EUROPEAN CONVENTION ON HUMAN RIGHTS

CAPRINO CASE

STRASBOURG

1981

APPLICATION N° 6871/75

by

Franco CAPRINO

against

the UNITED KINGDOM

This publication contains the report of the European Commission of Human Rights drawn up in accordance with Article 31 of the Convention for the Protection of Human Rights and Fundamental Freedoms, relating to the application (N° 6871/75) lodged with the Commission by Mr Franco Caprino against the United Kingdom.

This report was transmitted to the Committee of Ministers on 30 October 1980.

As the case was not referred to the European Court of Human Rights, it was for the Committee of Ministers to decide, under the provisions of Article 32, paragraph 1, of the Convention "wether there has been a violation of the Convention".

The decision of the Committee of Ministers was taken by Resolution DH (81) 7 of 30 April 1981, the text of which is reproduced at page 77 of the present publication.

The Committee of Ministers also authorised publication of the Commission's report on this case.

I. REPORT OF THE COMMISSION

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1. INTRODUCTION

1. The following is an outline of the case as it has been submitted by the parties to the European Commission of Human Rights.

The substance of the applicant's complaint

2. The applicant is an Italian citizen born in 1946 who is resident in the United Kingdom. In 1974 he applied for a residence permit in the United Kingdom as an EEC citizen, but the Secretary of State decided to make a deportation order against him under Section 3 (5) (b) of the Immigration Act 1971 on the ground that his deportation was conducive to the public good in the interest of national security. Simultaneously, he ordered the applicant's detention under para. 2 (3) of Schedule 3 to the Immigration Act. The applicant was arrested on 18 December 1974 and detained until 24 January 1975 when the Secretary of State, having received representations on behalf of the applicant, reviewed the case and decided to revoke the deportation order.

3. The admitted part of the application concerns the complaint that in the present case, being a case of national security, the judicial review of the lawfulness of the applicant's detention in view of his deportation by habeas corpus proceedings, by an action for wrongful imprisonment, or by an application for a prerogative order of certiorari, is limited in scope to an examination whether or not the Secretary of State has acted ultra vires or mala fide. This limitation of the judicial review raises an issue under Art. 5 (4) of the Convention.

Proceedings before the Commission

4. The application was introduced on behalf of the applicant by the Joint Council for the Welfare of Immigrants, London, on 9 January 1975. It was registered on 14 January 1975. The applicant has subsequently been represented by Messrs. Seifert, Sedley & Co., a solicitors firm in London which consulted Lord Gifford as counsel.

5. The applicant complained that his detention was not lawful (Art. 5 (1) of the Convention), that he had not been informed of the reasons for his arrest (Art. 5 (2)) and that he did not have the possibility to take proceedings in accordance with Art. 5 (4) of the Convention. He also complained of violations of Arts. 3, 6 and 14 of the Convention.

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6. Following the revocation of the deportation order against him, and his release from prison, the applicant stated that he wanted to maintain the application. Some delay occurred because the applicant sought legal advise concerning the availability of domestic remedies. On 23 April 1976, he submitted an opinion by counsel according to which there were no domestic remedies available.

7. On 8 October 1976, the Commission began with the examination of the admissibility of the application. It decided to ask the applicant for the submission of the relevant documents. These were submitted by his lawyers on 20 October 1976.

8. On 17 December 1976, the Commission decided to communicate the application to the respondent Government for their written observations on admissibility, in particular as regards the issues under Art. 5 (2) and Art. 5 (4) of the Convention.

The Government's observations were submitted on 22 March 1977, and the applicant's lawyers submitted observations in reply on 23 August 1977.

9. On 12 October 1977, the Commission decided to hold an oral hearing on the admissibility and merits of the application, on the basis of detailed questions which were communicated to the parties on 25 October 1977.

10. The hearing took place on 2 March 1978. The parties were represented as follows:

The Government by Mr. D.H. Anderson, Foreign and Commonwealth Office, Agent; Sir Vincent Evans, Q.C.; Mr. W. Hammond, Assistant Legal Adviser, Home Office; and Mr. P. Taylor, Assistant Secretary, Home Office.

The applicant by Lord Gifford, counsel; and Miss Sylvia King, solicitor. The applicant was also present.

11. Following the hearing, the Commission decided on 3 March 1978 to declare admissible and retain for the examination of the merits the applicant's complaint under Art. 5 (4) of the Convention, and to reject the remainder of the application as being inadmissible (cf. the Commission's decision on admissibility at Appendix II).

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12. On 26 July 1978, the applicant was asked to submit written observations on the merits of the admitted complaint, before 15 October 1978. At the request of the applicant's lawyers, this time-limit was subsequently extended by an Order of the Acting President, and the applicant's observations on the merits were eventually submitted on 7 December 1978.

On 19 December 1978, these observations were communicated to the respondent Government who were invited to submit their observations in reply before 9 February 1979. Also this time-limit was extended, at the Government's request, by an Order of the Acting President, and the Government's observations were eventually submitted on 21 March 1979.

13. The present Report has been drawn up by the Commission in pursuance of Art. 31 of the Convention, after deliberations and votes in plenary session, the following members being present*.

MM. C.A. NØRGAARD, Acting President
J.E.S. FAWCETT
B. DAVER
C.H.F. POLAK
J.A. FROWEIN
G. TENEKIDES
S. TRECHSEL
B. KIERNAN
N. KLECKER
M. MELCHIOR

14. The text of the Report was adopted by the Commission on 17 July 1980 and is now transmitted to the Committee of Ministers in accordance with Art. 31 (2) of the Convention.

15. A friendly settlement of the case has not been reached and the purpose of the present Report, pursuant to Art. 31 of the Convention, is accordingly:

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* Mr. Opsahl who, after having participated in the deliberations, could not be present when the Commission took its final vote was subsequently allowed to state that he agrees with the opinion of the Commission's majority as expressed in this Report.

