CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 36385/97
by Michel and Shirley VALMONT
against the United Kingdom

The European Court of Human Rights (Third Section) sitting on 23 March 1999 as a Chamber composed of

Mr J-P. Costa, *President*,
Sir Nicolas Bratza,
Mr L. Loucaides,
Mr P. Kūris,
Mr W. Fuhrmann,
Mrs H.S. Greve,
Mr K. Traja, *Judges*,

with Mrs S. Dollé, *Section Registrar*;

Having regard to Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 28 February 1997 by Michel and Shirley Valmont against the United Kingdom and registered on 6 September 1997 under file no. 36385/97;

Having regard to the reports provided for in Rule 49 of the Rules of Court;

Having regard to the observations submitted by the respondent Government on 18 March 1998 and the observations in reply submitted by the applicants on 14 May 1998;

Having deliberated;

Decides as follows:

THE FACTS

The first applicant, Michel Valmont, born in 20 March 1951, is a Seychelloise citizen, currently residing in the Seychelles. The second applicant is his wife, Shirley Valmont, who was born on 30 July 1936 and is a British citizen resident in Cardigan, Wales. The applicants are represented before the Court by Mr Barry J. Gawthorpe, a solicitor practising in Cardigan. The facts of the case, as submitted by the parties, may be summarised as follows.

A. Particular circumstances of the case

The first applicant arrived in the United Kingdom on 14 March 1976. When he arrived, he had the status of a citizen of the United Kingdom and the Colonies (CUKC) by virtue of section 14 of the British Nationality Act 1948, because the Seychelles was a British colony at the time of his birth. He was given leave to enter as a work permit holder for a period of 12 months. When the Seychelles became independent on 29 June 1976, he lost his CUKC status and became a citizen of the Seychelles only. However, since the Seychelles remained in the Commonwealth, he continued to hold the status of Commonwealth citizen, which status he retains.

The first applicant met the second applicant, who is British, in 1976. They started to live together as man and wife and on 27 August 1977 their twin children, Roseanne and Michel, were born. On 27 April 1978 the couple married, and on 15 June 1979 the first applicant was granted indefinite leave to remain in the United Kingdom.

On 5 December 1986, the first applicant returned to the Seychelles to attend to family affairs due to his father's illness. On 2 March 1987 he returned to the United Kingdom and on 12 April 1987 he left for the Seychelles again. On 19 March 1988 he returned to the United Kingdom and on 17 July 1988 went back to the Seychelles.

The first applicant then suffered a series of health and employment problems and found it difficult to save enough money for his flight back to the United Kingdom. He and his wife did, however, keep in contact, and he also kept in contact with his children. The first applicant's father died in 1993.

On 27 July 1996, the first applicant arrived in the United Kingdom. The second applicant had come to meet him at the airport. The first applicant told the immigration officer who interviewed him that he sought admission as a visitor for three months and that he intended to take employment on a farm owned by a friend. In addition, he told the immigration officer that he had a girlfriend in the Seychelles and to the customs officer he referred to that person as his "wife". The immigration officer refused him leave to enter as a visitor because he was not satisfied that the first applicant intended to stay for the stated period since he had been unemployed in the Seychelles and he intended to work in the United Kingdom.

Although the first applicant did not seek entry as a returning resident at the time, the immigration officer and the chief immigration officer who authorised the decision to refuse leave to enter considered his application on that basis and concluded that he did not qualify as a returning resident since he had not been resident in the United Kingdom within the last two years. Moreover, according to the Home Office there was no evidence that there had been

any intervening devotion between the applicant and his family in the United Kingdom. Arrangements were made for his removal on 24 August 1996.

The first applicant applied to the High Court for leave to apply for judicial review of the decision to refuse leave to enter. In the application the point was raised that he should be considered as someone having the right of abode in the United Kingdom under the Immigration Act 1971 ("the 1971 Act"). However, it was pointed out that under section 2(2) of the 1971 Act, as amended by the British Nationality Act 1981 ("the 1981 Act"), only a female Commonwealth citizen who was married to a British citizen would have the right of abode and that a male commonwealth citizen who was married to a British citizen did not. In addition, it was said that given that the case involved issues arising under Article 8 of the European Convention in conjunction with Article 14, the Secretary of State should have exercised his discretion in favour of protecting the relevant Convention rights.

On 28 August 1996 the court refused leave to apply for judicial review on the grounds that the Secretary of State had exercised his discretion properly.

