does not find that the applicant has established that circumstances as such in Kenya with regard to East African Asians discloses treatment attaining the severity of inhuman or degrading treatment.

As regards the possible lack of medical treatment, the Commission does not find it established that such treatment is necessary or that lack of such treatment would be likely to have a life-threatening or incapacitating effect as might to raise an issue under Article 3 (Art. 3). Further it appears that treatment would be available in Kenya, although this would require payment to be made.

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 she is being required to leave the country of which she is a citizen and in which she has the right to reside as the result of the removal of her mother. This infringes, she submits, her right to respect for her family and private life.

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 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."

Article 26 (Art. 26) of the Convention: exhaustion of domestic remedies

The Government submit that there is a pending asylum appeal which, if successful, will prevent the removal of the applicant's mother and that, accordingly, the application is premature.

The applicant argues that an asylum application is different legally and substantively from an application under the Convention. Accordingly, it cannot be regarded as a remedy for her complaints under the provisions of the Convention.

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 remedies, do not in reality offer any chance of redressing the alleged breach. It is furthermore established that the burden of proving the existence of available and sufficient domestic remedies lies upon the State invoking the rule (cf. Eur. Court H.R., De Jong, Baljet and Van den Brink judgment of 22 May 1984, Series A no. 77, p. 18, para. 36).

The Commission finds that an application by the applicant's mother for asylum on the basis of a fear of persecution cannot be considered as a remedy for the applicant's complaints of interference, inter alia, with her family and private life or of discrimination.

The Commission concludes that this complaint cannot be rejected for non-exhaustion of domestic remedies under Articles 26 (Art. 26) and 27 para. 3 (Art. 27-3) of the Convention.

Substantive complaints

Insofar as the applicant complains that she has been effectively expelled from the United Kingdom, the Commission notes that the United Kingdom has not ratified Protocol No. 4 which in Article 3 (P4-3) provides that no-one shall be expelled from the territory of a State of which he is a national. The Commission may therefore only examine the extent to which the removal of the applicant's mother has effected the applicant's right to family or private life.

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 her mother for the following reasons: she is young and can adapt, her mother is a Kenyan national and has professional qualifications from Kenya and can work there, and her maternal grandmother is a Kenyan national. As regards the claimed hostility and risk of isolation in Kenya, the Government submit that there is a community of 29 000 Asians, some of whom are second generation and have renounced British citizenship in favour of Kenyan. Many own property and enjoy economic prosperity and, while there have been occasional attacks on Asians, the Kenyan government have condemned them and there is no reason to suppose that the law does not operate to protect them.

Even supposing there was any interference, the Government submit that the expulsion would be justified under the second paragraph having regard, inter alia, to her mother's bad immigration record, her criminal record, her dependence on public funds and State provided accommodation.

The applicant seeks to distinguish the earlier Commission case-law. It is pointed out that the earlier cases 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 her citizenship by virtue of her mother's marriage to her father who was a British citizen - ius sanguinis rather than ius soli.

In answer to the claim that it is reasonable to expect the applicant to follow her mother and that she 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 her mother's criminal record is minor and that her mother by her marriage had gained a prima facie entitlement to remain but failed to fulfil the necessary formalities. A report from an expert in South Asian laws has been submitted which, inter alia, supports the probable prolonged isolation of the applicant and her mother on return to Kenya and their difficulties as members of a minority in face of a policy of "africanisation" which places Asians at a distinct disadvantage in business and professional life and in obtaining access to education.

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. 6.7.82, D.R. 29, p. 205).

However, the Commission notes 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 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, three 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 the hardship of living in a society where, due to family, socio-religious factors her mother risks having difficulties in integrating into any community there. The Commission recalls however that the mother was an illegal immigrant who had lived previously in Kenya. It finds that the applicant is of an age at which it can be expected that she can adapt to the change in environment. With reference to the applicant's links with her father, it does not appear from the material before the Commission that the removal would disrupt the relationship, there being no apparent established bond between them.

While the applicant has argued that weight should be given to her 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 she derived her citizenship by ius sanguinis through her British 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 her accompanying her mother.

As regards the problems with respect to possible shortcomings in health care in Kenya, these are not, in the Commission's view, of such a nature or degree as to impinge on respect for family or private life. 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. It concludes that the removal does not disclose 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 she has, by the circumstances of her mother's removal to Kenya, been deprived of her right to education.

Article 2 of Protocol No. 1 (P1-2) to 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 her 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 she has been 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 she is the subject of discrimination in that as a minor British citizen with a non-national custodial parent and whose father has broken off contact she is deprived of her right to remain in the United Kingdom. This is a difference in treatment applied to children whose British fathers remain in contact and those whose British fathers have rejected them: in the latter case,

additional requirements are imposed on the children in respect of whether they should be allowed to stay. This is not objectively justifiable and is in fact a punishment for a child already the victim of paternal rejection.

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 her family and private life with her mother in Kenya. The Commission consequently finds that the proposed measure of deportation of the applicant's mother, which will probably 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 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, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Commission — President of the Commission

(H.C. KRÜGER) — (S. TRECHSEL)