SB Ref: ICSB 12/06

Bills Committee on
Interception of Communications and Surveillance Bill

Response to Issues Raised by the Bills Committee

This paper sets out the Administration's response to certain issues previously raised by the Bills Committee.

Issue 1 : To consider establishing a mechanism for the keeping and destruction of intelligence derived from interception of communications and covert surveillance activities, and requiring an application for the keeping of such intelligence to be submitted to a panel judge.

2. Clause 56 of the Bill seeks to govern the disclosure, protection and destruction of products derived from covert operations provided for under the Bill. Information derived from such operations would fall within the definition of products as long as they are the originals, copies, extracts or summaries of the products. Should there be any analysis which cannot be traced back to the products (as defined), such information is kept by the law enforcement agencies (LEAs) only if it is useful for the purpose of prevention and detection of crime or the protection of public security.

3. Any information that constitutes personal data is subject to the Personal Data (Privacy) Ordinance (PD(P)O) (Cap. 486). The LEAs already have systems for managing such information, which comply with the PD(P)O. Under the PD(P)O, data users are generally required to, among other things, comply with the six data protection principles, concerning the purpose and manner of collecting personal data, the accuracy and duration of retention of such data, their use, security and access, as well as the transparency of personal data policies.

4. The PD(P)O provides for exemptions from its requirements for various specified types of data, including, for example, data held by a data user whose business consists of a news activity, data consisting of information in respect of which a claim to legal professional privilege could be maintained in law, and data held for the prevention or detection of crime or for safeguarding security in respect of Hong Kong. In respect of data used or held for the purposes of prevention or detection of crime and safeguarding security, relevant exemption provisions in respect

of data protection principles 3 and 6 would apply.

5. The LEAs already have in place systems complying with the provisions of the PD(P)O. Where necessary, we will consider further strengthening our current systems, particularly to enhance the transparency of the policy on the use of such data.

6. We are not inclined to the suggestion for establishing a mechanism for the keeping and destruction of intelligence derived from interception of communications and covert surveillance activities, and requiring an application for the keeping of such intelligence to be submitted to a panel judge. We do not think it is practicable, and we are not aware of any common law jurisdictions requiring a similar arrangement.

Issue 2: To explain why the Chief Executive (CE) will not be subject to the Bill

7. Article 30 of the Basic Law deals with the privacy of communication and provides that –

> *"The freedom and privacy of communication of Hong Kong residents shall be protected by law. No department or individual may, on any grounds, infringe upon the freedom and privacy of communication of residents except that the relevant authorities may inspect communication in accordance with legal procedures to meet the needs of public security or of the investigation into criminal offences."*

The main purpose of the Bill is to provide "legal procedures" by which public officers in the LEAs may conduct interception of communications and covert surveillance without breaching Article 30. The prohibition on public officers carrying out interception and covert surveillance other than in accordance with those legal procedures is incidental to that main purpose.

8. In the case of CE, there is no intention that he should be able to obtain authorization to conduct interception operations under the Bill, and so the legal procedures in the Bill do not extend to him. Nor is there any need to expressly prohibit CE from conducting such operations since Article 30 of the Basic Law already prohibits interception and covert surveillance other than in accordance with legal procedures.

9. One of CE's constitutional functions under Article 48 of the Basic Law is to be responsible for the implementation of the Basic Law.

Infringement upon the privacy of communications other than in accordance with the Bill or other legal procedures would be contrary to Article 30 of the Basic Law. CE would therefore be in breach of the Basic Law if he were to "inspect" communications other than in accordance with the Bill or other legal procedures. Such action may, in a serious case, constitute a serious breach of the law or dereliction of duty for the purposes of Article 73(9) of the Basic Law, and may even lead to the Legislative Council passing a motion of impeachment against him. The mere fact that the prohibition in clauses 4 and 5 of the Bill does not extend to CE would not absolve him from his duty to observe and implement Article 30 of the Basic Law.

Issue 3: To explain the rationale for not imposing criminal sanctions on public officers breaching the proposed legislation and instead only subjecting them to disciplinary action.

10. All public officers are liable to the same criminal offences as non-public officers for any actions carried out not in the course of discharging their duties. In this respect, there is no difference between public officers and non-public officers.

11. Where a public officer is discharging his duties in the service of the Government, he is not acting in his personal capacity. In general, where he does not comply with statutory requirements in such a case, he may, depending on the circumstances of the case, face disciplinary actions according to established civil service regulations. Where applicable, cases of professional misconduct may also be referred to the relevant professional bodies for action.

12. As far as the Bill is concerned, officers of the LEAs are subject to a number of checks and balances in carrying out covert operations. Besides internal reviews, an independent Commissioner on Interception of Communications and Surveillance (the Commissioner) will be reviewing compliance of the LEA officers with the relevant requirements, as well as receiving complaints from the public and making recommendations regarding the arrangements on covert operations. The Commissioner may refer a case to the Secretary for Justice to enable the latter to consider whether there is sufficient evidence to bring a prosecution against the defaulting officer for criminal offences. The Commissioner could also report any non-compliance with the enacted legislation, code of practice and terms of authorization to the respective heads of departments and to CE. In addition, he could refer to the issues in his annual reports to be tabled at the Legislative Council.

13. Moreover, the Commissioner would be apprised of actions to be taken by the LEAs in respect of non-compliance. The head of the LEA concerned is required to provide a report with details of any measures taken by the department concerned to address any of the issues arising from the decision of the Commissioner following his reviews or his examinations pursuant to complaints. We envisage that these details would include, where applicable, disciplinary actions taken by the department in respect of the officers concerned. The above mechanism, backed by the possibility of disciplinary action, will be effective in terms of rectifying the contraventions in a timely manner.

14. As far as the Bill is concerned, appreciating the need to make it abundantly clear to LEA officers (and, for transparency, to the public) the serious consequence of any breach of the relevant requirements, it has specifically provided for the making of a code of practice for such covert operations, and we shall include provisions in the code to clearly set out the possible consequence of such breach. The code would be published and made public. Finally, applicable laws will continue to apply to LEA officers, such as the provisions in the Crimes Ordinance (Cap. 200) imposing criminal sanctions against making false statements (whether or not sworn).

Issue 4: To provide a list of legislation in Hong Kong stipulating prohibitions on public officers without criminal sanction.

15. We understand that a number of legislative provisions stipulate prohibitions on public officers without specifying any criminal sanctions. A few examples are listed below.

- Under the Public Finance Ordinance (Cap. 2), section 18 provides that :

  "[n)o public officer shall make any payment of public moneys unless he is authorized to do so: (a) by warrant issued under section 19, 20, 21, 22 or 29 or by regulations, directions or instructions made or given under this Ordinance; or (b) by any other enactment."

  Sections 25 and 28(1) of the Public Finance Ordnance also prohibit public officers from other financial dealings without proper authority or approval :

  Section 25
  "Except where otherwise provided under any enactment, no

public officer in the course of his duties shall open an account or otherwise deposit any moneys at any bank or other financial institution without the authority in writing of the Financial Secretary or an officer authorized by him in writing for the purposes of this section."

Section 28(1)
"No public officer shall give a guarantee involving any financial liability upon the Government unless such guarantee is given- (a) for the purposes of and in accordance with the provisions of an Ordinance or a resolution of the Legislative Council; or (b) with the prior approval of the Finance Committee."

- Section 13A(3) of the Arbitration Ordinance (Cap. 341) provides that :

"[a] public officer shall not accept appointment as an arbitrator or umpire unless the [Secretary for Justice] has informed him that he can be made available to do so."

Issue 5 : To reconsider the feasibility of providing the number of cases of interception of communications/surveillance, broken down by serious crime and public security. (raised at the meeting on 25 April 2006)

16. We have considered a Member's request for the Administration to provide breakdowns of the number of cases of interception of communications and covert surveillance by serious crime and public security. As explained in paper SB Re: ICSB 5/06 presented to the Bills Committee for discussion at its meeting on 19 April 2006, we do not consider it appropriate to provide such breakdowns. The relevant extract of the paper is at **Annex A** for Members' reference. In gist –

- We could not preclude the possibility that the provision of any further breakdowns, including the proportion of cases accounted for by serious crime and public security respectively, would inadvertently disclose the operational details and/or capabilities of the LEAs to the benefit of criminals.

- We understand that comparable jurisdictions like the United Kingdom and Australia also do not disclose such breakdowns. In the United States, although there is a statutory requirement for the statistics to be published in respect of authorizations

given by the judges of the Foreign Intelligence Surveillance Court, the statutory requirement in this aspect is not as comprehensive as what we propose to include in the Commissioner's report in the Bill.

- In its recent report on the regulation of covert surveillance, the Hong Kong Law Reform Commission has also not recommended the provision of breakdowns in respect of the grounds for the issue of warrants in the annual reports to be furnished by the supervisory authority to the Legislative Council. The Commission envisages that the material contained in the annual reports will consist only of aggregate statistics and information.

Having reconsidered the matter, our views have not changed.

Issue 6 : To provide a copy of the judgment in the case of Esbester v UK and any other cases relevant to the view of the European Commission and Court of Human Rights referred to in paragraph 6 of the Administration's paper entitled "Response to issues raised at the meetings of 3, 6, and 12 April 2006" (raised at the meeting on 2 May 2006)

17. A selection of relevant cases are at **Annex B.**

Security Bureau
June 2006

Annex A

Bills Committee on
Interception of Communications and Surveillance Bill

Relevant extracts from the Information Paper SB Ref. ICSB 5/06

- ***To provide the number of cases of interception / covert surveillance, broken down by crime and public security, in past three years, and examples of issues involved in past public security cases.***

12. On 25 February 2006, we provided Members with the number of cases of interception of communications and covert surveillance in the last three months of 2005. We have also undertaken to count, assuming the implementation of the regime under the Bill, the number of cases for the three months starting 20 February 2006. We believe these should provide useful background information for the purpose of considering the Bill.

13. The provision of any further breakdowns of the numbers would need to be considered with great care in order not to inadvertently disclose the operational details and/or capabilities of the law enforcement agencies (LEAs) to the benefit of criminals. Balancing this against the need for increased transparency, we have already provided in the Bill that the Commissioner on Interception of Communications and Surveillance (the Commissioner) should in his annual report set out a list of information covering various issues such as the number of prescribed authorizations issued, the number of renewals, the number of applications refused, the major categories of offences and a summary of reviews ***by interception of communications and covert surveillance respectively***. (For details, please see clause 47 of the Bill.)

14. Given the sensitivity of public security cases, it would not be appropriate for the statistics to be subdivided into public security and criminal cases. We understand that comparable jurisdictions like the United Kingdom (UK) and Australia also do not disclose such breakdowns. In the United States (US), although there is a statutory requirement for the statistics to be published in respect of authorizations given by the judges of the Foreign Intelligence Surveillance Court (FISC), the statutory requirement in this aspect is not as comprehensive as what

we propose to include in the Commissioner's report in the Bill, in the following ways –

- while we propose to report statistics on both judicially and executively authorized cases, the US statutory requirement under the Foreign Intelligence Surveillance Act (FISA) covers judicially authorized cases, and not executively authorized cases;
- there are no statutory requirements to publish statistics regarding authorizations under section 1802 of the FISA given by the President without court orders in respect of operations that are directed at communications between foreign powers;
- there are also no statutory requirements to publish statistics on interception of wire, oral and electronic communications involving a consenting party, which under US law does not require judicial authorization.

In addition, there are no statutory requirements in the US to differentiate between physical search and electronic surveillance for the statistics published in respect of the FISC.

15. Indeed, in the UK, the Interception of Communications Commissioner specifically pointed out in his 2004 Report that while there was no serious risk in the publication of the total number of warrants issued by the Home Secretary (as the total included not only warrants issued in the interest of national security, but also for the prevention and detection of serious crime), he was of the view that the disclosure of the number of warrants issued by the Foreign Secretary and the Secretary of State for Northern Ireland (i.e. foreign intelligence and national security cases) would be prejudicial to the public interest. In particular, the Interception Commissioner pointed out that the views expressed in respect of the disclosure of number of warrants issued in the 1957 Report of the Committee of Privy Councillors appointed to inquire into the interception of communications ("the Birkett Report")[5] should still apply. The relevant paragraph of the Birkett Report is reproduced below —

> *"121. We are strongly of the opinion that it would be wrong*

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[5] The Privy Councillors were appointed on 29 June 1957 "to consider and report upon the exercise by the Secretary of State of the executive power to intercept communications and, in particular, under what authority, to what extent and for what purposes this power has been exercised and to what use information so obtained has been put; and to recommend whether, how and subject to what safeguards, this power should be exercised and in what circumstances information obtained by such means should be properly used or disclosed." Their report was presented to the UK Parliament by the Prime Minister in October 1957.

> *for figures to be disclosed by the Secretary of State at regular or irregular intervals in the future. It would greatly aid the operation of agencies hostile to the State if they were able to estimate even approximately the extent of the interceptions of communications for security purposes."*

We believe that in Hong Kong's context, the general underlying principle of not disclosing the breakdown of the number of cases of interception / covert surveillance by crime and public security as outlined above also applies. In this regard, we note that in its recent report on the regulation of covert surveillance, the Hong Kong Law Reform Commission has also not recommended the provision of breakdowns in respect of the grounds for the issue of warrants in the annual reports to be furnished by the supervisory authority to the Legislative Council. The Commission envisages that the material contained in the annual reports will consist only of aggregate statistics and information.

16. The sample cases involving threats to public security are at **Annex A**. *not attached*

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附件 B

Annex B

《截取通訊及監察條例草案》
Interception of Communications and Surveillance Bill

第 6 項的有關案例
Relevant cases for Issue 6

61975J0048

Judgment of the Court of 8 April 1976.

Jean Noël Royer.

Reference for a preliminary ruling: Tribunal de première instance de Liège - Belgium.

The right to stay in a Member State and public policy.

Case 48-75.

European Court reports 1976 Page 00497
Greek special edition Page 00203
Portuguese special edition Page 00221
Spanish special edition Page 00205
Swedish special edition Page 00073
Finnish special edition Page 00079

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Keywords

1 . FREE MOVEMENT OF PERSONS - NATIONALS OF MEMBER STATES - RIGHT OF RESIDENCE - INDIVIDUAL RIGHT - RIGHT CONFERRED DIRECTLY BY THE TREATY - SAFEGUARD OF PUBLIC POLICY , PUBLIC SECURITY AND PUBLIC HEALTH - EFFECTS

(EEC TREATY , ARTICLES 48 , 52 , 56 AND 59)

2 . FREE MOVEMENT OF PERSONS - NATIONALS OF MEMBER STATES - RESIDENCE PERMIT - ISSUE - MEMBER STATES ' OBLIGATIONS

(DIRECTIVE NO 68/360 , ARTICLE 4)

3 . FREE MOVEMENT OF PERSONS - NATIONALS OF MEMBER STATES - ENTRY , MOVEMENT AND RESIDENCE - LEGAL FORMALITIES - FAILURE TO COMPLY - CONSEQUENCES

(EEC TREATY , ARTICLES 48 , 52 AND 59)

4 . FREE MOVEMENT OF PERSONS - NATIONALS OF MEMBER STATES - EXPULSION - TAKING EFFECT - APPEAL BY THE PARTY CONCERNED - RIGHT - EXERCISE - PREREQUISITE

(DIRECTIVE NO 64/221 , ARTICLES 8 AND 9)

5 . FREE MOVEMENT OF PERSONS - NATIONALS OF MEMBER STATES - ESTABLISHMENT - PROVISION OF SERVICES - MEMBER STATES ' OBLIGATIONS - IMPLEMENTING MEASURES - NEW RESTRICTIONS - PROHIBITION

(EEC TREATY , ARTICLES 53 AND 62)

6 . MEASURES ADOPTED BY AN INSTITUTION - DIRECTIVE - IMPLEMENTATION IN THE NATIONAL SYSTEM - FORMS AND METHODS - CHOICE - EFFECTIVENESS - MEMBER STATES OBLIGATIONS

(EEC TREATY , ARTICLE 189)

Summary

1 . THE RIGHT OF NATIONALS OF A MEMBER STATE TO ENTER THE TERRITORY OF ANOTHER MEMBER STATE AND RESIDE THERE IS A RIGHT CONFERRED DIRECTLY , ON ANY PERSON FALLING WITHIN THE SCOPE OF COM- MUNITY LAW , BY THE TREATY , ESPECIALLY ARTICLES 48 , 52 AND 59 OR WHERE APPROPRIATE , BY THE PROVISIONS ADOPTED1 - LANGUAGE OF THE CASE : FRENCH .

FOR ITS IMPLEMENTATION , INDEPENDENTLY OF ANY RESIDENCE PERMIT ISSUED BY THE HOST STATE . THE EXCEPTION CONCERNING THE SAFEGUARD OF PUBLIC POLICY , PUBLIC SECURITY AND PUBLIC HEALTH CONTAINED IN ARTICLES 48 (3) AND 56 (1) OF THE TREATY MUST BE REGARDED NOT AS A CONDITION PRECEDENT TO THE ACQUISITION OF THE RIGHT OF ENTRY AND RESIDENCE BUT AS PROVIDING THE POSSIBILITY , IN INDIVIDUAL CASES WHERE THERE IS SUFFICIENT JUSTIFICATION , OF IMPOSING RESTRICTIONS ON THE EXERCISE OF A RIGHT DERIVED DIRECTLY FROM THE TREATY .

2 . ARTICLE 4 OF DIRECTIVE NO 78/360 ENTAILS AN OBLIGATION FOR MEMBER STATES TO ISSUE A RESIDENCE PERMIT TO ANY PERSON WHO PROVIDES PROOF , BY MEANS OF THE APPROPRIATE DOCUMENTS , THAT HE BELONGS TO ONE OF THE CATEGORIES SET OUT IN ARTICLE 1 OF THE DIRECTIVE .

3 . THE MERE FAILURE BY A NATIONAL OF A MEMBER STATE TO COMPLY WITH THE FORMALITIES CONCERNING THE ENTRY , MOVEMENT AND RESIDENCE OF ALIENS IS NOT OF SUCH A NATURE AS TO CONSTITUTE IN ITSELF CONDUCT THREATENING PUBLIC POLICY , AND PUBLIC SECURITY AND CANNOT THEREFORE , BY ITSELF , JUSTIFY A MEASURE ORDERING EXPULSION OR TEMPORARY IMPRISONMENT FOR THAT PURPOSE .

4 . A DECISION ORDERING EXPULSION CANNOT BE EXECUTED , SAVE IN CASES OF URGENCY WHICH HAVE BEEN PROPERLY JUSTIFIED , AGAINST A PERSON PROTECTED BY COMMUNITY LAW UNTIL THE PARTY CONCERNED HAS BEEN ABLE TO EXHAUST THE REMEDIES GUARANTEED BY ARTICLES 8 AND 9 OF DIRECTIVE NO 64/221 .

5 . ARTICLES 53 AND 62 OF THE TREATY PROHIBIT THE INTRODUCTION BY A MEMBER STATE OF NEW RESTRICTIONS ON THE ESTABLISHMENT OF NATIONALS OF OTHER MEMBER STATES AND THE FREEDOM TO PROVIDE SERVICES WHICH HAS IN FACT BEEN ATTAINED AND PREVENT THE MEMBER STATES FROM REVERTING TO LESS LIBERAL PROVISIONS OR PRACTICES IN SO FAR AS THE LIBERALIZATION MEASURES ALREADY ADOPTED CONSTITUTE THE IMPLEMEN- TATION OF OBLIGATIONS ARISING FROM THE PROVISIONS AND OBJECTIVES OF THE TREATY .

6 . THE FREEDOM LEFT TO THE MEMBER STATES BY ARTICLE 189 AS TO THE CHOICE OF FORMS AND METHODS OF IMPLEMEN- TATION OF DIRECTIVES DOES NOT AFFECT THEIR OBLIGATION TO CHOOSE THE MOST APPROPRIATE FORMS AND METHODS TO ENSURE THE EFFECTIVENESS OF THE DIRECTIVES .

Parties

IN CASE 48/75

REFERENCE TO THE COURT , PURSUANT TO ARTICLE 177 OF THE EEC TREATY BY THE TRIBUNAL DE PREMIERE INSTANCE OF LIEGE FOR A PRELIMINARY RULING IN THE CRIMINAL PROCEEDINGS PENDING BEFORE THAT COURT AGAINST

JEAN NOEL ROYER , RESIDENT IN LISIEUX (FRANCE)

Subject of the case

ON THE INTERPRETATION OF VARIOUS PROVISIONS OF COMMUNITY LAW RELATING TO FREEDOM OF MOVEMENT FOR WORKERS , TO THE RIGHT OF ESTABLISHMENT AND THE FREEDOM TO PROVIDE SERVICES , IN PARTICULAR ARTICLES 48 , 53 , 56 AND 62 OF THE EEC TREATY AND COUNCIL DIRECTIVES NOS 64/221 OF 25 FEBRUARY 1964 ON THE COORDINATION OF SPECIAL MEASURES CONCERNING THE MOVEMENT AND RESIDENCE OF FOREIGN NATIONALS WHICH ARE JUSTIFIED ON GROUNDS OF PUBLIC POLICY , PUBLIC SECURITY OR PUBLIC HEALTH AND 68/360 OF 15 OCTOBER 1968 ON THE ABOLITION OF RESTRICTIONS ON MOVEMENT AND RESIDENCE WITHIN THE COMMUNITY FOR WORKERS OF MEMBER STATES AND THEIR FAMILIES .

Grounds

1 BY A JUDGMENT OF 6 MAY 1975 WHICH WAS RECEIVED AT THE COURT REGISTRY ON 29 MAY 1975 , CONFIRMED BY THE JUDGMENT OF THE COUR D ' APPEL OF LIEGE OF 22 DECEMBER 1975 WHICH WAS RECEIVED AT THE COURT REGISTRY ON 30 DECEMBER 1975 , THE TRIBUNAL DE PREMIERE INSTANCE OF LIEGE ASKED , PURSUANT TO ARTICLE 177 OF THE EEC TREATY , A NUMBER OF QUESTIONS CONCERNING THE INTERPRETATION OF ARTICLES 48 , 53 , 56 , 62 AND 189 OF THE EEC TREATY OF COUNCIL DIRECTIVES NOS 64/221 OF 25 FEBRUARY 1964 ON THE COORDINATION OF SPECIAL MEASURES CONCERNING THE MOVEMENT AND RESIDENCE OF FOREIGN NATIONALS WHICH ARE JUSTIFIED ON GROUNDS OF PUBLIC POLICY , PUBLIC SECURITY OR PUBLIC HEALTH (OJ , ENGLISH SPECIAL EDITION 1963-1964 , P . 117) AND 68/360 OF 15 OCTOBER 1968 ON THE ABOLITION OF RESTRICTIONS ON MOVEMENT AND RESIDENCE WITHIN THE COMMUNITY FOR WORKERS OF MEMBER STATES AND THEIR FAMILIES (OJ , ENGLISH SPECIAL EDITION 1968 (II), P . 485).

2 THESE QUESTIONS WERE RAISED IN THE COURSE OF CRIMINAL PROCEEDINGS AGAINST A FRENCH NATIONAL FOR ILLEGAL ENTRY INTO AND ILLEGAL RESIDENCE IN BELGIAN TERRITORY .

3 IT APPEARS FROM THE FILE THAT IN HIS COUNTRY OF ORIGIN THE ACCUSED HAS BEEN CONVICTED OF PROCURING AND PROSECUTED FOR VARIOUS ARMED ROBBERIES WITHOUT , HOWEVER , ACCORDING TO THE INFORMATION AVAILABLE , HAVING BEEN CONVICTED OF THEM .

4 THE ACCUSED ' S WIFE , ALSO A FRENCH NATIONAL , RUNS A CAFE AND DANCE HALL IN THE LIEGE DISTRICT ACTING AS AN EMPLOYEE OF THE COMPANY OWNING THE BUSINESS AND THE ACCUSED HAD JOINED HER BUT FAILED TO COMPLY WITH THE ADMINISTRATIVE FORMALITIES OF ENTRY ON THE POPULATION REGISTER .

5 HAVING DETECTED HIS PRESENCE , THE COMPETENT AUTHORITIES ORDERED HIM TO LEAVE THE COUNTRY AND INITIATED PROCEEDINGS AGAINST HIM FOR ILLEGAL RESIDENCE WHICH RESULTED IN A FIRST CONVICTION BY A COURT .

6 AFTER A BRIEF STAY IN GERMANY THE ACCUSED RETURNED TO BELGIAN TERRITORY AND REJOINED HIS WIFE , ONCE AGAIN FAILING TO COMPLY WITH THE LEGAL FORMALITIES FOR THE CONTROL OF ALIENS .

7 HE WAS AGAIN APPREHENDED BY THE POLICE AND COMMITTED TO PRISON BUT THE COMMITTAL WAS NOT CONFIRMED BY THE JUDICIAL AUTHORITIES .

8 BEFORE HIS RELEASE HOWEVER THE ACCUSED WAS SERVED WITH A MINISTERIAL DECREE OF EXPULSION ON THE GROUNDS THAT ' ROYER ' S PERSONAL CONDUCT SHOWS HIS PRESENCE TO BE A DANGER TO PUBLIC POLICY ' AND THAT ' HE HAS NOT OBSERVED THE CONDITIONS ATTACHED TO THE RESIDENCE OF ALIENS AND HE HAS NO PERMIT TO ESTABLISH HIMSELF IN THE KINGDOM ' .

9 FOLLOWING THIS EXPULSION ORDER THE ACCUSED DOES IN FACT SEEM TO HAVE LEFT BELGIAN TERRITORY BUT

THE PROSECUTIONS FOR ILLEGAL ENTRY AND ILLEGAL RESIDENCE FOLLOWED THEIR COURSE BEFORE THE TRIBUNAL DE PREMIERE INSTANCE .

THE RELEVANT COMMUNITY PROVISIONS

10 AT THE PRESENT STAGE OF THE PROCEEDINGS THE NATIONAL COURT HAS NOT YET FINALLY DETERMINED THE POSITION OF THE ACCUSED WITH REGARD TO THE PROVISIONS OF COMMUNITY LAW APPLICABLE TO HIM .

11 THE FACTS SUBMITTED BY THE NATIONAL COURT AND THE CHOICE OF THE PROVISIONS OF COMMUNITY LAW OF WHICH IT SEEKS INTERPRETATION ALLOWS OF DIFFERENT HYPOTHESES ACCORDING TO WHETHER THE ACCUSED FALLS WITHIN THE PROVISIONS OF COMMUNITY LAW BY VIRTUE OF AN OCCUPATION WHICH HE CARRIED OUT HIMSELF OR BY VIRTUE OF A POST WHICH HE HAD HIMSELF FOUND OR AGAIN AS THE HUSBAND OF A PERSON SUBJECT TO THE PROVISIONS OF COMMUNITY LAW BECAUSE OF HER OCCUPATION SO THAT THE ACCUSED ' S POSITION MAY BE REGULATED BY EITHER :

(A) THE CHAPTER OF THE TREATY CONCERNING WORKERS AND , MORE ESPECIALLY , ARTICLE 48 WHICH WAS IMPLEMENTED BY REGULATION (EEC) NO 1612/68 OF THE COUNCIL OF 15 OCTOBER 1968 ON FREEDOM OF MOVEMENT FOR WORKERS WITHIN THE COMMUNITY (OJ , ENGLISH SPECIAL EDITION 1968 (II), P . 475) AND COUNCIL DIRECTIVE NO 68/360/EEC OR

(B) THE CHAPTERS CONCERNING THE RIGHT OF ESTABLISHMENT AND FREEDOM TO PROVIDE SERVICES , IN PARTICULAR ARTICLES 52 , 53 , 56 , 62 AND 66 IMPLEMENTED BY COUNCIL DIRECTIVE NO 73/148 OF 21 MAY 1973 CONCERNING THE REMOVAL OF RESTRICTIONS ON THE MOVEMENT AND RESIDENCE OF NATIONALS OF THE MEMBER STATES WITHIN THE COMMUNITY FOR ESTABLISHMENT AND PROVISION OF SERVICES (OJ , L . 172 , P . 14).

12 NEVERTHELESS COMPARISON OF THESE DIFFERENT PROVISIONS SHOWS THAT THEY ARE BASED ON THE SAME PRINCIPLES BOTH IN SO FAR AS THEY CONCERN THE ENTRY INTO AND RESIDENCE IN THE TERRITORY OF MEMBER STATES OF PERSONS COVERED BY COMMUNITY LAW AND THE PROHIBITION OF ALL DISCRIMINATION BETWEEN THEM ON GROUNDS OF NATIONALITY .

13 IN PARTICULAR ARTICLE 10 OF REGULATION (EEC) NO 1612/68 , ARTICLE 1 OF DIRECTIVE NO 68/360 AND ARTICLE 1 OF DIRECTIVE NO 73/148 EXTEND IN IDENTICAL TERMS THE APPLICATION OF COMMUNITY LAW RELATING TO ENTRY INTO AND RESIDENCE IN THE TERRITORY OF THE MEMBER STATES TO THE SPOUSE OF ANY PERSON COVERED BY THESE PROVISIONS .

14 FURTHER , ARTICLE 1 OF DIRECTIVE NO 64/221 STATES THAT THE DIRECTIVE SHALL APPLY TO ANY NATIONAL OF A MEMBER STATE WHO RESIDES IN OR TRAVELS TO ANOTHER MEMBER STATE OF THE COMMUNITY EITHER IN ORDER TO PURSUE AN ACTIVITY AS AN EMPLOYED OR SELF-EMPLOYED PERSON , OR AS A RECIPIENT OF SERVICES , AND HIS OR HER SPOUSE AND MEMBERS OF THEIR FAMILY .

15 IT IS APPARENT FROM THE FOREGOING THAT SUBSTANTIALLY IDENTICAL PROVISIONS OF COMMUNITY LAW APPLY IN A CASE SUCH AS THE ONE AT ISSUE IF THERE EXISTS EITHER WITH REGARD TO THE PARTY CONCERNED OR HIS SPOUSE A CONNEXION WITH COMMUNITY LAW UNDER ANY OF THE ABOVE-MENTIONED PROVISIONS .

16 THE QUESTIONS REFERRED BY THE TRIBUNAL DE PREMIERE INSTANCE WILL BE ANSWERED IN THE LIGHT OF THESE CONSIDERATIONS AND WITHOUT PREJUDICE TO THE NATIONAL COURT ' S RIGHT TO DETERMINE THE SITUATION BEFORE IT WITH RESPECT TO PROVISIONS OF COMMUNITY LAW .

THE FIRST , SECOND , THIRD AND FOURTH QUESTIONS (SOURCE OF RIGHTS) CONFERRED BY THE TREATY IN RESPECT OF ENTRY INTO AND RESIDENCE IN THE TERRITORY OF THE MEMBER STATES)

17 THE FIRST , SECOND , THIRD AND FOURTH QUESTIONS SEEK TO DETERMINE , WITH PARTICULAR REGARD TO ARTICLE 48 OF THE TREATY AND DIRECTIVES NOS 64/221 AND 68/360 THE SOURCE OF THE RIGHT OF ANY NATIONALS OF A MEMBER STATE TO ENTER INTO AND RESIDE IN THE TERRITORY OF ANOTHER MEMBER STATE AND THE EFFECT ON THE EXERCISE OF THIS RIGHT OF POWERS EXERCISED BY THE MEMBER STATES WITH REGARD TO THE SUPERVISION OF ALIENS .