The first applicant made a renewed application for leave to apply for judicial review to the Court of Appeal, raising the same points. On 4 September 1996 the Court of Appeal refused leave on the grounds that the facts of the case were not such as to suggest that the discretion should have been exercised in favour of the applicant and that the Secretary of State had acted lawfully since he had considered all material factors before him and had exercised his discretion reasonably. In connection with the argument that the Secretary of State had failed properly to exercise his discretion as he had not taken full account of Convention considerations, the Court of Appeal referred to the case of *ex parte Brind* ([1991] 1 AC 696) and a line of subsequent decisions, including *R. v. Ministry of Defence ex parte Smith* ([1996] QB 517).

The first applicant was deported to the Seychelles on 7 September 1996.

B. Relevant domestic law

Between 1976 and at least 1980, section 2 of the Immigration Act 1971 was applicable. This section stated (as relevant):

> "(1) A person is under this Act to have the right of abode in the United Kingdom if –
> [four categories, (a) – (b), none of which applied to the applicant]
>
> (2) A woman is under this Act also to have the right of abode in the United Kingdom if she is a Commonwealth citizen and either –
>
> (a) is the wife of any such citizen of the United Kingdom and Colonies as is mentioned in subsection (1)(a), (b) or (c) above or any such Commonwealth citizen as is mentioned in subsection (1)(d); or
>
> (b) has at any time been the wife –
>
> (i) of a person then being such a citizen of the United Kingdom and Colonies or Commonwealth citizen; ... ."

On 1 January 1983, the British Nationality Act 1981 ("the 1981 Act") came into force. The 1981 Act replaced the concept of "citizenship of the United Kingdom and Colonies" with various categories of citizenship, including "British citizenship". It also prospectively removed the distinction between men and women which had been contained in the old section 2(2) of the 1971 Act, whilst, however, retaining the right of abode for those who had obtained it under any provision in the old section 2, including subsection 2(2), which applied only to women. The new section 2, which is still in force, provides, so far as is material:

"(1) A person is under this Act to have the right of abode in the United Kingdom if –

(a) he is a British citizen; or

(b) he is a Commonwealth citizen who –

(i) immediately before the commencement of the British Nationality Act 1981 was a Commonwealth citizen having the right of abode in the United Kingdom by virtue of section 2(1)(d) or section 2(2) of this Act as then in force; and

(ii) has not ceased to be a Commonwealth citizen in the meanwhile."

A person who does not have the right of abode requires leave to enter the United Kingdom. At all material times, a person who, like the first applicant, had been granted indefinite leave to remain and had then left the United Kingdom could be permitted to return as a "returning resident" provided he was not absent from the United Kingdom for a period of over two continuous years (Statement of Changes in Immigration Rules, HC 395, paragraphs 15 and 18-20).

COMPLAINTS

1. The applicants complain of violations of Article 14 of the Convention on grounds of sex, taken together with Article 8. In particular, they complain of the differential treatment under the Immigration Act of 1971 as amended by the British Nationality Act 1981, between female and male Commonwealth citizens married to British citizens, in that a female Commonwealth citizen has the right to abode in the United Kingdom if she is married to a British citizen.

2. The applicants also complain that, contrary to Article 13 of the Convention, under United Kingdom law they have no access to an effective remedy with respect to the arguable breach of Article 14 taken together with Article 8.

PROCEDURE

The application was introduced on 28 February 1997 and registered on 6 September 1997.

On 3 December 1997, the Commission decided to communicate the application to the respondent Government.

The Government's written observations were submitted on 18 March 1998. The applicants replied on 14 May 1998.

On 15 September 1998 the Commission granted the applicants legal aid.

On 1 November 1998, by operation of Article 5 § 2 of Protocol No. 11 to the Convention, the case fell to be examined by the Court in accordance with the provisions of that Protocol.

THE LAW

1. The applicants complain of a discriminatory interference with their family life, in breach of Articles 8 and 14 of the Convention taken together.

Article 8 of the Convention provides:

> "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."

Article 14 of the Convention states:

> "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 Government's first contention is that the application was made outside the period of six months laid down by Article 35 § 1 (formerly Article 26) of the Convention. Article 35 § 1 states:

> "The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken."