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(1) to establish the facts; and

(2) to state an opinion as to whether the facts found disclose a breach by the respondent Government of its obligations under the Convention.

16. A schedule setting out the history of proceedings before the Commission and the Commission's decision on admissibility in the case are attached hereto as Appendices I and II. An account of the Commission's unsuccessful attempt to reach a friendly settlement has been produced as a separate document (Appendix III).

17. The full text of the pleadings of the parties, together with the documents lodged as exhibits, are held in the archives of the Commission and are available to the Committee of Ministers, if required.

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II. ESTABLISHMENT OF THE FACTS

18. The applicant is an Italian citizen born in 1946 who is resident in the United Kingdom.

19. According to information submitted by the Government, the applicant was first admitted to the United Kingdom on 8 December 1969 as a visitor for one month on condition that he took no employment. On 7 January 1970, he applied for an extension of his leave to enter and for his condition of stay to be varied. He provided evidence of his employment as a kitchen porter. His application was refused and he was advised that unless he could obtain an acceptable employment, viz. a post in a hospital, he would be required to leave the country without delay. On 20 January 1970 he applied again for an extension, this time as a visitor. He was given successive extensions until 26 March 1970, on each occasion on condition that he took no employment. He left the country on 8 March 1970.

20. On 9 June 1970 he returned to the United Kingdom and was admitted as a visitor for one month on condition again that he took no employment. After the applicant had enrolled at a language school, subsequent extensions were granted to him to enable him to remain in the United Kingdom as a student until 1972. In July 1972, his leave to remain was extended until 30 July 1973, the condition prohibiting employment was lifted, and he was given permission to take employment as a clerk/book-keeper at the Italian Book Centre. His leave to remain expired on 30 July 1973.

21. The Government claim that after this date the applicant remained illegally in the country. The applicant, however, denies this stating that at the material time he lived outside the United Kingdom.

22. On 4 February 1974 the applicant submitted an application for a residence permit based upon his nationality as a national of a country within the European Economic Community under provisions which had then recently come into force in the United Kingdom. Before his application had been dealt with, a number of applications were received from him and were considered. No decisions on the application were taken however.

23. However, on 11 December 1974 the Secretary of State made a deportation order against the applicant under Section 3 (5) (b) of the Immigration Act 1971 on the ground that his deportation was conducive to the public good in the interest of national security. At the same time the Secretary of State authorised the applicant's detention under paragraph 2 (3) of Schedule 3 to the Immigration Act which provides that "where a deportation

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order is in force against any person, he may be detained under the authority of the Secretary of State pending his removal or departure from the United Kingdom ...".

24. The deportation order was drafted in the following terms:

"Immigration Act 1971 (4 a)

Deportation Order

Whereas I deem it to be conducive to the public good to deport from the United Kingdom

Franco CAPRINO

a person who is not patrial within the meaning of the Immigration Act 1971:

And whereas the said Franco CAPRINO

is, accordingly, liable to deportation by virtue of Section 3 (5) (b) of the said Act:

Now, therefore, in pursuance of Section 5 (1) of the said Act, I by this order require the said Franco CAPRINO

to leave and prohibit him from entering the United Kingdom so long as this order is in force.

And in pursuance of paragraph 2 (3) of Schedule 3 of the said Act, I hereby authorise him to be detained until he is removed from the United Kingdom.

Home Office (signed) Roy Jenkins
Whitehall One of her Majesty's Principal Secretaries of State

11 Dec. 1974"

25. This order was served on the applicant on 18 December 1974 together with directives for his removal to Italy. At the same time the applicant was handed a letter dated 13 December 1974 stating that the decision to deport him had been made in the interest of national security. He was also told that he was not entitled, under Section 15 (3) of the Act of 1971, to appeal within the statutory immigration appeal system against the making of the order but that his case could be made the subject of the non-statutory advisory procedure should he so wish. He was also told of his right to appeal under Section 17 of the Act against the decision to remove him to Italy.

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26. The applicant was immediately arrested and detained at H.M. Prison Pentonville. He was not told of any special reasons why his detention pending his removal to Italy was considered necessary or appropriate.

At the oral hearing before the Commission on 2 March 1978 it was submitted on behalf of the Government that at the relevant time the authorities feared that the applicant might go underground if he was not arrested. The applicant submitted that this was the first time he had heard of any such allegation, which even now was not supported by any evidence. He denied that the authorities' fear was justified.

27. According to the applicant he was about to ask the officers who informed him of the deportation order how much time he was going to have to leave the country when he was told that he was in fact being arrested. Thus he was not given any opportunity to leave the United Kingdom of his own accord. It was submitted on behalf of the applicant that he would have been willing to leave voluntarily if eventually his remedies had remained unsuccessful.

28. On 31 December 1974, the applicant gave notice that he wished to exercise the right of appeal under Section 17 of the Immigration Act and, separately through the Joint Council for the Welfare of Immigrants, that he wished to have an oral hearing before the advisory panel under the non-statutory advisory procedure.

29. He was due to appear before the panel of advisers on 27 January 1975, but three days before that date he was handed a letter from the Home Office saying that the deportation order was revoked. He was then released from custody on 24 January 1975.

30. The Government submit that after having received representations on behalf of the applicant, the Secretary of State reviewed the case in the light of all the information then available and decided to revoke the deportation order.

31. A five-year residence permit was issued to the applicant on 3 March 1975.

32. The applicant's case had considerable repercussions in the national press. On 14 January 1975 the Guardian newspaper reported that it was claimed that the applicant was a member of Lotta Contiua, a terrorist organisation which had connections with the IRA. The applicant denies these allegations. It was also reported that the applicant was active in welfare work among Italians in Britain and had been trying to organise trade union representation for workers in London.

The Government have submitted that they had not "inspired" nor had they otherwise been connected with this newspaper article.