18 MORE PARTICULARLY , IT IS ASKED IN THIS CONNEXION

(A) WHETHER THIS RIGHT IS CONFERRED DIRECTLY BY THE TREATY OR OTHER PROVISIONS OF COMMUNITY LAW OR WHETHER IT ONLY ARISES BY MEANS OF A RESIDENCE PERMIT ISSUED BY THE COMPETENT AUTHORITY OF A MEMBER STATE RECOGNIZING THE PARTICULAR POSITION OF A NATIONAL OF ANOTHER MEMBER STATE WITH RESPECT TO COMMUNITY LAW ;

(B) WHETHER IT IS TO BE INFERRED FROM ARTICLE 4 (1) AND (2) OF DIRECTIVE NO 68/360 THAT MEMBER STATES ARE OBLIGED TO ISSUE A RESIDENCE PERMIT ONCE THE PERSON CONCERNED IS ABLE TO PRODUCE PROOF THAT HE OR SHE IS COVERED BY THE PROVISIONS OF COMMUNITY LAW ;

(C) WHETHER THE FAILURE BY A NATIONAL OF A MEMBER STATE TO COMPLY WITH THE LEGAL FORMALITIES FOR THE CONTROL OF ALIENS CONSTITUTES IN ITSELF CONDUCT ENDANGERING PUBLIC POLICY OR PUBLIC SECURITY AND WHETHER SUCH CONDUCT MAY THEREFORE JUSTIFY A DECISION ORDERING EXPULSION OR THE PROVISIONAL DEPRIVATION OF AN INDIVIDUAL ' S LIBERTY ;

(D) WHETHER AN EXPULSION ORDER MADE SUBSEQUENTLY TO SUCH A FAILURE IS A MEASURE OF A ' GENERAL ' PREVENTIVE NATURE OR WHETHER IT IS GOVERNED BY CONSIDERATIONS OF A ' SPECIAL ' PREVENTIVE NATURE ATTACHING TO THE PERSONAL CONDUCT OF THE INDIVIDUAL CONCERNED .

19 ARTICLE 48 PROVIDES THAT FREEDOM OF MOVEMENT FOR WORKERS SHALL BE SECURED WITHIN THE COMMUNITY .

20 PARAGRAPH (3) OF THAT ARTICLE PROVIDES THAT IT SHALL ENTAIL THE RIGHT TO ENTER THE TERRITORY OF MEMBER STATES , TO MOVE FREELY THERE , TO STAY THERE FOR THE PURPOSE OF EMPLOYMENT AND TO REMAIN THERE AFTER THE END OF THIS EMPLOYMENT .

21 ARTICLE 52 PROVIDES THAT RESTRICTIONS ON THE FREEDOM OF ESTABLISHMENT OF NATIONALS OF A MEMBER STATE IN THE TERRITORY OF ANOTHER MEMBER STATE SHALL BE ABOLISHED BY PROGRESSIVE STAGES WHICH SHALL BE COMPLETED BY THE END OF THE TRANSITIONAL PERIOD .

22 ARTICLE 59 PROVIDES THAT RESTRICTIONS ON FREEDOM TO PROVIDE SERVICES WITHIN THE COMMUNITY SHALL ALSO BE ABOLISHED IN THE SAME MANNER .

23 THESE PROVISIONS , WHICH MAY BE CONSTRUED AS PROHIBITING MEMBER STATES FROM SETTING UP RESTRICTIONS OR OBSTACLES TO THE ENTRY INTO AND RESIDENCE IN THEIR TERRITORY OF NATIONALS OF OTHER MEMBER STATES , HAVE THE EFFECT OF CONFERRING RIGHTS DIRECTLY ON ALL PERSONS FALLING WITHIN THE AMBIT OF THE ABOVE-MENTIONED ARTICLES , AS LATER GIVEN CLOSER ARTICULATION BY REGULATIONS OR DIRECTIVES IMPLEMENTING THE TREATY .

24 THIS INTERPRETATION HAS BEEN RECOGNIZED BY ALL THE MEASURES OF SECONDARY LAW ADOPTED FOR THE PURPOSE OF IMPLEMENTING THE ABOVE-MENTIONED PROVISIONS OF THE TREATY .

25 THUS ARTICLE 1 OF REGULATION NO 1612/68 PROVIDES THAT ANY NATIONAL OF A MEMBER STATE , SHALL , IRRESPECTIVE OF HIS PLACE OF RESIDENCE , HAVE ' THE RIGHT TO TAKE UP ACTIVITY AS AN EMPLOYED PERSON AND TO PURSUE SUCH ACTIVITY WITHIN THE TERRITORY OF ANOTHER MEMBER STATE ' AND ARTICLE 10 OF THE SAME REGULATION EXTENDS THE ' RIGHT TO INSTALL THEMSELVES ' TO THE MEMBERS OF THE FAMILY OF SUCH A NATIONAL .

26 ARTICLE 4 OF DIRECTIVE NO 68/360 PROVIDES THAT ' MEMBER STATES SHALL GRANT THE RIGHT OF RESIDENCE IN THEIR TERRITORY ' TO THE PERSONS REFERRED TO AND FURTHER STATES THAT AS ' PROOF ' OF THIS RIGHT AN INDIVIDUAL RESIDENCE PERMIT SHALL BE ISSUED .

27 FURTHER THE PREAMBLE TO DIRECTIVE NO 73/148 STATES THAT FREEDOM OF ESTABLISHMENT CAN BE FULLY ATTAINED ONLY ' IF A RIGHT OF PERMANENT RESIDENCE IS GRANTED TO THE PERSONS WHO ARE TO ENJOY FREEDOM OF ESTABLISHMENT ' AND THAT FREEDOM TO PROVIDE SERVICES ENTAILS THAT PERSONS PROVIDING AND RECEIVING SERVICES SHOULD HAVE ' THE RIGHT OF RESIDENCE FOR THE TIME DURING WHICH THE SERVICES ARE BEING PROVIDED ' .

28 THESE PROVISIONS SHOW THAT THE LEGISLATIVE AUTHORITIES OF THE COMMUNITY WERE AWARE THAT , WHILE NOT CREATING NEW RIGHTS IN FAVOUR OF PERSONS PROTECTED BY COMMUNITY LAW , THE REGULATION AND DIRECTIVES CONCERNED DETERMINED THE SCOPE AND DETAILED RULES FOR THE EXERCISE OF RIGHTS CONFERRED DIRECTLY BY THE TREATY .

29 IT IS THEREFORE EVIDENT THAT THE EXCEPTION CONCERNING THE SAFEGUARD OF PUBLIC POLICY , PUBLIC SECURITY AND PUBLIC HEALTH CONTAINED IN ARTICLES 48 (3) AND 56 (1) OF THE TREATY MUST BE REGARDED NOT AS A CONDITION PRECEDENT TO THE ACQUISITION OF THE RIGHT OF ENTRY AND RESIDENCE BUT AS PROVIDING THE POSSIBILITY , IN INDIVIDUAL CASES WHERE THERE IS SUFFICIENT JUSTIFICATION , OF IMPOSING RESTRICTIONS ON THE EXERCISE OF A RIGHT DERIVED DIRECTLY FROM THE TREATY .

30 IN VIEW OF THESE CONSIDERATIONS THE SPECIFIC QUESTIONS REFERRED BY THE NATIONAL COURT MAY BE ANSWERED AS FOLLOWS .

31 (A) IT FOLLOWS FROM THE FOREGOING THAT THE RIGHT OF NATIONALS OF A MEMBER STATE TO ENTER THE TERRITORY OF ANOTHER MEMBER STATE AND RESIDE THERE FOR THE PURPOSES INTENDED BY THE TREATY - IN PARTICULAR TO LOOK FOR OR PURSUE AN OCCUPATION OR ACTIVITIES AS EMPLOYED OR SELF-EMPLOYED PERSONS , OR TO REJOIN THEIR SPOUSE OR FAMILY - IS A RIGHT CONFERRED DIRECTLY BY THE TREATY , OR , AS THE CASE MAY BE , BY THE PROVISIONS ADOPTED FOR ITS IMPLEMENTATION .

32 IT MUST THEREFORE BE CONCLUDED THAT THIS RIGHT IS ACQUIRED INDEPENDENTLY OF THE ISSUE OF A RESIDENCE PERMIT BY THE COMPETENT AUTHORITY OF A MEMBER STATE .

33 THE GRANT OF THIS PERMIT IS THEREFORE TO BE REGARDED NOT AS A MEASURE GIVING RISE TO RIGHTS BUT AS A MEASURE BY A MEMBER STATE SERVING TO PROVE THE INDIVIDUAL POSITION OF A NATIONAL OF ANOTHER MEMBER STATE WITH REGARD TO PROVISIONS OF COMMUNITY LAW .

34 (B) ARTICLE 4 (1) AND (2) OF DIRECTIVE NO 68/360 PROVIDES , WITHOUT PREJUDICE TO ARTICLE 10 THEREOF THAT MEMBER STATES SHALL ' GRANT ' THE RIGHT OF RESIDENCE IN THEIR TERRITORY TO PERSONS WHO ARE ABLE TO PRODUCE THE DOCUMENTS LISTED IN THE DIRECTIVE AND THAT ' PROOF ' OF THE RIGHT OF RESIDENCE SHALL BE CONSTITUTED BY ISSUE OF A SPECIAL RESIDENCE PERMIT .

35 THE ABOVE-MENTIONED PROVISIONS OF THE DIRECTIVE ARE INTENDED TO DETERMINE THE PRACTICAL DETAILS REGULATING THE EXERCISE OF RIGHTS CONFERRED DIRECTLY BY THE TREATY .

36 IT FOLLOWS THEREFORE , THAT THE RIGHT OF RESIDENCE MUST BE GRANTED BY THE AUTHORITIES OF THE MEMBER STATES TO ANY PERSON FALLING WITHIN THE CATEGORIES SET OUT IN ARTICLE 1 OF THE DIRECTIVE AND WHO IS ABLE TO PROVE , BY PRODUCING THE DOCUMENTS SPECIFIED IN ARTICLE 4 (3), THAT HE FALLS WITHIN ONE OF THESE CATEGORIES .

37 THE ANSWER TO THE QUESTION PUT SHOULD THEREFORE BE THAT ARTICLE 4 OF DIRECTIVE NO 68/360 ENTAILS AN OBLIGATION FOR MEMBER STATES TO ISSUE A RESIDENCE PERMIT TO ANY PERSON WHO PROVIDES PROOF , BY MEANS OF THE APPROPRIATE DOCUMENTS , THAT HE BELONGS TO ONE OF THE CATEGORIES SET OUT IN ARTICLE 1 OF THE DIRECTIVE .

38 (C) THE LOGICAL CONSEQUENCE OF THE FOREGOING IS THAT THE MERE FAILURE BY A NATIONAL OF A MEMBER STATE TO COMPLETE THE LEGAL FORMALITIES CONCERNING ACCESS , MOVEMENT AND RESIDENCE OF ALIENS DOES NOT JUSTIFY A DECISION ORDERING EXPULSION .

39 SINCE IT IS A QUESTION OF THE EXERCISE OF A RIGHT ACQUIRED UNDER THE TREATY ITSELF , SUCH CONDUCT CANNOT BE REGARDED AS CONSTITUTING IN ITSELF A BREACH OF PUBLIC POLICY OR PUBLIC SECURITY .

40 CONSEQUENTLY ANY DECISION ORDERING EXPULSION MADE BY THE AUTHORITIES OF A MEMBER STATE AGAINST A NATIONAL OF ANOTHER MEMBER STATE COVERED BY THE TREATY WOULD , IF IT WERE BASED SOLELY ON THAT PERSON ' S FAILURE TO COMPLY WITH THE LEGAL FORMALITIES CONCERNING THE CONTROL OF ALIENS OR ON THE LACK OF A RESIDENCE PERMIT , BE CONTRARY TO THE PROVISIONS OF THE TREATY .

41 IT MUST NEVERTHELESS BE STATED IN THIS RESPECT THAT ON THE ONE HAND THE MEMBER STATES MAY STILL EXPEL FROM THEIR TERRITORY A NATIONAL OF ANOTHER MEMBER STATE WHERE THE REQUIREMENTS OF PUBLIC

POLICY AND PUBLIC SECURITY ARE INVOLVED FOR REASONS OTHER THAN THE FAILURE TO COMPLY WITH FORMALITIES CONCERNING THE CONTROL OF ALIENS WITHOUT PREJUDICE TO THE LIMITS PLACED ON THEIR DISCRETION BY COMMUNITY LAW AS STATED BY THE COURT IN ITS JUDGMENT OF 26 OCTOBER 1975 (CASE 36/75 , RUTILI V MINISTER FOR THE INTERIOR (1975) ECR 1219).

42 ON THE OTHER HAND COMMUNITY LAW DOES NOT PREVENT THE MEMBER STATES FROM PROVIDING , FOR BREACHES OF NATIONAL PROVISIONS CONCERNING THE CONTROL OF ALIENS , ANY APPROPRIATE SANCTIONS - OTHER THAN MEASURES OF EXPULSION FROM THE TERRITORY - NECESSARY IN ORDER TO ENSURE THE EFFICACITY OF THOSE PROVISIONS .

43 AS TO THE QUESTION WHETHER A MEMBER STATE MAY TAKE MEASURES FOR THE TEMPORARY DEPRIVATION OF LIBERTY OF AN ALIEN COVERED BY THE TERMS OF THE TREATY WITH A VIEW TO EXPELLING HIM FROM THE TERRITORY IT MUST FIRST BE STATED THAT NO MEASURE OF THIS NATURE IS PERMISSIBLE IF A DECISION ORDERING EXPULSION FROM THE TERRITORY WOULD BE CONTRARY TO THE TREATY .

44 MOREOVER THE VALIDITY OF A MEASURE OF PROVISIONAL DEPRIVATION OF LIBERTY TAKEN IN THE CASE OF AN ALIEN WHO WAS UNABLE TO PROVE THAT HE WAS COVERED BY THE TREATY OR WHO COULD BE EXPELLED FROM THE TERRITORY FOR REASONS OTHER THAN FAILURE TO COMPLY WITH THE FORMALITIES CONCERNING THE CONTROL OF ALIENS DEPENDS ON THE PROVISIONS OF NATIONAL LAW AND THE INTERNATIONAL OBLIGATIONS ASSUMED BY THE MEMBER STATE CONCERNED SINCE COMMUNITY LAW AS SUCH DOES NOT YET IMPOSE ANY SPECIFIC OBLIGATIONS ON MEMBER STATES IN THIS RESPECT .

45 (D) ARTICLE 3 (1) OF DIRECTIVE NO 64/221 PROVIDES THAT ' MEASURES TAKEN ON GROUNDS OF PUBLIC POLICY OR OF PUBLIC SECURITY SHALL BE BASED EXCLUSIVELY ON THE PERSONAL CONDUCT OF THE INDIVIDUAL CONCERNED ' .

46 THIS PROVISION OBLIGES THE MEMBER STATES TO MAKE THEIR ASSESSMENT , AS REGARDS THE REQUIREMENTS OF PUBLIC POLICY AND PUBLIC SECURITY , ON THE BASIS OF THE INDIVIDUAL POSITION OF ANY PERSON PROTECTED BY COMMUNITY LAW AND NOT ON THE BASIS OF GENERAL CONSIDERATIONS .

47 NEVERTHELESS IT IS EVIDENT FROM THE FOREGOING THAT THE FAILURE TO COMPLY WITH THE LEGAL FORMALITIES CONCERNING THE ENTRY , MOVEMENT AND RESIDENCE OF ALIENS DOES NOT IN ITSELF CONSTITUTE A THREAT TO PUBLIC POLICY AND PUBLIC SECURITY WITHIN THE MEANING OF THE TREATY .

48 IN ITSELF SUCH CONDUCT CANNOT THEREFORE GIVE RISE TO THE APPLICATION OF THE MEASURES REFERRED TO IN ARTICLE 3 OF THE ABOVE-MENTIONED DIRECTIVE .

49 IT IS THEREFORE APPARENT FROM WHAT HAS ALREADY BEEN STATED THAT THIS PART OF THE QUESTIONS NO LONGER SERVES ANY PURPOSE .

50 THE QUESTIONS PUT SHOULD THEREFORE BE ANSWERED IN THE SENSE THAT THE RIGHT OF NATIONALS OF ONE MEMBER STATE TO ENTER THE TERRITORY OF ANOTHER MEMBER STATE AND TO RESIDE THERE IS CONFERRED DIRECTLY , ON ANY PERSON FALLING WITHIN THE SCOPE OF COMMUNITY LAW , BY THE TREATY , ESPECIALLY ARTICLES 48 , 52 AND 59 OR , AS THE CASE MAY BE , BY ITS IMPLEMENTING PROVISIONS INDEPENDENTLY OF ANY RESIDENCE PERMIT ISSUED BY THE HOST STATE .

51 THE MERE FAILURE BY A NATIONAL OF A MEMBER STATE TO COMPLY WITH THE FORMALITIES CONCERNING ENTRY , MOVEMENT AND RESIDENCE OF ALIENS IS NOT OF SUCH A NATURE AS TO CONSTITUTE IN ITSELF CONDUCT THREATENING PUBLIC POLICY AND PUBLIC SECURITY AND CANNOT THEREFORE BY ITSELF JUSTIFY A MEASURE ORDERING EXPULSION OR TEMPORARY IMPRISONMENT FOR THAT PURPOSE .

THE FIFTH QUESTION (IMPLEMENTATION OF MEASURES OF EXPULSION AND LEGAL REMEDIES)

52 IN SUBSTANCE THE FIFTH QUESTION ASKS WHETHER A DECISION ORDERING EXPULSION OR A REFUSAL TO ISSUE A RESIDENCE OR ESTABLISHMENT PERMIT MAY , IN VIEW OF THE REQUIREMENTS OF COMMUNITY LAW , GIVE RISE TO IMMEDIATE MEASURES OF EXECUTION OR WHETHER SUCH A DECISION ONLY TAKES EFFECT AFTER REMEDIES BEFORE THE NATIONAL COURTS HAVE BEEN EXHAUSTED .

53 UNDER ARTICLE 8 OF DIRECTIVE NO 64/221 ANY PERSON SUBJECT TO AN ORDER OF EXPULSION FROM THE TERRITORY SHALL HAVE THE SAME LEGAL REMEDIES IN RESPECT OF THESE DECISIONS AS ARE AVAILABLE TO NATIONALS IN RESPECT OF ACTS OF THE ADMINISTRATION .

54 IN DEFAULT OF THIS THE PERSON CONCERNED MUST , UNDER ARTICLE 9 , AT THE VERY LEAST BE ABLE TO EXERCISE HIS RIGHT OF DEFENCE BEFORE A COMPETENT AUTHORITY WHICH MUST NOT BE THE SAME AS THAT WHICH ADOPTED THE MEASURES RESTRICTING HIS FREEDOM .

55 IT IS APPROPRIATE TO STATE IN THIS RESPECT THAT ALL STEPS MUST BE TAKEN BY THE MEMBER STATES TO ENSURE THAT THE SAFEGUARD OF THE RIGHT OF APPEAL IS IN FACT AVAILABLE TO ANYONE AGAINST WHOM A RESTRICTIVE MEASURE OF THIS KIND HAS BEEN ADOPTED .

56 HOWEVER THIS GUARANTEE WOULD BECOME ILLUSORY IF THE MEMBER STATES COULD , BY THE IMMEDIATE EXECUTION OF A DECISION ORDERING EXPULSION , DEPRIVE THE PERSON CONCERNED OF THE OPPORTUNITY OF EFFECTIVELY MAKING USE OF THE REMEDIES WHICH HE IS GUARANTEED BY DIRECTIVE NO 64/221 .

57 IN THE CASE OF THE LEGAL REMEDIES REFERRED TO IN ARTICLE 8 OF DIRECTIVE NO 64/221 , THE PARTY CONCERNED MUST A LEAST HAVE THE OPPORTUNITY OF LODGING AN APPEAL AND THUS OBTAINING A STAY OF EXECUTION BEFORE THE EXPULSION ORDER IS CARRIED OUT .

58 THIS CONCLUSION ALSO FOLLOWS FROM THE LINK ESTABLISHED BY THE DIRECTIVE BETWEEN ARTICLES 8 AND 9 THEREOF IN VIEW OF THE FACT THAT THE PROCEDURE SET OUT IN THE LATTER PROVISION IS OBLIGATORY INTER ALIA WHERE THE LEGAL REMEDIES REFERRED TO IN ARTICLE 8 ' CANNOT HAVE SUSPENSORY EFFECT ' .

59 UNDER ARTICLE 9 THE PROCEDURE OF APPEAL TO A COMPETENT AUTHORITY MUST PRECEDE THE DECISION ORDERING EXPULSION IN CASES OF URGENCY .

60 CONSEQUENTLY WHERE A LEGAL REMEDY REFERRED TO IN ARTICLE 8 IS AVAILABLE THE DECISION ORDERING EXPULSION MAY NOT BE EXECUTED BEFORE THE PARTY CONCERNED IS ABLE TO AVAIL HIMSELF OF THE REMEDY .

61 WHERE NO SUCH REMEDY IS AVAILABLE , OR WHERE IT IS AVAILABLE BUT CANNOT HAVE SUSPENSORY EFFECT , THE DECISION CANNOT BE TAKEN - SAVE IN CASES OR URGENCY WHICH HAVE BEEN PROPERLY JUSTIFIED - UNTIL THE PARTY CONCERNED HAS HAD THE OPPORTUNITY OF APPEALING TO THE AUTHORITY DESIGNATED IN ARTICLE 9 OF DIRECTIVE NO 64/221 AND UNTIL THIS AUTHORITY HAS REACHED A DECISION .

62 THE QUESTION MUST THEREFORE BE ANSWERED TO THE EFFECT THAT A DECISION ORDERING EXPULSION CANNOT BE EXECUTED , SAVE IN CASES OF URGENCY WHICH HAVE BEEN PROPERLY JUSTIFIED , AGAINST A PERSON PROTECTED BY COMMUNITY LAW UNTIL THE PARTY CONCERNED HAS BEEN ABLE TO EXHAUST THE REMEDIES GUARANTEED BY ARTICLES 8 AND 9 OF DIRECTIVE NO 64/221 .

THE SIXTH , SEVENTH AND EIGHTH QUESTIONS (PROHIBITION OF NEW RESTRICTIONS)

63 THE SIXTH , SEVENTH AND EIGHTH QUESTIONS ASK WHETHER , BY VIRTUE OF ARTICLES 53 AND 62 OF THE TREATY PROHIBITING THE INTRODUCTION BY A MEMBER STATE OF NEW RESTRICTIONS ON THE ESTABLISHMENT OF NATIONALS OF OTHER MEMBER STATES AND ON THE FREEDOM TO PROVIDE SERVICES WHICH HAS IN FACT BEEN ACHIEVED , A MEMBER STATE MAY REVERT TO PROVISIONS OR PRACTICES WHICH ARE LESS LIBERAL THAN THOSE WHICH IT HAD PREVIOUSLY APPLIED .

64 MORE PARTICULARLY , IT IS ASKED IN THIS RESPECT

(A) WHETHER NATIONAL PROVISIONS WHICH HAVE THE EFFECT OF MAKING THE PROVISIONS PREVIOUSLY APPLIED LESS LIBERAL ARE JUSTIFIED WHEN THEY SEEK TO BRING NATIONAL LAW INTO LINE WITH THE RELEVANT COMMUNITY DIRECTIVES ;

(B) WHETHER THE PROHIBITION ON NEW RESTRICTIONS APPLIES ALSO TO PROVISIONS OF A FORMAL OR PROCEDURAL NATURE IN SPITE OF THE FACT THAT ARTICLE 189 OF THE EEC LEAVES TO THE MEMBER STATES ' THE CHOICE OF FORMS AND METHODS ' FOR THE IMPLEMENTATION OF DIRECTIVES .

65 (A) ARTICLES 53 AND 62 PROHIBIT NOT MERELY THE INTRODUCTION OF NEW RESTRICTIONS AS COMPARED WITH THOSE APPLYING IN THE SITUATION EXISTING WHEN THE TREATY ENTERED INTO FORCE , BUT ALSO THE REVOCATION OF LIBERALIZING MEASURES TAKEN BY THE MEMBER STATES IN IMPLEMENTATION OF THEIR OBLIGATIONS UNDER COMMUNITY LAW .

66 IN THIS RESPECT , THE MEASURES ADOPTED BY THE COMMUNITY PARTICULARLY IN THE FORM OF DIRECTIVES FOR THE IMPLEMENTATION OF THE TREATY PROVISIONS MAY GIVE SOME INDICATION AS TO THE SCOPE OF THE OBLIGATIONS BORNE BY THE MEMBER STATES .

67 IN PARTICULAR THIS IS TRUE OF DIRECTIVE NO 64/221 WHICH SETS OUT A NUMBER OF LIMITS ON THE DISCRETION ENJOYED BY THE MEMBER STATES AND OF OBLIGATIONS IMPOSED UPON THEM WITH REGARD TO THE SAFEGUARD OF PUBLIC POLICY , PUBLIC SECURITY AND PUBLIC HEALTH .

68 ON THE OTHER HAND IT IS NOT POSSIBLE TO RELY ON THE RULE IN ARTICLES 53 AND 62 IN CASES WHERE IT IS ESTABLISHED THAT THE ADVANTAGES GRANTED BY A MEMBER STATE TO NATIONALS OF OTHER MEMBER STATES ARE NOT GRANTED IN EXECUTION OF AN OBLIGATION UNDER COMMUNITY LAW .

69 (B) THERE IS NO CONTRADICTION BETWEEN THE PROHIBITION OF NEW RESTRICTIONS BY ARTICLES 53 AND 62 AND THE PROVISION CONTAINED IN ARTICLE 189 WHICH LEAVES TO THE MEMBER STATES ' THE CHOICE OF FORM AND METHODS ' FOR THE IMPLEMENTATION OF DIRECTIVES .

70 IN FACT THE CHOICE OF FORM AND METHODS CAN ONLY OPERATE IN COMPLIANCE WITH THE STIPULATIONS AND PROHIBITIONS IN COMMUNITY LAW .

71 WITH RESPECT TO THE DIRECTIVES INTENDED TO IMPLEMENT THE FREE MOVEMENT OF PERSONS THE COMPETENT COMMUNITY INSTITUTIONS HAVE ATTACHED PARTICULAR IMPORTANCE TO A GROUP OF STIPULATIONS OF A FORMAL AND PROCEDURAL NATURE INTENDED TO ENSURE THE PRACTICAL WORKING OF THE SCHEME ESTABLISHED BY THE TREATY .

72 THIS IS THE CASE IN PARTICULAR AS REGARDS DIRECTIVE NO 64/221 ON SPECIAL MEASURES JUSTIFIED ON GROUNDS OF PUBLIC POLICY , PUBLIC SECURITY OR PUBLIC HEALTH , IN THAT SOME OF THE GUARANTEES PROVIDED BY THE DIRECTIVE FOR PERSONS PROTECTED BY COMMUNITY LAW , NAMELY THE OBLIGATION TO INFORM ANY PERSON SUBJECT TO A RESTRICTIVE MEASURE OF THE REASONS FOR IT AND TO GIVE HIM A RIGHT OF APPEAL , ARE OF A PROCEDURAL NATURE .

73 THE MEMBER STATES ARE CONSEQUENTLY OBLIGED TO CHOOSE , WITHIN THE BOUNDS OF THE FREEDOM LEFT TO THEM BY ARTICLE 189 , THE MOST APPROPRIATE FORMS AND METHODS TO ENSURE THE EFFECTIVE FUNCTIONING OF THE DIRECTIVES , ACCOUNT BEING TAKEN OF THEIR AIMS .

74 THE QUESTIONS SHOULD THEREFORE BE ANSWERED TO THE EFFECT THAT ARTICLES 53 AND 62 OF THE TREATY PROHIBIT THE INTRODUCTION BY A MEMBER STATE OF NEW RESTRICTIONS ON THE ESTABLISHMENT OF NATIONALS OF OTHER MEMBER STATES AND THE FREEDOM TO PROVIDE SERVICES WHICH HAS IN FACT BEEN ATTAINED AND THAT THEY PREVENT THE MEMBER STATES FROM REVERTING TO LESS LIBERAL PROVISIONS OR PRACTICES IN SO FAR AS THE LIBERALIZATION MEASURES ALREADY ADOPTED CONSTITUTE THE IMPLEMENTATION OF OBLIGATIONS ARISING FROM THE PROVISIONS AND OBJECTIVES OF THE TREATY .

75 THE FREEDOM LEFT TO THE MEMBER STATES BY ARTICLE 189 AS TO THE CHOICE OF FORMS AND METHODS OF IMPLEMENTATION OF DIRECTIVES DOES NOT AFFECT THEIR OBLIGATION TO CHOOSE THE MOST APPROPRIATE FORMS AND METHODS TO ENSURE THE EFFECTIVENESS OF THE DIRECTIVES .

Decision on costs

COSTS

76 THE COSTS INCURRED BY THE COMMISSION OF THE EUROPEAN COMMUNITIES WHICH HAS SUBMITTED OBSERVATIONS TO THE COURT ARE NOT RECOVERABLE .

77 SINCE THE PROCEEDINGS ARE , SO FAR AS THE PARTIES TO THE MAIN ACTION ARE CONCERNED , IN THE NATURE

OF A STEP IN THE ACTION PENDING BEFORE THE TRIBUNAL DE PREMIERE INSTANCE OF LIEGE , IT IS FOR THAT COURT TO MAKE AN ORDER AS TO COSTS .

Operative part

ON THOSE GROUNDS ,

THE COURT

IN ANSWER TO THE QUESTIONS REFERRED TO IT BY THE TRIBUNAL DE PREMIERE INSTANCE , LIEGE , HEREBY RULES :

1 . THE RIGHT OF NATIONALS OF A MEMBER STATE TO ENTER THE TERRITORY OF ANOTHER MEMBER STATE AND RESIDE THERE IS A RIGHT CONFERRED DIRECTLY , ON ANY PERSON FALLING WITHIN THE SCOPE OF COMMUNITY LAW , BY THE TREATY - ESPECIALLY ARTICLES 48 , 52 AND 59 - OR , AS THE CASE MAY BE , BY THE PROVISIONS ADOPTED FOR ITS IMPLEMENTATION , INDEPENDENTLY OF ANY RESIDENCE PERMIT ISSUED BY THE HOST STATE .

2 . ARTICLE 4 OF DIRECTIVE NO 68/360 ENTAILS AN OBLIGATION FOR MEMBER STATES TO ISSUE A RESIDENCE PERMIT TO ANY PERSON WHO PROVIDES PROOF , BY MEANS OF THE APPROPRIATE DOCUMENTS , THAT HE BELONGS TO ONE OF THE CATEGORIES SET OUT IN ARTICLE 1 OF THE DIRECTIVE .

3 . THE MERE FAILURE BY A NATIONAL OF A MEMBER STATE TO COMPLY WITH THE FORMALITIES CONCERNING THE ENTRY , MOVEMENT AND RESIDENCE OF ALIENS IS NOT OF SUCH A NATURE AS TO CONSTITUTE IN ITSELF CONDUCT THREATENING PUBLIC POLICY AND PUBLIC SECURITY AND CANNOT THEREFORE , BY ITSELF , JUSTIFY A MEASURE ORDERING EXPULSION OR TEMPORARY IMPRISONMENT FOR THAT PURPOSE .

4 . A DECISION ORDERING EXPULSION CANNOT BE EXECUTED , SAVE IN CASES OF URGENCY WHICH HAVE BEEN PROPERLY JUSTIFIED , AGAINST A PERSON PROTECTED BY COMMUNITY LAW UNTIL THE PARTY CONCERNED HAS BEEN ABLE TO EXHAUST THE REMEDIES GUARANTEED BY ARTICLES 8 AND 9 OF DIRECTIVE NO 64/221 .

5 . ARTICLES 53 AND 62 OF THE TREATY PROHIBIT THE INTRODUCTION BY A MEMBER STATE OF NEW RESTRICTIONS ON THE ESTABLISHMENT OF NATIONALS OF OTHER MEMBER STATES AND THE FREEDOM TO PROVIDE SERVICES WHICH HAS IN FACT BEEN ATTAINED AND PREVENT THE MEMBER STATES FROM REVERTING TO LESS LIBERAL PROVISIONS OR PRACTICES IN SO FAR AS THE LIBERALIZATION MEASURES ALREADY ADOPTED CONSTITUTE THE IMPLEMENTATION OF OBLIGATIONS ARISING FROM THE PROVISIONS AND OBJECTIVES OF THE TREATY .

6 . THE FREEDOM LEFT TO THE MEMBER STATES BY ARTICLE 189 AS TO THE CHOICE OF FORMS AND METHODS OF IMPLEMENTATION OF DIRECTIVES DOES NOT AFFECT THEIR OBLIGATION TO CHOOSE THE MOST APPROPRIATE FORMS AND METHODS TO ENSURE THE EFFECTIVENESS OF THE DIRECTIVES .

