AS TO THE ADMISSIBILITY OF

Application No. 28574/95
by Mohammed ULLAH
against the United Kingdom

The European Commission of Human Rights sitting in private on 25 November 1996, the following members being present:

Mr. S. TRECHSEL, President
Mrs. G.H. THUNE
Mrs. J. LIDDY
MM. E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
H. DANELIUS
F. MARTINEZ
J.-C. GEUS
M.P. PELLONPÄÄ
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
I. BÉKÉS
J. MUCHA
D. SVÁBY
G. RESS
A. PERENIC
C. BÎRSAN
P. LORENZEN
K. HERNDL
E. BIELIUNAS
E.A. ALKEMA
M. VILA AMIGÓ

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 17 October 1994 by Mohammed ULLAH against the United Kingdom and registered on 18 September 1995 under file No. 28574/95;

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 national of Bangladesh, born in 1939 and residing in London. Before the Commission he is represented by Leolin Price and Edward Fitzgerald, barristers practising in London.

The facts of the case as submitted by the applicant may be summarised as follows.

Particular circumstances of the case

The applicant came to the United Kingdom in 1987 from Bangladesh where he had practised as an advocate. In April 1989 he was called to the English Bar.

Upon his entering the United Kingdom in May 1987 the applicant was granted leave to remain in the country for six months as a visitor. The period of six months expired on 22 November 1987, but the applicant remained in the country. Between June 1988 and May 1990 he wrote on several occasions to the Home Office requesting inter alia leave to remain in the United Kingdom and/or British citizenship. However, the examination of these applications apparently did not result in formal decisions being taken.

In July or August 1991 the applicant applied for asylum in the United Kingdom stating that he was the founding member and the President of the Bangladesh Social Party. On 23 December 1991, following an interview with the competent authority, the applicant withdrew his application for asylum. On the same day, thereafter on 2 January 1992, and again on 11 May 1992 he wrote to the Home Office applying for leave to remain in the United Kingdom for one year in order to practise as a barrister and to write a book.

On 29 September 1992 the applicant was interviewed by an immigration officer. It was established during this interview that in the past several months the applicant had been living on income support and that he had twice changed his address.

On the same day the applicant's application for leave to remain in the United Kingdom as a visitor to write a book was refused and he was served with a notice of intention to deport. The decision stated inter alia:

"You were last given leave to enter the United Kingdom on 22 May 1987 for six months as a visitor. The Secretary of State is satisfied that you have since remained without leave. You submitted a late application to remain on [2] January 1992, which was refused on 29 September 1992. Full account has been taken of this application. But nothing in it has persuaded the Secretary of State that deportation is not the appropriate course in all the circumstances."

The applicant was also served with a notice that the Home Office had decided to detain him pending the making of a deportation order pursuant to Section 2(2) of the Immigration Act 1971 (see below Relevant domestic law and practice).

Immediately thereafter, on the same day, the applicant was arrested. On 7 October 1992 he appealed against the notice of intention to deport.

Between 29 September 1992 and 16 October 1992 the applicant was moved four times from one detention centre to another.

On 16 October 1992 the applicant was released by decision of the Home Office. He received a letter stating inter alia:

"The purpose of this letter is to inform you that the Secretary of State has further considered the matter and has decided that the decision to deport was not in accordance with the law due to the fact that full consideration was not given to all your applications prior to service of the deportation notice. Accordingly, you should regard the notice as withdrawn and you are to be released immediately."

In another letter, from the competent immigration authority to the governor of the prison, it was stated inter alia:

"Since the lodging of the appeal against the decision to make a deportation order, [the applicant's] case has been reviewed and it has been established that the decision was not valid."

On 14 January 1993 the applicant commenced proceedings seeking damages for false imprisonment. The applicant and then the defendants applied for strike out orders each claiming that the adverse party's position disclosed no reasonable claim, or defence, respectively. The applicant's application was granted on 15 September 1993 by a Master of the Supreme Court who issued an order striking the defence as not disclosing a reasonable defence. However on 20 October 1993, upon the defendants' appeal against the Master's decision, a High Court Judge reversed it and ordered a trial. Upon the defendants' further appeal, on 23 June 1994 the Court of Appeal ruled that the statement of claim of the applicant should be struck out as disclosing no reasonable cause of action. On 15 December 1994 the House of Lords refused the applicant leave to appeal against this decision.

The Court of Appeal in its judgment of 23 June 1994 noted inter alia that after 22 November 1987 the applicant had been liable to deportation as he had remained in the United Kingdom beyond the authorised time. The Court also noted that it was accepted that the notice of 29 September 1992 of the decision to deport the applicant had complied with the formalities. The applicant's main submission had been only that once the notice had been withdrawn on 16 October 1992, and since it had been acknowledged that the notice had been "not in accordance with the law", it could no longer be relied upon as justification for the applicant's detention.