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33. The applicant subsequently sought legal advice concerning the availability of domestic remedies against his above detention which he considered to have been unlawful. He was, however, told by his legal advisers that none of the remedies which would otherwise have been available to him had any prospects of success in a case where the deportation, and the concomitant detention, had been ordered in the interest of national security. Accordingly, he did not take any proceedings before the courts in England.

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III. SUBMISSIONS OF THE PARTIES

34. The summary of the parties' submissions set out below is limited to arguments relevant to the issue arising in the present case under Art. 5 (4) of the Convention. In addition to the parties' written submissions on the merits of this issue, it also includes arguments advanced by the parties at the admissibility stage and at the oral hearing on 2 March 1978.

Submissions of the applicant

35. The applicant originally complained, inter alia, that the proposed appeal to the panel of advisers (to be held in secret and at which the evidence against him would not have been revealed) would have been the only remedy available to him. The judicial review of the lawfulness of his detention was so restricted that it could not be considered as an effective remedy. He therefore considered that he was not required, under Art. 26 of the Convention, to apply for such judicial review of his detention, and at the same time he alleged a breach of Art. 5 (4) of the Convention.

36. According to the applicant the Immigration Act 1971, even as modified by EEC Directive 64/221, gives an unlimited power to detain persons against whom a deportation order has been made. The applicant's detention was based on para. 2 (3) of Schedule 3 of the Act but other provisions of the Act likewise applied in the circumstances of his detention. Thus para. 18 (4) of Schedule 2 provides that "a person shall be deemed to be in legal custody at any time when he is detained" under the above provision.

37. The applicant submits that given the legal provisions applicable to the case it would have been wholly pointless for him to have challenged the lawfulness of his arrest by an action for habeas corpus, or for false imprisonment, or by an application for certiorari. The case-law of the courts shows that the provisions of the Immigration Act give the authorities an absolute right to detain someone whom they have ordered to be deported, and that the courts are not willing to control the Secretary of State's discretion in this respect.

38. The applicant refers in this context to five court decisions:

(a) In the case of the Duke of Chateau Thierry /1917/ 1 K.B. 922, the Court of Appeal had to decide on an application for an order of certiorari sought to quash a deportation order under the Aliens Restriction Act 1914. There it is said:

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"A Secretary of State is not required to justify in a court of law his reasons for making a deportation order in the case of an alien. In the event of it being disputed that the subject of a deportation order is an alien, the matter must be determined by a court, and unless it be proved that the person is an alien, the order must be quashed as made without jurisdiction, but I am not aware of any other ground upon which such an order can be quashed."

(b) In that case the person concerned had not been imprisoned, but the following year in the case of Sacksteder /1918/ 1 K.B. 578, the court had also to decide on detention. Lord Justice Pickford stated:

"It seems to me that any direction, whether oral or written, if it be made by the Secretary of State, is sufficent to satisfy the order. There is that direction in this case. In my opinion it is not possible for us to go behind that. I wish to guard myself in this way ... I am not prepared to say that in every case where there is an order of detention or imprisonment the court is entitled to go behind that and to see what the motives for making that order were. But I am certainly not inclined to say that in no case can the court go behind an order which on the face of it is valid ordering detention or custody. If that order is, if I may say so, practically a sham, if the purpose behind it is such as to show that the order is not a genuine or bona fide order, it seems to me the court can go behind it."

(c) This case shows that the only exception where the courts can control the order is if it has not been made bona fide. This issue was also examined in the Soblen case /1963/ 2 Q.B. 243. Lord Justice Donovan there said regarding the suggestion that the order was a sham:

"The task of the subject who seeks to establish such an allegation as this is indeed heavy. On the face of it, the order which he wishes the court to quash will look perfectly valid, and to get behind it, and to demonstrate its alleged true character, he will need to have revealed to him the communications, oral and written, which have passed between the home and the foreign authorities. But if the appropriate Minister here certifies, as he has done in this case, that such disclosure will be contrary to the public interest, then as a general rule, the subject will not obtain it."

(d) In the case of Liversidge v. Anderson /1942/ A.C. 206 which concerned an action for false imprisonment, Lord MacMillan said with reference to a similar provision authorising detention if the Secretary of State had reasonable cause to believe that a person had hostile associations:

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"A court of law manifestly could not pronounce upon the reasonableness of the Secretary of State's cause of belief unless it were able to place itself in the position of the Secretary of State and were put in possession of all the knowledge both of fact and of policy, which he had. However, the public interest must, by the nature of things, frequently preclude the Secretary of State from disclosing to a court or to anyone else, the facts and reasons which have actuated him. What is to happen then? The appellant says that the court is entitled, and has a duty, to examine the grounds of the Secretary of State's belief. The court, however, is also bound to accept the statement by the Secretary of State that he cannot, consistently with the public interest, divulge these grounds. Here is indeed an impasse. The appellant's solution has the merit of courage, not to say audacity. He says that where the Secretary of State ... has failed to justify the detention, he must be held confessed of having falsely imprisoned the detained person" ... "I decline", says the Lord, "to accept an interpretation of the regulation which leads to so fantastic a result."

(e) Finally, in the case of Hosenball, /1977/ 1 W.L.R. 766, Lord Denning summarised the attitude of English courts to such matters in the following way:

"There is a conflict here between the interests of national security on the one hand and the freedom of the individual on the other. The balance between these two is not for a court of law, it is for the Home Secretary. He is the person entrusted by Parliament with the task. In some parts of the world, national security has on occasions been used as an excuse for all sorts of infringements of individual liberty, but not in England. Both during the Wars, and after them, successive Ministers have discharged their duties to the complete satisfaction of the people at large. They have set up advisory committees to help them, usually with a Chairman who has done everything he can to ensure that justice is done. They have never interfered with the liberty of freedom of movement of any individual, except where it is absolutely necessary to the safety of the State. In this case, we are assured that the Home Secretary himself gave it his personal consideration, and I have no reason whatsoever to doubt the care with which he considered the whole matter. He is answerable to Parliament as to the way in which he did it, and not to the courts here."