Haut

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Judgment of the Court of 15 May 1986. - Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary. - Reference for a preliminary ruling: Industrial Tribunal, Belfast (Northern Ireland) - United Kingdom. - Equal treatment for men and women - Armed member of a police reserve force. - Case 222/84.

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Keywords

1 . COMMUNITY LAW - INTERPRETATION - TAKING INTO CONSIDERATION THE EUROPEAN CONVENTION ON HUMAN RIGHTS

2 . SOCIAL POLICY - MALE AND FEMALE WORKERS - ACCESS TO EMPLOYMENT AND WORKING CONDITIONS - EQUAL TREATMENT - EXCEPTIONS - SUBJECT TO EFFECTIVE JUDICIAL CONTROL - ARTICLE 6 OF DIRECTIVE 76/207 - EFFECT ON RELATIONS BETWEEN THE STATE AND INDIVIDUALS

(COUNCIL DIRECTIVE 76/207 , ART . 6)

3 . SOCIAL POLICY - MALE AND FEMALE WORKERS - ACCESS TO EMPLOYMENT AND WORKING CONDITIONS - EQUAL TREATMENT - REQUIREMENTS OF PUBLIC SAFETY - EXAMINATION IN THE CONTEXT OF DIRECTIVE 76/207

(COUNCIL DIRECTIVE 76/207)

4 . SOCIAL POLICY - MALE AND FEMALE WORKERS - ACCESS TO EMPLOYMENT AND WORKING CONDITIONS - EQUAL TREATMENT - EXCEPTIONS - OCCUPATIONS FOR WHICH THE SEX OF THE WORKER CONSTITUTES A DETERMINING FACTOR - ARMED POLICE OFFICERS - TAKING INTO CONSIDERATION THE REQUIREMENTS OF PUBLIC SAFETY IN AN INTERNAL SITUATION CHARACTERIZED BY FREQUENT ASSASSINATIONS - PERMISSIBLE - CONTROL BY THE NATIONAL COURTS

(COUNCIL DIRECTIVE 76/207 , ART . 2 (2))

5 . SOCIAL POLICY - MALE AND FEMALE WORKERS - ACCESS TO EMPLOYMENT AND WORKING CONDITIONS - EQUAL TREATMENT - EXCEPTIONS - PROTECTION OF WOMEN - RISKS OF BEING AN ARMED POLICE OFFICER - EXCLUSION

(COUNCIL DIRECTIVE 76/207 , ART . 2 (3))

6 . MEASURES ADOPTED BY THE INSTITUTIONS - DIRECTIVES - IMPLEMENTATION BY THE MEMBER STATES - NEED TO ENSURE THAT DIRECTIVES ARE EFFECTIVE - OBLIGATIONS OF NATIONAL COURTS

(EEC TREATY , ART . 5 AND THIRD PARAGRAPH OF ART . 189)

7 . SOCIAL POLICY - MALE AND FEMALE WORKERS - ACCESS TO EMPLOYMENT AND WORKING CONDITIONS - EQUAL TREATMENT - DIRECTIVE 76/207 , ARTICLE 2 (1) COMBINED WITH ARTICLES 3 (1) AND 4 - EFFECT ON THE RELATIONS BETWEEN THE STATE AND INDIVIDUALS - STATE EMPLOYER

(COUNCIL DIRECTIVE 76/207 , ARTS 2 (1) AND (2), 3 (1) AND 4)

Summary

1 . AS THE EUROPEAN PARLIAMENT , COUNCIL AND COMMISSION RECOGNIZED IN THEIR JOINT DECLARATION OF 5 APRIL 1977 AND AS THE COURT HAS RECOGNIZED IN ITS DECISIONS , THE PRINCIPLES ON WHICH THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS IS BASED MUST BE TAKEN INTO CONSIDERATION IN COMMUNITY LAW .

2 . THE PRINCIPLE OF EFFECTIVE JUDICIAL CONTROL LAID DOWN IN ARTICLE 6 OF COUNCIL DIRECTIVE 76/207 , A PRINCIPLE WHICH UNDERLIES THE CONSTITUTIONAL TRADITIONS COMMON TO THE MEMBER STATES AND WHICH IS LAID DOWN IN ARTICLES 6 AND 13 OF THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS , DOES NOT ALLOW A CERTIFICATE ISSUED BY A NATIONAL AUTHORITY STATING THAT THE CONDITIONS FOR DEROGATING FROM THE PRINCIPLE OF EQUAL TREATMENT FOR MEN AND WOMEN FOR THE PURPOSES OF PROTECTING PUBLIC SAFETY ARE SATISFIED TO BE TREATED AS CONCLUSIVE EVIDENCE SO AS TO EXCLUDE THE EXERCISE OF ANY POWER OF REVIEW BY THE COURTS . THE PROVISION CONTAINED IN ARTICLE 6 TO THE EFFECT THAT ALL PERSONS WHO CONSIDER THEMSELVES WRONGED BY DISCRIMINATION BETWEEN MEN AND WOMEN MUST HAVE AN EFFECTIVE JUDICIAL REMEDY MAY BE RELIED UPON BY INDIVIDUALS AS AGAINST A MEMBER STATE WHICH HAS NOT ENSURED THAT IT IS FULLY IMPLEMENTED IN ITS INTERNAL LEGAL ORDER .

3 . IT IS NOT PERMISSIBLE TO READ INTO THE TREATY , REGARDLESS OF THE SPECIFIC CASES ENVISAGED BY CERTAIN OF ITS PROVISIONS , A GENERAL PROVISO COVERING ANY MEASURE TAKEN BY A MEMBER STATE FOR REASONS OF PUBLIC SAFETY . RECOGNITION OF SUCH A GENERAL PROVISO MIGHT IMPAIR THE BINDING NATURE OF COMMUNITY LAW AND ITS UNIFORM APPLICATION . IT FOLLOWS THAT ACTS OF SEX DISCRIMINATION DONE FOR REASONS RELATED TO THE PROTECTION OF PUBLIC SAFETY MUST BE EXAMINED IN THE LIGHT OF THE DEROGATIONS FROM THE PRINCIPLE OF EQUAL TREATMENT OF MEN AND WOMEN .

4 . SINCE ARTICLE 2 (2) OF DIRECTIVE 76/207 AUTHORIZES DEROGATIONS FROM THE RIGHT TO EQUAL TREATMENT AS REGARDS ACCESS TO EMPLOYMENT AND WORKING CONDITIONS , IT MUST BE INTERPRETED STRICTLY AND APPLIED IN ACCORDANCE WITH THE PRINCIPLE OF PROPORTIONALITY . IN DECIDING WHETHER , BY REASON OF THE CONTEXT IN WHICH THE ACTIVITIES OF A POLICE OFFICER ARE CARRIED OUT , THE SEX OF THE OFFICER CONSTITUTES A DETERMINING FACTOR FOR THAT OCCUPATIONAL ACTIVITY , IT IS NOT EXCLUDED THAT A MEMBER STATE MAY TAKE INTO CONSIDERATION , SUBJECT TO CONTROL BY THE NATIONAL COURTS , REQUIREMENTS OF PUBLIC SAFETY IN ORDER TO RESTRICT GENERAL POLICING DUTIES , IN AN INTERNAL SITUATION CHARACTERIZED BY FREQUENT ASSASSINATIONS , TO MEN EQUIPPED WITH FIRE-ARMS .

5 . SINCE ARTICLE 2 (3) OF DIRECTIVE 76/207 AUTHORIZES DEROGATIONS FROM THE RIGHT TO EQUAL TREATMENT AS REGARDS ACCESS TO EMPLOYMENT AND WORKING CONDITIONS , IT MUST BE INTERPRETED STRICTLY . THE PROTECTION OF WOMEN WHICH IT ENVISAGES DOES NOT INCLUDE PROTECTION AGAINST THE RISKS AND DANGERS , SUCH AS THOSE TO WHICH ANY ARMED POLICE OFFICER IS EXPOSED WHEN PERFORMING HIS DUTIES IN A GIVEN SITUATION , THAT DO NOT SPECIFICALLY AFFECT WOMEN AS SUCH .

6 . IN ALL CASES IN WHICH A DIRECTIVE HAS BEEN PROPERLY IMPLEMENTED ITS EFFECTS REACH INDIVIDUALS THROUGH THE IMPLEMENTING MEASURES ADOPTED BY THE MEMBER STATES CONCERNED .

THE MEMBER STATES ' OBLIGATION TO ACHIEVE THE RESULT ENVISAGED BY A DIRECTIVE AND THEIR DUTY UNDER ARTICLE 5 OF THE TREATY TO TAKE ALL APPROPRIATE MEASURES , WHETHER GENERAL OR PARTICULAR , TO ENSURE THE FULFILMENT OF THAT OBLIGATION , IS BINDING ON ALL THE AUTHORITIES OF THE MEMBER STATES INCLUDING , FOR MATTERS WITHIN THEIR JURISDICTION , THE COURTS . IT FOLLOWS THAT , IN APPLYING NATIONAL LAW , AND IN PARTICULAR THE PROVISIONS OF NATIONAL LEGISLATION SPECIFICALLY INTRODUCED IN ORDER TO IMPLEMENT A DIRECTIVE , NATIONAL COURTS ARE REQUIRED TO INTERPRET THEIR NATIONAL LAW IN THE LIGHT OF THE WORDING AND THE PURPOSE OF THE DIRECTIVE IN ORDER TO ACHIEVE THE RESULT REFERRED TO IN THE THIRD PARAGRAPH OF ARTICLE 189 OF THE EEC TREATY .

7 . INDIVIDUALS MAY CLAIM THE APPLICATION , AS AGAINST A STATE AUTHORITY CHARGED WITH THE MAINTENANCE OF PUBLIC ORDER AND SAFETY ACTING IN ITS CAPACITY OF EMPLOYER , OF THE PRINCIPLE OF EQUAL TREATMENT FOR MEN AND WOMEN LAID DOWN IN ARTICLE 2 (1) OF DIRECTIVE 76/207 TO THE MATTERS REFERRED TO IN ARTICLES 3 (1) AND 4 CONCERNING THE CONDITIONS FOR ACCESS TO POSTS AND TO VOCATIONAL TRAINING AND ADVANCED VOCATIONAL TRAINING IN ORDER TO HAVE A DEROGATION FROM THAT PRINCIPLE CONTAINED IN NATIONAL LEGISLATION SET ASIDE IN SO FAR AS IT EXCEEDS THE LIMITS OF THE EXCEPTIONS PERMITTED BY ARTICLE 2 (2).

Parties

CHIEF CONSTABLE OF THE ROYAL ULSTER CONSTABULARY

ON THE INTERPRETATION OF COUNCIL DIRECTIVE NO 76/207/EEC OF 9 FEBRUARY 1976 ON THE IMPLEMENTATION OF THE PRINCIPLE OF EQUAL TREATMENT FOR MEN AND WOMEN (OFFICIAL JOURNAL 1976 , L 39 , P . 40) AND OF ARTICLE 224 OF THE EEC TREATY ,

THE COURT

COMPOSED OF : LORD MACKENZIE STUART , PRESIDENT , T . KOOPMANS , U . EVERLING , K . BAHLMANN AND R . JOLIET , PRESIDENTS OF CHAMBER , O . DUE , Y . GALMOT , C . KAKOURIS AND T . F . O ' HIGGINS , JUDGES ,

ADVOCATE GENERAL : M . DARMON

Subject of the case

REGISTRAR : P . HEIM

Grounds

WHILST ARTICLE 53 (2) PROVIDES THAT

' A CERTIFICATE SIGNED BY OR ON BEHALF OF THE SECRETARY OF STATE AND CERTIFYING THAT AN ACT SPECIFIED IN THE CERTIFICATE WAS DONE FOR A PURPOSE MENTIONED IN PARAGRAPH (1) SHALL BE CONCLUSIVE EVIDENCE THAT IT WAS DONE FOR THAT PURPOSE ' .

4 IN THE UNITED KINGDOM POLICE OFFICERS DO NOT AS A GENERAL RULE CARRY FIRE-ARMS IN THE PERFORMANCE OF THEIR DUTIES EXCEPT FOR SPECIAL OPERATIONS AND NO DISTINCTION IS MADE IN THIS REGARD BETWEEN MEN AND WOMEN . BECAUSE OF THE HIGH NUMBER OF POLICE OFFICERS ASSASSINATED IN NORTHERN IRELAND OVER A NUMBER OF YEARS , THE CHIEF CONSTABLE OF THE RUC CONSIDERED THAT HE COULD NOT MAINTAIN THAT PRACTICE . HE DECIDED THAT , IN THE RUC AND THE RUC RESERVE , MEN SHOULD CARRY FIRE-ARMS IN THE REGULAR COURSE OF THEIR DUTIES BUT THAT WOMEN WOULD NOT BE EQUIPPED WITH THEM AND WOULD NOT RECEIVE TRAINING IN THE HANDLING AND USE OF FIRE-ARMS .

5 IN THOSE CIRCUMSTANCES , THE CHIEF CONSTABLE DECIDED IN 1980 THAT THE NUMBER OF WOMEN IN THE RUC WAS SUFFICIENT FOR THE PARTICULAR TASKS GENERALLY ASSIGNED TO WOMEN OFFICERS . HE TOOK THE VIEW THAT

GENERAL POLICE DUTIES , FREQUENTLY INVOLVING OPERATIONS REQUIRING THE CARRYING OF FIRE-ARMS , SHOULD NO LONGER BE ASSIGNED TO WOMEN AND DECIDED NOT TO OFFER OR RENEW ANY MORE CONTRACTS FOR WOMEN IN THE RUC FULL-TIME RESERVE EXCEPT WHERE THEY HAD TO PERFORM DUTIES ASSIGNED ONLY TO WOMEN OFFICERS . SINCE THAT DECISION , NO WOMAN IN THE RUC FULL-TIME RESERVE HAS BEEN OFFERED A CONTRACT OR HAD HER CONTRACT RENEWED , SAVE IN ONE CASE .

6 ACCORDING TO THE DECISION MAKING THE REFERENCE FOR A PRELIMINARY RULING , MRS JOHNSTON HAD BEEN A MEMBER OF THE RUC FULL-TIME RESERVE FROM 1974 TO 1980 . SHE HAD EFFICIENTLY PERFORMED THE GENERAL DUTIES OF A UNIFORMED POLICE OFFICER , SUCH AS ACTING AS STATION-DUTY OFFICER , TAKING PART IN MOBILE PATROLS , DRIVING THE PATROL VEHICLE AND ASSISTING IN SEARCHING PERSONS BROUGHT TO THE POLICE STATION . SHE WAS NOT ARMED WHEN CARRYING OUT THOSE DUTIES AND WAS ORDINARILY ACCOMPANIED IN DUTIES OUTSIDE THE POLICE STATION BY AN ARMED MALE OFFICER OF THE RUC FULL-TIME RESERVE . IN 1980 THE CHIEF CONSTABLE REFUSED TO RENEW HER CONTRACT BECAUSE OF HIS NEW POLICY , MENTIONED ABOVE , WITH REGARD TO FEMALE MEMBERS OF THE RUC FULL-TIME RESERVE .

7 MRS JOHNSTON LODGED AN APPLICATION WITH THE INDUSTRIAL TRIBUNAL CHALLENGING THE DECISION , TAKEN PURSUANT TO THAT NEW POLICY , TO REFUSE TO RENEW HER CONTRACT AND TO GIVE HER TRAINING IN THE HANDLING OF FIRE-ARMS . SHE CONTENDED THAT SHE HAD SUFFERED UNLAWFUL DISCRIMINATION PROHIBITED BY THE SEX DISCRIMINATION ORDER .

8 IN THE PROCEEDINGS BEFORE THE INDUSTRIAL TRIBUNAL THE CHIEF CONSTABLE PRODUCED A CERTIFICATE ISSUED BY THE SECRETARY OF STATE IN WHICH THAT MINISTER OF THE UNITED KINGDOM GOVERNMENT CERTIFIED IN ACCORDANCE WITH ARTICLE 53 OF THE SEX DISCRIMINATION ORDER , CITED ABOVE , THAT ' THE ACT CONSISTING OF THE REFUSAL OF THE ROYAL ULSTER CONSTABULARY TO OFFER FURTHER FULL-TIME EMPLOYMENT TO MRS MARGUERITE I . JOHNSTON IN THE ROYAL ULSTER CONSTABULARY RESERVE WAS DONE FOR THE PURPOSE OF (A) SAFEGUARDING NATIONAL SECURITY ; AND (B) PROTECTING PUBLIC SAFETY AND PUBLIC ORDER ' .

9 MRS JOHNSTON REFERRED TO DIRECTIVE NO 76/207 . THE PURPOSE OF THAT DIRECTIVE , ACCORDING TO ARTICLE 1 THEREOF , IS TO PUT INTO EFFECT THE PRINCIPLE OF EQUAL TREATMENT FOR MEN AND WOMEN AS REGARDS ACCESS TO EMPLOYMENT , INCLUDING PROMOTION , AND TO VOCATIONAL TRAINING AND AS REGARDS WORKING CONDITIONS . ACCORDING TO ARTICLE 2 (1), THE PRINCIPLE OF EQUAL TREATMENT MEANS THAT THERE SHALL BE NO DISCRIMINATION WHATSOEVER ON GROUNDS OF SEX , SUBJECT , HOWEVER , TO THE EXCEPTIONS ALLOWED BY ARTICLE 2 (2) AND (3). FOR THE PURPOSES OF THE APPLICATION OF THAT PRINCIPLE IN DIFFERENT SPHERES , ARTICLES 3 TO 5 REQUIRE THE MEMBER STATES IN PARTICULAR TO ABOLISH ANY LAWS , REGULATIONS OR ADMINISTRATIVE PROVISIONS CONTRARY TO THE PRINCIPLE OF EQUAL TREATMENT AND TO REVISE LAWS , REGULATIONS AND ADMINISTRATIVE PROVISIONS WHERE THE CONCERN FOR PROTECTION WHICH ORIGINALLY INSPIRED THEM IS NO LONGER WELL FOUNDED . ARTICLE 6 PROVIDES THAT ALL PERSONS WHO CONSIDER THEMSELVES WRONGED BY DISCRIMINATION MUST BE ABLE TO PURSUE THEIR CLAIMS BY JUDICIAL PROCESS .

10 IN ORDER TO BE ABLE TO RULE ON THAT DISPUTE , THE INDUSTRIAL TRIBUNAL REFERRED THE FOLLOWING QUESTIONS TO THE COURT FOR A PRELIMINARY RULING :

(1) ON THE PROPER CONSTRUCTION OF COUNCIL DIRECTIVE NO 76/207 AND IN THE CIRCUMSTANCES OF THIS CASE , CAN A MEMBER STATE EXCLUDE FROM THE DIRECTIVE ' S FIELD OF APPLICATION ACTS OF SEX DISCRIMINATION AS REGARDS ACCESS TO EMPLOYMENT DONE FOR THE PURPOSE OF SAFEGUARDING NATIONAL SECURITY OR OF PROTECTING PUBLIC SAFETY OR PUBLIC ORDER?

(2) ON THE PROPER CONSTRUCTION OF THE DIRECTIVE AND IN THE CIRCUMSTANCES OF THIS CASE , IS FULL-TIME EMPLOYMENT AS AN ARMED MEMBER OF A POLICE RESERVE FORCE , OR TRAINING IN THE HANDLING AND USE OF FIRE-ARMS FOR SUCH EMPLOYMENT , CAPABLE OF CONSTITUTING ONE OF THOSE OCCUPATIONAL ACTIVITIES AND , WHERE APPROPRIATE , THE TRAINING LEADING THERETO FOR WHICH , BY REASON OF THEIR NATURE OR THE CONTEXT IN WHICH THEY ARE CARRIED OUT , THE SEX OF THE WORKER CONSTITUTES A DETERMINING FACTOR , WITHIN THE MEANING OF ARTICLE 2 (2)?

(3) WHAT ARE THE PRINCIPLES AND CRITERIA BY WHICH MEMBER STATES SHOULD DETERMINE WHETHER ' THE SEX OF A WORKER CONSTITUTES A DETERMINING FACTOR ' WITHIN THE MEANING OF ARTICLE 2 (2) IN RELATION TO (A) ' THE OCCUPATIONAL ACTIVITIES ' OF AN ARMED MEMBER OF SUCH A FORCE AND (B) ' THE TRAINING LEADING THERETO ' , WHETHER BY REASON OF THEIR NATURE OR BY REASON OF THE CONTEXT IN WHICH THEY ARE CARRIED OUT?

(4) IS A POLICY APPLIED BY A CHIEF CONSTABLE OF POLICE , CHARGED WITH A STATUTORY RESPONSIBILITY FOR THE DIRECTION AND CONTROL OF A POLICE FORCE , THAT WOMEN MEMBERS OF THAT FORCE SHOULD NOT CARRY FIRE-ARMS CAPABLE , IN THE CIRCUMSTANCES OF THIS CASE , OF CONSTITUTING A ' PROVISION CONCERNING THE PROTECTION OF WOMEN ' , WITHIN THE MEANING OF ARTICLE 2 (3), OR AN ' ADMINISTRATIVE PROVISION ' INSPIRED BY ' CONCERN FOR PROTECTION ' WITHIN THE MEANING OF ARTICLE 3 (2) (C) OF THE DIRECTIVE?

(5) IF THE ANSWER TO QUESTION 4 IS AFFIRMATIVE , WHAT ARE THE PRINCIPLES AND CRITERIA BY WHICH MEMBER STATES SHOULD DETERMINE WHETHER THE ' CONCERN FOR PROTECTION ' IS ' WELL FOUNDED ' , WITHIN THE MEANING OF ARTICLE 3 (2) (C)?

(6) IS THE APPLICANT ENTITLED TO RELY UPON THE PRINCIPLE OF EQUAL TREATMENT CONTAINED IN THE RELEVANT PROVISIONS OF THE DIRECTIVE BEFORE THE NATIONAL COURTS AND TRIBUNALS OF MEMBER STATES IN THE CIRCUMSTANCES OF THE PRESENT CASE?

(7) IF THE ANSWER TO QUESTION 6 IS AFFIRMATIVE :

(A) DOES ARTICLE 224 OF THE EEC TREATY , ON ITS PROPER CONSTRUCTION , PERMIT MEMBER STATES WHEN CONFRONTED WITH SERIOUS INTERNAL DISTURBANCES AFFECTING THE MAINTENANCE OF LAW AND ORDER TO DEROGATE FROM ANY OBLIGATIONS WHICH WOULD OTHERWISE BE IMPOSED ON THEM OR ON EMPLOYERS WITHIN THEIR JURISDICTION BY THE DIRECTIVE?

(B) IF SO , IS IT OPEN TO AN INDIVIDUAL TO RELY UPON THE FACT THAT A MEMBER STATE DID NOT CONSULT WITH OTHER MEMBER STATES FOR THE PURPOSE OF PREVENTING THE FIRST MEMBER STATE FROM RELYING ON ARTICLE 224 OF THE EEC TREATY?

11 TO ENABLE ANSWERS TO BE GIVEN WHICH WILL BE OF ASSISTANCE IN RESOLVING THE DISPUTE IN THE MAIN PROCEEDINGS , IT IS NECESSARY TO EXPLAIN THE SITUATION IN WHICH THE INDUSTRIAL TRIBUNAL IS REQUIRED TO ADJUDICATE . AS IS CLEAR FROM THE DECISION BY WHICH THE CASE WAS REFERRED TO THE COURT , THE CHIEF

CONSTABLE ACKNOWLEDGED BEFORE THE INDUSTRIAL TRIBUNAL THAT , OF ALL THE PROVISIONS IN THE SEX DISCRIMINATION ORDER , ONLY ARTICLE 53 COULD JUSTIFY HIS POSITION . MRS JOHNSTON , FOR HER PART , CONCEDED THAT THE CERTIFICATE ISSUED BY THE SECRETARY OF STATE WOULD DEPRIVE HER OF ANY REMEDY IF NATIONAL LAW WAS APPLIED ON ITS OWN ; SHE RELIED ON THE PROVISIONS OF THE DIRECTIVE IN ORDER TO HAVE THE EFFECTS OF ARTICLE 53 OF THE SEX DISCRIMINATION ORDER SET ASIDE .

12 IT THEREFORE APPEARS THAT THE QUESTIONS RAISED BY THE INDUSTRIAL TRIBUNAL ARE INTENDED TO ASCERTAIN FIRST OF ALL WHETHER IT IS COMPATIBLE WITH COMMUNITY LAW AND DIRECTIVE NO 76/207 FOR A NATIONAL COURT OR TRIBUNAL TO BE PREVENTED BY A RULE SUCH AS THAT LAID DOWN IN ARTICLE 53 (2) OF THE SEX DISCRIMINATION ORDER FROM FULLY EXERCISING ITS POWERS OF JUDICIAL REVIEW (PART OF QUESTION 6). THE NEXT OBJECT OF THE QUESTIONS SUBMITTED BY THE INDUSTRIAL TRIBUNAL IS TO ENABLE IT TO DECIDE WHETHER AND UNDER WHAT CONDITIONS THE PROVISIONS OF THE DIRECTIVE , IN A SITUATION SUCH AS THAT WHICH EXISTS IN THE PRESENT CASE , ALLOW MEN AND WOMEN EMPLOYED WITH THE POLICE TO BE TREATED DIFFERENTLY ON GROUNDS OF THE PROTECTION OF PUBLIC SAFETY MENTIONED IN ARTICLE 53 (1) OF THE SEX DISCRIMINATION ORDER (QUESTIONS 1 TO 5). THE QUESTIONS SUBMITTED ARE ALSO INTENDED TO ENABLE THE INDUSTRIAL TRIBUNAL TO ASCERTAIN WHETHER OR NOT THE PROVISIONS OF THE DIRECTIVE MAY , IN AN APPROPRIATE CASE , BE RELIED UPON AS AGAINST A CONFLICTING RULE OF NATIONAL LAW (REMAINDER OF QUESTION 6). FINALLY , DEPENDING ON THE ANSWERS TO BE GIVEN TO THOSE QUESTIONS , THE QUESTION MIGHT ARISE WHETHER A MEMBER STATE MAY AVAIL ITSELF OF ARTICLE 224 OF THE EEC TREATY IN ORDER TO DEROGATE FROM OBLIGATIONS WHICH THE DIRECTIVE IMPOSES ON IT IN A CASE SUCH AS THIS (QUESTION 7).

THE RIGHT TO AN EFFECTIVE JUDICIAL REMEDY

13 IT IS THEREFORE NECESSARY TO EXAMINE IN THE FIRST PLACE THE PART OF THE SIXTH QUESTION WHICH RAISES THE POINT WHETHER COMMUNITY LAW , AND MORE PARTICULARLY DIRECTIVE NO 76/207 , REQUIRES THE MEMBER STATES TO ENSURE THAT THEIR NATIONAL COURTS AND TRIBUNALS EXERCISE EFFECTIVE CONTROL OVER COMPLIANCE WITH THE PROVISIONS OF THE DIRECTIVE AND WITH THE NATIONAL LEGISLATION INTENDED TO PUT IT INTO EFFECT .

14 IN MRS JOHNSTON ' S VIEW , A PROVISION SUCH AS ARTICLE 53 (2) OF THE SEX DISCRIMINATION ORDER IS CONTRARY TO ARTICLE 6 OF THE DIRECTIVE INASMUCH AS IT PREVENTS THE COMPETENT NATIONAL COURT OR TRIBUNAL FROM EXERCISING ANY JUDICIAL CONTROL .

15 THE UNITED KINGDOM OBSERVES THAT ARTICLE 6 OF THE DIRECTIVE DOES NOT REQUIRE THE MEMBER STATES TO SUBMIT TO JUDICIAL REVIEW EVERY QUESTION WHICH MAY ARISE IN THE APPLICATION OF THE DIRECTIVE , EVEN WHERE NATIONAL SECURITY AND PUBLIC SAFETY ARE INVOLVED . RULES OF EVIDENCE SUCH AS THE RULE LAID DOWN IN ARTICLE 53 (2) OF THE SEX DISCRIMINATION ORDER ARE QUITE COMMON IN NATIONAL PROCEDURAL LAW . THEIR JUSTIFICATION IS THAT MATTERS OF NATIONAL SECURITY AND PUBLIC SAFETY CAN BE SATISFACTORILY ASSESSED ONLY BY THE COMPETENT POLITICAL AUTHORITY , NAMELY THE MINISTER WHO ISSUES THE CERTIFICATE IN QUESTION .

16 THE COMMISSION TAKES THE VIEW THAT TO TREAT THE CERTIFICATE OF A MINISTER AS HAVING AN EFFECT SUCH AS THAT PROVIDED FOR IN ARTICLE 53 (2) OF THE SEX DISCRIMINATION ORDER IS TANTAMOUNT TO REFUSING ALL JUDICIAL CONTROL OR REVIEW AND IS THEREFORE CONTRARY TO A FUNDAMENTAL PRINCIPLE OF COMMUNITY LAW AND TO ARTICLE 6 OF THE DIRECTIVE .

17 AS FAR AS THIS ISSUE IS CONCERNED , IT MUST BE BORNE IN MIND FIRST OF ALL THAT ARTICLE 6 OF THE DIRECTIVE REQUIRES MEMBER STATES TO INTRODUCE INTO THEIR INTERNAL LEGAL SYSTEMS SUCH MEASURES AS ARE NEEDED TO ENABLE ALL PERSONS WHO CONSIDER THEMSELVES WRONGED BY DISCRIMINATION ' TO PURSUE THEIR CLAIMS BY JUDICIAL PROCESS ' . IT FOLLOWS FROM THAT PROVISION THAT THE MEMBER STATES MUST TAKE MEASURES WHICH ARE SUFFICIENTLY EFFECTIVE TO ACHIEVE THE AIM OF THE DIRECTIVE AND THAT THEY MUST ENSURE THAT THE RIGHTS THUS CONFERRED MAY BE EFFECTIVELY RELIED UPON BEFORE THE NATIONAL COURTS BY THE PERSONS CONCERNED .

18 THE REQUIREMENT OF JUDICIAL CONTROL STIPULATED BY THAT ARTICLE REFLECTS A GENERAL PRINCIPLE OF LAW WHICH UNDERLIES THE CONSTITUTIONAL TRADITIONS COMMON TO THE MEMBER STATES . THAT PRINCIPLE IS ALSO LAID DOWN IN ARTICLES 6 AND 13 OF THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS OF 4 NOVEMBER 1950 . AS THE EUROPEAN PARLIAMENT , COUNCIL AND COMMISSION RECOGNIZED IN THEIR JOINT DECLARATION OF 5 APRIL 1977 (OFFICIAL JOURNAL C 103 , P . 1) AND AS THE COURT HAS RECOGNIZED IN ITS DECISIONS , THE PRINCIPLES ON WHICH THAT CONVENTION IS BASED MUST BE TAKEN INTO CONSIDERATION IN COMMUNITY LAW .

19 BY VIRTUE OF ARTICLE 6 OF DIRECTIVE NO 76/207 , INTERPRETED IN THE LIGHT OF THE GENERAL PRINCIPLE STATED ABOVE , ALL PERSONS HAVE THE RIGHT TO OBTAIN AN EFFECTIVE REMEDY IN A COMPETENT COURT AGAINST MEASURES WHICH THEY CONSIDER TO BE CONTRARY TO THE PRINCIPLE OF EQUAL TREATMENT FOR MEN AND WOMEN LAID DOWN IN THE DIRECTIVE . IT IS FOR THE MEMBER STATES TO ENSURE EFFECTIVE JUDICIAL CONTROL AS REGARDS COMPLIANCE WITH THE APPLICABLE PROVISIONS OF COMMUNITY LAW AND OF NATIONAL LEGISLATION INTENDED TO GIVE EFFECT TO THE RIGHTS FOR WHICH THE DIRECTIVE PROVIDES .