When summarising the parties' submissions the Court further noted that the notice was withdrawn because there was recognised to be a procedural irregularity in failing to have regard to all of the submissions made by the applicant, having regard to Rules 162, 164 and 166 of the Immigration Rules. However, there was nothing in the wording of paragraph 2(2) of Schedule 3 of the 1971 Act, or elsewhere in the statute, to suggest that where a notice is withdrawn, or set aside by the court, the arrest and the period of detention would be retrospectively rendered unlawful.

The Court found that the applicant's detention had remained lawful because the two conditions precedent to its legality had been satisfied. These conditions were that the applicant was a person liable to deportation and that notice was given to him of a decision to make a deportation order against him. These conditions would not be fulfilled if no intention to deport had been formed, or if the intention had been formed in bad faith. The mere fact that a notice of intention to deport was withdrawn, or set aside, could not affect the lawfulness of the detention.

Relevant domestic law and practice

Section 3(5)(a) of the Immigration Act 1971 provides, insofar as relevant, that " a person who is not a British citizen shall be liable to deportation from the United Kingdom if having only a limited leave to enter or remain he ... remains beyond the time limited by the leave."

In case of a deportation the first step for the Secretary of State is to decide to make a deportation order and, before actually making the order, to give notice of his decision to the person to be deported, so as to give him or her an opportunity to appeal against that decision. Once notice had been given, the person is liable to be detained under paragraph 2(2) of Schedule 3 of the Immigration Act. This provision, insofar as relevant, provides as follows:

"Where notice has been given to a person in accordance with regulations under Section 18 of this Act of a decision to make a deportation order against him ... he may be detained under the authority of the Secretary of State pending the making of the deportation order."

COMPLAINTS

The applicant complains under Article 5 para. 1 of the Convention that his detention with a view to deportation was unlawful. This was so because the authorities acknowledged that the decision underlying the applicant's detention, namely the decision to deport him, was "not in accordance with the law" and "not valid".

The applicant further contends that United Kingdom law, as applied in his case, permits a decision about detention to be governed by casuistry and bad faith. This was so because the Court of Appeal found that "all that is required to make detention legitimate is the giving of a notice of intention to make a deportation order". Such approach, in the applicant's view, is incompatible with Article 5 of the Convention.

The applicant complains under Article 5 para. 5 of the Convention that he did not have an enforceable right to compensation for his unlawful detention.

In a letter to the Commission dated 19 July 1995 the applicant raised an additional complaint, under Article 5 para. 4 of the Convention, that he was constantly moved from one detention centre to another and that as a result he could not take appropriate legal action.

THE LAW

1. The applicant complains under Article 5 para. 1 (Art. 5-1) of the Convention that his detention with a view to deportation was unlawful.

This provision, insofar as relevant, provides as follows:

> "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:
> ...
> f. the lawful arrest or detention of a person ... against whom action is being taken with a view to deportation...
> ..."

The Commission recalls that when requiring that a detention must be "lawful" and in compliance with a "procedure prescribed by law" the Convention essentially refers back to national law and states the obligation to conform to the substantive and procedural rules thereof. It requires in addition that any deprivation of liberty should be consistent with the purpose of Article 5 (Art. 5), namely to protect individuals from arbitrariness. It is in the first place for the national authorities, notably the courts, to interpret and apply domestic law. However, since under Article 5 para. 1 (Art. 5-1) failure to comply with domestic law entails a breach of the Convention, the Convention organs can and should exercise a certain power to review whether this law has been complied with.

In cases where the lawfulness of a deprivation of liberty depends upon a court order, the subsequent finding that the court erred under domestic law in making the order will not necessarily retrospectively affect its validity (Eur. Court HR, Benham v. the United Kingdom judgment of 10 June 1996, to be published in Reports of Judgments and Decisions 1996, para. 42).

For this reason the Convention organs have refused to uphold complaints under Article 5 (Art. 5) of the Convention from persons convicted of criminal offences, whose conviction or sentence was found by the appellate courts to have been based on errors of fact or law,

or from a person detained pursuant to an order, which was subsequently quashed by a higher court. In the latter case the domestic court's decision quashing the detention order did not find unambiguously that the order had been unlawful under domestic law and, furthermore, the detention was not arbitrary (cf. Eur. Court HR, Bozano v. France judgment of 18 December 1986, Series A No. 111, p. 23, para. 55; Benham v. the United Kingdom judgment of 10 June 1996, loc. cit., paras. 40 - 46; Krzycki v. Germany, Comm. Report 9.3.78, D.R. 13, pp. 60 - 61).