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39. Four of the above five cases concern deportation orders, three out of the five concern persons who were in detention, two concern habeas corpus, two are applications for certiorari, and one is an action for false imprisonment. Thus all the avenues which the Government have suggested have been attempted and have been shown to lead nowhere.

40. The case-law shows that the Secretary of State need only prove that a deportation order has been made. The courts will not look behind the order, save in the rare case of a "sham". Even that proviso is of little value, since the deportee will not normally be aware of facts by which he might establish a lack of bona fides. Moreover, there is no provision whatsoever for any court to determine whether it is necessary or reasonable to detain the deportee during the period between the making of an order and his departure. There exists no form of judicial proceeding by which it can be determined whether or not the detention is related to the deportation proceedings and is for no other purpose which, according to the Commission's decision on the admissibility of the present application, is a condition for the justification of the detention under Art. 5 (1) (f). The applicant also relies on the Commission's finding in its decision on admissibility that the applicant's complaints "fall precisely within the area where the courts in England are not willing to control the discretion of the Minister and which, according to the respondent Government, are not justiciable but are essentially administrative matters". He argues that by the same reasoning there is no possibility for him to take proceedings in accordance with Art. 5 (4).

41. The applicant has further referred to the judgment of the European Court of Human Rights in the case of Ireland v. the United Kingdom. The Court held that because in habeas corpus proceedings the United Kingdom courts considered that their powers did not allow them to go behind the statutory authority for the detention, the judicial review of the measures at issue was thus not sufficiently wide in scope taking into account the purpose and object of Art. 5 (4).

The remedy which was in fact open to the applicant in the present case, namely to make representation to a panel of three independent advisers, did not satisfy the requirements of Art. 5 (4). The advisers could not order the applicant's release, they were not obliged to inform the applicant of the allegations against him, and they were in no sense to be considered as a court. This has also been confirmed in the Irish inter-State case in respect of similar advisory bodies.

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42. The applicant argues that the lawfulness of a person's detention cannot be decided by a court, if the detaining authority is not obliged before that court to give any reason for the detention beyond the authority of a law giving unrestricted powers.

Art. 5 (4) would be devoid of any meaning if its requirements could be satisfied by a hearing before a court which could not look behind the decision of the Executive and review the substance of that decision.

The remedies given by domestic law in compliance with the requirements of Art. 5 (4) must be effective. A judicial proceeding which is merely a rubber stamp for an executive decision is unacceptable in a democratic society.

43. The applicant submits that in order to comply with Art. 5 (4) the following minimum requirements must be observed:

The procedure must be a judicial proceeding. An advisory panel is not adequate. As a judicial proceeding, the normal rules of natural justice must be observed. That is to say, the person detained must be informed of the reasons why it is considered necessary to detain him, and have the opportunity to answer the case made against him.

More particularly the procedure must enable the person detained to discover

(i) whether the decision to deport him has been made in accordance with the law;

(ii) whether his detention pending deportation is justified by law.

For these purposes the court must have the possibility to examine all the elements which are necessary for the determination of the lawfulness of the detention, although it need not necessarily be able to go into all the background of the deportation.

44. The applicant finally considers that in the determination of the merits of the issue under Art. 5 (4), the other provisions of Art. 5 are also relevant, in particular the words in para. (1) "in accordance with a procedure prescribed by law", the words in Art. 5 (1) (f) "the lawful detention" and the right laid down in Art. 5 (2) to be informed of the reasons for arrest.

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Submissions of the Government

45. It is the Government's submission that Art. 5 (4) is satisfied if there is a procedure for determining the lawfulness, under domestic law, of the arrest or detention of a person and that it does not require that there be a procedure under which the domestic courts can review the grounds on merits of any decision to deprive a person of his liberty to the extent that the decision is, as a matter of domestic law, exclusively within the domain of the administrative or executive authorities and not of the courts.

46. Art. 5 (4) must be interpreted in the context of Art. 5 as a whole and in particular in its relationship with Art. 5 (1). Art. 5 (1) specifies the cases in which the arrest or detention of a person is permissible in accordance with the Convention. As the Commission stated in its decision on admissibility, the word "lawful" in sub-para. (f) and other sub-paragraphs of Art. 5 (1) means "lawful under the applicable domestic law".

Subject to the requirements of Art. 5 (1), and to the provisions of Art. 5 (2) and (3), each Contracting Party is free to prescribe the procedure by which and the grounds on which a person may be arrested or detained. There is no question that powers of arrest and detention may be conferred by law on administrative or executive authorities. Indeed it is the common practice of States to do so. The Court explicitly referred to this possibility in para. 76 of its judgment of 18 June 1971 in the "Vagrancy Cases". It follows that a decision to arrest or detain an individual can be lawfully made by an administrative or executive authority under powers conferred by law. There is nothing in the Convention to suggest that domestic law may not entrust to such authorities a degree of discretion in the exercise of these powers, and the decisions to be made by them will frequently require an appreciation of facts or evidence in the light of specialised knowledge or experience (for instance, in mental health cases). If they act within the authority conferred by law, they act lawfully.

47. Art. 5 (4) requires a right of recourse to the courts to determine whether the administrative or executive authorities concerned have acted lawfully, that is to say within the limits of the powers conferred on them and in accordance with the procedure laid down by law. It does not require a right to judicial review of all aspects of the case, including the substantive grounds or merits of the decision to the extent that under the relevant domestic law these are exclusively a matter for determination by the authorities concerned; nor does it require that the court should substitute its own discretion for that of the decision-making authority. In other words, Art. 5 (4) is intended to secure a right to judicial supervision and not a right of appeal to the court.