20 A PROVISION WHICH , LIKE ARTICLE 53 (2) OF THE SEX DISCRIMINATION ORDER , REQUIRES A CERTIFICATE SUCH AS THE ONE IN QUESTION IN THE PRESENT CASE TO BE TREATED AS CONCLUSIVE EVIDENCE THAT THE CONDITIONS FOR DEROGATING FROM THE PRINCIPLE OF EQUAL TREATMENT ARE FULFILLED ALLOWS THE COMPETENT AUTHORITY TO DEPRIVE AN INDIVIDUAL OF THE POSSIBILITY OF ASSERTING BY JUDICIAL PROCESS THE RIGHTS CONFERRED BY THE DIRECTIVE . SUCH A PROVISION IS THEREFORE CONTRARY TO THE PRINCIPLE OF EFFECTIVE JUDICIAL CONTROL LAID DOWN IN ARTICLE 6 OF THE DIRECTIVE .

21 THE ANSWER TO THIS PART OF THE SIXTH QUESTION PUT BY THE INDUSTRIAL TRIBUNAL MUST THEREFORE BE THAT THE PRINCIPLE OF EFFECTIVE JUDICIAL CONTROL LAID DOWN IN ARTICLE 6 OF COUNCIL DIRECTIVE NO 76/207 OF 9 FEBRUARY 1976 DOES NOT ALLOW A CERTIFICATE ISSUED BY A NATIONAL AUTHORITY STATING THAT THE CONDITIONS FOR DEROGATING FROM THE PRINCIPLE OF EQUAL TREATMENT FOR MEN AND WOMEN FOR THE PURPOSE OF PROTECTING PUBLIC SAFETY ARE SATISFIED TO BE TREATED AS CONCLUSIVE EVIDENCE SO AS TO EXCLUDE THE EXERCISE OF ANY POWER OF REVIEW BY THE COURTS .

THE APPLICABILITY OF DIRECTIVE NO 76/207 TO MEASURES TAKEN TO PROTECT PUBLIC SAFETY

22 IT IS NECESSARY TO EXAMINE NEXT THE INDUSTRIAL TRIBUNAL ' S FIRST QUESTION BY WHICH IT SEEKS TO ASCERTAIN WHETHER , HAVING REGARD TO THE FACT THAT DIRECTIVE NO 76/207 CONTAINS NO EXPRESS PROVISION CONCERNING MEASURES TAKEN FOR THE PURPOSE OF SAFEGUARDING NATIONAL SECURITY OR OF PROTECTING PUBLIC

ORDER , AND MORE PARTICULARLY PUBLIC SAFETY , THE DIRECTIVE IS APPLICABLE TO SUCH MEASURES .

23 IN MRS JOHNSTON ' S VIEW , NO GENERAL DEROGATION FROM THE FUNDAMENTAL PRINCIPLE OF EQUAL TREATMENT UNRELATED TO PARTICULAR OCCUPATIONAL ACTIVITIES , THEIR NATURE AND THE CONTEXT IN WHICH THEY ARE CARRIED OUT , EXISTS FOR SUCH PURPOSES . BY BEING BASED ON THE SOLE GROUND THAT A DISCRIMINATORY ACT IS DONE FOR PURPOSES SUCH AS THE PROTECTION OF PUBLIC SAFETY , SUCH A DEROGATION WOULD ENABLE THE MEMBER STATES UNILATERALLY TO AVOID THE OBLIGATIONS WHICH THE DIRECTIVE IMPOSES ON THEM .

24 THE UNITED KINGDOM TAKES THE VIEW THAT THE SAFEGUARD CLAUSES CONTAINED IN ARTICLES 36 , 48 , 56 , 66 , 223 AND 224 OF THE EEC TREATY SHOW THAT NEITHER THE TREATY NOR , THEREFORE , THE LAW DERIVED FROM IT APPLY TO THE FIELDS MENTIONED IN THE INDUSTRIAL TRIBUNAL ' S QUESTION AND DO NOT RESTRICT THE MEMBER STATES ' POWER TO TAKE MEASURES WHICH THEY CAN CONSIDER EXPEDIENT OR NECESSARY FOR THOSE PURPOSES . THE MEASURES REFERRED TO IN THE FIRST QUESTION DO NOT THEREFORE FALL WITHIN THE SCOPE OF THE DIRECTIVE .

25 THE COMMISSION SUGGESTS THAT THE DIRECTIVE SHOULD BE INTERPRETED WITH REFERENCE TO ARTICLE 224 OF THE EEC TREATY SO THAT CONSIDERATIONS OF PUBLIC SAFETY COULD , IN THE SPECIAL CONDITIONS ENVISAGED BY THAT ARTICLE AND SUBJECT TO JUDICIAL REVIEW , JUSTIFY DEROGATIONS FROM THE PRINCIPLE OF EQUAL TREATMENT EVEN WHERE THE STRICT CONDITIONS LAID DOWN IN ARTICLE 2 (2) AND (3) OF THE DIRECTIVE ARE NOT FULFILLED .

26 IT MUST BE OBSERVED IN THIS REGARD THAT THE ONLY ARTICLES IN WHICH THE TREATY PROVIDES FOR DEROGATIONS APPLICABLE IN SITUATIONS WHICH MAY INVOLVE PUBLIC SAFETY ARE ARTICLES 36 , 48 , 56 , 223 AND 224 WHICH DEAL WITH EXCEPTIONAL AND CLEARLY DEFINED CASES . BECAUSE OF THEIR LIMITED CHARACTER THOSE ARTICLES DO NOT LEND THEMSELVES TO A WIDE INTERPRETATION AND IT IS IS NOT POSSIBLE TO INFER FROM THEM THAT THERE IS INHERENT IN THE TREATY A GENERAL PROVISO COVERING ALL MEASURES TAKEN FOR REASONS OF PUBLIC SAFETY . IF EVERY PROVISION OF COMMUNITY LAW WERE HELD TO BE SUBJECT TO A GENERAL PROVISO , REGARDLESS OF THE SPECIFIC REQUIREMENTS LAID DOWN BY THE PROVISIONS OF THE TREATY , THIS MIGHT IMPAIR THE BINDING NATURE OF COMMUNITY LAW AND ITS UNIFORM APPLICATION .

27 IT FOLLOWS THAT THE APPLICATION OF THE PRINCIPLE OF EQUAL TREATMENT FOR MEN AND WOMEN IS NOT SUBJECT TO ANY GENERAL RESERVATION AS REGARDS MEASURES TAKEN ON GROUNDS OF THE PROTECTION OF PUBLIC SAFETY , APART FROM THE POSSIBLE APPLICATION OF ARTICLE 224 OF THE TREATY WHICH CONCERNS A WHOLLY EXCEPTIONAL SITUATION AND IS THE SUBJECT-MATTER OF THE SEVENTH QUESTION . THE FACTS WHICH INDUCED THE COMPETENT AUTHORITY TO INVOKE THE NEED TO PROTECT PUBLIC SAFETY MUST THEREFORE IF NECESSARY BE TAKEN INTO CONSIDERATION , IN THE FIRST PLACE , IN THE CONTEXT OF THE APPLICATION OF THE SPECIFIC PROVISIONS OF THE DIRECTIVE .

28 THE ANSWER TO THE FIRST QUESTION MUST THEREFORE BE THAT ACTS OF SEX DISCRIMINATION DONE FOR REASONS RELATED TO THE PROTECTION OF PUBLIC SAFETY MUST BE EXAMINED IN THE LIGHT OF THE EXCEPTIONS TO THE PRINCIPLE OF EQUAL TREATMENT FOR MEN AND WOMEN LAID DOWN IN DIRECTIVE NO 76/207 .

THE DEROGATIONS ALLOWED ON ACCOUNT OF THE CONTEXT IN WHICH THE OCCUPATIONAL ACTIVITY IS CARRIED OUT

29 THE INDUSTRIAL TRIBUNAL ' S SECOND AND THIRD QUESTIONS ARE CONCERNED WITH THE INTERPRETATION OF THE DEROGATION , PROVIDED FOR IN ARTICLE 2 (2) OF THE DIRECTIVE , FROM THE PRINCIPLE OF EQUAL TREATMENT AND ARE DESIGNED TO ENABLE THE TRIBUNAL TO DECIDE WHETHER A DIFFERENCE IN TREATMENT , SUCH AS THAT IN QUESTION , IS COVERED BY THAT DEROGATION . IT ASKS TO BE INFORMED OF THE CRITERIA AND PRINCIPLES TO BE APPLIED FOR DETERMINING WHETHER AN ACTIVITY SUCH AS THAT IN QUESTION IN THE PRESENT CASE IS ONE OF THE ACTIVITIES FOR WHICH ' BY REASON OF THEIR NATURE OR THE CONTEXT IN WHICH THEY ARE CARRIED OUT , THE SEX OF THE WORKER CONSTITUTES A DETERMINING FACTOR ' .

30 MRS JOHNSTON TAKES THE VIEW THAT A REPLY TO THIS QUESTION IS NOT POSSIBLE IN TERMS SO GENERAL . SHE STATES THAT SHE HAS ALWAYS WORKED SATISFACTORILY IN PERFORMING HER DUTIES WITH THE POLICE AND MAINTAINS THAT WOMEN ARE QUITE CAPABLE OF BEING TRAINED IN THE HANDLING OF FIRE-ARMS . IT IS FOR THE INDUSTRIAL TRIBUNAL TO DETERMINE WHETHER A DEROGATION IS POSSIBLE UNDER ARTICLE 2 (2) OF THE DIRECTIVE , HAVING REGARD TO THE SPECIFIC DUTIES WHICH SHE IS REQUIRED TO CARRY OUT . THAT PROVISION DOES NOT MAKE IT POSSIBLE FOR HER TO BE COMPLETELY EXCLUDED FROM ANY EMPLOYMENT IN THE RUC FULL-TIME RESERVE .

31 THE UNITED KINGDOM SUBMITS THAT THE MEMBER STATES HAVE A DISCRETION IN DECIDING WHETHER , OWING TO REQUIREMENTS OF NATIONAL SECURITY AND PUBLIC SAFETY OR PUBLIC ORDER , THE CONTEXT IN WHICH AN OCCUPATIONAL ACTIVITY IN THE POLICE IS CARRIED OUT PREVENTS THAT ACTIVITY FROM BEING CARRIED OUT BY AN ARMED POLICEWOMAN . IN DETERMINING THAT QUESTION THE MEMBER STATES MAY TAKE INTO CONSIDERATION CRITERIA SUCH AS THE DIFFERENCE IN PHYSICAL STRENGTH BETWEEN THE SEXES , THE PROBABLE REACTION OF THE PUBLIC TO THE APPEARANCE OF ARMED POLICEWOMEN AND THE RISK OF THEIR BEING ASSASSINATED . SINCE THE DECISION TAKEN BY THE CHIEF CONSTABLE WAS TAKEN ON THE APPLICATION OF SUCH CRITERIA , IT IS COVERED BY ARTICLE 2 (2) OF THE DIRECTIVE .

32 THE COMMISSION TAKES THE VIEW THAT , OWING TO THE CONTEXT IN WHICH IT IS CARRIED OUT BUT NOT TO ITS NATURE , THE OCCUPATIONAL ACTIVITY OF AN ARMED POLICE OFFICER COULD BE CONSIDERED AN ACTIVITY FOR WHICH THE SEX OF THE OFFICER IS A DETERMINING FACTOR . A DEROGATION MUST , HOWEVER , BE JUSTIFIED IN RELATION TO SPECIFIC DUTIES AND NOT IN RELATION TO AN EMPLOYMENT CONSIDERED IN ITS ENTIRETY . IN PARTICULAR , THE PRINCIPLE OF PROPORTIONALITY MUST BE OBSERVED . THE NATIONAL COURT MUST LOOK AT THE DISCRIMINATION IN QUESTION FROM THAT POINT OF VIEW .

33 IN THIS REGARD IT MUST BE STATED FIRST OF ALL THAT , IN SO FAR AS THE COMPETENT POLICE AUTHORITIES IN NORTHERN IRELAND HAVE DECIDED , BECAUSE OF THE REQUIREMENTS OF PUBLIC SAFETY , TO DEPART FROM THE PRINCIPLE , GENERALLY APPLIED IN OTHER PARTS OF THE UNITED KINGDOM , OF NOT ARMING THE POLICE IN THE ORDINARY COURSE OF THEIR DUTIES , THAT DECISION DOES NOT IN ITSELF INVOLVE ANY DISCRIMINATION BETWEEN MEN AND WOMEN AND IS THEREFORE OUTSIDE THE SCOPE OF THE PRINCIPLE OF EQUAL TREATMENT . IT IS ONLY IN SO FAR AS THE CHIEF CONSTABLE DECIDED THAT WOMEN WOULD NOT BE ARMED OR TRAINED IN THE USE OF FIRE-ARMS , THAT GENERAL POLICING DUTIES WOULD IN FUTURE BE CARRIED OUT ONLY BY ARMED MALE OFFICERS AND THAT CONTRACTS OF WOMEN IN THE RUC FULL-TIME RESERVE WHO , LIKE MRS JOHNSTON , HAD PREVIOUSLY BEEN ENTRUSTED WITH GENERAL POLICING DUTIES , WOULD NOT BE RENEWED , THAT AN APPRAISAL OF THOSE MEASURES IN THE LIGHT OF THE PROVISIONS OF THE DIRECTIVE IS RELEVANT .

34 SINCE, AS IS CLEAR FROM THE INDUSTRIAL TRIBUNAL 'S DECISION, IT IS EXPRESSLY PROVIDED THAT THE SEX DISCRIMINATION ORDER IS TO APPLY TO EMPLOYMENT IN THE POLICE AND SINCE IN THIS REGARD NO DISTINCTION IS MADE BETWEEN MEN AND WOMEN IN THE SPECIFIC PROVISIONS THAT ARE APPLICABLE, THE NATURE OF THE OCCUPATIONAL ACTIVITY IN THE POLICE FORCE IS NOT A RELEVANT GROUND OF JUSTIFICATION FOR THE DISCRIMINATION IN QUESTION. WHAT MUST BE EXAMINED, HOWEVER, IS THE QUESTION WHETHER, OWING TO THE SPECIFIC CONTEXT IN WHICH THE ACTIVITY DESCRIBED IN THE INDUSTRIAL TRIBUNAL 'S DECISION IS CARRIED OUT, THE SEX OF THE PERSON CARRYING OUT THAT ACTIVITY CONSTITUTES A DETERMINING FACTOR.

35 AS IS CLEAR FROM THE INDUSTRIAL TRIBUNAL 'S DECISION, THE POLICY TOWARDS WOMEN IN THE RUC FULL-TIME RESERVE WAS ADOPTED BY THE CHIEF CONSTABLE BECAUSE HE CONSIDERED THAT IF WOMEN WERE ARMED THEY MIGHT BECOME A MORE FREQUENT TARGET FOR ASSASSINATION AND THEIR FIRE-ARMS COULD FALL INTO THE HANDS OF THEIR ASSAILANTS, THAT THE PUBLIC WOULD NOT WELCOME THE CARRYING OF FIRE-ARMS BY WOMEN, WHICH WOULD CONFLICT TOO MUCH WITH THE IDEAL OF AN UNARMED POLICE FORCE, AND THAT ARMED POLICEWOMEN WOULD BE LESS EFFECTIVE IN POLICE WORK IN THE SOCIAL FIELD WITH FAMILIES AND CHILDREN IN WHICH THE SERVICES OF POLICEWOMEN ARE PARTICULARLY APPRECIATED. THE REASONS WHICH THE CHIEF CONSTABLE THUS GAVE FOR HIS POLICY WERE RELATED TO THE SPECIAL CONDITIONS IN WHICH THE POLICE MUST WORK IN THE SITUATION EXISTING IN NORTHERN IRELAND, HAVING REGARD TO THE REQUIREMENTS OF THE PROTECTION OF PUBLIC SAFETY IN A CONTEXT OF SERIOUS INTERNAL DISTURBANCES.

36 AS REGARDS THE QUESTION WHETHER SUCH REASONS MAY BE COVERED BY ARTICLE 2 (2) OF THE DIRECTIVE, IT SHOULD FIRST BE OBSERVED THAT THAT PROVISION, BEING A DEROGATION FROM AN INDIVIDUAL RIGHT LAID DOWN IN THE DIRECTIVE, MUST BE INTERPRETED STRICTLY. HOWEVER, IT MUST BE RECOGNIZED THAT THE CONTEXT IN WHICH THE OCCUPATIONAL ACTIVITY OF MEMBERS OF AN ARMED POLICE FORCE ARE CARRIED OUT IS DETERMINED BY THE ENVIRONMENT IN WHICH THAT ACTIVITY IS CARRIED OUT. IN THIS REGARD, THE POSSIBILITY CANNOT BE EXCLUDED THAT IN A SITUATION CHARACTERIZED BY SERIOUS INTERNAL DISTURBANCES THE CARRYING OF FIRE-ARMS BY POLICEWOMEN MIGHT CREATE ADDITIONAL RISKS OF THEIR BEING ASSASSINATED AND MIGHT THEREFORE BE CONTRARY TO THE REQUIREMENTS OF PUBLIC SAFETY.

37 IN SUCH CIRCUMSTANCES, THE CONTEXT OF CERTAIN POLICING ACTIVITIES MAY BE SUCH THAT THE SEX OF POLICE OFFICERS CONSTITUTES A DETERMINING FACTOR FOR CARRYING THEM OUT. IF THAT IS SO, A MEMBER STATE MAY THEREFORE RESTRICT SUCH TASKS, AND THE TRAINING LEADING THERETO, TO MEN. IN SUCH A CASE, AS IS CLEAR FROM ARTICLE 9 (2) OF THE DIRECTIVE, THE MEMBER STATES HAVE A DUTY TO ASSESS PERIODICALLY THE ACTIVITIES CONCERNED IN ORDER TO DECIDE WHETHER, IN THE LIGHT OF SOCIAL DEVELOPMENTS, THE DEROGATION FROM THE GENERAL SCHEME OF THE DIRECTIVE MAY STILL BE MAINTAINED.

38 IT MUST ALSO BE BORNE IN MIND THAT, IN DETERMINING THE SCOPE OF ANY DEROGATION FROM AN INDIVIDUAL RIGHT SUCH AS THE EQUAL TREATMENT OF MEN AND WOMEN PROVIDED FOR BY THE DIRECTIVE, THE PRINCIPLE OF PROPORTIONALITY, ONE OF THE GENERAL PRINCIPLES OF LAW UNDERLYING THE COMMUNITY LEGAL ORDER, MUST BE OBSERVED. THAT PRINCIPLE REQUIRES THAT DEROGATIONS REMAIN WITHIN THE LIMITS OF WHAT IS APPROPRIATE AND NECESSARY FOR ACHIEVING THE AIM IN VIEW AND REQUIRES THE PRINCIPLE OF EQUAL TREATMENT TO BE RECONCILED AS FAR AS POSSIBLE WITH THE REQUIREMENTS OF PUBLIC SAFETY WHICH CONSTITUTE THE DECISIVE FACTOR AS REGARDS THE CONTEXT OF THE ACTIVITY IN QUESTION.

39 BY REASON OF THE DIVISION OF JURISDICTION PROVIDED FOR IN ARTICLE 177 OF THE EEC TREATY, IT IS FOR THE NATIONAL COURT TO SAY WHETHER THE REASONS ON WHICH THE CHIEF CONSTABLE BASED HIS DECISION ARE IN FACT WELL FOUNDED AND JUSTIFY THE SPECIFIC MEASURE TAKEN IN MRS JOHNSTON 'S CASE. IT IS ALSO FOR THE NATIONAL COURT TO ENSURE THAT THE PRINCIPLE OF PROPORTIONALITY IS OBSERVED AND TO DETERMINE WHETHER THE REFUSAL TO RENEW MRS JOHNSTON 'S CONTRACT COULD NOT BE AVOIDED BY ALLOCATING TO WOMEN DUTIES WHICH, WITHOUT JEOPARDIZING THE AIMS PURSUED, CAN BE PERFORMED WITHOUT FIRE-ARMS.

40 THE ANSWER TO THE INDUSTRIAL TRIBUNAL 'S SECOND AND THIRD QUESTIONS SHOULD THEREFORE BE THAT ARTICLE 2 (2) OF DIRECTIVE NO 76/207 MUST BE INTERPRETED AS MEANING THAT IN DECIDING WHETHER, BY REASON OF THE CONTEXT IN WHICH THE ACTIVITIES OF A POLICE OFFICER ARE CARRIED OUT, THE SEX OF THE OFFICER CONSTITUTES A DETERMINING FACTOR FOR THAT OCCUPATIONAL ACTIVITY, A MEMBER STATE MAY TAKE INTO CONSIDERATION REQUIREMENTS OF PUBLIC SAFETY IN ORDER TO RESTRICT GENERAL POLICING DUTIES, IN AN INTERNAL SITUATION CHARACTERIZED BY FREQUENT ASSASSINATIONS, TO MEN EQUIPPED WITH FIRE-ARMS.

THE DEROGATIONS ALLOWED ON THE GROUND OF A CONCERN TO PROTECT WOMEN

41 IN ITS FOURTH AND FIFTH QUESTION THE INDUSTRIAL TRIBUNAL THEN ASKS THE COURT FOR AN INTERPRETATION OF THE EXPRESSIONS 'PROTECTION OF WOMEN' IN ARTICLE 2 (3) OF THE DIRECTIVE AND 'CONCERN FOR PROTECTION' IN ARTICLE 3 (2) (C), WHICH INSPIRED CERTAIN PROVISIONS OF NATIONAL LAW, SO THAT IT CAN DECIDE WHETHER THE DIFFERENCE IN TREATMENT IN QUESTION MAY FALL WITHIN THE SCOPE OF THE DEROGATIONS FROM THE PRINCIPLE OF EQUAL TREATMENT LAID DOWN FOR THOSE PURPOSES.

42 IN MRS JOHNSTON 'S VIEW, THOSE PROVISIONS MUST BE INTERPRETED STRICTLY. THEIR SOLE PURPOSE IS TO ASSURE WOMEN SPECIAL TREATMENT IN ORDER TO PROTECT THEIR HEALTH AND SAFETY IN THE CASE OF PREGNANCY OR MATERNITY. THAT IS NOT THE CASE WHERE WOMEN ARE COMPLETELY EXCLUDED FROM SERVICE IN AN ARMED POLICE FORCE.

43 THE UNITED KINGDOM STATES THAT THE AIM OF THE POLICY WITH REGARD TO WOMEN IN THE RUC FULL-TIME RESERVE IS TO PROTECT WOMEN BY PREVENTING THEM FROM BECOMING TARGETS FOR ASSASSINATION. THE EXPRESSION 'PROTECTION OF WOMEN' MAY COVER SUCH AN AIM IN A PERIOD OF SERIOUS DISTURBANCES. THE COMMISSION ALSO TAKES THE VIEW THAT AN EXCEPTIONAL SITUATION SUCH AS EXISTS IN NORTHERN IRELAND AND THE RESULTANT DANGERS FOR ARMED WOMEN POLICE OFFICERS MAY BE TAKEN INTO CONSIDERATION FROM THE VIEWPOINT OF THE PROTECTION OF WOMEN.

44 IT MUST BE OBSERVED IN THIS REGARD THAT, LIKE ARTICLE 2 (2) OF THE DIRECTIVE, ARTICLE 2 (3), WHICH ALSO DETERMINES THE SCOPE OF ARTICLE 3 (2) (C), MUST BE INTERPRETED STRICTLY. IT IS CLEAR FROM THE EXPRESS REFERENCE TO PREGNANCY AND MATERNITY THAT THE DIRECTIVE IS INTENDED TO PROTECT A WOMAN 'S BIOLOGICAL CONDITION AND THE SPECIAL RELATIONSHIP WHICH EXISTS BETWEEN A WOMAN AND HER CHILD. THAT PROVISION OF THE DIRECTIVE DOES NOT THEREFORE ALLOW WOMEN TO BE EXCLUDED FROM A CERTAIN TYPE OF EMPLOYMENT ON THE GROUND THAT PUBLIC OPINION DEMANDS THAT WOMEN BE GIVEN GREATER PROTECTION THAN MEN AGAINST RISKS WHICH AFFECT MEN AND WOMEN IN THE SAME WAY AND WHICH ARE DISTINCT FROM WOMEN 'S SPECIFIC NEEDS OF PROTECTION, SUCH AS THOSE EXPRESSLY MENTIONED.

45 IT DOES NOT APPEAR THAT THE RISKS AND DANGERS TO WHICH WOMEN ARE EXPOSED WHEN PERFORMING THEIR DUTIES IN THE POLICE FORCE IN A SITUATION SUCH AS EXISTS IN NORTHERN IRELAND ARE DIFFERENT FROM THOSE TO WHICH ANY MAN IS ALSO EXPOSED WHEN PERFORMING THE SAME DUTIES . A TOTAL EXCLUSION OF WOMEN FROM SUCH AN OCCUPATIONAL ACTIVITY WHICH , OWING TO A GENERAL RISK NOT SPECIFIC TO WOMEN , IS IMPOSED FOR REASONS OF PUBLIC SAFETY IS NOT ONE OF THE DIFFERENCES IN TREATMENT THAT ARTICLE 2 (3) OF THE DIRECTIVE ALLOWS OUT OF A CONCERN TO PROTECT WOMEN .

46 THE ANSWER TO THE INDUSTRIAL TRIBUNAL ' S FOURTH AND FIFTH QUESTIONS MUST THEREFORE BE THAT THE DIFFERENCES IN TREATMENT BETWEEN MEN AND WOMEN THAT ARTICLE 2 (3) OF DIRECTIVE NO 76/207 ALLOWS OUT OF A CONCERN TO PROTECT WOMEN DO NOT INCLUDE RISKS AND DANGERS , SUCH AS THOSE TO WHICH ANY ARMED POLICE OFFICER IS EXPOSED WHEN PERFORMING HIS DUTIES IN A GIVEN SITUATION , THAT DO NOT SPECIFICALLY AFFECT WOMEN AS SUCH .

THE EFFECTS OF DIRECTIVE NO 76/207

47 BY ITS SIXTH QUESTION THE INDUSTRIAL TRIBUNAL ALSO SEEKS TO ASCERTAIN WHETHER AN INDIVIDUAL MAY RELY UPON THE PROVISIONS OF THE DIRECTIVE IN PROCEEDINGS BROUGHT BEFORE A NATIONAL COURT . IN VIEW OF THE FOREGOING , THIS QUESTION ARISES MORE PARTICULARLY WITH REGARD TO ARTICLES 2 AND 6 OF THE DIRECTIVE .

48 MRS JOHNSTON CONSIDERS THAT ARTICLE 2 (1) OF THE DIRECTIVE IS UNCONDITIONAL AND SUFFICIENTLY CLEAR AND PRECISE TO HAVE DIRECT EFFECT . IT MAY BE RELIED UPON AS AGAINST THE CHIEF CONSTABLE ACTING AS A PUBLIC AUTHORITY . IN ANY EVENT , THE DIRECTIVE HAS HORIZONTAL DIRECT EFFECT EVEN IN REGARD TO PRIVATE PERSONS .

49 IN THE VIEW OF THE UNITED KINGDOM , ARTICLE 2 (1) OF THE DIRECTIVE IS A CONDITIONAL PROVISION INASMUCH AS IT IS SUBJECT TO DEROGATIONS WHICH THE MEMBER STATE MAY DETERMINE IN A DISCRETIONARY MANNER . THE CHIEF CONSTABLE IS CONSTITUTIONALLY INDEPENDENT OF THE STATE AND IN THE PRESENT CASE IS INVOLVED ONLY AS AN EMPLOYER ; THE DIRECTIVE HAS NO DIRECT EFFECT IN SUCH RELATIONSHIPS .

50 THE COMMISSION TAKES THE VIEW THAT THE CASE MAY BE DEALT WITH WITHIN THE SCOPE OF NATIONAL LAW AND THAT A RULING ON THE DIRECT EFFECT OF ARTICLES 2 AND 3 OF THE DIRECTIVE IS NOT NECESSARY .

51 ON THIS POINT IT MUST BE OBSERVED FIRST OF ALL THAT IN ALL CASES IN WHICH A DIRECTIVE HAS BEEN PROPERLY IMPLEMENTED ITS EFFECTS REACH INDIVIDUALS THROUGH THE IMPLEMENTING MEASURES ADOPTED BY THE MEMBER STATES CONCERNED . THE QUESTION WHETHER ARTICLE 2 (1) MAY BE RELIED UPON BEFORE A NATIONAL COURT THEREFORE HAS NO PURPOSE SINCE IT IS ESTABLISHED THAT THE PROVISION HAS BEEN PUT INTO EFFECT IN NATIONAL LAW .

52 THE DEROGATION FROM THE PRINCIPLE OF EQUAL TREATMENT WHICH , AS STATED ABOVE , IS ALLOWED BY ARTICLE 2 (2) CONSTITUTES ONLY AN OPTION FOR THE MEMBER STATES . IT IS FOR THE COMPETENT NATIONAL COURT TO SEE WHETHER THAT OPTION HAS BEEN EXERCISED IN PROVISIONS OF NATIONAL LAW AND TO CONSTRUE THE CONTENT OF THOSE PROVISIONS . THE QUESTION WHETHER AN INDIVIDUAL MAY RELY UPON A PROVISION OF THE DIRECTIVE IN ORDER TO HAVE A DEROGATION LAID DOWN BY NATIONAL LEGISLATION SET ASIDE ARISES ONLY IF THAT DEROGATION WENT BEYOND THE LIMITS OF THE EXCEPTIONS PERMITTED BY ARTICLE 2 (2) OF THE DIRECTIVE .

53 IN THIS CONTEXT IT SHOULD BE OBSERVED FIRST OF ALL THAT , AS THE COURT HAS ALREADY STATED IN ITS JUDGMENTS OF 10 APRIL 1984 (CASE 14/83 VON COLSON AND KAMANN V LAND NORDRHEIN-WESTFALEN (1984) ECR 1891 AND CASE 79/83 HARZ V DEUTSCHE TRADAX GMBH (1984) ECR 1921) THE MEMBER STATES ' OBLIGATION UNDER A DIRECTIVE TO ACHIEVE THE RESULT ENVISAGED BY THAT DIRECTIVE AND THEIR DUTY UNDER ARTICLE 5 OF THE TREATY TO TAKE ALL APPROPRIATE MEASURES , WHETHER GENERAL OR PARTICULAR , TO ENSURE THE FULFILMENT OF THAT OBLIGATION , IS BINDING ON ALL THE AUTHORITIES OF MEMBER STATES INCLUDING , FOR MATTERS WITHIN THEIR JURISDICTION , THE COURTS . IT FOLLOWS THAT , IN APPLYING NATIONAL LAW , AND IN PARTICULAR THE PROVISIONS OF NATIONAL LEGISLATION SPECIFICALLY INTRODUCED IN ORDER TO IMPLEMENT DIRECTIVE NO 76/207 , NATIONAL COURTS ARE REQUIRED TO INTERPRET THEIR NATIONAL LAW IN THE LIGHT OF THE WORDING AND THE PURPOSE OF THE DIRECTIVE IN ORDER TO ACHIEVE THE RESULT REFERRED TO IN THE THIRD PARAGRAPH OF ARTICLE 189 OF THE EEC TREATY . IT IS THEREFORE FOR THE INDUSTRIAL TRIBUNAL TO INTERPRET THE PROVISIONS OF THE SEX DISCRIMINATION ORDER , AND IN PARTICULAR ARTICLE 53 (1) THEREOF , IN THE LIGHT OF THE PROVISIONS OF THE DIRECTIVE , AS INTERPRETED ABOVE , IN ORDER TO GIVE IT ITS FULL EFFECT .

54 IN THE EVENT THAT , HAVING REGARD TO THE FOREGOING , THE QUESTION SHOULD STILL ARISE WHETHER AN INDIVIDUAL MAY RELY ON THE DIRECTIVE AS AGAINST A DEROGATION LAID DOWN BY NATIONAL LEGISLATION , REFERENCE SHOULD BE MADE TO THE ESTABLISHED CASE-LAW OF THE COURT (SEE IN PARTICULAR ITS JUDGMENT OF 19 JANUARY 1982 IN CASE 8/81 BECKER V FINANZAMT MUNSTER-INNENSTADT (1982) ECR 53). MORE PARTICULARLY , THE COURT RECENTLY HELD IN ITS JUDGMENT DELIVERED ON 26 FEBRUARY 1986 IN CASE 152/84 (MARSHALL V SOUTHAMPTON AND SOUTH WEST HAMPSHIRE AREA HEALTH AUTHORITY (1986) ECR 723) THAT CERTAIN PROVISIONS OF DIRECTIVE NO 76/207 ARE , AS FAR AS THEIR SUBJECT-MATTER IS CONCERNED , UNCONDITIONAL AND SUFFICIENTLY PRECISE AND THAT THEY MAY BE RELIED UPON BY INDIVIDUALS AS AGAINST A MEMBER STATE WHERE IT FAILS TO IMPLEMENT IT CORRECTLY .