Also, the Commission recalls that detention is justified under Article 5 para. 1(f) (Art. 5-1-f) of the Convention as soon as "action is being taken with a view to deportation". The Commission has found in a previous case that this indicates that the lawfulness of the deportation order is not a prerequisite for the detention to be in conformity with Article 5 para. 1(f) (Art. 5-1-f) of the Convention (No. 6871/75, Dec. 3.3.78, D.R. 12, pp. 14, 18 - 20; Franco Caprino v. the United Kingdom, Comm. Report 17.7.80, unpublished, para. 65).

The Commission notes that the applicant's complaint is based on the assertion that the decision to deport him was unlawful and that as a result the detention order, which was based on the deportation notice, was also unlawful. The applicant criticises the relevant law, as applied by the Court of Appeal in his case, under which the withdrawal or the setting aside of the deportation notice did not render the ensuing detention order unlawful.

However, the Commission first notes that it was far from clear, despite the wording of the Secretary of State's letter of 16 October 1992, whether the deportation notice had been unlawful under the relevant domestic law. No such finding was made by the Court of Appeal in the applicant's case and in fact it was accepted that the notice of 29 September 1992 complied with the relevant formalities. Furthermore, the Court of Appeal found that the conditions precedent to the applicant's detention, namely liability to deportation and a notice of intention to deport, had been satisfied and that therefore the Home Office had not acted in excess of jurisdiction.

It is true that the Court of Appeal mentioned, when summarising the parties' submissions, that there had been procedural irregularities in the making of the deportation order. However, even assuming that this mention was a finding of the Court of Appeal and not part of the submissions of the parties, the Court of Appeal also found that the procedural irregularities in question did not in domestic law affect the lawfulness of the detention. The Commission likewise considers that the procedural flaws in the making of the deportation order were sufficiently remote from the basic procedural and substantive requirements for detention to render it unlawful or not "in accordance with a procedure prescribed by law" within the meaning of Article 5 para. 1 (Art. 5-1) of the Convention.

Moreover, it does not appear that the applicant's detention was ordered arbitrarily or that the approach adopted by the Court of Appeal was inconsistent with the Convention, in the light of the Convention organs' case-law. The Commission notes in particular that under the applicable rules, as recalled by the Court of Appeal in the applicant's case, the conditions precedent to his detention would not have been fulfilled if there had been no real intention to deport or in case of bad faith on the part of the authorities. However, no such claim had been made by the applicant and, indeed, no such circumstances appear to have existed.

The Commission does not consider therefore that the applicant's detention was unlawful under domestic law and thus contrary to Article 5 para. 1 (Art. 5-1) of the Convention.

It follows that this part of the application is manifestly ill-

founded and has to be rejected under Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant complains under Article 5 para. 5 (Art. 5-5) of the Convention that he did not receive compensation for his unlawful detention.

However, the Commission has just found that the applicant's complaint under Article 5 para. 1 (Art. 5-1) of the Convention of the alleged unlawfulness of his detention is manifestly ill-founded. Accordingly, Article 5 para. 5 (Art. 5-5) of the Convention did not require that the applicant receive compensation for his detention (Eur. Court HR, Benham v. the United Kingdom judgment of 10 June 1996, loc. cit., para. 50).

It follows that this complaint is also manifestly ill-founded and has to be rejected under Article 27 para. 2 (Art. 27-2) of the Convention.

3. The applicant also complains, invoking Article 5 para. 4 (Art. 5-4) of the Convention, that he could not take "appropriate legal action" because he was moved four times from one detention centre to another.

However, the Commission notes that the applicant has not shown that he has complained before the domestic authorities of the alleged impediment to the exercise of his rights. Furthermore, even assuming that no effective domestic remedies were available to him in this respect, the Commission recalls that as regards complaints not included in the initial application itself, the running of the six months' time-limit under Article 26 (Art. 26) of the Convention is not interrupted until the date when the complaint is first submitted to the Commission (cf. No. 10293/83, Dec. 12.12.85, D.R. 45, p. 41; No. 10857/84, Dec. 15.7.86, D.R. 48, p. 106).

In the present case the applicant's complaint under Article 5 para. 4 (Art. 5-4) of the Convention was first submitted on 19 July 1995, whereas his detention ended on 16 October 1992.

In any event, the Commission notes that the applicant appealed against his deportation notice on 7 October 1992 and that nothing suggests that he could not also appeal against his detention.

It follows that the remainder of the application has to be rejected in accordance with Article 27 (Art. 27) of the Convention.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

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