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48. The Government oppose the view taken by the Commission in its Report on the Vagrancy Cases (and reiterated in its Report on the Winterwerp Case, paras. 88-89) that "the body determining the lawfulness of the detention must have jurisdiction enabling it to control all aspects of the decision to detain, whether relating to fact or law" (Publications of the Court, Series B, Vol. 10, p. 95). They associate themselves with the view expressed by the Belgian Government in the Vagrancy Cases according to which "the Commission's opinion is in contradiction with the interpretation traditionally given to the control of lawfulness in the legal systems of the Contracting Parties since this control is always considered as separate from the supervision of the findings of fact or matters of expediency" (ibid. p. 199).

49. The Government contend that their interpretation of Art. 5 (4) is in accordance with the plain and natural meaning of the words used in this provision.

They consider that it is also supported by the Court's judgment in the Vagrancy Cases (§ 76) and by the Commission's case law prior to those cases (reference to the decision on the admissibility of application No. 858/60 v. Belgium, Yearbook 4, p. 238) as well as by legal writing (Fawcett, The Application of the European Convention on Human Rights, p. 113).

50. The Government also refer to the travaux préparatoires of the Convention. Art. 5 (4) was included in the Convention with proceedings in the nature of habeas corpus, which historically is probably the most celebrated of all remedies for the protection of individual liberty, in mind. Certainly this was the understanding of the United Kingdom Government, who in fact proposed the text of Art. 5 (4) (cf. Collection Edition of the "Travaux Préparatoires", Vol. III, p. 284). It is true that the text contains no specific reference to habeas corpus, but this is because it had to cover comparable proceedings in other legal systems. Had the construction put forward by the Commission in paras. 88-90 of its Report in the Winterwerp Case been thought conceivable, the United Kingdom could not have accepted Art. 5 (4) without an appropriate reservation or interpretative statement. The Government believe that the interpretation advanced by the Commission in that case is neither consistent with the plain and natural meaning of the words in Art. 5 (4), nor does it accord with the intention of Governments when concluding the Convention.

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51. In the circumstances in which the present applicant was detained three remedies were available to enable the lawfulness of the detention to be decided by the courts. First, it is open to any person who claims that he is unlawfully detained to apply to a writ of habeas corpus. Secondly, if a person can establish that he has been unlawfully arrested or detained, an action will lie for damages for false imprisonment. Thirdly, the legality of the underlying deportation order could be tested by means of an application for an order of certiorari: if the deportation order is quashed, the power to detain on the basis of the order will of course then cease.

52. The Government submit that of these remedies, the habeas corpus proceedings clearly satisfy the requirements of Art. 5 (4). Every person who is detained by a governmental or other organisation or by any individual may apply for a writ of habeas corpus to a Divisional Court (consisting of three Judges) of the Queen's Bench Division of the High Court or, if the courts are not sitting, to a single Judge wherever he may be found. A single Judge may grant the writ but, if he refused the application, it can be renewed before the Divisional Court. Appeal against the decision of the Divisional Court lies to the Court of Appeal and then to the House of Lords.

The purpose of the writ of habeas corpus is to direct the organisation or person detaining the applicant to produce him before the court so that his release from illegal detention may be secured. Where the illegality is clear the court may order that the writ be issued forthwith, but more commonly the court will arrange for the person holding the detainee to be notified of the application and given an opportunity of appearing before the court to justify the detention if he wishes to do so. Applications are given priority over other business. The court will examine whether the applicant has been detained lawfully in accordance with the requirements of the relevant legislation and, if there is evidence of a misuse of power, whether the responsible authority has acted in bad faith or capriciously or for a wrongful purpose; but subject to this the court will not review the grounds or merits of the decision taken to the extent that in accordance with the relevant legislation these are exclusively a matter for determination by the executive or administrative authority concerned. If the court finds that the responsible authority has acted in bad faith or for a wrongful purpose or is otherwise not satisfied that the detention is lawful, it will issue the writ which will have the effect of procuring the release of the person detained.

53. The Government underline that the approach of the English courts in habeas corpus proceedings would be akin to that taken by the Commission when ascertaining in its decision on the admissibility of

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the present application whether or not the applicant's detention was "lawful" within the meaning of Art. 5 (1) (f). The criteria which are applicable to determine whether detention is "lawful" in accordance with Art. 5 (1) (f) must also be sufficient to satisfy the requirement as to the determination of "lawfulness" in Art. 5 (4).

54. The Government further submit that the procedures available in the present case are appropriate to the kind of deprivation of liberty in question.

In its judgment on the Vagrancy Cases, referred to in the Commission's decision on admissibility, the Court stated that the forms of procedure required by the Convention need not necessarily be identical in each of the cases where the intervention of a court is required by Art. 5 (4) and in order to determine whether a proceeding provides adequate guarantees regard must be had to the particular nature of the circumstances in which such proceeding takes place.

The Government observe that in the same paragraph the Court referred with approval to its judgment of 27 June 1968 in the Neumeister Case on the question of interpretation of the term "court" in Art. 5 (4) where it said (§ 24) that:

> "This term implies only that the authority called upon to decide thereon must possess a judicial character, that is to say be independent both of the executive and of the parties to the case; it in no way relates to the procedure to be followed."

In the present case the judicial character of the Divisional Court of the High Court could hardly be called in question and it is submitted therefore that there can be no doubt but that this requirement of Art. 5 (4) is satisfied.

55. Without prejudice to their contention that the requirements of Art. 5 (4) are fully complied with by the availability of proceedings for a writ of habeas corpus, the Government submit that in the United Kingdom there are various procedures prescribed by law for the different cases of deprivation of liberty referred to in Art. 5 (1) of the Convention andthe extent of judicial supervision varies according to the applicable procedure. Each particular procedure has been developed with due regard to the special considerations relevant to the cases to which it is applicable. The Government contend that it is also true in regard to deprivation of liberty in deportation cases.