55 THAT STATEMENT WAS MADE , IN THE AFORESAID JUDGMENT OF 26 FEBRUARY 1986 , WITH REGARD TO THE APPLICATION OF THE PRINCIPLE OF EQUAL TREATMENT LAID DOWN IN ARTICLE 2 (1) OF THE DIRECTIVE TO THE CONDITIONS GOVERNING DISMISSAL REFERRED TO IN ARTICLE 5 (1). THE SAME APPLIES AS REGARDS THE APPLICATION OF THE PRINCIPLE CONTAINED IN ARTICLE 2 (1) TO THE CONDITIONS GOVERNING ACCESS TO JOBS AND ACCESS TO VOCATIONAL TRAINING AND ADVANCED VOCATIONAL TRAINING REFERRED TO IN ARTICLES 3 (1) AND 4 WHICH ARE IN QUESTION IN THIS CASE .

56 THE COURT ALSO HELD IN THE AFORESAID JUDGMENT THAT INDIVIDUALS MAY RELY ON THE DIRECTIVE AS AGAINST AN ORGAN OF THE STATE WHETHER IT ACTS QUA EMPLOYER OR QUA PUBLIC AUTHORITY . AS REGARDS AN AUTHORITY LIKE THE CHIEF CONSTABLE , IT MUST BE OBSERVED THAT , ACCORDING TO THE INDUSTRIAL TRIBUNAL ' S DECISION , THE CHIEF CONSTABLE IS AN OFFICIAL RESPONSIBLE FOR THE DIRECTION OF THE POLICE SERVICE . WHATEVER ITS RELATIONS MAY BE WITH OTHER ORGANS OF THE STATE , SUCH A PUBLIC AUTHORITY , CHARGED BY THE STATE WITH THE MAINTENANCE OF PUBLIC ORDER AND SAFETY , DOES NOT ACT AS A PRIVATE INDIVIDUAL . IT MAY NOT TAKE ADVANTAGE OF THE FAILURE OF THE STATE , OF WHICH IT IS AN EMANATION , TO COMPLY WITH COMMUNITY LAW .

57 THE ANSWER TO THE SIXTH QUESTION SHOULD THEREFORE BE THAT INDIVIDUALS MAY CLAIM THE APPLICATION , AS AGAINST A STATE AUTHORITY CHARGED WITH THE MAINTENANCE OF PUBLIC ORDER AND SAFETY ACTING IN ITS CAPACITY OF AN EMPLOYER , OF THE PRINCIPLE OF EQUAL TREATMENT FOR MEN AND WOMEN LAID DOWN IN ARTICLE 2

(1) OF DIRECTIVE NO 76/207 TO THE MATTERS REFERRED TO IN ARTICLES 3 (1) AND 4 CONCERNING THE CONDITIONS FOR ACCESS TO POSTS AND TO VOCATIONAL TRAINING AND ADVANCED VOCATIONAL TRAINING IN ORDER TO HAVE A DEROGATION FROM THAT PRINCIPLE UNDER NATIONAL LEGISLATION SET ASIDE IN SO FAR AS IT EXCEEDS THE LIMITS OF THE EXCEPTIONS PERMITTED BY ARTICLE 2 (2).

58 AS REGARDS ARTICLE 6 OF THE DIRECTIVE WHICH , AS EXPLAINED ABOVE , IS ALSO APPLICABLE IN THIS CASE , THE COURT HAS ALREADY HELD IN ITS JUDGMENTS OF 10 APRIL 1984 , CITED ABOVE , THAT THAT ARTICLE DOES NOT CONTAIN , AS FAR AS SANCTIONS FOR ANY DISCRIMINATION ARE CONCERNED , ANY UNCONDITIONAL AND SUFFICIENTLY PRECISE OBLIGATION WHICH MAY BE RELIED UPON BY AN INDIVIDUAL . ON THE OTHER HAND , IN SO FAR AS IT FOLLOWS FROM THAT ARTICLE , CONSTRUED IN THE LIGHT OF A GENERAL PRINCIPLE WHICH IT EXPRESSES , THAT ALL PERSONS WHO CONSIDER THEMSELVES WRONGED BY SEX DISCRIMINATION MUST HAVE AN EFFECTIVE JUDICIAL REMEDY , THAT PROVISION IS SUFFICIENTLY PRECISE AND UNCONDITIONAL TO BE CAPABLE OF BEING RELIED UPON AS AGAINST A MEMBER STATE WHICH HAS NOT ENSURED THAT IT IS FULLY IMPLEMENTED IN ITS INTERNAL LEGAL ORDER .

59 THE ANSWER TO THIS PART OF THE SIXTH QUESTION MUST THEREFORE BE THAT THE PROVISION CONTAINED IN ARTICLE 6 TO THE EFFECT THAT ALL PERSONS WHO CONSIDER THEMSELVES WRONGED BY DISCRIMINATION BETWEEN MEN AND WOMEN MUST HAVE AN EFFECTIVE JUDICIAL REMEDY MAY BE RELIED UPON BY INDIVIDUALS AS AGAINST A MEMBER STATE WHICH HAS NOT ENSURED THAT IT IS FULLY IMPLEMENTED IN ITS INTERNAL LEGAL ORDER .

ARTICLE 224 OF THE EEC TREATY

60 AS FAR AS CONCERNS THE SEVENTH QUESTION , ON THE INTERPRETATION OF ARTICLE 224 , IT FOLLOWS FROM THE FOREGOING THAT ARTICLE 2 (2) OF DIRECTIVE NO 76/207 ALLOWS A MEMBER STATE TO TAKE INTO CONSIDERATION THE REQUIREMENTS OF THE PROTECTION OF PUBLIC SAFETY IN A CASE SUCH AS THE ONE BEFORE THE COURT . AS REGARDS THE REQUIREMENT THAT THE QUESTION WHETHER THE RULES LAID DOWN BY THE DIRECTIVE HAVE BEEN COMPLIED WITH MUST BE AMENABLE TO JUDICIAL REVIEW , NONE OF THE FACTS BEFORE THE COURT AND NONE OF THE OBSERVATIONS SUBMITTED TO IT SUGGEST THAT THE SERIOUS INTERNAL DISTURBANCES IN NORTHERN IRELAND MAKE JUDICIAL REVIEW IMPOSSIBLE OR THAT MEASURES NEEDED TO PROTECT PUBLIC SAFETY WOULD BE DEPRIVED OF THEIR EFFECTIVENESS BECAUSE OF SUCH REVIEW BY THE NATIONAL COURTS . IN THOSE CIRCUMSTANCES , THE QUESTION WHETHER ARTICLE 224 OF THE EEC TREATY MAY BE RELIED UPON BY A MEMBER STATE IN ORDER TO AVOID COMPLIANCE WITH THE OBLIGATIONS IMPOSED ON IT BY COMMUNITY LAW AND IN PARTICULAR BY THE DIRECTIVE DOES NOT ARISE IN THIS CASE .

61 THE SEVENTH QUESTION THEREFORE HAS NO PURPOSE IN VIEW OF THE ANSWERS TO THE OTHER QUESTIONS .

COSTS

62 THE COSTS INCURRED BY THE UNITED KINGDOM , THE GOVERNMENT OF DENMARK AND THE COMMISSION OF THE EUROPEAN COMMUNITIES , WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT , ARE NOT RECOVERABLE . SINCE THESE PROCEEDINGS ARE , IN SO FAR AS THE PARTIES TO THE MAIN PROCEEDINGS ARE CONCERNED , IN THE NATURE OF A STEP IN THE PROCEEDINGS PENDING BEFORE THE NATIONAL TRIBUNAL , THE DECISION ON COSTS IS A MATTER FOR THAT TRIBUNAL .

ON THOSE GROUNDS ,

THE COURT ,

Decision on costs

IN ANSWER TO THE QUESTIONS SUBMITTED TO IT BY THE INDUSTRIAL TRIBUNAL OF NORTHERN IRELAND BY DECISION OF 8 AUGUST 1984 , HEREBY RULES :

(1) THE PRINCIPLE OF EFFECTIVE JUDICIAL CONTROL LAID DOWN IN ARTICLE 6 OF COUNCIL DIRECTIVE NO 76/207 OF 9 FEBRUARY 1976 DOES NOT ALLOW A CERTIFICATE ISSUED BY A NATIONAL AUTHORITY STATING THAT THE CONDITIONS FOR DEROGATING FROM THE PRINCIPLE OF EQUAL TREATMENT FOR MEN AND WOMEN FOR THE PURPOSES OF PROTECTING PUBLIC SAFETY ARE SATISFIED TO BE TREATED AS CONCLUSIVE EVIDENCE SO AS TO EXCLUDE THE EXERCISE OF ANY POWER OF REVIEW BY THE COURTS . THE PROVISION CONTAINED IN ARTICLE 6 TO THE EFFECT THAT ALL PERSONS WHO CONSIDER THEMSELVES WRONGED BY DISCRIMINATION BETWEEN MEN AND WOMEN MUST HAVE AN EFFECTIVE JUDICIAL REMEDY MAY BE RELIED UPON BY INDIVIDUALS AS AGAINST A MEMBER STATE WHICH HAS NOT ENSURED THAT IT IS FULLY IMPLEMENTED IN ITS INTERNAL LEGAL ORDER .

Operative part

(2)ACTS OF SEX DISCRIMINATION DONE FOR REASONS RELATED TO THE PROTECTION OF PUBLIC SAFETY MUST BE EXAMINED IN THE LIGHT OF THE DEROGATIONS FROM THE PRINCIPLE OF EQUAL TREATMENT FOR MEN AND WOMEN WHICH ARE LAID DOWN IN DIRECTIVE NO 76/207 .

(3)ARTICLE 2 (2) OF DIRECTIVE NO 76/207 MUST BE INTERPRETED AS MEANING THAT IN DECIDING WHETHER , BY REASON OF THE CONTEXT IN WHICH THE ACTIVITIES OF A POLICE OFFICER ARE CARRIED OUT , THE SEX OF THE OFFICER CONSTITUTES A DETERMINING FACTOR FOR THAT OCCUPATIONAL ACTIVITY , A MEMBER STATE MAY TAKE INTO CONSIDERATION REQUIREMENTS OF PUBLIC SAFETY IN ORDER TO RESTRICT GENERAL POLICING DUTIES , IN AN INTERNAL SITUATION CHARACTERIZED BY FREQUENT ASSASSINATIONS , TO MEN EQUIPPED WITH FIRE-ARMS .

(4)THE DIFFERENCES IN TREATMENT BETWEEN MEN AND WOMEN THAT ARTICLE 2 (3) OF DIRECTIVE NO 76/207 ALLOWS OUT OF A CONCERN TO PROTECT WOMEN DO NOT INCLUDE RISKS AND DANGERS , SUCH AS THOSE TO WHICH ANY ARMED POLICE OFFICER IS EXPOSED IN THE PERFORMANCE OF HIS DUTIES IN A GIVEN SITUATION , THAT DO NOT SPECIFICALLY AFFECT WOMEN AS SUCH .

(5)INDIVIDUALS MAY CLAIM THE APPLICATION , AS AGAINST A STATE AUTHORITY CHARGED WITH THE MAINTENANCE OF PUBLIC ORDER AND SAFETY ACTING IN ITS CAPACITY AS EMPLOYER , OF THE PRINCIPLE OF EQUAL TREATMENT FOR

MEN AND WOMEN LAID DOWN IN ARTICLE 2 (1) OF DIRECTIVE NO 76/207 TO THE MATTERS REFERRED TO IN ARTICLES 3 (1) AND 4 CONCERNING THE CONDITIONS FOR ACCESS TO POSTS AND TO VOCATIONAL TRAINING AND ADVANCED VOCATIONAL TRAINING IN ORDER TO HAVE A DEROGATION FROM THAT PRINCIPLE CONTAINED IN NATIONAL LEGISLATION SET ASIDE IN SO FAR AS IT EXCEEDS THE LIMITS OF THE EXCEPTIONS PERMITTED BY ARTICLE 2 (2).

MACKENZIE STUART KOOPMANS EVERLING BAHLMANN JOLIET DUE GALMOT KAKOURIS O ' HIGGINS DELIVERED IN OPEN COURT IN LUXEMBOURG ON 15 MAY 1986 .

P . HEIM A . J . MACKENZIE STUART

REGISTRAR PRESIDENT

** TRANSLATED FROM THE FRENCH .*

61989J0367

Judgment of the Court of 4 October 1991. - Criminal proceedings against Aimé Richardt and Les Accessoires Scientifiques SNC. - Reference for a preliminary ruling: Cour de cassation - Grand Duchy of Luxemburg. - Free movement of goods - Community transit - Strategic material. - Case C-367/89.

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Keywords

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Free movement of goods - Community transit - Principle of the freedom of Community transit - Restrictive measures adopted on the basis of Article 36 of the Treaty - Permissibility - Transit of goods described as strategic material - Requirement for special authorization - Justification on public security grounds

(EEC Treaty, Art. 36; Council Regulation No 222/77)

Summary

The existence, as a consequence of the Customs Union, of a general principle of freedom of transit of goods within the Community does not, as Article 10 of Regulation No 222/77 affirms, have the effect of precluding the Member States from verifying the nature of goods in transit, pursuant to the Treaty, in particular Article 36. That article authorizes the Member States to impose restrictions on the transit of goods on grounds of public security, which covers both a Member State' s internal security and its external security, of which the latter manifestly requires to be taken into consideration in the case of goods capable of being used for strategic purposes.

Accordingly, the aforementioned regulation does not preclude the legislation of a Member State from requiring, on external security grounds, that special authorization must be obtained for the transit through its territory of goods described as strategic material, irrespective of the Community transit document issued by another Member State. However, the measures adopted by the Member State as a consequence of the failure to comply with that requirement must not be disproportionate to the objective pursued.

Parties

In Case C-367/89,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Cour de Cassation, Luxembourg, for a preliminary ruling in the criminal proceedings pending before that court against

Aimé Richardt,

Les Accessoires Scientifiques SNC,

on the interpretation of the provisions of Community law on the free movement of goods and Community transit,

THE COURT,

composed of: T.F. O' Higgins, President of a Chamber, acting as President, J.C. Moitinho de Almeida, M. Díez de Velasco, Presidents of Chambers, C.N. Kakouris, F.A. Schockweiler, F. Grévisse and M. Zuleeg, Judges,

Advocate General: F.G. Jacobs,

Registrar: J.A. Pompe, Deputy Registrar,

after considering the written observations submitted on behalf of

the Finance Ministry of the Grand Duchy of Luxembourg and the Director of Customs, by Alphonse Berns, Director of International Economic Relations and Cooperation, acting as Agent, assisted by Pierre Bermes, of the Luxembourg Bar,

A. Richardt, Les Accessoires Scientifiques SNC, by Ernest Arendt, of the Luxembourg Bar, and Mireille Abensour-Gibert, of the Paris Bar,

the French Government, by Edwige Belliard, Deputy Director in the Directorate of Legal Affairs at the Ministry of Foreign

Affairs, and Géraud de Bergues, Principal Deputy Secretary in the Directorate of Legal Affairs of that Ministry, acting as Agents,

the United Kingdom, by J.E. Collins, of the Treasury Solicitor' s Department, acting as Agent,

the Belgian Government, by G. Speltincx, Director of European Affairs at the Ministry of Foreign Affairs, External Trade and Development Cooperation, acting as Agent,

the Commission of the European Communities, by Joern Sack, Legal Adviser, assisted by Hervé Lehman, a French official seconded to the Commission' s Legal Service under the exchange scheme with national officials, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Finance Ministry of the Grand Duchy of Luxembourg and the Director of Customs, of A. Richardt, the French Government, the United Kingdom, represented by Derrick Wyatt, Barrister, acting as Agent, and the Commission of the European Communities at the hearing on 13 March 1991,

after hearing the Opinion of the Advocate General at the sitting on 8 May 1991,

gives the following

Judgment

Grounds

1 By judgment of 30 November 1989, which was received at the Court on 6 December 1989, the Cour de Cassation, Luxembourg, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Council Regulation (EEC) No 222/77 of 13 December 1976 on Community transit (Official Journal 1977 L 38, p. 1), in order to enable it to determine the compatibility with Community law of the restrictions imposed by Luxembourg legislation on the transit of goods of a strategic nature.

2 That question was raised in the course of criminal proceedings brought against Mr Aimé Richardt and four other persons by the Finance Ministry of the Grand Duchy of Luxembourg and the Director of Customs for attempting to effect the unlawful transit of goods in contravention of a Grand Ducal Regulation of 17 August 1963 requiring a licence for the transit of certain goods (Mémorial A, No 47, 17 August 1963, p. 764). The combined provisions of Articles 1 and 2 of that regulation require the production of a licence for the transit of the goods set out in list I annexed thereto coming from, inter alia, the United States of America or the French Republic and declared to be in transit and destined for, amongst other countries, the Soviet Union.

3 Mr Richardt, the chairman and managing director of Les Accessoires Scientifiques (hereinafter referred to as "LAS"), established in France, agreed to deliver to a Soviet central purchasing agency, Technoprominport, established in Moscow, a unit for the production of bubble memory circuits including, inter alia, a ten-inch Veeco Microetch which, on importation into France from the United States, was placed in free circulation in the Community.

4 Mr Richardt completed in France the necessary formalities for the goods to be exported by air to Moscow. Since the goods could not be loaded on board the aeroplane provided for that purpose at Roissy, owing to the cancellation of a flight by Aeroflot, they were taken by lorry on the initiative of Air France to the airport of the Grand Duchy of Luxembourg and presented, in transit, to the Luxembourg customs on 21 May 1985 for departure from the territory of the Grand Duchy for Moscow. The goods were accompanied, apparently in error, but without any objection by either the French or Luxembourg authorities, by the T1 document prescribed in Regulation No 222/77 for goods not in free circulation in the Community.

5 The customs check carried out at Luxembourg airport resulted in the seizure of, inter alia, the manufacturing machine, which, according to the Luxembourg authorities, was accompanied by inaccurate declarations in order to conceal its strategic nature and to permit its transit to the USSR in contravention of the Luxembourg legislation, which requires a special transit licence in such cases. Mr Richardt and four other persons were therefore charged with attempting to effect the unlawful transit of goods subject to a licence requirement.

6 At first instance, the Tribunal Correctionnel (Criminal Court) dismissed the charges against Mr Richardt and his co-accused but ordered the machine to be confiscated.

7 On appeal by LAS and Mr Richardt against the operative part of the judgment in so far as it ordered the confiscation of the machine, the Cour d' Appel de Luxembourg held that there was no ground for its confiscation, since the accompanying T1 document was to be regarded as a valid certificate of authorization for transit issued by France, exempting the person concerned from production of a licence issued by the authorities of the Grand Duchy of Luxembourg. In those circumstances, according to the Cour d' Appel, the transit had taken place in accordance with the law.

8 In their appeal in cassation, the Finance Ministry of the Grand Duchy of Luxembourg and the Director of Customs challenged the judgment of the Cour d' Appel on the ground that it ascribed too general a scope to the T1 document. They contended essentially that Article 10 of Regulation No 222/77 applied only to goods described as ordinary, whilst the transit of goods of a strategic nature could be made subject, inter alia, to authorization justified by the dictates of external security.

9 Taking the view that the outcome of the proceedings depended on the interpretation of Regulation No 222/77, the Cour de Cassation, Luxembourg, decided, by judgment of 30 November 1989, to stay the proceedings pending a preliminary ruling by the Court on the following question:

"Is Council Regulation (EEC) No 222/77 to be interpreted as laying down the mandatory obligation for the T1 document provided for therein to be recognized without reservation as a valid authorization for transit in the territory of any Member State of the European Economic Community, irrespective of the nature of the goods transported and even if they endanger the external security of the State concerned, or conversely does the regulation allow a Member State the possibility of refusing to recognize the T1 document as equivalent to a transit authorization when the national legislation of that State considers the goods transported to be strategic equipment and, on external security grounds, makes transit through its territory subject to the grant of special permission?"

10 Reference is made to the Report for the Hearing for a fuller account of the facts of the case before the national court, the Community and national provisions at issue, the course of the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

11 It should be pointed out at the outset that at the time of seizure the goods in question had not been imported into the

Grand Duchy of Luxembourg, but were there solely for the purpose of being transported to a non-member country, that is to say, they were in transit. In this case, the role of the customs authorities of the Grand Duchy of Luxembourg therefore corresponds to that of an "office of transit" within the meaning of the second indent of Article 11(d) of Regulation No 222/77. It follows that the export in question must be regarded as effected not from the Grand Duchy of Luxembourg but from the Member State of initial departure, namely the French Republic, where the export formalities appear moreover to have been completed, as provided for in Council Regulation (EEC) No 2102/77 of 20 September 1977 introducing a Community export declaration form (Official Journal 1977 L 246, p. 1). Consequently, Regulation (EEC) No 2603 of the Council of 20 December 1969 establishing common rules for exports (Official Journal English Special Edition 1969 (II), p. 590), last amended by Regulation (EEC) No 1934/82 (Official Journal 1982 L 211, p. 1), is not applicable in the main proceedings and the only relevant provisions are those contained in Regulation No 222/77, which, moreover, is the subject of the question referred for a preliminary ruling.

12 The Grand Duchy of Luxembourg, the United Kingdom of Great Britain and Northern Ireland, the French Republic, the Kingdom of Belgium and the Commission consider that Regulation No 222/77 does not preclude a Member State from requiring, in addition to the transit document accompanying the goods, special authorization where such authorization, which is justified on external security grounds, relates to goods described as strategic material.

13 On the other hand, Mr Richardt and LAS take the view that the licence requirement provided for in the Luxembourg legislation, together with the transit document T1 accompanying the goods in question, is contrary to the EEC Treaty and to Regulation No 222/77 because, pursuant to Article 37 of that regulation, the T1 document is a transit permit which, in all the Member States, is to have the same legal effects as a transit certificate, irrespective of the strategic nature or otherwise of the goods.

14 Having regard to those opposing points of view, it should first be recalled that, as the Court held in its judgment in Case 266/81 SIOT v Ministero delle Finanze [1983] ECR 731, paragraph 16, it is necessary, as a consequence of the Customs Union and in the mutual interest of the Member States, to acknowledge the existence of a general principle of freedom of transit of goods within the Community. That principle is, moreover, confirmed by the reference to "transit" in Article 36 of the Treaty.

15 As the Court stated in its judgment in Case C-117/88 Trend-Moden Textilhandels GmbH v Hauptzollamt Emmerich [1990] ECR I-631, paragraph 16, the purpose of Regulation No 222/77 is to facilitate the transport of goods within the Community by simplifying and standardizing the formalities to be carried out when internal frontiers are crossed.

16 Finally, the tenth recital in the preamble to Regulation No 222/77 states that the Community transit procedure should, in principle, be applied to all movements of goods within the Community. That procedure thus covers all goods, irrespective of their possible strategic nature.

17 However, that situation does not preclude the Member States from verifying goods in transit, in accordance with the provisions of the Treaty. Article 10 of Regulation No 222/77 provides that prohibitions and restrictions on importation, exportation and transit issued by the Member States are to apply to the extent to which they are compatible with the three Treaties establishing the European Communities.

18 It must therefore be considered whether the rules of the Treaty, in particular Article 36, preclude a requirement for special authorization and also the consequences, such as confiscation measures, of a failure to comply with that requirement.

19 In that connection the Court has consistently held that the purpose of Article 36 of the Treaty is not to reserve certain matters to the exclusive jurisdiction of the Member States, but merely to allow national legislation to derogate from the principle of the free movement of goods to the extent to which this is and remains justified in order to achieve the objectives set out in the article (see, in particular, the judgment in Case 72/83 Campus Oil Limited v Minister for Industry and Energy [1984] ECR 2727, paragraph 32).

20 The Court has stated on several occasions (see the judgment in Campus Oil, cited above, paragraph 37, concerning restrictions on imports) that Article 36, as an exception to a fundamental principle of the Treaty, must be interpreted in such a way that its scope is not extended any further than is necessary for the protection of the interests which it is intended to secure. Measures adopted on the basis of Article 36 can therefore be justified only if they are such as to serve the interest which that article protects and if they do not restrict intra-Community trade more than is absolutely necessary.

21 Having regard to that case-law, a Member State may invoke Article 36 in order to justify a measure restricting transit only if no other measure, less restrictive from the point of view of the free movement of goods, permits the same objective to be attained.

22 In that respect, it is necessary to state, along with the Commission and the Member States which submitted written observations to the Court, that the concept of public security within the meaning of Article 36 of the Treaty covers both a Member State's internal security and its external security. It is common ground that the importation, exportation and transit of goods capable of being used for strategic purposes may affect the public security of a Member State, which it is therefore entitled to protect pursuant to Article 36 of the Treaty.

23 Accordingly, in order to verify the nature of goods described as strategic material, the Member States are entitled under Article 36 of the Treaty to make their transit subject to the grant of a special authorization.

24 As regards the penalties laid down for failure to comply with the obligation to obtain such authorization, it should be stated, as the Commission, LAS and Mr Richardt pointed out, that a measure involving seizure or confiscation may be considered disproportionate to the objective pursued, and thus incompatible with Article 36 of the Treaty, in a case where the return of the goods to the Member State of origin could suffice.

25 However, it is for the national court to determine whether the system established complies with the principle of proportionality, taking account of all the elements of each case, such as the nature of the goods capable of endangering the security of the State, the circumstances in which the breach was committed and whether or not the trader seeking to effect the transit and holding documents for that purpose issued by another Member State was acting in good faith.

26 It follows from the foregoing considerations that the reply to the question submitted by the national court must be that Regulation No 222/77 must be interpreted as meaning that it does not preclude legislation of a Member State which, on external security grounds, requires special authorization to be obtained for the transit through its territory of goods described as strategic material, irrespective of the Community transit document issued by another Member State. However, the measures adopted by the Member State as a consequence of the failure to comply with that requirement must not be disproportionate to the objective pursued.

Decision on costs

Costs

27 The costs incurred by the Belgian, French, Luxembourg and United Kingdom Governments and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

Operative part

On those grounds,

THE COURT,

in answer to the question referred to it by the Cour de Cassation of the Grand Duchy of Luxembourg, by judgment of 30 November 1989, hereby rules:

Council Regulation (EEC) No 222/77 of 13 December 1976 on Community transit must be interpreted as meaning that it does not preclude legislation of a Member State which, on external security grounds, requires special authorization to be obtained for the transit through its territory of goods described as strategic material, irrespective of the Community transit document issued by another Member State. However, the measures adopted by the Member State as a consequence of the failure to comply with that requirement must not be disproportionate to the objective pursued.

ESBESTER *v.* UNITED KINGDOM

(Security monitoring)

App. No. 18601/91
April 1993

Complaints: The applicant complains that information as to his private life was kept on secret files by MI5 and/or police Special Branches and/or the Police National Computer and/or the Government Communications Headquarters (GCHQ). He submits that it is at very least reasonably likely that the intelligence services have compiled and retained information about his private life and this, taken with the existence of practices permitting secret surveillance, constitutes an infringement of Article 8(1) of the Convention. The use of this information in the course of negative vetting procedures is an additional interference, especially since he did not have the opportunity to refute the information in question.

The applicant further submits that the interference was not in accordance with law since there is no law governing the compilation and use of information by police Special Branches, the Police National Computer or GCHQ. While the Security Service Act 1989 was passed in response to applications before the Commission, he submits that it only covers the activities of MI5 and in any case to offer an adequate definition of the function of the Security Service. Further, the Security Service Tribunal set up by the Act does not provide adequate protection from abuse.

The applicant submits that the interference fails to satisfy the other criteria of Article 8(2) of the Convention. In particular, the Tribunal does not offer adequate and effective protection against abuse since it only has jurisdiction over the Security Service and cannot consider the correctness of the Security Service decisions on whether the Service was justified in retaining the records of its enquiries. Moreover, its jurisdiction is further limited where inquiries are made by the Service on the ground that a person is a member of a category of persons regarded by the Service as requiring investigation. The Tribunal is also prevented from giving reasons for its decisions.

The applicant also complains that he had no effective remedy in respect of his complaints, contrary to Article 13 of the Convention.

The Law

Article 8 of the Convention

The applicant complains that information concerning his private life has been compiled, retained and disclosed by the Security Service, police Special Branches, the Police National Computer or GCHQ. He invokes Article 8 of the Convention.

The Government, in line with their policy of not disclosing information about the operations of the intelligence services, have neither confirmed nor denied the applicant's allegations.

The Commission recalls that a security check does not *per se* constitute an interference with the right to respect for private life guaranteed by Article 8 of the Convention. An interference with this right occurs when security checks are based on information about a person's private life.[72]

The Commission notes that the applicant had no concrete proof to support his allegation that any of the intelligence services, including the Security Service, compiled and continue to retain a file of personal information about him. The Commission recalls however that "an individual may, under certain conditions, claim to be a victim of a violation occasioned by the mere existence of secret measures ... without having to allege that such measures were in fact applied to him."[73]

[72] See *e.g.*, LEANDER *v.* SWEDEN (A/116): (1987) 9 E.H.R.R. 433.
[73] KLASS *v.* GERMANY (A/28): (1979–80) 2 E.H.R.R. 214.

Similarly, in the MALONE case, the Court agreed with the Commission that the existence of laws and practices permitting and establishing a system for effecting secret surveillance amounted in itself to an interference with the applicant's rights under Article 8 of the Convention, apart from any measures actually taken against him.[74]

The Commission has held that this case law cannot be interpreted so broadly as to encompass every person in the United Kingdom who fears that the Security Service may have compiled information about him. An applicant however cannot be reasonably expected to prove that information concerning his private life has been compiled and retained. It is sufficient, in the area of secret measures, that the existence of practices permitting secret surveillance be established and that there is a reasonable likelihood that the Security Service has compiled and retained information concerning his private life.[75]

In the present case, the Commission notes that the applicant was refused a post in the Central Office of Information after initial approval had been given subject to satisfactory completion of "inquiries". He was informed by the COI that "having completed our inquiries ... we are unable to offer you the appointment". In these circumstances the Commission finds that the applicant's assertion that a security check was carried out and involved reference to recorded information concerning matters falling within the sphere of "private life" is a reasonable inference from the facts. The recording of such information for the purpose of discharging their functions would appear to fall within the ambit of the Security Service and/or police Special Branches. There is nothing to indicate that GCHQ or the Police National Computer have recorded information relating to the applicant's private life.

Against the above background, the Commission finds that the applicant has established a reasonable likelihood that the Security Service and/or police Special Branches have compiled and retained information concerning his private life, which was referred to in the course of a security check. It follows that there has been an interference with the applicant's rights to respect for his private life guaranteed under Article 8(1) of the Convention.

The Commission must next determine whether this interference is justified under the second paragraph of Article 8 of the Convention, namely whether it was "in accordance with the law" and if so, whether it was necessary in a democratic society or one or more of the reasons specified.

"in accordance with the law"

This expression has been interpreted by the Court as importing three requirements—the interference must have some basis in domestic law, the law in concept must be accessible to the individual concerned and its consequences for him must also be foreseeable. The Court has further held the requirement of foreseeability in the special context of employment "vetting" in sectors affecting national security cannot be the same as in many other fields. In the LEANDER case[76] it stated:

> Thus, it cannot mean that an individual should be enable to foresee precisely what checks will be made in his regard by the Swedish special police service in its efforts to protect national security. Nevertheless, in a system applicable to citizens generally, as under the Personnel Control Ordinance, the law has to be sufficiently clear in its terms to give them an adequate indication as to the circumstances in which and the conditions on which the public authorities are empowered to resort to this kind of secret and potentially dangerous interference with private life (para. 67) ...
>
> In addition, where the implementation of the law consists of secret measures,

[74] MALONE *v.* UNITED KINGDOM (A/82): (1985) 7 E.H.R.R. 14.