In particular, the Government contend that the present application is akin to application no. 7379/76, X. v. the United Kingdom, in which it was held that, in the absence of any remedy against a decision or an act of a public authority, the six month period runs from the moment the decision or the act takes effect (Commission's decision on admissibility, D&R 8, p. 211). With reference to the present application, the Government submit that any discrimination between the sexes contained in the 1971 Act as amended by the 1981 Act crystallised on 1 January 1983, when the 1981 Act came into force. The applicants' complaint could, and should, have been made within six months of that date, and it was not open to them to salvage an otherwise out-of-time application by seeking leave to move for

judicial review. They consider that the application for judicial review was immaterial to the time-limit under Article 35 § 1 of the Convention, since it was not possible for the applicants to seek judicial review of the provisions of an Act of Parliament.

The applicants submit that the correct construction of Article 35 § 1 is that an application must be made to the Court within six months of the decision which finally adjudicated upon the alleged violation of the complainant's Convention right. In the domestic courts, the first applicant, relying on the Convention, sought to argue that the Home Secretary, acting through the immigration officer, should have exercised his discretion under the immigration legislation in such a way as to place the applicant in the same position as those with the right of abode. The Court of Appeal rejected this argument, but nevertheless dealt with it, and in so doing referred to a number of cases, including recently decided ones.

The Court recalls that Article 35 § 1 of the Convention requires an applicant to bring an application within six months of a "final decision". That "final decision" is generally the decision at the end of the process of exhaustion of domestic remedies. In the present case, the alleged violation of the Convention arose when, on 27 July 1996, the first applicant was refused leave to enter the United Kingdom. It is not clear whether, before that date, the first applicant could have claimed to be a "victim of a violation" by the United Kingdom of the rights in the Convention within the meaning of Article 34 of the Convention, but it was on that date that he was clearly affected for the first time by, *inter alia*, the discrimination complained of. It follows that the applicants' attempts to challenge that decision constitute the exhaustion of domestic remedies within the meaning of Article 35 § 1, and it was from the Court of Appeal's decision of 4 September 1996 that the six months' period in Article 35 § 1 began to run. The application was introduced on 28 February 1997.

It follows that the application has been introduced in time.

The Government next submit that the application is manifestly ill-founded. They contend, first, that the ties between the first applicant, on the one hand, and the second applicant and children, on the other, are so weak as not to amount to "family life" within the meaning of Article 8 of the Convention. In the alternative, the Government submit that there was a reasonable and objective justification for any discrimination under the 1971 Act as amended by the 1981 Act.

The applicants maintain that the bond between parent and child, amounting to family life within the meaning of Article 8, could only be broken in exceptional circumstances, and claim that Government have failed to show that there were such exceptional circumstances in the present case.

The Court recalls that Article 14 complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not necessarily presuppose a breach of those provisions – and to this extent it is autonomous -, there can be no room for its application unless the facts at issue fall within the ambit of one or more of those provisions (see the Abdulaziz, Cabales and Balkandali v. the United Kingdom judgment of 28 May 1985, Series A no. 94, p. 35, § 71).

The Court must therefore determine whether the facts of this application fall within the scope of Article 8, and in particular whether the applicants can be said to enjoy "family life". In this respect, it notes that that the applicants are married and lived together in the United Kingdom for ten years. They have twin children, born in 1977, and it is uncontested that until 1986, when the first applicant returned to the Seychelles, the family enjoyed full "family life". Since then, however, the ties have weakened: the first applicant visited his wife and children in the United Kingdom in 1987 and 1988 but then did not return until July 1996, by which time the children were adults. When the first applicant arrived at Manchester, he did not refer to the second applicant or the children, although he did mention a girlfriend in the Seychelles, and he sought admission only as a visitor for three months.

The Court does not consider that the above facts indicate that "family life" existed between the applicants during the period prior to the impugned decision. It follows that the application does not fall within the scope of Article 8, and that Article 14 is not, therefore, applicable.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention, and must be rejected in accordance with Article 35 § 4.

2. In addition, the applicants claim that judicial review does not enable the courts properly to examine the compatibility of domestic norms with Convention standards. They claim a violation of Article 13 of the Convention, which states:

> "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 Government claim that this complaint is manifestly ill-founded as the substantive complaints have no merit, but that in any event the Convention does not guarantee a right to challenge primary legislation.

The Court recalls that Article 13 guarantees an effective domestic remedy only in respect of alleged breaches of the Convention. In view of its above finding that the facts of the application do not fall within the scope of Article 8, it concludes that Article 13 is not applicable.

It follows that this part of the application also is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention, and must be rejected in accordance with Article 35 § 4.

For these reasons, the Court, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

S Dollé
Registrar

J-P. Costa
President