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56. Under Section 3 (5) (b) of the *Immigration* Act 1971 a person who is not a patrial is liable to deportation from the United Kingdom if the Secretary of State deems his deportation to be conducive to the public good. In such cases the normal procedure is first to serve on the person concerned notice that the Secretary of State has decided to make a deportation order against him. There is a right of appeal against this decision to an adjudicator or to the Immigration Appeal Tribunal set up under the Act and, if the appeal is to an adjudicator in the first instance and any party to it is dissatisfied with the decision, then subject to any requirement in the rules of procedure as to leave to appeal, he may appeal to the Appeal Tribunal. Proceedings before an adjudicator or the Appeal Tribunal are of a judicial character. On appeal the decision to deport is reviewed both as to law and as to the facts and, if the appellate authority determines that deportation is not justified, the Secretary of State is bound to comply with the decision. A deportation order may not be made while an appeal is pending.

Paragraph 2 of Schedule 3 to the Act governs the question of detention pending deportation. If the appellant is detained under the authority of the Secretary of State pending the making of a deportation order, the adjudicator or the Appeal Tribunal may, and in some cases must, release him on bail pending his appeal. It is open to any person who considers that he is detained unlawfully to apply for a writ of habeas corpus and, if he considers that a deportation order has been made against him unlawfully, he may apply for an order of certiorari to have the order quashed. If his action is successful, he will be released.

57. However, where the Secretary of State has decided to make a deportation order against an individual on the ground that his deportation is conducive to the public good as being in the interests of national security, special considerations apply and Section 15 (3) of the *Immigration* Act provides that in these cases there shall be no right of appeal to an adjudicator or to the Appeal Tribunal. Very often in this type of case there is evidence which cannot be shown even to the person concerned. The reason is the need to protect sources of information that are available to the authorities of the state, and information that might lead to the disclosure of sources of information. For this reason it is not possible to use the normal procedure for appeals to an adjudicator or to the Appeal Tribunal. In such cases therefore there is a non-statutory procedure under which the person concerned may, if he wishes, make representations to an advisory panel. He will be informed, so far as possible, of the nature

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of the allegations against him and given the opportunity to appear before the advisers and to arrange for persons to testify on his behalf. The advisers themselves will be given the information on which the Secretary of State based his decision to deport, but in assessing the case they will bear in mind that it has not been tested by cross-examination. On receiving the advice of the advisers, the Secretary of State will reconsider his original decision. But unlike the decisions of the adjudicator or Appeal Tribunal the advisers only give advice and do not give decisions that are binding on the Secretary of State.

58. The main reason therefore why in national security cases in particular it has not been found appropriate to introduce a procedure for full judicial review of all aspects of the Secretary of State's decisions to deport or to authorise detention pending deportation, whether relating to facts or law, is the sensitivity of the information on which decisions are often based in these cases and the need to protect it from disclosure. However this does not mean that the courts cannot adjudicate on the lawfulness of the detention of the person concerned or of the deportation order in such cases. Proceedings can be brought for habeas corpus or false imprisonment to test the lawfulness of detention or for certiorari to quash the deportation order. And this is not a mere formal possibility. The courts will not only examine whether the requirements of the relevant legislation have been properly complied with. They will in fact look behind the order if evidence is produced that the Secretary of State has not acted bona fide in the exercise of his discretionary powers. The Government refer here to the Soblen Case (/1962/ 3 All. E.R. p. 461 at p. 661).

59. The Government also consider it relevant that, in addition to the jurisdiction of the courts to review the lawfulness of the Secretary of State's decision, he is answerable to Parliament for the way in which he discharges his functions, including the exercise of his discretionary powers. This is an important means of supervising the actions of Ministers and their Departments. It can lead to Parliamentary censure which politically is a serious and damaging matter for the Government and the Minister concerned. Mr. Caprino's case was in fact raised in Parliament and the Home Secretary informed the House of Commons on 27 January 1975 of the revocation of the deportation order against him and his release from custody. Answerability to Parliament is further reinforced by the Parliamentary Commissioner for Administration ("Ombudsman") who, on receiving a complaint of maladministration from a Member of Parliament, has power to examine all files relative to a particular action by the Minister or his Department and report on the result of his investigation. Thus even beyond the control exercised by the courts of the lawfulness of a decision, there are other important checks on the actions of the executive authorities.

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The Government submit that the following considerations are relevant to the limitation of judicial review in cases such as that of the applicant:

(i) The right of an alien to reside in the territory of a particular state is not as such a right which is guaranteed by the Convention, and the power to deport aliens is a right of the Contracting Parties which Art. 5 (1) of the Convention and Arts. 3 and 4 of Protocol No. 4 thereto clearly imply. An interpretation of Art. 5 (4) as requiring that the body determining the lawfulness of the detention must have jurisdiction enabling it to control all aspects of the decision to detain, whether relating to facts of law, would include an investigation of the reasons giving rise to a decision to deport. This would effectively extend the application of Art. 5 (4) to a matter which is outside the scope of the Convention. The Government refer here to the Commission's decision on admissibility in the Agee Case. The Commission has determined in that case that Art. 6 is not applicable to deportation procedures. In the same way Art. 5 (4) can not mean that a court of law must have the power to review the substance or merits of an administrative decision to deport and thus have the effect of securing a judicial hearing on a matter which is excluded from Art. 6 (1).

(ii) Detention in the cases in question is an ancillary measure to deportation.

(iii) As such it would normally be of very limited duration and not for a lengthy period, as it could have been for instance under the Civil Authorities (Special Powers) Act (Northern Ireland) 1922 or in Vagrancy Cases under Belgian law.