[75] See *e.g.*, No. 12015/86 57 D.R. 108.

[76] LEANDER *v.* SWEDEN *loc. cit.*

not open to scrutiny by the individuals concerned or by the public at large, the law itself, as opposed to the accompanying administrative practice, must indicate the scope of any discretion conferred on the competent authority with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference (see the above-mentioned Malone judgment, para. 68).

The Commission finds that the interference in the present case had a valid basis in domestic law, namely, the Security Service Act 1989 which placed the Security Service on a statutory footing for the first time.

The applicant has submitted however that the domestic law nonetheless lacks the requisite accessibility and foreseeability. In this context he refers to the only partially defined term of "the interests of national security" and the fact that the guidelines produced by the Secretary of State pursuant to section 2(3) of the 1989 Act governing the Director-General's supervision of the use of information obtained by the Security Service are unpublished.

The Commission considers however that the principles referred to above do not necessarily require a comprehensive definition of the notion of "the interests of national security". Many laws, which by their subject-matter require to be flexible, are inevitably couched in terms which are to a greater or lesser extent vague and whose interpretation and application are questions of practice. The Commission notes that the exercise of the Security Service's functions are subject to express limitations and to the supervision of a tribunal and commissioner appointed pursuant to the 1989 Act. The guidelines referred to in section 2(3) of the Act relate only to the administrative implementation of preceding provisions, which expressly limit the use of information by the Service to that necessary to fulfil its functions.

As regards the police Special Branches, the Commission notes that they are part of the ordinary police force and have the same powers and duties, which includes the common law power to collect and retain information about offenders and offences and information required for the preservation of public order.

In light of the above, the Commission considers that in the present case the law is formulated with sufficient precision to enable the applicant to anticipate the application of vetting procedures and to the likely nature of the involvement of the Security Service and police Special Branches with regard to the collection, recording and release of information relating to himself.

"necessary in a democratic society . . ."

The Commission recalls that the notion of necessity implies that the interference corresponds to a pressing social need and, in particular that it is proportionate to the legitimate aim pursued. Regard must also be had on this context to the margin of appreciation of the respondent state which in the area of assessing the requirements of and means of pursuing interests of national security has been held by the Court to be wide.[77]

The aim pursued by the interference in the present case was the "interests of national security". The Court has acknowledged the necessity for States to collect and store information on persons and to use this information when assessing the eligibility of persons for posts of importance for national security. It is however crucial given the potential seriousness of resulting invasions of a person's private sphere that there exist adquate and effective guarantees against abuse.[78]

The Government have pointed to the framework of supervision set up under the 1989 Act.

The applicant contends that the protection offered is inadequate and ineffective. He alleges, *inter alia*, the following defects:

[77] LEANDER *v.* SWEDEN, *loc. cit.*
[78] KLASS *v.* GERMANY (A/28): (1979–80) 2 E.H.R.R. 214.

— the wide scope of the term "interests of national security";
— the fact that the Tribunal does not give reasons for its failure to make a determination in favour of an applicant;
— the inability of an applicant to verify or correct information recorded;
— the fact that the Tribunal is prohibited from examining inquiries which ceased before the 1989 Act came into force (see para. 9(1) of Schedule No. 1);
— the limited scope of the Tribunal's inquiries, in particular, since it cannot examine whether the information if true renders the person concerned a security risk;
— the inability of the Commissioner to make binding decisions.

The applicant has also submitted that in comparison with the other systems whose security legislation has come under the scrutiny of the Convention organs there is significantly no element of Parliamentary or judicial control. He also has drawn attention to the framework of legislative controls provided for in the Canadian and Australian systems which are alleged to provide much greater respect for the rights of the individual.

The Commission however finds reference to other systems of limited relevance. One particular system may be more ideal or more sophisticated than another. The task of the Commission is however to determine whether the system under examination in the concrete case before it passes the threshold imposed by the Convention guarantees.

The Commision has already stated above that the term "national security" is not amenable to exhaustive definition and since sufficient indication is given of the scope and manner of exercise of the functions of the Security Service, considers that no problem arises in this respect. As regards the lack of reasons for the decisions of the tribunal, the Court considered a similar problem in the KLASS case[79] but found that the State could legitimately fear that the efficacy of surveillance systems might be jeopardised if information is divulged to the person concerned. Similarly, as found in the LEANDER case[80] the absence of communication to the applicant of the information recorded may ensure the efficacy of the procedure and cannot in itself warrant the conclusion that the interference was not "necessary".

As regards the applicant's assertion that the Tribunal is barred from investigating matters arising before the Act came into force, the Commission notes that the provision refers specifically to the Tribunal's examination of the inquiries which have ceased. The Commission notes that it does not purport to extend to the Security Service's use of information already collected and accepts the Government's assertion that the Tribunal could have examined the vetting procedure if applied to the applicant since it would have taken place after the Act came into force.

The Commission has examined the applicant's remaining complaints against the background of the 1989 Act as a whole. It notes that the Tribunal consists of lawyers of 10 years' experience and who act in an independent capacity. While they do not have jurisdiction to substitute their opinion for that of the Security Service, it has a supervisory role which includes examination of whether the service had reasonable grounds for a particular belief or decision. It must also refer to the Commissioner cases where it finds that the Service is not justified in treating a person as a legitimate object of inquiry merely on the ground that he is member of a particular group and where it considers that the Service has acted unreasonably with respect to a complainant. The Commissioner is a person who holds or who has held high judicial office and he may make recommendations concerning complaints to the Secretary of State in addition to making an annual report to the Houses of Parliament.

As regards any possible involvement of the police Special Branches, the Commission recalls that their role includes support of the Security Service and that they pass on to the Service any relevant information. The use of such information

[79] KLASS *v.* GERMANY, *loc. cit.*
[80] LEANDER *v.* SWEDEN (A/116): (1987) 9 E.H.R.R. 433.

would then also appear to fall within the ambit of supervision of the Tribunal and Commissioner.

In the absence of any evidence or indication that they system is not functioning as required by domestic law, the Commission finds that the framework of safeguards achieves a compromise between the requirements of defending democratic society and the rights of the individual which is compatible with the provisions of the Convention. Consequently it concludes that the interference in the present case was necessary in a democratic society in the interests of national security.

It follows that this complaint is manifestly ill-founded within the meaning of Article 27(2) of the Convention.

Article 13 of the Convention

The applicant complains that he has no effective remedy for his complaints and invokes Article 13 of the Convention.

The Commission recalls however that Article 13 does not require a remedy under domestic law in respect of any alleged violation of the Convention. It only applies if the individual can be said to have an "arguable claim" of a violation of the Convention.[81]

The Commission finds that the applicant cannot be said, in light of its findings above to have an "arguable claim" of a violation of his Convention rights.

Held: full Commission by majority in Private, Articles 8 and 13; complaint inadmissible.

BRIND AND OTHERS *v.* UNITED KINGDOM

(Ban on broadcasting Sinn Fein members, direct speech)

App. No 18714/91
May 1994

The Facts

The first six applicants are a television producer and five other broadcast journalists, working as employed or independent television and radio producers, editors or presenters. The seventh applicant is a clerk, who is bringing the application as the holder of a television licence. A list of the seven applicants is set out in the annex.

The particular circumstances of the case

On 19 October 1988, the Secretary of State for the Home Department issued two notices, one addressed to the British Broadcasting Corporation (BBC), the other to the Independent Broadcasting Authority (IBA), in the following terms:

1. . . . I hereby require [the BBC] [the IBA] to refrain at all times from sending any broadcast matter which consists of or includes—

any words spoken, whether in the course of an interview or discussion or otherwise, by a person who appears or is heard on the programme in which the matter is broadcast where—

(a) the person speaking the words represents or purports to represent an organisation specified in paragraph 2 below, or

(b) the words support or solicit or invite support for such an organisation,

other than any matter specified in paragraph 3 below.

2. The organisations referred to in paragraph 1 above are—

(a) any organisation which is for the time being a proscribed organisation for the purposes of the Prevention of Terrorism (Temporary Provisions) Act 1984 or the Northern Ireland (Emergency Provisions) Act 1978; and

[81] BOYLE AND RICE *v.* UNITED KINGDOM (A/131): (1988) 10 E.H.R.R. 425.

APPLICATION N° 21482/93

Campbell CHRISTIE v/the UNITED KINGDOM

DECISION of 27 June 1994 on the admissibility of the application

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Article 8, paragraph 1 of the Convention : *Where a person can show, or the Government acknowledge, a reasonable likelihood that a public authority has secretly collected information about that person's activities through interception of telecommunications, an interference with the exercise of the rights guaranteed by this provision may be assumed.*

Article 8, paragraph 2 of the Convention :

a) *For an interference to be "in accordance with the law", the law must be sufficiently accessible and precise. In the case of secret surveillance by a public authority. the law itself must define the scope and manner of exercise of the authority's functions with sufficient clarity to protect the individual against arbitrariness. However, a comprehensive definition of all relevant terms is not necessarily required and the adequacy of the definition is more important than its source.*

   Legislation authorising interception of communications and use and retention of intercepted material by the Security Service (United Kingdom). Although the legislation defines neither the term "national security" not the principles governing the use and retention of intercepted material, it satisfies the requirements of clarity and foreseeability when read in conjunction with elaboration published in an independent Commissioner's statutory reports, notwithstanding the non-adversarial, secret proceedings in which the provisions are interpreted.

b) *The State has a wide margin of appreciation in matters of national security. Although it may be necessary for a State to collect information on individuals, given the potential seriousness of the resulting invasion of privacy there must exist adequate and effective guarantees against abuse.*

Interception of telecommunications and use of intercepted material by public authorities (United Kingdom). The system of supervision imposed by legislation, requiring the issue of a warrant by the Secretary of State and empowering a Tribunal and Commissioner to review individual cases, investigate complaints and award compensation, satisfies the requirements of Article 8 para. 2 notwithstanding the secrecy of the complaints procedure and limitations on the scope of review. Here, authorised interception of telexes received from trade unions in Eastern Europe considered necessary in a democratic society in the interests of national security or the economic well-being of the country.

THE FACTS

The applicant is a British citizen, born in 1937, and resident in Falkirk. He is represented before the Commission by Mr. John Wadham of the organisation "Liberty".

The facts of the present case, as submitted by the parties, may be summarised as follows.

A. *Particular circumstances of the case*

Since April 1986, the applicant has been the General Secretary of the Scottish Trades Union Congress, a confederation of trade unions. In that capacity, the applicant has been in regular contact with trade unions in Eastern Europe and elsewhere and from time to time he has received telexes from trade unions in Eastern Europe.

In or about July 1991, it came to the attention of the applicant, in the context of a Granada television documentary "Defending the Realm", that telexes addressed to himself from East European trade unions were being routinely intercepted by GCHQ (Government Communications Headquarters) which is the United Kingdom's central intelligence-gathering centre. Information from these telexes had been collated and reported to other government agencies, including the Security Service. The evidence for these allegations was provided anonymously by a former GCHQ employee, who also stated that at a particular address in London all telexes passing in and out of London were intercepted and fed into a programme known as "the Dictionary", which picked out key names and words. He stated that "the Dictionary" was monitored by carefully vetted British Telecom employees to give the impression that GCHQ was not carrying out the interception and that warrants were not obtained for this activity.

In a letter dated 10 March 1992 to the applicant's representatives, the documentary presenter explained that at a time between 1984 and 1987 - most probably in 1985 - one of the clerical staff at GCHQ had made a fuss when he found himself filing a report in which the applicant appeared. The clerk, who was in the same civil service union as the applicant, made an objection to the head of section and the incident was well-known within GCHQ.

On 19 June 1992, the applicant made an application to the Interception of Communications Tribunal complaining of the interception of his telexes. He also made an application to the Security Services Tribunal concerning Security Service involvement in the collection and retention of information derived from the telexes.

By letter dated 16 September 1992, the Interception of Communications Tribunal informed the applicant that his complaint had been investigated and that the Tribunal was satisfied that there had been no contravention of Sections 2 to 5 of the Interception of Communications Act 1985 with respect to a relevant warrant or certificate.

By letter dated 4 December 1992, the Security Services Tribunal informed the applicant that his complaint had been investigated and no determination in his favour made.

B. *Relevant domestic law and practice*

i. Interception of communications

Interception of Communications Act 1985

Following the decision of the Court in the Malone case (Eur. Court H.R., Malone judgment of 2 August 1984, Series A no. 82), the Interception of Communications Act 1985 was enacted. This came into force on 10 April 1986.

Pursuant to section 1 of the 1985 Act, a person who intentionally intercepts a communication in the course of its transmission by post or by means of a public telecommunications system is guilty of an offence. A person convicted of this offence is liable on summary conviction to a fine not exceeding £5,000 and, on conviction on indictment, to imprisonment for up to two years and/or a fine.

A number of exceptions are made, the relevant one in this case relating to authorised interceptions:

> "1. (2) a person shall not be guilty of a criminal offence under this section if -
>
> (a) the communication is intercepted in obedience to a warrant issued by the Secretary of State under section 2 below ..."

Warrants for interception

The Secretary of State may issue a warrant of interception subject to the provisions of the Act. These provide, *inter alia*, that he shall not issue a warrant unless he considers that the warrant is necessary:

"(a) in the interests of national security;
(b) for the purpose of detecting serious crime; or
(c) for the purpose of safeguarding the economic well-being of the United Kingdom." (section 2 (2)).

Warrants in respect of (c) are not considered necessary unless the information to be acquired relates to the acts or intentions of persons outside the British Islands (section 2 (4)).

Warrants must be issued under the hand of the Secretary of State or a permitted official of high rank with the written authorisation of the Secretary of State. If issued under the hand of the Secretary of State, the warrant is valid for two months; if by another official, it is valid for two days. Only the Secretary of State may renew a warrant. If the Secretary of State considers that a warrant is no longer necessary for the purposes set out in section 2 (2), he is under a duty to cancel it (section 4).

Use and retention of information

Section 6 provides that the Secretary of State is under a duty to ensure that the dissemination and retention of information obtained by interception under a warrant are strictly controlled. This includes the requirement that arrangements are made to ensure that material is disclosed only to the extent that it is necessary for the permitted purposes and that material is destroyed as soon as its retention is no longer necessary for the permitted purposes (section 6 (2)-(3)).

The Tribunal

Section 7 of the Act provides for a tribunal to investigate complaints from any person who believes that communications sent by or to him have been intercepted. Its jurisdiction, so far as material, is limited to investigating whether there is or has been a relevant warrant and, where there is or has been, whether there has been any contravention of sections 2-5 of the 1985 Act in relation to that warrant.

The Tribunal applies the principles applicable by a court on an application for judicial review. If it finds there has been a contravention of the provisions of the Act, it shall give notice of that finding to the applicant, make a report to the Prime Minister and to the Commissioner appointed under the Act and, where it thinks fit, make an order quashing the relevant warrant, directing the destruction of the material intercepted and/or direct the Secretary of State to pay compensation. In other cases, it must give notice to the applicant stating that there has been no contravention of sections 2-5 of the Act.

The Tribunal consists of five members, each of whom must be a qualified lawyer of not less than ten years standing. They hold office for a five year period and may be reappointed. Its decisions are not subject to appeal.

Since its inception, the Tribunal has not found that any contravention of the provisions of sections 2-5 of the Act has occurred. During 1992, it received 45 complaints.

The Commissioner

Section 8 provides that a Commissioner be appointed by the Prime Minister. He is required to be a person who holds, or who has held, high judicial office. The present Commissioner is Sir Thomas Bingham, Master of the Rolls.

The Commissioner's functions include the following:

- to keep under review the carrying out by the Secretary of State of the functions conferred on him by sections 2-5;

- to keep under review the adequacy of the arrangements under section 6 for safeguarding intercepted material and destroying it where its retention is no longer necessary;

- to report to the Prime Minister if there appears to have been a contravention of sections 2-5 which has not been reported by the Tribunal or if the arrangements under section 6 are inadequate;

- to make an annual report to the Prime Minister on the exercise of the Commissioner's functions. This report must be laid before the Houses of Parliament. The Prime Minister has a power to exclude any matter from the report if publication would be prejudicial to national security, to the prevention or detection of serious crime or to the well-being of the United Kingdom. The report must state if any matter has been so excluded.

There have been seven annual reports published by the Commissioner to date. In these reports the Commissioner explains his exercise of his functions and the results of his review of the procedure for obtaining warrants and the adequacy of the safeguards in practice.

The Commissioner's Reports

The 1986 Report

In the 1986 report, the Commissioner (then Lord Justice Lloyd, a member of the Court of Appeal) noted that while he was not concerned with the investigation of unlawful interception, the Secretary of State had said during the passage of the Bill through the House of Commons that he assumed that if the Commissioner came across a case of unlawful interception he would report it.

In the report, the Commissioner also explained his approach to the term "national security":

> "27. National security is not defined in the Act, or in Article 8 of the European Convention of Human Rights and Fundamental Freedoms where the same term is used. It has usually been taken to include threats to the security of the Nation by terrorism, espionage and major subversive activities, but it is not confined to these three matters. Nor, of course, is subversion defined. But I have taken as the test the well known language of Lord Harris of Greenwich in February 1975 namely, activities 'which threaten the safety or well-being of the State and which are intended to undermine or overthrow parliamentary democracy by political, industrial or violent means' ..."

He continued that, given the sensitivity of the area of subversion which was less clear-cut than terrorism or espionage, he had taken care to review all warrants issued on those grounds. He found no indication that the warrants issued had not satisfied the requisite test.

In relation to the ground of "economic well-being" the Commissioner noted that it also was undefined, but considered that there was an important negative qualification in that no warrant can be issued unless the information sought related to the acts or intentions of those outside the British Islands. His review revealed no case where a warrant had not been so directed.

The Commissioner explained that he had adopted the practice of selecting warrants at random to examine save in the case of those pursuing the purpose of counter-subversion.

The Commissioner concluded that his overall impression was of the high value of the intelligence obtained from interception and also of the care taken by all concerned to observe not only the letter but also the spirit of the Act.

The 1987 Report

In this report the Commissioner indicated that he applied the test of "really needed" to the requirement under the Act of whether a warrant was "necessary". He found that all the warrants which he reviewed fulfilled this criterion. He recounted a number of incidents however where problems had occurred.

The 1988 Report

The Commissioner made further comments on the term "national security":

> "10. Now national security, as I pointed out in my first report, is not defined in the Act... It is narrower than the term 'public interest' which is found in section 4 of the Official Secrets Act 1920, now repealed. But it is obviously

wider than the three heads of counter-terrorism, counter-espionage and counter-subversion. To take a simple example, nothing could be more directly related to national security than defence. So if an interception is judged necessary for the defence of the realm against a potential external aggressor, then clearly it is necessary in the interests of national security. Further than that I do not think it would be wise or indeed possible to go in defining what is covered by national security. Each case must be judged on its merits. That is what is done by the Secretary of State; and this is what I do when fulfilling my functions as Commissioner."

The 1989 Report

In this report, the Commissioner referred to the fact that the Security Service Act 1989 had come into force and an independent Commissioner been appointed. He noted the similarity in the provisions of the two Acts and that they overlapped in some areas. He concluded that it was desirable that the two Commissioners applied the principles of judicial review in broadly the same way in exercising their functions and stated that they would consult together for this purpose.

The 1990 Report

The Commissioner referred to the evidence that interceptions were assisting in the prevention of crime and terrorism: over 40% of interceptions at the request of the police resulted in arrests and, in respect of HM Customs, the equivalent figure was just under 50%.

The 1991 Report

In this report, the former Commissioner at the end of his term of office reviewed the previous six years:

"... 3. The Commissioner has two main functions. His principal function is to keep under review the system whereby, subject to certain limited exceptions set out in section 1 of the Act, interception cannot lawfully take place without a warrant issued by the Secretary of State. The grounds on which the Secretary of State can issue a warrant, if he considers it necessary to do so, are set out in section 2 of the Act, namely (i) national security, (ii) the prevention or detection of serious crime, (iii) safeguarding the economic well-being of the United Kingdom. During my six years in office I have not come across a single warrant which could not be justified on one or other of these grounds.

4. The great majority of all warrants issued by the Home Secretary are, and have always been, concerned with the prevention or detection of serious crime, especially the importation and distribution of dangerous drugs. Success in this field has been marked. Thus half the record quantity of cocaine and heroin seized by HM Customs in 1991 owed something to interception intelligence.

5. The pattern of warrants issued on the ground of national security has changed over the last six years. In particular the threat of subversion has steadily declined. For example, in 1985 there were a number of warrants issued against individual subversives who were regarded as being a major threat to Parliamentary democracy. Last year there were only two. Now there are none. But just as the threat of subversion has declined, so the threat of terrorism has increased. Over the same period the number of warrants issued on the ground of counter-terrorism has, not surprisingly, risen.

6. There have never been more than a few warrants issued on the ground of safeguarding the economic well-being of the United Kingdom. There is no question of this ground being used for the purpose of industrial espionage within the United Kingdom, as it is sometimes thought, or being otherwise abused. The Act requires that the information sought must relate to the acts or intentions of persons *outside* the United Kingdom. This is how it works in practice.

7. I am confident that the Secretaries of State, who sign warrants, take great care to satisfy themselves that the warrants are necessary for the purposes stated in the Act. If they are not so satisfied they decline to issue, or renew, the warrant as the case may be. But this is not all. As part of my duties, I make regular visits to HM Customs, the police, and the security and intelligence agencies in England, Scotland and Northern Ireland. From the start I have been impressed by the determination of the agencies not only to obey the letter of the law, but also the spirit. I have given illustrations of this from time to time in previous reports. Where mistakes have been made, they have been acknowledged. On doubtful points they have asked for guidance. I am satisfied that the system is working as intended by Parliament, and is working well.

8. What I have said about the agencies applies equally to those operating the postal and public telecommunications services. Unless they have a warrant in their hands, or are satisfied that it has been signed, they do not carry out the interception. This is one of the main safeguards built into the Act.

9. My second function is, as I see it, to reassure members of the public that interception of communications is serving an important public objective, and that it is not being abused by the Government, the police or anybody else. This function is not spelt out in the Act. But I regard it as implicit in my appointment.

10. The task of reassuring the public would have been easier if I could publish everything which has appeared in the unpublished appendices to my report. I could then give chapter and verse. But for obvious reasons I cannot do that. I can only attempt to reassure in general terms.

11. In this connection, I may be allowed to mention certain comments which have appeared in the press, and on the radio or television during the last year.

On 14 June 1991, in a radio interview, John McWilliam, MP for Blaydon, a former telephone engineer, said that police officers down to the rank of superintendent could in certain circumstances issue warrants. This is simply not so.

12. On the same day, the *Guardian* carried an article which estimated that the number of interceptions had reached a record level of 35,000 lines. This was based on an alleged increase in the number of specialist engineers employed by British Telecom to 70. Since the Home Secretary and the Secretary of State for Scotland had together only issued 539 warrants during 1990, the implication was that there were thousands of unauthorised interceptions. Mr. McWilliam was quoted as saying:

> "My suspicion is that a lot of perfectly innocent citizens are being subject to surveillance for no particularly good reason."

It cannot be said too strongly that there is no basis whatever for this speculation.

13. On 15 July a programme was shown by Granada in the World in Action series. I cannot comment in this part of my report on the individual allegations in the programme; but there is not the slightest truth in the suggestion, repeated in the *Guardian* on 16 July, that the law is being 'bent' by GCHQ, and that British businessmen are being 'ambushed' as a matter of routine."

The 1992 Report

The current Commissioner, Sir Thomas Bingham, the Master of the Rolls, referred to the safeguards in operation against abuse of power. He was impressed by the scrupulous adherence to the statutory provisions of those involved in the procedures. He commented on the stories which occasionally circulated in the press with regard to the interceptions by GCHQ and MI5 and MI6, stating that in his experience they were without exception false and gave an entirely misleading impression to the public both of the extent of official interception and of the targets against which interception is directed.

The Commissioner detailed a number of contraventions and errors which had occurred during the year. These included incidents where mistakes were made in relation to the telephone number to be intercepted and where there were delays in acting on the cancellation of warrants being acted on. On discovery of such errors, the intercepted material was destroyed. The Commissioner stated that steps were being taken to remedy deficiencies in the procedures which had allowed errors to occur and hoped that he would find fewer such errors in the following year.

Number of warrants issued and in force

Each of the Commissioner's reports includes the statistics for the number of warrants in force and issued by the Home Secretary and the Secretary of State for Scotland each year.

In relation to interceptions of telecommunications over the year 1992, authorised by warrant of the Home Secretary, there were 265 warrants in force on 31 December 1992, while 756 had been issued during the year.

ii. The Security Service

The Security Service Act 1989

The Security Service Act 1989 places the Security Service on a statutory basis under the authority of the Secretary of State. The function of the Service is "the protection of national security and, in particular, its protection against threats from espionage, terrorism and sabotage, from the activities of agents of foreign powers and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means" (section 1 (2)). It also has the function to safeguard the economic well-being of the United Kingdom against threats posed by the actions or intentions of persons outside the British Islands (section 1 (3)).

The operations of the Service are under the control of a Director-General appointed by the Secretary of State. He has the responsibility for the efficiency of the Service. He has the duty of ensuring that there are arrangements for securing that no information is obtained by the Service except so far as necessary for the proper discharge of its functions, that no information is disclosed by it except so far as necessary for that purpose or for the purpose of preventing or detecting serious crime, and that the Service does not take any action to further the interests of any political party (sections 2 (1)-(2)). The Director-General must also make an annual report on the work of the Service to the Prime Minister and the Secretary of State and may at any time report to either of them on any matter relating to its work.

The Security Service Tribunal

The Act also provides for a tribunal, known as the Security Service Tribunal, to deal with complaints. Its decisions are not subject to appeal.

Schedule 1 to the Act provides, *inter alia*, that any person may complain to the Tribunal if he is aggrieved by anything which he believes the Service has done in relation to him or to any property of his.

Under paragraph 2 of Schedule 1, the Tribunal has the role of investigating whether a complainant has been the subject of inquiries by the Service and, if so, whether the Service had reasonable grounds for deciding to institute inquiries about the

complainant in the discharge of its functions and, if the inquiries are continuing, whether the Service had reasonable grounds for deciding to continue inquiries about the complainant in the discharge of its functions. Where the Tribunal determines that the Service did not have reasonable grounds for the decision or belief in question, it is provided that they shall give notice to the complainant that they have made a determination in his favour under that paragraph and make a report of their findings to the Secretary of State and to the Commissioner. Where in the case of any complaint no such determination is made, the Tribunal shall give notice to the complainant that no determination in his favour has been made on his complaint.

Where a determination has been made in favour of a complainant, the Tribunal may order inquiries by the Service about the complainant to be ended and any records relating to such inquiries to be destroyed. They may also direct the Secretary of State to pay to the complainant such sum by way of compensation as they may specify. In addition, the Tribunal may quash any warrant in respect of any property of the complainant which the Commissioner has found to have been improperly issued or renewed and which he considers should be quashed. If the Commissioner considers that a sum should be paid to the complainant by way of compensation, the Tribunal may direct the Secretary of State to pay to the complainant such sum as the Commissioner may specify.

Pursuant to Schedule 2, the Tribunal consists of three to five members, each of whom must be a barrister, solicitor or advocate of not less than ten years' standing. Members are appointed for a period of five years by Her Majesty by Royal Warrant and may be removed from office by Her Majesty on an address presented to her by both Houses of Parliament.

Pursuant to para. 9 (1) of Schedule 1, the Tribunal is limited as follows:

> "9. (1) No complaint shall be entertained under this Schedule if and so far as it relates to anything done before the date on which this Schedule comes into force."

The Security Service Commissioner

Pursuant to Section 4 of the Act, the Prime Minister appoints as a Commissioner a person who holds or has held high judicial office. He has the role, *inter alia*, of keeping under review the exercise by the Secretary of State of his powers under section 3 to issue warrants in respect of entry on and interference with property.

Pursuant to paragraph 7 of Schedule 1, matters may be referred to the Commissioner by the Tribunal:

> "7. (1) If in a case investigated by the Tribunal under paragraph 2 above they consider that the Service may not be justified in regarding all members of a particular category as requiring investigation they shall refer that matter to the Commissioner.

(2) If in any case investigated by the Tribunal -

(a) the Tribunal's conclusions on the matters which they are required to investigate are such that no determination is made by them in favour of the complainant; but

(b) it appears to the Tribunal from the allegations made by the complainant that it is appropriate for there to be an investigation into whether the Service has in any other respect acted unreasonably in relation to the complainant or his property,

they shall refer that matter to the Commissioner.

(3) The Commissioner may report any matter referred to him under this paragraph to the Secretary of State who may take such action in the light of the report as he thinks fit, including any action which the Tribunal have power to take or direct under paragraph 6 above."

The Commissioner makes an annual report to the Prime Minister on the discharge of his functions and the report is then laid before Parliament.

COMPLAINTS

The applicant complains that his correspondence from East European trade unions has been intercepted by GCHQ, or that it is reasonably likely that such interception has taken place, and information from it collated and reported to other government agencies, including the Security Service. He submits that this constitutes an interference with his right to respect for his correspondence contrary to Article 8 of the Convention. He further submits that this interference cannot be justified under the second paragraph for the following reasons.

The interference was and is not "in accordance with the law" since the interception of communications and functions of the Security Service are still not sufficiently regulated by legislation. In particular:

- the definition of the type of activity likely to be susceptible to interception is not precise;

- the circumstances in which information gathered is destroyed and in which use may be made of the information are not defined;

- the function of the Security Service provided for in the 1989 Act, namely "the protection of national security", is not adequately defined and includes protection against threats from actions intended to undermine parliamentary democracy by political means;

- the function of the Security Service to safeguard the economic well-being of the United Kingdom is undefined;

- the safeguards provided by the two Tribunals are grossly inadequate.

The interference was and is not "necessary" since there is no pressing social need for the measures in this case and there are no adequate and effective safeguards against abuse in existence. In particular:

1. Concerning the Interception of Communications Tribunal:

i. the Tribunal has no jurisdiction to investigate interceptions which ceased before 10 April 1986;

ii. the Tribunal has no power to consider the correctness of the Secretary of State's decision to issue a warrant, only whether the decision was one which no reasonable Secretary of State could have reached; it also has no jurisdiction to investigate cases where no warrant has been issued;

iii. the Tribunal is prevented from giving reasons for a decision which is not in the applicant's favour and its decisions are not subject to any appeal to a court;

iv. the Tribunal has never upheld any of the complaints made to it;

v. parliamentarians, as such, play no role in the process;

2. Concerning the Security Service Tribunal:

i. the Tribunal has no competence to consider complaints where the inquiries ceased before 18 December 1989;

ii. the Tribunal has no power to consider the correctness of the Service's decision that inquiries were justified in the discharge of its functions, only whether it had reasonable grounds for so deciding;

iii. if inquiries are made by the Service on the basis that a person is a member of a particular group, the Tribunal's examination is limited to whether the Service had reasonable grounds for believing the person to be a member of the group. The question of whether it is justifiable to regard all members of a group as requiring investigation can be referred by the Tribunal to the Security Service Commissioner, but he has only the ability to make recommendations to the Secretary of State;

iv. the same points as are made concerning the Interception of Communications Tribunal in 1. iii.-v. above.

The applicant also complains that he has no effective remedy for his complaints as required by Article 13 of the Convention.

.....

THE LAW

1. The applicant complains that his correspondence has been interfered with contrary to Article 8 of the Convention, the relevant part of which provides as follows:

> "1. Everyone has the right to respect for ... 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."

The applicant alleges that his telexes from East European trade unions were intercepted by GCHQ.

The Government neither confirm nor deny that such interception took place. They are, however, willing for the applicant's complaints to be dealt with on the basis that there is a reasonable likelihood that the communications which referred to the applicant may have been intercepted by GCHQ and come to the attention of the Security Service.

The Commission therefore considers that an interference with the applicant's correspondence under Article 8 para. 1 may be assumed in this case. It has accordingly examined whether this interference is justified under the second paragraph, namely, whether it was "in accordance with the law" and if so, whether it was necessary in a democratic society for one or more of the reasons specified.