It is true that in the case of Ireland v. the United Kingdom the Commission (p. 91 of the Report of 25 January 1976) and the Court (para. 200 of the judgment of 18 January 1978) appear to take the view that in relation to arrest and detention under the Northern Ireland Special Powers Act 1922 habeas corpus was not a sufficient remedy for the purposes of Art. 5 (4) because the judicial review of the lawfulness of the measures in issue was not sufficiently wide in scope, taking into account the purpose and object of Art. 5 (4) of the Convention. However, the Court has failed to indicate how much wider the scope of the review should have been and in any event, it did not find a breach of the Convention because the powers there in question were covered by derogations made by the United Kingdom under Art. 15 of the Convention.

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The Government submit that the application of Art. 5 (4) in the present case is a separate issue to which different considerations apply. One difference is that in the Irish State Case the detention was of the essence of the matter, and secondly it concerned detention or internment for a lengthy period. In the present case, however, the essence of the matter is deportation, and detention is only ancillary to it. Moreover, it has been recognised in the Irish State Case that the form of detention there in question was more analogous to the cases contemplated in sub-para. (c) of Art. 5 (1) than to those in the other sub-paras. including in particular Art. 5 (1) (f).

(iv) The national security implications in themselves put cases like the present one into a special category. The problems with which Governments are faced in combatting terrorism have been recognised by the Court in its judgment in the Klass Case where it was accepted that in order effectively to counter such threats the State must be able to undertake the secret surveillance of subversive elements operating within its jurisdiction. In para. 59 of the same judgment, the Court agreed with the Commission that some compromise between the requirements of defending democratic society and individual rights is inherent in the system of the Convention.

(v) Under the Immigration Act, decisions to deport and to detain pending deportation are not subject to judicial review in the broadest sense, they are subject to judicial supervision as described above by the High Court with all the authority which that entails.

60. The Government finally submit that it is very important that Art. 5 (4) should not be interpreted in a sense which will unduly limit the options available to Governments in developing procedures best suited to each category of case in the context of their own constitutional, legal and administrative systems.

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OPINION OF THE COMMISSION

61. The only issue remaining open for determination by the Commission on the merits is the question whether or not there has been a violation of Art. 5 (4) of the Convention in this case.

62. This provision reads as follows:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

63. The Commission first observes that this provision is applicable notwithstanding the finding on admissibility that the applicant's detention was as such covered by Art. 5 (1) (f) of the Convention. Also a person who has been lawfully deprived of his liberty is entitled to a supervision of the lawfulness of his detention by a court (cf. ECHR, Judgment of 18 June 1971 in the Vagrancy case, § 73). Art. 5 (4) envisages only remedies available during the time of the detention, and therefore the possibility under English law of claiming damages for false imprisonment after the release does not enter into account for the purposes of this provision.

64. Since Art. 5 (4) provides for the judicial control of deprivation of liberty it must be seen in connection with the different cases in which such a deprivation of liberty is justified under Art. 5 (1)(f) of the Convention. In the present case, the Commission must interpret Art. 5 (4) in relation to detention under Art. 5 (1)(f).

65. The applicant seems to suggest that the control of the lawfulness of his detention to which he was entitled under Art. 5 (4) should also include the lawfulness of the deportation order as such. However, detention is justified under Art. 5 (1)(f) as soon as "action is being taken with a view to deportation". This indicates that the lawfulness of the deportation order is not a prerequisite for the detention to be in conformity with Art. 5 (1)(f).

It is therefore irrelevant that in the present case the judicial review of the deportation order provided by certiorari proceedings would have been limited to an examination whether the Secretary of State had acted ultra vires or mala fide. The Convention does not require any judicial review of deportation proceedings (cf. the Commission's decision on the admissibility of application No. 7729/76, Agee v. UK, DR7, p. 164) and the legal position under the Convention cannot be judged otherwise even if a deportation order serves as the basis for detention.

It is therefore only the legality of the detention itself which must be judicially controlled under Art. 5 (4).

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66. The judicial control of the lawfulness of the detention under Art. 5 (4) is to be seen as a strict requirement. Its purpose is to safeguard the liberty of the individual and to prevent arbitrary measures of detention (cf. ECHR, Judgment of 24 October 1979 in the Winterwerp case, § 45 and passim). Therefore, the Commission and the Court have held that the procedure under Art. 5 (4) must cover the substantive grounds for detention (cf. the Commission's Report of 15 December 1977 on application No. 6301/73, Winterwerp v. the Netherlands, § 90, and its Report of 16 July 1980 on application No. 6998/75, X. v. UK, §§ 131, 133 and 137, The ECHR left this question unresolved in its above cited Judgment in the Winterwerp case, § 63; cf. however § 200 of the Judgment of 18 January 1978 in the case of Ireland v. the United Kingdom). This does not mean, however, that in the proceedings envisaged by Art. 5 (4) of the Convention the court must have unlimited powers of review. The question how far the review must extend may vary according to the kind of deprivation of liberty in question (ECHR, Judgment in the Vagrancy case, §§ 76, 78). Thus the court under Art. 5 (4) does not have to review the correctness of a criminal conviction under Art. 5 (1) (a) while it must be able to ascertain whether a person is of unsound mind under Art. 5 (1) (e).

67. In the present case there is no dispute as to the availability of habeas corpus. The applicant argues that by this procedure only the formal legality of the detention order could have been established. Neither the reasons for deportation nor those for ordering the detention would have been looked into by the court in habeas corpus proceedings, according to his allegations. The Commission notes that according to the practice in the United Kingdom, courts in habeas corpus procedure will set aside a decision when it has been taken ultra vires or mala fide. It is open to dispute whether that will always be sufficient for the control required by Art. 5 (4) of the Convention. The Commission has held that a detention under Art. 5 (1) (f) must be seen as subject to principles such as necessity or proportionality (cf. the Commission's decision on the admissibility of application No. 7317/75, Lynas v. Switzerland, DR 6, pp. 141, 153). It is not clear whether under a habeas corpus procedure the courts would go into these matters.