"In accordance with the law"

This expression has been interpreted by the Court, firstly, as requiring that the interference must have some basis in domestic law and secondly, as referring to the quality of the law (see e.g. Eur. Court H.R., Kruslin and Huvig judgments of 24 April 1990, Series A no. 176-A, p. 20, paras. 26-27, and no. 176-B, p. 52, paras. 54-55).

The Commission notes that the provisions governing interception of communications and the functions of the Security Service are contained in statute, the Interception of Communications Act 1985 and the Security Service Act 1989 respectively. It finds accordingly that the interference had sufficient basis in domestic law.

The criterion of "in accordance with the law" however extends further to the quality of the law, requiring it to be compatible with the rule of law in providing a measure of protection against arbitrary interferences. In this context, it should be accessible to the person concerned, who must moreover be able to foresee its consequences for him (see e.g. Eur. Court H.R., Sunday Times judgment of 26 April 1979, Series A no. 30, p. 31, para. 49, and the Malone judgment of 2 August 1984, Series A no. 82, p. 32, para. 67).

The criterion of "accessibility" does not raise any problem in the instant case, the relevant provisions being set out in the above-mentioned statutes.

As regards "foreseeability", the Court has emphasised that the law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to interfere. A law which conferred a discretion would not be inconsistent with this requirement provided that the scope of the discretion and the manner of its exercise were indicated with sufficient clarity to give the individual adequate protection against arbitrary interference (see e.g. Eur. Court H.R., Olsson judgment of 24 March 1988, Series A no. 130, p.30, para. 61).

The applicant submits that the terms "national security" and "economic well-being" are not even partially defined in the 1985 Act. The latter term is also unelaborated in the 1989 Act. To the extent that "national security" is partially defined in the 1989 Act, it is still unacceptably vague. He submits that, while a certain flexibility is acceptable in the context of terms subject to judicial interpretation, this is not the case where the interpretation and application are done secretly by the Government without public adversarial argument on the issues involved. Further the applicant alleges that the circumstances in which information obtained from interceptions should be destroyed, and the use which may be made of it, are inadequately defined.

The Government contend that the terms of the relevant legislative provisions sufficiently indicate the type of activity likely to be susceptible to interception of communications, and that safeguards are imposed which regulate the retention and use of information obtained from interceptions.

The Commission notes that the case-law of the Commission and Court establishes that the requirement of foreseeability in the special context of sectors affecting national security cannot be the same as in many other fields. In the Leander case the Court stated:

> "Thus, it cannot mean that an individual should be enabled to foresee precisely what checks will be made in his regard by the Swedish special police service in its efforts to protect national security. Nevertheless, in a system applicable to citizens generally, as under the Personnel Control Ordinance, the law has to be sufficiently clear in its terms to give them an adequate indication as to the

circumstances in which and the conditions on which the public authorities are empowered to resort to this kind of secret and potentially dangerous interference with private life ...

In addition, where the implementation of the law consists of secret measures, not open to scrutiny by the individuals concerned or by the public at large, the law itself, as opposed to the accompanying administrative practice, must indicate the scope of any discretion conferred on the competent authority with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference (see the above-mentioned Malone judgment, Series A no. 82, pp. 32-33, para. 68)." (Eur. Court H.R., Leander judgment of 26 March 1987, Series A no. 116, p. 23, para. 51).

The Commission recalls that it has considered the compatibility with the requirements of foreseeability of the partial definition of "interests of national security" in the 1989 Act (see section 1 (2) in Relevant Domestic Law and Practice) in two previous cases, Esbester v. United Kingdom (No. 18601/91, Dec. 2.4.93 unpublished) and Hewitt and Harman v. United Kingdom (No. 20317/92, Dec. 1.9.93 unpublished). It considered that the principles referred to above did not necessarily require a comprehensive definition of the notion of "the interests of national security", noting that many laws, which by their subject-matter require to be flexible, are inevitably couched in terms which are to a greater or lesser extent vague and whose interpretation and application are questions of practice. It held that, given the express limitations on the exercise of the Security Service's functions and the supervision of a Tribunal and Commissioner, the law was formulated with sufficient precision.

In the present case, the Commission notes that the term "national security" in the 1985 Act and that of "economic well-being" in the 1985 and 1989 Acts are not expressly defined. It appears however that the Commissioner appointed under the 1985 Act has in his public annual reports given elaboration on how the provision is to be interpreted, with reference in the context of "national security" to the definition given by Lord Harris of Greenwich (the 1986 Report, p. 123 above). He has also given further consideration as to its ambit in the 1988 Report (p. 124 above). As regards the criterion of economic well-being, this is subject to the express limitation that it may only justify interception where the information which it is considered necessary to obtain is information relating to the acts or intentions of persons outside the British Islands. A similar limitation applies in the context of the 1989 Act.

While, as the applicant points out, the provisions of the 1985 and 1989 Acts are not subject to the influence of the adversarial input which forms part of the judicial process of interpretation, the Commission does not consider that the concept of foreseeability requires that questions of interpretation and practice must be decided in a judicial forum. It is compatible with the requirements of foreseeability that terms which are on their face general and unlimited are explained by administrative or executive statements and instructions, since it is the provision of sufficiently precise

guidance to enable individuals to regulate their conduct, rather than the source of that guidance, which is of relevance (cf. Eur. Court H.R., Silver judgment of 25 March 1983, Series A no. 61, pp. 33-34, paras. 88-89).

As regards the use and retention of information obtained by interception, the Commission notes that section 6 of the 1985 Act imposes an obligation on the Secretary of State to provide arrangements to ensure that material is disclosed only to the extent necessary to fulfil the purposes allowed and that it must be destroyed once its retention ceases to be necessary for those purposes. The Commissioner, a senior member of the judiciary, exercises the function of reviewing the adequacy of those arrangements and reports annually on his findings.

In light of the above, the Commission considers that the scope and manner of exercise of the powers to intercept communications and make use of the information obtained are indicated with the requisite degree of certainty to satisfy the minimum requirements referred to above.

The Commission thus concludes that any interference in the present case was "in accordance with the law".

Legitimate aim

It is not contested that the aims pursued by the interference in the present case were the "interests of national security" and/or the "economic well-being of the country", which are legitimate aims provided for in the second paragraph of Article 8 of the Convention.

"Necessary in a democratic society ..."

The Commission recalls that the notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued. Regard must also be had in this context to the margin of appreciation of the respondent State, which in the area of assessing the requirements of national security and choosing the means of achieving its protection has been held by the Court to be wide (Leander judgment, *loc. cit.*, p. 25, paras. 58-59).

The Court has acknowledged the necessity for States to collect and store information on persons but has emphasised that it is however crucial, given the potential seriousness of resulting invasions of a person's private sphere, that there exist adequate and effective guarantees against abuse (Eur. Court H.R., Klass judgment of 6 September 1979, Series A no. 28, p. 23, para. 50).

The Government have pointed to the framework of supervision set up under the 1985 and 1989 Acts.

The applicant contends that the protection offered is inadequate and ineffective. He alleges a number of defects.

In so far as the applicant complains that the Tribunal has no jurisdiction to investigate interceptions which ceased before 10 April 1986, the Commission notes that the substance of the present complaint relates effectively to the adequacy of existing safeguards under the 1985 Act and not to pre-existing law. In any event, all outstanding warrants were reconsidered under the 1985 Act and fresh warrants issued if appropriate. Information gathered prior to the 1985 Act which might still be retained by the Security Service would be subject to the limitations set out in the 1989 Act, namely, it could be retained only in so far as it was necessary for the proper discharge of its functions and this retention could be reviewed by the Security Service Commissioner.

The applicant criticises the limited nature of the examination of complaints carried out by the Tribunal, which has no power to consider the correctness of the Secretary of State's decision to issue a warrant, only whether the decision was one which no reasonable Secretary of State could have reached. The Commission considered similar complaints in the context of the scope of review of the Security Service Tribunal in the Esbester case (*loc. cit.*), but found that the supervisory role which it exercised in combination with the Commissioner was sufficient. In the context of the 1985 Act, the Commission notes that the Tribunal is similarly constituted by lawyers of ten years' experience who act in an independent capacity. While it could not reconsider the merits of a decision to issue a warrant, it does have the competence, applying the judicial review standard, to investigate whether there has been a contravention of sections 2-5 of the 1985 Act, which would include reviewing whether the Secretary of State issued a warrant for a proper purpose. Further the Commissioner is under an obligation to review warrants under section 8 (1) (a) of the 1985 Act. It appears from his 1987 report that in reviewing the issue of warrants he applies a rigorous test of whether they were "really needed" for the purpose.

While the Tribunal and Commissioner under the 1985 Act have no express jurisdiction to investigate cases where no warrant has been issued, the Commission recalls that interceptions without a warrant are criminal offences and accordingly a matter for the police. If, however, the Tribunal or Commissioner came across an instance of an unauthorised interception, it is apparent from the Secretary of State's statement before Parliament that it would be expected that they would report it.

In so far as the applicant complains that the Tribunals under the 1985 and 1989 Acts are prevented from giving reasons for a decision which is not in the applicant's favour, this limitation has already been considered by the Commission in the context of the 1989 Act in the Esbester case where it found, on the basis of established case-law, that States may legitimately fear that the efficacy of a system might be jeopardised by the provision of information to complainants and that the absence of such information cannot in itself warrant the conclusion that the interference was not "necessary" (see Klass judgment, *loc. cit.*, p. 27, paras. 57-58, and the Leander judgment, *loc. cit.*, p. 27, para. 66).

The applicant has also criticised the fact that the decisions of the Tribunals are not subject to any appeal to a court and casts doubt on their effectiveness, pointing out that neither Tribunal has ever made a determination in favour of a complainant. In addition, no parliamentarians play a role in the process and, he submits, the effectiveness of the Commissioner must be in doubt since he has no independent source of information and cannot personally review every warrant.

While the Commissioner does appear to choose warrants to review on the basis of random selection (save where he decides, as in the case of "subversion", to review a particular category in its entirety), the Commission is satisfied that his existence must in itself furnish a significant safeguard against abuse. The annual reports indicate that the Commissioner, a senior member of the judiciary, takes a thorough and critical approach to his function in identifying any abuse of the statutory powers. In his 1991 report, however, he found no evidence to substantiate the rumours, reported in the media (and referred to by the applicant in the present case), of widespread use of surveillance powers and in particular of routine interception of British businessmen by GCHQ.

The fact that the Tribunals have never made a determination in favour of an applicant is insufficient, in the Commission's view, to indicate that the system of safeguards is not effectively functioning as intended by domestic law. The Commission notes that the possibility of review by a court or involvement of parliamentarians in supervision would furnish additional independent safeguards to the system. Having regard however to the wide margin of appreciation accorded to the Contracting Parties in this area, the Commission finds that the 1985 Act nonetheless satisfies the threshold requirements of Article 8 para. 2 of the Convention in providing a framework of safeguards against any arbitrary or unreasonable use of statutory powers in respect of an individual in the position of the applicant. It also finds no reason in the present case to depart from its finding with regard to the 1989 Act in the cases of Esbester and Hewitt and Harman (*loc. cit.*).

The Commission concludes that any interference in the present case can be regarded as necessary in a democratic society in the interests of national security and/or the economic well-being of the country. It follows that this part of the application must be rejected as manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention.

2. The applicant complains that he has no effective remedy for his complaints contrary to Article 13 of the Convention, which provides:

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The Commission recalls however that Article 13 does not require a remedy under domestic law in respect of any alleged violation of the Convention. It only

applies if the individual can be said to have an "arguable claim" of a violation of the Convention (Eur. Court H.R., Boyle and Rice judgment of 27 April 1988, Series A no. 131, p. 23, para. 52). The Commission finds that the applicant cannot be said, in light of its findings above, to have an "arguable claim" of a violation of his Convention rights. It follows that this complaint must also be dismissed as manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention.

For these reasons, the Commission, by a majority

DECLARES THE APPLICATION INADMISSIBLE.

Secretary of State for the Home Department v Rehman

[2001] UKHL 47

HOUSE OF LORDS

LORD SLYNN OF HADLEY, LORD STEYN, LORD HOFFMANN, LORD CLYDE AND LORD HUTTON

2, 3 MAY, 11 OCTOBER 2001

Immigration – Appeal – Deportation – Appeal against deportation on grounds of national security – Secretary of State concluding that Pakistani national supporting terrorist organisation abroad and deciding to deport him on grounds of national security – Appeals commission not being satisfied of truth of factual allegations on high civil balance of probabilities – Whether activities capable of being threat to national security if not targeted at United Kingdom or its citizens – Whether appeals commission applying correct approach to standard of proof.

R, a Pakistani national with temporary leave to stay in the United Kingdom, applied for indefinite leave to remain. An assessment by the security service concluded that R was involved with an Islamic terrorist organisation, and that, whilst it was unlikely that he and his followers would carry out any acts of violence in the United Kingdom, his activities were intended to further the cause of a terrorist organisation abroad. On the basis of that information, the Secretary of State refused R's application and instead certified that his departure from the United Kingdom would be conducive to the public good in the interests of national security. R appealed to the Special Immigration Appeals Commission. The commission allowed the appeal, holding that conduct could only constitute a threat to national security if it were targeted at the United Kingdom, its citizens or its system of government, and concluding that the Secretary of State had failed to prove to a 'high civil balance of probabilities' the acts which were said to have endangered national security. On the Secretary of State's appeal, the Court of Appeal held that the commission had taken too narrow a view of what constituted a threat to national security, that the 'high civil balance of probabilities' test applied by the commission was incorrect and that it was necessary instead to ask whether, viewing the case as a whole, the individual was a danger to national security, taking into account the executive's policy with regard to that matter. Accordingly, the appeal was allowed, and R appealed to the House of Lords.

Held – (1) Although a deportation in the interests of national security could only be justified by the existence of some possibility of risk or danger to the well-being of the nation which the Secretary of State considered made it desirable for the public good that the individual should be deported, that risk did not have to be the result of a direct threat to the United Kingdom, and the interests of national security were not limited to action by an individual which could be said to be targeted at the United Kingdom, its system of government or its people. In contemporary world conditions, action against a foreign state might be capable indirectly of affecting the security of the United Kingdom. The means open to terrorists, both in attacking another state and attacking international or global activity by the community of nations, whatever the objectives of the terrorist,

might well be capable of reflecting on the safety and well-being of the United Kingdom or its citizens. The sophistication of means available, the speed of movement of persons and goods, and the speed of modern communication were all factors which might have to be taken into account in deciding whether there was a real possibility that the national security of the United Kingdom might immediately or subsequently be put at risk by the actions of others. To require the matters in question to be capable of resulting directly in a threat to national security limited too tightly the discretion of the executive in deciding how the interests of the state, including not merely military defence but democracy and the legal and constitutional systems of the state, needed to be protected. The reciprocal co-operation between the United Kingdom and other states in combating international terrorism was capable of promoting the country's national security, and such co-operation was itself capable of fostering such security by, inter alia, the United Kingdom taking action against supporters within the United Kingdom of terrorism directed against other states. That involved a very large element of policy which was primarily for the Secretary of State, and was an area where he could claim that a preventative or precautionary action was justified. If an act was capable of creating indirectly a real possibility of harm to national security, the state did not have to wait until action had been taken which had a direct effect against the United Kingdom. Accordingly, the Court of Appeal had been correct to hold that the interests of national security were not to be confined in the way accepted by the commission (see [15]–[17], [20], [27], [32], [49], [63], [64], below).

(2) In determining whether there was a real possibility of activities harmful to national security, the Secretary of State did not have to be satisfied, or show on appeal, that all the material before him was proved, and that his conclusion was justified, to a high civil degree of probability. Although fairness required that specific past acts, relied on as grounds for the deportation of an individual, should be proved to the civil standard of proof, that was not the whole exercise. In deciding whether it was conducive to the public good that a person should be deported, the Secretary of State was entitled to have regard to all the information in his possession about the actual and potential activities and the connections of the person concerned. He was entitled to have regard to the precautionary and preventative principles rather than to wait until directly harmful activities had taken place, the individual in the meantime remaining in the United Kingdom. In doing so, he was not merely finding facts but forming an executive judgment or assessment. There had to be material on which, proportionately and reasonably, the Secretary of State could conclude that there was a real possibility of activities harmful to national security, but establishing a degree of probability did not seem relevant to the reaching of a conclusion on whether there should be a deportation in the public good. That approach did not confuse proof of facts with the exercise of discretion. Specific acts had to be proved and an assessment made of the whole picture. The discretion then had to be exercised as to whether there should be a decision to deport. Although the commission had powers of review both of fact and of the exercise of discretion, it had to give due weight to the assessment and conclusions of the Secretary of State in the light, at any particular time, of his responsibilities, or of government policy and the means at his disposal of being informed of, and understanding, the problems involved. He was undoubtedly in the best position to judge what national security required, and the assessment of what was needed in the light of changing circumstances was primarily for him. Accordingly, the Court of Appeal had also been correct on the second point, and

the appeal would therefore be dismissed (see [22], [23], [25]–[27], [32], [49], [61], [63]–[66], below).

Decision of the Court of Appeal [2000] 3 All ER 778 affirmed.

Notes

For liability for deportation, see 4(2) *Halsbury's Laws* (4th edn reissue) para 121.

Cases referred to in opinions

Chahal v UK (1996) 23 EHRR 413, ECt HR.

Chandler v DPP [1962] 3 All ER 142, [1964] AC 763, [1962] 3 WLR 694, HL.

Council of Civil Service Unions v Minister for the Civil Service [1984] 3 All ER 935, [1985] AC 374, [1984] 3 WLR 1174, HL.

H (minors) (sexual abuse: standard of proof), Re [1996] 1 All ER 1, [1996] AC 563, [1996] 2 WLR 8, HL.

Johnston v Chief Constable of the Royal Ulster Constabulary Case 222/84 [1986] 3 All ER 135, [1987] QB 129, [1986] 3 WLR 1038, [1986] ECR 1651, ECJ.

R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23, [2001] 2 All ER 929, [2001] 2 WLR 1389.

R v Ministry of Defence, ex p Smith [1996] 1 All ER 257, [1996] QB 517, [1996] 2 WLR 305, CA.

R v Secretary of State for the Home Dept, ex p Hosenball [1977] 3 All ER 452, [1977] 1 WLR 766, CA.

R v Secretary of State for the Home Dept, ex p Chahal [1995] 1 All ER 658, [1995] 1 WLR 526, CA.

R v Secretary of State for the Home Dept, ex p McQuillan [1995] 4 All ER 400.

Smith and Grady v UK (2000) 29 EHRR 493, ECt HR.

Tinnelly & Sons Ltd v UK (1998) 27 EHRR 249, ECt HR.

Appeal

The appellant, Shafiq Ur Rehman, appealed from the decision of the Court of Appeal (Lord Woolf MR, Laws LJ and Harrison J) on 23 May 2000 ([2000] 3 All ER 778, [2000] 3 WLR 1240) allowing an appeal by the respondent, the Secretary of State for the Home Department, from the decision of the Special Immigration Appeals Commission (Potts J, Judge Pearl and Sir Brian Barder) on 7 September 1999 ([1999] INLR 517) allowing an appeal by Mr Rehman against the Secretary of State's decision, communicated in a letter dated 9 December 1998, to deport him from the United Kingdom on the grounds that his deportation would be conducive to the public good in the interests of national security. Permission to appeal was granted in respect of one ground of appeal by the Court of Appeal on 23 May 2000 and in respect of another ground of appeal by the Appeal Committee of the House of Lords on 4 October 2000. The two petitions of appeal were consolidated by order of 6 November 2000. The facts are set out in the opinion of Lord Slynn of Hadley.

Sibghat Kadri QC, *Arthur Blake* and *Adrian Berry* (instructed by *Bhatti & Co*, Manchester) for Mr Rehman.

Philip Sales and *Robin Tam* (instructed by the *Treasury Solicitor*) for the Secretary of State.

Their Lordships took time for consideration.

11 October 2001. The following opinions were delivered.

LORD SLYNN OF HADLEY.

[1] My Lords, Mr Rehman, the appellant, is a Pakistani national, born in June 1971 in Pakistan. He was educated and subsequently, after obtaining a Master's degree in Islamic studies, taught at Jamid Salfiah in Islamabad until January 1993. On 17 January 1993 he was given an entry clearance to enable him to work as a minister of religion with the Jamait Ahle-e-Hadith in Oldham. His father is such a minister in Halifax and both his parents are British citizens. He arrived here on 9 February 1993 and was subsequently given leave to stay until 9 February 1997 to allow him to complete four years as a minister. He married and has two children born in the United Kingdom. In October 1997 he was given leave to stay until 7 January 1998 to enable him to take his family to Pakistan from which he returned on 4 December 1997. He applied for indefinite leave to remain in the United Kingdom but that was refused on 9 December 1998. In his letter of refusal the Secretary of State said:

> '... the Secretary of State is satisfied, on the basis of the information he has received from confidential sources, that you are involved with an Islamic terrorist organisation Markaz Dawa Al Irshad (MDI). He is satisfied that in the light of your association with the MDI it is undesirable to permit you to remain and that your continued presence in this country represents a danger to national security. In these circumstances, the Secretary of State has decided to refuse your application for indefinite leave to remain in accordance with paragraph 322(5) of the Immigration Rules (HC395). By virtue of section 2(1)(b) of the Special Immigration Appeals Commission Act 1997 you are entitled to appeal against the Secretary of State's decision as he has personally certified that [sic] your departure from the United Kingdom to be conducive to the public good in the interests of national security.'

The Secretary of State added that his deportation from the United Kingdom would be conducive to the public good 'in the interests of national security because of your association with Islamic terrorist groups'. Mr Rehman was told that he was entitled to appeal, which he did, to the Special Immigration Appeals Commission by virtue of s 2(1)(c) of the Special Immigration Appeals Commission Act 1997. The Special Immigration Appeals Commission (Procedure) Rules 1998, SI 1998/1881 allowed the Secretary of State to make both an open statement and a closed statement, only the former being disclosed to Mr Rehman. The Secretary of State in his open statement said:

> 'The Security Service assesses that while Ur Rehman and his United Kingdom-based followers are unlikely to carry out any acts of violence in this country, his activities directly support terrorism in the Indian subcontinent and are likely to continue unless he is deported. Ur Rehman has also been partly responsible for an increase in the number of Muslims in the United Kingdom who have undergone some form of militant training, including indoctrination into extremist beliefs and at least some basic weapons training. The Security Service is concerned that the presence of returned jihad trainees in the United Kingdom may encourage the radicalisation of the

British Muslim community. His activities in the United Kingdom are intended to further the cause of a terrorist organisation abroad. For this reason, the Secretary of State considers both that Ur Rehman poses a threat to national security and that he should be deported from the United Kingdom on [the] grounds that his presence here is not conducive to the public good for reasons of national security.'

[2] The appeal was heard both in open and in closed sessions. The commission in its decision of 20 August 1999 held ([1999] INLR 517 at 528):

'That the expression "national security" should be construed narrowly, rather than in the wider sense contended for by the Secretary of State and identified in the passages from Mr Sales' written submissions cited above. We recognise that there is no statutory definition of the term or legal authority directly on the point. However, we derive assistance from the passages in the authorities cited to us by Mr Kadri, namely (*Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935 at 950, [1985] AC 374 at 410 per Lord Diplock and *R v Secretary of State for the Home Dept, ex p Hosenball* [1977] 3 All ER 452 at 456–457, 461, [1977] 1 WLR 766 at 778, 783 per Lord Denning MR), and note the doubts expressed by Staughton LJ in [*R v Secretary of State for the Home Dept, ex p Chahal* [1995] 1 All ER 658 at 663–664, [1995] 1 WLR 526 at 531]. Moreover, whilst we recognise the terms of the Security Service Act 1989 are in no way decisive in the issue, we have derived assistance from the general approach contended for by Mr Nicholas Blake [special advocate before the commission]. We have found the passage cited by him from Professor Grahl-Madsen's book [*The Status of Refugees in International Law* (1966)] to be particularly helpful. In the circumstances, and for the purposes of this case, we adopt the position that a person may be said to offend against national security if he engages in, promotes, or encourages violent activity which is targeted at the UK, its system of government or its people. This includes activities directed against the overthrow or destabilisation of a foreign government if that foreign government is likely to take reprisals against the UK which affect the security of the UK or of its nationals. National security extends also to situations where UK citizens are targeted, wherever they may be. This is the definition of national security which should be applied to the issues of fact raised by this appeal.'

[3] They then considered the allegations of fact and they said (at 528–529):

'... we have asked ourselves whether the Secretary of State has satisfied us to a high civil balance of probabilities that the deportation of this appellant, a lawful resident of the UK, is made out on public good grounds because he has engaged in conduct that endangers the national security of the UK and, unless deported, is likely to continue to do so. In answering this question we have to consider the material, open, closed, and restricted, the oral evidence of witnesses called by the respondent, and the evidence of the appellant produced before us. We are satisfied that this material and evidence enables us properly to reach a decision in this appeal (r 3 of the 1998 rules).'

[4] The commission declined to set out in detail their analysis of the 'open', 'restricted' and 'closed' evidence on the basis that this would be capable of

creating a serious injustice and they confined themselves to stating (at 530–531) their conclusions, namely:

> '(1) Recruitment. We are not satisfied that the appellant has been shown to have recruited British Muslims to undergo militant training as alleged.
>
> (2) We are not satisfied that the appellant has been shown to have engaged in fund-raising for the LT [Lashkar Tayyaba] as alleged.
>
> (3) We are not satisfied that the appellant has been shown to have knowingly sponsored individuals for militant training camps as alleged.
>
> (4) We are not satisfied that the evidence demonstrates the existence in the UK of returnees, originally recruited by the appellant, who during the course of that training overseas have been indoctrinated with extremist beliefs or given weapons training, and who as a result allow them to create a threat to the UK's national security in the future.'

[5] They added (at 531):

> 'We have reached all these conclusions while recognising that it is not disputed that the appellant has provided sponsorship, information and advice to persons going to Pakistan for the forms of training which may have included militant or extremist training. Whether the appellant knew of the militant content of such training has not, in our opinion, been satisfactorily established to the required standard by the evidence. Nor have we overlooked the appellant's statement that he sympathised with the aims of the LT insofar as that organisation confronted what he regarded as illegal violence in Kashmir. But, in our opinion, these sentiments do not justify the conclusion contended for by the respondent. It follows, from these conclusions of fact, that the respondent has not established that the appellant was, is, and is likely to be a threat to national security. In our view, that would be the case whether the wider or narrower definition of that term, as identified above, is taken as the test. Accordingly, we consider that the respondent's decisions in question were not in accordance with the law or the Immigration Rules (para 364 of HC 395) and thus we allow these appeals.'

[6] The Secretary of State appealed. The Court of Appeal ([2000] 3 All ER 778, [2000] 3 WLR 1240) considered that the commission had taken too narrow a view of what could constitute a threat to national security in so far as it required the conduct relied on by the Secretary of State to be targeted at this country or its citizens. The Court of Appeal also considered ([2000] 3 All ER 778 at 791, [2000] 3 WLR 1240 at 1254) that the test was not whether it had been shown 'to a high degree of probability' that the individual was a danger to national security but that a global approach should be adopted 'taking into account the executive's policy with regard to national security'. Accordingly they allowed the appeal and remitted the matter to the commission for redetermination applying the approach indicated in their judgment.

[7] The Court of Appeal in its judgment has fully analysed in detail the provisions of the Immigration Act 1971, the 1997 Act and the 1998 rules. I adopt what the court has said and can accordingly confine my references to the legislation which is directly in issue on this appeal to your Lordships' House.

[8] The 1971 Act contemplates first a decision by the Secretary of State to make a deportation order under s 3(5) of that Act, in the present case in respect of a person who is not a British citizen '(b) if the Secretary of State deems his deportation to be conducive to the public good'. There is no definition or

limitation of what can be 'conducive to the public good' and the matter is plainly in the first instance and primarily one for the discretion of the Secretary of State. The decision of the Secretary of State to make a deportation order is subject to appeal by s 15(1)(a) of the 1971 Act save that by virtue of s 15(3)—

> 'A person shall not be entitled to appeal against a decision to make a deportation order against him if the ground of the decision was that his deportation is conducive to the public good as being in the interests of national security or of the relations between the United Kingdom and any other country or for other reasons of a political nature.'

[9] Despite this prohibition there was set up an advisory procedure to promote a consideration of the Secretary of State's decision under that Act. This, however, was held by the European Court of Human Rights in *Chahal v UK* (1996) 23 EHRR 413 not to provide an effective remedy within art 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) (Cmd 8969) (the convention). Accordingly the commission was set up by the 1997 Act and by s 2(1)(c) a person was given a right to appeal to the commission against—

> 'any matter in relation to which he would be entitled to appeal under subsection (1)(a) of section 15 of [the 1971 Act] (appeal to an adjudicator or the Appeal Tribunal against a decision to make a deportation order), but for subsection (3) of that section (deportation conducive to public good).'

The exclusion of the right of appeal if the decision to deport was on the ground that deportation was conducive to the public good on the basis that it was in the interests of national security or of the relations between the United Kingdom and any other country or for any other reasons of a political nature was thus removed.

[10] Section 4 of the 1997 Act provides that the commission—

> '(a) shall allow the appeal if it considers—(i) that the decision or action against which the appeal is brought was not in accordance with the law or with any immigration rules applicable to the case, or (ii) where the decision or action involved the exercise of a discretion by the Secretary of State or an officer, that the discretion should have been exercised differently, and (b) in any other case, shall dismiss the appeal.'

[11] It seems to me that on this language and in accordance with the purpose of the legislation to ensure an 'effective remedy', within the meaning of art 13 of the convention, that the commission was empowered to review the Secretary of State's decision on the law and also to review his findings of fact. It was also given the power to review the question whether the discretion should have been exercised differently. Whether the question should have been exercised differently will normally depend on whether on the facts found the steps taken by the Secretary of State were disproportionate to the need to protect national security.

[12] From the commission's decision there is a further appeal to the Court of Appeal on 'any question of law material to' the commission's determination (s 7(1)).

[13] The two main points of law which arose before the Court of Appeal are now for consideration by your Lordships' House. Mr Kadri QC has forcefully argued that the Court of Appeal was wrong on both points.

[14] As to the meaning of 'national security' he contends that the interests of national security do not include matters which have no direct bearing on the

United Kingdom, its people or its system of government. 'National security' has the same scope as 'defence of the realm'. For that he relies on what was said by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935 at 950, [1985] AC 374 at 410, and on the use of the phrases in a number of international conventions. Moreover he says that since the Secretary of State based his decision on a recommendation of the Security Services it can only be on matters within their purview and that their function, by s 1(2) of the Security Service Act 1989, was—

> 'the protection of national security and, in particular, its protection against threats from espionage, terrorism and sabotage, from the activities of agents of foreign powers and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means.'

He relies moreover on statements by groups of experts in international law, the Johannesburg Principles on National Security, Freedom of Expression and Access to Information, as approved on 1 October 1995 in Johannesburg which stressed as:

> 'Principle 2: Legitimate National Security Interest
>
> (a) A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government.
>
> (b) In particular, a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest.'

[15] It seems to me that Mr Rehman is entitled to say that 'the interests of national security' cannot be used to justify any reason the Secretary of State has for wishing to deport an individual from the United Kingdom. There must be some possibility of risk or danger to the security or well-being of the nation which the Secretary of State considers makes it desirable for the public good that the individual should be deported. But I do not accept that this risk has to be the result of 'a direct threat' to the United Kingdom as Mr Kadri has argued. Nor do I accept that the interests of national security are limited to action by an individual which can be said to be 'targeted at' the United Kingdom, its system of government or its people as the commission considered. The commission agreed ([1999] INLR 517 at 528) that this limitation is not to be taken literally since they accepted that such targeting—

> 'includes activities directed against the overthrow or destabilisation of a foreign government if that foreign government is likely to take reprisals against the UK which affect the security of the UK or of its nationals.'

[16] I accept as far as it goes a statement by Professor Grahl-Madsen in *The Status of Refugees in International Law* (1966):

> 'A person may be said to offend against national security if he engages in activities directed at the overthrow by external or internal force or other

illegal means of the government of the country concerned or in activities which are directed against a foreign government which as a result threaten the former government with intervention of a serious nature.'