68. However, in the present case the Commission is not required to decide this question. The applicant has not applied for habeas corpus. Nor has he furnished any indications why in his case the detention could be held to be "unlawful" for any reason which the courts would not have investigated. Where a remedy is available which in principle may fulfil the requirements of Art. 5 (4) of the Convention, the Commission cannot find a violation of this provision merely on the basis of a hypothetical judgment. This is all the more so where the applicant has chosen to avail himself of the existing informal appeal procedures against the deportation order and has thereby achieved what he wished to obtain.

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69. The Commission is well aware of the formal nature of the guarantee included in Art. 5 (4). Where no remedy exists at all, this provision will be violated even though there may be no indications that the detention is unlawful (cf. the above cited Report of the Commission in the Winterwerp case and the Judgment of the Court in that case, §§ 33 et seq.). This is, however, different where a remedy exists and the dispute is as to its scope. Here the applicant would either have had to use this remedy or to indicate to the Commission why in his particular case he had no chance to rely on any grounds for the "unlawfulness" of the detention because of the restricted scope of review.

Conclusion

70. For these reasons, the Commission finds by eight votes against one, with one abstention, that there has been no breach of Art. 5 (4) of the Convention in the present case.

Secretary to the Commission — Acting President of the Commission

(H.C. KRÜGER) — (C.A. NØRGAARD)

Dissenting opinion of Mr. M. Melchior

1. The opinion expressed by the majority of the Commission could, in a tendentious way perhaps, be summarised as follows: There is no violation of Art. 5 (4) of the Convention because the applicant has not exhausted the domestic remedies, or because he has failed to show in which way these remedies are ineffective in his case. This opinion seems to be in contradiction to the Commission's decision of 3 March 1978 declaring admissible the application No. 6871/75.

2. I cannot share the opinion expressed in para. 65 of the Report that, since a detention is justified under Art. 5 (1) (f) of the Convention as soon as "action is being taken with a view to deportation", it follows a fortiori that the lawfulness of the deportation order is not a prerequisite for the detention to be in conformity with Art. 5 (1) (f). It appears to me that a different argument must be used according to whether a) a deportation proceeding is still pending, or b) a deportation order has already been adopted. In the second case, the lawfulness of this order is a condition for the lawfulness ("regularité") of the detention under Art. 5 (1) (f), and its control must accordingly be ensured in conformity with Art. 5 (4).

3. It is evident that only the legality of the detention itself must be judicially controlled under Art. 5 (4), but it is also evident that this control is not to be seen as a mere formality because its purpose is to prevent arbitrary measures of detention. I agree that this provision does not imply unlimited powers of review for the competent court.

4. Nevertheless, I am of the opinion that since Mr. Caprino's detention was based on the existence of a deportation order against him, and since this detention could not be lawful if the deportation order itself was unlawful, the judicial control under Art. 5 (4) could and even should have extended to the lawfulness of the deportation order as such or as basis of the applicant's detention.

5. This opinion is not in contradiction with the Commission's jurisprudence according to which the power to deport an alien can be construed by the national legislation as an essentially administrative and not justiciable matter (applications Nos.7729/76, 7916/77, 7902/77). Indeed, even assuming that a deportation order underlying detention under

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Art. 5 (1) (f) could be construed as an act of state escaping judicial review as to its lawfulness, the same is not true with regard to the detention itself. Even if ancillary to deportation, the detention of a person can never be a matter exclusively within the jurisdiction of an administrative authority as Art. 5 (4) of the Convention requires the judicial review of its lawfulness. I consider that the special judicial control of the legality of detention provided for in this provision, to be of any effect, cannot be limited to the mere formal legality under domestic law, irrespective of the contents of the applicable law.

6. In this case, it must be recalled that the applicable law in the United Kingdom presumes that the detention will always be legal custody if ordered by the Secretary of State once a deportation order has been made against some alien (Section 18 (4) of Schedule 2 applicable by virtue of section 2 (4) of Schedule 3 of the Immigration Act 1971).

7. It follows that the judicial review by certiorari proceedings (challenging the lawfulness of the deportation order underlying the detention) or by habeas corpus proceedings (challenging the detention itself) do not meet the requirements of Art. 5 (4) of the Convention. Indeed, these two procedures result in a purely formal control because of the large discretionary powers conferred on the Secretary of State and the limited jurisdiction which the courts assume in this respect.

8. As regards the determination of the lawfulness of the detention as such (habeas corpus) the Court's jurisdiction is limited to the question of whether or not the Secretary of State has acted in good faith when ordering the detention. In this respect, there are no legal criteria laid down by which the court could judge the Secretary of State's actions. The law does not state whether detention in cases like the present one should be the rule or the exception, and it does not specify any facts which could be relevant to the Secretary of State's decision to order detention following the making of a deportation order. In the absence of any legal criteria the Secretary of State's good faith can apparently only be measured by reference to his own considerations when ordering the detention, but the courts will refrain from compelling the Secretary of State to disclose even these considerations and underlying facts, if not to the deportee, at least to the court itself. The Government has argued that it was necessary to protect sources of information from getting known to the interested person, but the Government has failed to show why it should be necessary to shield these sources of information from scrutiny by the courts themselves.

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By leaving not only the absolute discretion, but also all relevant information concerning a person's detention exclusively in the hands of the Secretary of State, the law does not enable the courts to ascertain effectively whether or not the detention in a particular case has been ordered arbitrarily.

9. The same kind of reasoning applies to the determination of the lawfulness of the deportation order on which the applicant's detention is based (certiorari proceedings).

10. For these reasons, I consider that in the circumstances of the present case there is a situation which does not satisfy the requirements of Art. 5 (4) of the Convention, as no effective control as to the transgression of his powers by the Secretary of State can be exercised by the courts.