That was adopted by the commission but I for my part do not accept that these are the only examples of action which makes it in the interests of national security to deport a person. It seems to me that, in contemporary world conditions, action against a foreign state may be capable indirectly of affecting the security of the United Kingdom. The means open to terrorists both in attacking another state and attacking international or global activity by the community of nations, whatever the objectives of the terrorist, may well be capable of reflecting on the safety and well-being of the United Kingdom or its citizens. The sophistication of means available, the speed of movement of persons and goods, the speed of modern communication, are all factors which may have to be taken into account in deciding whether there is a real possibility that the national security of the United Kingdom may immediately or subsequently be put at risk by the actions of others. To require the matters in question to be capable of resulting 'directly' in a threat to national security limits too tightly the discretion of the executive in deciding how the interests of the state, including not merely military defence but democracy, the legal and constitutional systems of the state need to be protected. I accept that there must be a real possibility of an adverse affect on the United Kingdom for what is done by the individual under inquiry but I do not accept that it has to be direct or immediate. Whether there is such a real possibility is a matter which has to be weighed up by the Secretary of State and balanced against the possible injustice to that individual if a deportation order is made.

[17] In his written case Mr Kadri appears to accept (contrary it seems to me to his argument in the Court of Appeal that they were mutually exclusive and to be read disjunctively) that the three matters referred to in s 15(3) of the 1971 Act, namely 'national security', 'the relations between the United Kingdom and any other country' or 'for other reasons of a political nature' may overlap but only if action which falls in one or more categories amounts to a direct threat. I do not consider that these three categories are to be kept wholly distinct even if they are expressed as alternatives. As the commission itself accepted, reprisals by a foreign state due to action by the United Kingdom may lead to a threat to national security even though this is action such as to affect 'relations between the United Kingdom and any other country' or to be 'of a political nature'. The Secretary of State does not have to pin his colours to one mast and be bound by his choice. At the end of the day the question is whether the deportation is conducive to the public good. I would accept the Secretary of State's submission that the reciprocal co-operation between the United Kingdom and other states in combating international terrorism is capable of promoting the United Kingdom's national security, and that such co-operation itself is capable of fostering such security 'by, inter alia, the United Kingdom taking action against supporters within the United Kingdom of terrorism directed against other states'. There is a very large element of policy in this which is, as I have said, primarily for the Secretary of State. This is an area where it seems to me particularly that the Secretary of State can claim that a preventative or precautionary action is justified. If an act is capable of creating indirectly a real possibility of harm to national security it is in principle wrong to say that the state must wait until action is taken which has a direct effect against the United Kingdom.

[18] National security and defence of the realm may cover the same ground though I tend to think that the latter is capable of a wider meaning. But if they are the same then I would accept that defence of the realm may justify action to prevent indirect and subsequent threats to the safety of the realm.

[19] The United Kingdom is not obliged to harbour a terrorist who is currently taking action against some other state (or even in relation to a contested area of land claimed by another state) if that other state could realistically be seen by the Secretary of State as likely to take action against the United Kingdom and its citizens.

[20] I therefore agree with the Court of Appeal that the interests of national security are not to be confined in the way which the commission accepted.

[21] Mr Kadri's second main point is that the Court of Appeal were in error when rejecting the commission's ruling that the Secretary of State had to satisfy them, 'to a high civil balance of probabilities', that the deportation of this appellant, a lawful resident of the United Kingdom, was made out on public good grounds because he had engaged in conduct that endangered the national security of the United Kingdom and, unless deported, was likely to continue to do so. The Court of Appeal said:

> 'However, in any national security case the Secretary of State is entitled to make a decision to deport not only on the basis that the individual has in fact endangered national security but that he is a *danger* to national security. When the case is being put in this way, it is necessary not to look only at the individual allegations and ask whether they have been proved. It is also necessary to examine the case as a whole against an individual and then ask whether on a global approach that individual is a danger to national security, taking into account the executive's policy with regard to national security. When this is done, the cumulative effect may establish that the individual is to be treated as a danger, although it cannot be proved to a high degree of probability that he has performed any individual act which would justify this conclusion.' (See [2000] 3 All ER 778 at 791, [2000] 3 WLR 1240 at 1254.)

[22] Here the liberty of the person and the practice of his family to remain in this country is at stake and when specific acts which have already occurred are relied on, fairness requires that they should be proved to the civil standard of proof. But that is not the whole exercise. The Secretary of State, in deciding whether it is conducive to the public good that a person should be deported, is entitled to have regard to all the information in his possession about the actual and potential activities and the connections of the person concerned. He is entitled to have regard to the precautionary and preventative principles rather than to wait until directly harmful activities have taken place, the individual in the meantime remaining in this country. In doing so he is not merely finding facts but forming an executive judgment or assessment. There must be material on which proportionately and reasonably he can conclude that there is a real possibility of activities harmful to national security but he does not have to be satisfied, nor on appeal to show, that all the material before him is proved, and his conclusion is justified, to a 'high civil degree of probability'. Establishing a degree of probability does not seem relevant to the reaching of a conclusion on whether there should be a deportation for the public good.

[23] Contrary to Mr Kadri's argument this approach is not confusing proof of facts with the exercise of discretion—specific acts must be proved, and an

assessment made of the whole picture and then the discretion exercised as to whether there should be a decision to deport and a deportation order made.

[24] If of course it is said that the decision to deport was not based on grounds of national security and there is an issue as to that matter then 'the government is under an obligation to produce evidence that the decision was in fact based on grounds of national security' (see *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935 at 944, [1985] AC 374 at 402). That however is not the issue in the present case.

[25] On the second point I am wholly in agreement with the decision of the Court of Appeal.

[26] In conclusion even though the commission has powers of review both of fact and of the exercise of the discretion, the commission must give due weight to the assessment and conclusions of the Secretary of State in the light at any particular time of his responsibilities, or of government policy and the means at his disposal of being informed of and understanding the problems involved. He is undoubtedly in the best position to judge what national security requires even if his decision is open to review. The assessment of what is needed in the light of changing circumstances is primarily for him. On an appeal the Court of Appeal and your Lordships' House no doubt will give due weight to the conclusions of the commission, constituted as it is of distinguished and experienced members, and knowing as it did, and as usually the court will not know, of the contents of the 'closed' evidence and hearing. If any of the reasoning of the commission shows errors in its approach to the principles to be followed, then the courts can intervene. In the present case I consider that the Court of Appeal was right in its decision on both of the points which arose and in its decision to remit the matters to the commission for redetermination in accordance with the principles which the Court of Appeal and now your Lordships have laid down. I would accordingly dismiss the appeal.

LORD STEYN.

[27] My Lords, I am in agreement with the reasons given by Lord Slynn of Hadley in his opinion and I would also dismiss the appeal. I can therefore deal with the matter quite shortly.

[28] Section 15(3) of the Immigration Act 1971 contemplated deportation of a person in three situations, viz where—

> 'his deportation is conducive to the public good as being in the interests of national security or of the relations between the United Kingdom and any other country or for other reasons of a political nature.'

The commission ([1999] INLR 517) thought that s 15(3) should be interpreted disjunctively. In the Court of Appeal Lord Woolf MR explained ([2000] 3 All ER 778 at 790, [2000] 3 WLR 1240 at 1253) that while it is correct that these situations are alternatives 'there is clearly room for there to be an overlap'. I agree. Addressing directly the issue whether the conduct must be targeted against the security of this country, Lord Woolf MR observed:

> 'Whatever may have been the position in the past, increasingly the security of one country is dependent upon the security of other countries. That is why this country has entered into numerous alliances. They acknowledge the extent to which this country's security is dependent upon the security of other countries. The establishment of NATO is but a reflection of this reality.

> An attack on an ally can undermine the security of this country.' (See [2000] 3 All ER 778 at 788–789, [2000] 3 WLR 1240 at 1251.)

Later in his judgment ([2000] 3 All ER 778 at 790, [2000] 3 WLR 1240 at 1253–1254) Lord Woolf MR said that the government 'is perfectly entitled to treat any undermining of its policy to protect this country from international terrorism as being contrary to the security interests of this country'. I respectfully agree. Even democracies are entitled to protect themselves, *and* the executive is the best judge of the need for international co-operation to combat terrorism and counter-terrorist strategies. This broader context is the backcloth of the Secretary of State's statutory power of deportation in the interests of national security.

[29] That brings me to the next issue. Counsel for Mr Rehman submitted that the civil standard of proof is applicable to the Secretary of State and to the commission. This argument necessarily involves the proposition that even if the Secretary of State is fully entitled to be satisfied on the materials before him that the person concerned *may* be a real threat to national security, the Secretary of State may not deport him. That cannot be right. The task of the Secretary of State is to evaluate risks in respect of the interests of national security. Lord Woolf MR expressed the point with precision as follows:

> '... in any national security case the Secretary of State is entitled to make a decision to deport not only on the basis that the individual has in fact endangered national security but that he is a *danger* to national security. When the case is being put in this way, it is necessary not to look only at the individual allegations and ask whether they have been proved. It is also necessary to examine the case as a whole against an individual and then ask whether on a global approach that individual is a danger to national security, taking into account the executive's policy with regard to national security. When this is done, the cumulative effect may establish that the individual is to be treated as a danger, although it cannot be proved to a high degree of probability that he has performed any individual act which would justify this conclusion. Here it is important to remember that the individual is still subject to immigration control. He is not in the same position as a British citizen. He has not been charged with a specific criminal offence. It is the danger which he constitutes to national security which is to be balanced against his own personal interests.' (See [2000] 3 All ER 778 at 791, [2000] 3 WLR 1240 at 1254.)

The dynamics of the role of the Secretary of State, charged with the power and duty to consider deportation on grounds of national security, irresistibly supports this analysis. While I came to this conclusion by the end of the hearing of the appeal, the tragic events of 11 September 2001 in New York reinforce compellingly that no other approach is possible.

[30] The interpretation of s 4 of the Special Immigration Appeals Commission Act 1997 was not explored in any depth on the appeal to the House. Section 4 so far as relevant reads:

> '(1) The Special Immigration Appeals Commission on an appeal to it under this Act—(a) shall allow the appeal if it considers—(i) that the decision or action against which the appeal is brought was not in accordance with the law or with any immigration rules applicable to the case, or (ii) where the decision or action involved the exercise of a discretion by the Secretary of

State or an officer, that the discretion should have been exercised differently, and (b) in any other case, shall dismiss the appeal. *a*

(2) Where an appeal is allowed, the Commission shall give such directions for giving effect to the determination as it thinks requisite, and may also make recommendations with respect to any other action which it considers should be taken in the case under the Immigration Act 1971; and it shall be the duty of the Secretary of State and of any officer to whom directions are *b* given under this subsection to comply with them.'

In the light of the observations of the European Court of Human Rights in *Chahal v UK* (1996) 23 EHRR 413 Parliament has provided for a high-powered commission, consisting of a member who holds or has held high judicial office, an immigration judge, and a third member, who will apparently be someone *c* with experience of national security matters (see s 1 of and Sch 1 to the 1997 Act and per Lord Woolf MR [2000] 3 All ER 778 at 782, 783, [2000] 3 WLR 1240 at 1245, 1246). Lord Woolf MR observed ([2000] 3 All ER 778 at 791, [2000] 3 WLR 1240 at 1254) that the commission were correct to regard it as their responsibility to determine questions of fact and law. He added: *d*

'The fact that Parliament has given SIAC [the Special Immigration Appeals Commission] responsibility of reviewing the manner in which the Secretary of State has exercised his discretion, inevitably leads to this conclusion. Without statutory intervention, this is not a role which a court readily adopts. But SIAC's membership meant that it was more appropriate for SIAC to *e* perform this role.'

I respectfully agree. Not only the make-up of the commission but also the procedures of the commission serve to protect the interests of national security: Special Immigration Appeals Commission (Procedure) Rules 1998, SI 1998/1881; *f* see also the discussion of the new procedure in (1998) 12 INLP 67–70.

[31] Moreover the expression 'in accordance with the law' in s 4 of the 1997 Act comprehends also since 2 October 2000 convention rights under the Human Rights Act 1998. Thus art 8 (right of respect for family life), art 10 (freedom of expression) and art 11 (freedom of assembly and association) all permit such derogations as are prescribed by law and are necessary in a democratic society in *g* the interests of national security. While a national court must accord appropriate deference to the executive, it may have to address the questions: Does the interference serve a legitimate objective? Is it necessary in a democratic society? In *Tinnelly & Sons Ltd v UK* (1998) 27 EHRR 249 the European Court of Human Rights had to consider public interest immunity certificates involving national *h* security considerations issued by the Secretary of State in discrimination proceedings. The court observed (at 290 (para 77)):

'... the conclusive nature of the section 42 [Fair Employment (Northern Ireland) Act 1976] certificates had the effect of preventing a judicial *j* determination on the merits of the applicants' complaints that they were victims of unlawful discrimination. The Court would observe that such a complaint can properly be submitted for an independent judicial determination even if national security considerations are present and constitute a highly material aspect of the case. The right guaranteed to an applicant under Article 6(1) of the Convention to submit a dispute to a court or tribunal in

> order to have a determination on questions of both fact and law cannot be displaced by the *ipse dixit* of the executive.'

It is well established in the case law that issues of national security do not fall beyond the competence of the courts: see, for example, *Johnston v Chief Constable of the Royal Ulster Constabulary* Case 222/84 [1986] 3 All ER 135, [1987] QB 129, [1986] ECR 1651; *R v Secretary of State for the Home Dept, ex p McQuillan* [1995] 4 All ER 400; *R v Ministry of Defence, ex p Smith* [1996] 1 All ER 257, [1996] QB 517 and *Smith and Grady v UK* (2000) 29 EHRR 493; compare also the extensive review of the jurisprudence on expulsion and deportation in van Dijk and van Hoof *Theory and Practice of the European Convention on Human Rights* (3rd edn, 1998) pp 515–521. It is, however, self-evidently right that national courts must give great weight to the views of the executive on matters of national security. But not all the observations in *Chandler v DPP* [1962] 3 All ER 142, [1964] AC 763 can be regarded as authoritative in respect of the new statutory system.

[32] For the reasons given by Lord Woolf MR, the reasons given by Lord Slynn, and my brief reasons, I would dismiss the appeal.

LORD HOFFMANN.

The decision to deport

[33] My Lords, Mr Shafiq Ur Rehman is a Pakistani national. He came to this country in 1993 and was given limited leave to enter and to work as a minister of religion. In 1997 he applied for indefinite leave to remain. On 9 December 1998 the Home Secretary refused the application. His letter said that he was satisfied, on the basis of information from confidential sources, that Mr Rehman was involved with an Islamic terrorist organisation called Markaz Dawa Al Irshad (MDI) and that his continued presence in this country was a danger to national security. The Home Secretary also gave notice of his intention to make a deportation order under s 3(5)(b) of the Immigration Act 1971 on the ground that for the same reasons his deportation would be conducive to the public good.

The right of appeal

[34] Until 1998 Mr Rehman would have had no right of appeal against the Home Secretary's decision to deport him. Ordinarily there is a right of appeal to an immigration adjudicator against a decision of the Secretary of State to make a deportation order under s 3(5) (see s 15(1)). The adjudicator hearing the appeal is required by s 19(1) to allow the appeal if he considers that the decision was 'not in accordance with the law or with any immigration rules applicable to the case' or, where the decision involved the exercise of a discretion by the Secretary of State, 'that the discretion should have been exercised differently'. Otherwise, the appeal must be dismissed.

[35] But this general right of appeal is excluded by s 15(3) if the ground of the decision to make the deportation order—

> 'was that his deportation is conducive to the public good as being in the interests of national security or of the relations between the United Kingdom and any other country or for other reasons of a political nature.'

Parliament took the view that the need to preserve the confidentiality of the material taken into account by the Home Secretary in making a deportation order on one or other of these grounds made it impossible to allow an effective

right of appeal. All that could be permitted was the right to make representations to an extra-statutory panel appointed by the Home Secretary to advise him.

[36] In *Chahal v UK* (1996) 23 EHRR 413 the European Court of Human Rights decided that this procedure was inadequate to safeguard two of the deportee's convention rights. First, he was entitled under art 13 to an effective remedy from an independent tribunal to protect his right under art 3 not to be deported to a country where there was a serious risk that he would suffer torture or inhuman or degrading treatment. Secondly, if he was detained pending deportation, he was entitled under art 5(4) to the determination of an independent tribunal as to whether his detention was lawful. The European court rejected the United Kingdom government's argument that considerations of national security or international relations made it impossible to accord such a right of appeal. The court (at 469 (para 131)) commended the procedure established by the Canadian Immigration Act 1976, under which the confidentiality of secret sources could be maintained by disclosing it only to a special security-cleared advocate appointed to represent the deportee who could cross-examine witnesses in the absence of the appellant (see 472 (para 144)).

[37] The European Court also considered the argument that decisions on national security were essentially a matter for the executive and that it would be contrary to principle to allow an independent tribunal to substitute its own decision on such matters for that of the responsible minister. It acknowledged (at 468 (para 127)) that art 5(4)—

> 'does not guarantee a right to judicial review of such breadth as to empower the court, on all aspects of the case including questions of pure expediency, to substitute its own discretion for that of the decision-making authority. The review should, however, be wide enough to bear on those conditions which are essential for the "lawful" detention of a person according to Article 5(1).'

The term 'question of expediency' is regularly used by the European Court to describe what English lawyers would call a question of policy (see the discussion of the European cases in the recent case of *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2001] 2 All ER 929, [2001] 2 WLR 1389).

[38] This was the background to the passing of the Special Immigration Appeals Commission Act 1997, under which Mr Rehman was able to appeal. The Act was intended to enable the United Kingdom to comply with the convention as interpreted by the court in *Chahal's* case. It established a Special Immigration Appeals Commission (the commission) with jurisdiction to hear various categories of appeals, including (under s 2(1)(c)) those excluded from the jurisdiction of the adjudicator by s 15(3) of the 1971 Act. Section 4(1) gave the commission power to deal with such appeals in the same terms as the power conferred upon the adjudicator by s 19(1) of the 1971 Act. The 1997 Act enabled the Lord Chancellor to make procedural rules for the commission and pursuant to this power he made the Special Immigration Appeals Commission (Procedure) Rules 1998, SI 1998/1881. This follows the Canadian model in allowing part of the proceedings to be conducted at a private hearing from which the appellant may be excluded but represented by a special advocate.

The Home Secretary's reasons

[39] Pursuant to r 10(1)(a), the Home Secretary provided the commission with a summary of the facts relating to his decision and the reasons for the decision. It said that Mr Rehman was the United Kingdom point of contact for MDI, an 'extremist organisation' whose mujahidin fighters were known as Lashkar Tayyaba (LT). Mr Rehman was said to have been involved on MDI's behalf in the recruitment of British Muslims to undergo military training and in fund raising for LT. He was a personal contact of Mohammed Saeed, the worldwide leader of MDI and LT. The Security Service assessed that his activities directly supported a terrorist organisation.

[40] The grounds upon which these activities were seen as a threat to national security was that, while Mr Rehman and his followers were unlikely to carry out acts of violence in the United Kingdom, his activities directly supported terrorism in the Indian subcontinent. Mr Peter Wrench, head of the Home Office Terrorism and Protection Unit, told the commission that the defence of United Kingdom national security against terrorist groups depended upon international reciprocity and co-operation. It was therefore in the security interests of the United Kingdom to co-operate with other nations, including India, to repress terrorism anywhere in the world.

[41] An additional reason was that Mr Rehman had been responsible for an increase in the number of Muslims in the United Kingdom who had undergone some form of militant training and that the presence of returned trainees in the United Kingdom might encourage the radicalisation of the British Muslim community.

The commission's decision

[42] The commission ([1999] INLR 517) said that the appeal raised two issues. The first was whether Mr Rehman was engaged in the activities alleged by the Home Secretary. The second was whether his activities, so far as the commission found them proved, were against the interests of the security of the United Kingdom. The view taken by the commission was that the Home Secretary's allegations had to be established 'to a high civil balance of probabilities'. The commission went through each of the principal allegations: (1) involvement in recruitment of British Muslims to go to Pakistan for terrorist training; (2) fund-raising for LT; (3) sponsorship of individuals for militant training camps; and (4) creation of a group of returnees who had been given weapons training or been indoctrinated with extremist beliefs so as to create a threat to the security of the United Kingdom. In each case it said that it was not satisfied to the necessary standard of proof that the allegation had been made out.

[43] On the question of whether Mr Rehman's activities, so far as proved, constituted a threat to national security, the commission rejected the argument that the question of what could constitute a threat to national security was a matter for the Home Secretary to decide. It said that the definition of national security was a question of law which it had jurisdiction to decide. It examined various authorities and came to the conclusion (at 528) that a person 'may be said to offend against national security if he engages in, promotes, or encourages violent activity which is targeted at the UK, its system of government or its people'. It included within this definition activities against a foreign government 'if that foreign government is likely to take reprisals against the UK which affect the security of the UK or of its nationals'.

[44] Finally, the commission said that the various grounds of decision which s 15(3) of the 1971 Act excluded from the jurisdiction of the adjudicator (and which consequently fell within the jurisdiction of the commission) were to be read disjunctively:

> 'Once the Secretary of State identified "the public good" as being "the interests of national security" as the basis of his decision, he cannot broaden his grounds to avoid difficulties which he may encounter in proving his case.'

The Court of Appeal's decision

[45] The Secretary of State appealed to the Court of Appeal ([2000] 3 All ER 778, [2000] 2 WLR 1240) under s 7 of the 1997 Act on the ground that the commission had erred in law. The court (Lord Woolf MR, Laws LJ and Harrison J) allowed the appeal and remitted the appeal to the commission for reconsideration in accordance with its judgment. Against that decision Mr Rehman appeals to your Lordships' House.

[46] The Court of Appeal identified three errors of law. First, it considered that the commission had given too narrow an interpretation to the concept of national security. It did not think that a threat to national security had to be 'targeted' against this country and it accepted Mr Wrench's evidence of the need for international co-operation against terrorism as a legitimate point of view. It was sufficient that there was a real possibility of adverse repercussions on the security of the United Kingdom, its system of government or its people.

[47] Secondly, the commission should not have treated national security, international relations and other political reasons as separate compartments. Conduct which adversely affected international relations, for example, could thereby have adverse repercussions on security.

[48] Thirdly, it was wrong to treat the Home Secretary's reasons as counts in an indictment and to ask whether each had been established to an appropriate standard of proof. The question was not simply what Mr Rehman had done but whether the Home Secretary was entitled to consider, on the basis of the case against him as a whole, that his presence in the United Kingdom was a danger to national security. When one is concerned simply with a fact-finding exercise concerning past conduct such as might be undertaken by a jury, the notion of a standard of proof is appropriate. But the Home Secretary and the commission do not only have to form a view about what the appellant has been doing. The final decision is evaluative, looking at the evidence as a whole, and predictive, looking to future danger. As Lord Woolf MR said:

> '... the cumulative effect may establish that the individual is to be treated as a danger, although it cannot be proved to a high degree of probability that he has performed any individual act which would justify this conclusion.' (See [2000] 3 All ER 778 at 791, [2000] 2 WLR 1240 at 1254.)

[49] My Lords, I will say at once that I think that on each of these points the Court of Appeal were right. In my opinion the fundamental flaw in the reasoning of the commission was that although they correctly said that s 4(1) gave them full jurisdiction to decide questions of fact and law, they did not make sufficient allowance for certain inherent limitations, first, in the powers of the judicial branch of government and secondly, within the judicial function, in the appellate process. First, the limitations on the judicial power. These arise from the principle of the separation of powers. The commission is a court, a member of the judicial

branch of government. It was created as such to comply with art 6 of the convention. However broad the jurisdiction of a court or tribunal, whether at first instance or on appeal, it is exercising a judicial function and the exercise of that function must recognise the constitutional boundaries between judicial, executive and legislative power. Secondly, the limitations on the appellate process. They arise from the need, in matters of judgment and evaluation of evidence, to show proper deference to the primary decision-maker.

The separation of powers

[50] I shall deal first with the separation of powers. Section 15(3) of the 1971 Act specifies 'the interests of national security' as a ground on which the Home Secretary may consider a deportation conducive to the public good. What is meant by 'national security' is a question of construction and therefore a question of law within the jurisdiction of the commission, subject to appeal. But there is no difficulty about what 'national security' means. It is the security of the United Kingdom and its people. On the other hand, the question of whether something is 'in the interests' of national security is not a question of law. It is a matter of judgment and policy. Under the constitution of the United Kingdom and most other countries, decisions as to whether something is or is not in the interests of national security are not a matter for judicial decision. They are entrusted to the executive.

[51] In *Chandler v DPP* [1962] 3 All ER 142, [1964] AC 763 the appellants, campaigners for nuclear disarmament, had been convicted of conspiring to commit an offence under s 1 of the Official Secrets Act 1911, namely, for a purpose prejudicial to the safety or interests of the state to have entered a RAF station at Wethersfield. They claimed that their purpose was to prevent nuclear bombers from taking off and wanted the judge or jury to decide that stopping the bombers was not at all prejudicial to the safety or interests of the state. They said that, on the contrary, the state would be much safer without them. But the House ruled that whether having nuclear bombers was conducive to the safety of the state was a matter for the decision of the executive. A court could not question it.

[52] Mr Kadri QC, who appeared for Mr Rehman, emphasised that s 4(1) of the 1997 Act gave the commission the same full appellate jurisdiction as adjudicators had under the 1971 Act. But the question is not the extent of the commission's appellate jurisdiction. It is whether the particular issue can properly be decided by a judicial tribunal at all. The criminal and appellate courts in *Chandler*'s case had full jurisdiction over questions of fact and law in the same way as the commission. The refusal of the House to re-examine the executive's decision that having nuclear bombers was conducive to the safety of the state was based purely upon the separation of powers. Lord Radcliffe said:

> '... we are dealing with a matter of the defence of the realm and with an Act designed to protect state secrets and the instruments of the state's defence. If the methods of arming the defence forces and the disposition of those forces are at the decision of Her Majesty's ministers for the time being, as we know that they are, it is not within the competence of a court of law to try the issue whether it would be better for the country that that armament or those dispositions should be different.' (See [1962] 3 All ER 142 at 151, [1964] AC 763 at 798.)

[53] Accordingly it seems to me that the commission is not entitled to differ from the opinion of the Secretary of State on the question of whether, for

example, the promotion of terrorism in a foreign country by a United Kingdom resident would be contrary to the interests of national security. Mr Kadri rightly said that one man's terrorist was another man's freedom fighter. The decision as to whether support for a particular movement in a foreign country would be prejudicial to our national security may involve delicate questions of foreign policy. And, as I shall later explain, I agree with the Court of Appeal that it is artificial to try to segregate national security from foreign policy. They are all within the competence of responsible ministers and not the courts. The commission was intended to act judicially and not, as the European Court recognised in *Chahal v UK* (1996) 23 EHRR 413 at 468 (para 127), to substitute its own opinion for that of the decision-maker on 'questions of pure expediency'.

[54] This does not mean that the whole decision on whether deportation would be in the interests of national security is surrendered to the Home Secretary, so as to 'defeat the purpose for which the commission was set up' (see the commission's decision [1999] INLR 517 at 528). It is important neither to blur nor to exaggerate the area of responsibility entrusted to the executive. The precise boundaries were analysed by Lord Scarman, by reference to *Chandler's* case in his speech in *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935 at 947–948, [1985] AC 374 at 406. His analysis shows that the commission serves at least three important functions which were shown to be necessary by the decision in *Chahal's* case. First, the factual basis for the executive's opinion that deportation would be in the interests of national security must be established by evidence. It is therefore open to the commission to say that there was no factual basis for the Home Secretary's opinion that Mr Rehman was actively supporting terrorism in Kashmir. In this respect the commission's ability to differ from the Home Secretary's evaluation may be limited, as I shall explain, by considerations inherent in an appellate process but not by the principle of the separation of powers. The effect of the latter principle is only, subject to the next point, to prevent the commission from saying that although the Home Secretary's opinion that Mr Rehman was actively supporting terrorism in Kashmir had a proper factual basis, it does not accept that this was contrary to the interests of national security. Secondly, the commission may reject the Home Secretary's opinion on the ground that it was 'one which no reasonable minister advising the Crown could in the circumstances reasonably have held'. Thirdly, an appeal to the commission may turn upon issues which at no point lie within the exclusive province of the executive. A good example is the question, which arose in *Chahal's* case itself, as to whether deporting someone would infringe his rights under art 3 of the convention because there was a substantial risk that he would suffer torture or inhuman or degrading treatment. The European jurisprudence makes it clear that whether deportation is in the interests of national security is irrelevant to rights under art 3. If there is a danger of torture, the government must find some other way of dealing with a threat to national security. Whether a sufficient risk exists is a question of evaluation and prediction based on evidence. In answering such a question, the executive enjoys no constitutional prerogative.

The standard of proof

[55] I turn next to the commission's views on the standard of proof. By way of preliminary I feel bound to say that I think that a 'high civil balance of probabilities' is an unfortunate mixed metaphor. The civil standard of proof always means more likely than not. The only higher degree of probability

required by the law is the criminal standard. But, as Lord Nicholls of Birkenhead explained in *Re H (minors) (sexual abuse: standard of proof)* [1996] 1 All ER 1 at 16, [1996] AC 563 at 586, some things are inherently more likely than others. It would need more cogent evidence to satisfy one that the creature seen walking in Regent's Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that it was an Alsatian. In this basis, cogent evidence is generally required to satisfy a civil tribunal that a person has been fraudulent or behaved in some other reprehensible manner. But the question is always whether the tribunal thinks it more probable than not.

[56] In any case, I agree with the Court of Appeal that the whole concept of a standard of proof is not particularly helpful in a case such as the present. In a criminal or civil trial in which the issue is whether a given event happened, it is sensible to say that one is sure that it did, or that one thinks it more likely than not that it did. But the question in the present case is not whether a given event happened but the extent of future risk. This depends upon an evaluation of the evidence of the appellant's conduct against a broad range of facts with which they may interact. The question of whether the risk to national security is sufficient to justify the appellant's deportation cannot be answered by taking each allegation seriatim and deciding whether it has been established to some standard of proof. It is a question of evaluation and judgment, in which it is necessary to take into account not only the degree of probability of prejudice to national security but also the importance of the security interest at stake and the serious consequences of deportation for the deportee.

Limitations of the appellate process

[57] This brings me to the limitations inherent in the appellate process. First, the commission is not the primary decision-maker. Not only is the decision entrusted to the Home Secretary but he also has the advantage of a wide range of advice from people with day-to-day involvement in security matters which the commission, despite its specialist membership, cannot match. Secondly, as I have just been saying, the question at issue in this case does not involve a Yes or No answer as to whether it is more likely than not that someone has done something but an evaluation of risk. In such questions an appellate body traditionally allows a considerable margin to the primary decision-maker. Even if the appellate body prefers a different view, it should not ordinarily interfere with a case in which it considers that the view of the Home Secretary is one which could reasonably be entertained. Such restraint may not be necessary in relation to every issue which the commission has to decide. As I have mentioned, the approach to whether the rights of an appellant under art 3 are likely to be infringed may be very different. But I think it is required in relation to the question of whether a deportation is in the interests of national security.

[58] I emphasise that the need for restraint is not based upon any limit to the commission's appellate jurisdiction. The amplitude of that jurisdiction is emphasised by the express power to reverse the exercise of a discretion. The need for restraint flows from a commonsense recognition of the nature of the issue and the differences in the decision-making processes and responsibilities of the Home Secretary and the commission.

Section 15(3) of the 1971 Act

[59] Finally I come to the construction of s 15(3) of the 1971 Act, which excludes certain cases from the jurisdiction of the adjudicator and by the same definition

brings them within the jurisdiction of the commission under s 2(1)(c) of the 1997 Act. For the purpose of deciding whether an appeal is excluded by s 15(3), it is necessary only to decide that the Home Secretary's reasons fall into one or more of the specified categories. If his reasons could be said to relate to national security or foreign relations or possibly both, it is unnecessary to allocate them to one class or the other. The categories, with their sweeping-up words 'or for other reasons of a political nature', do not create separate classes of reasons but a single composite class. In my opinion the other side of the coin, conferring jurisdiction on the commission, operates in the same way. The Home Secretary does not have to commit himself to whether his reasons can be described as relating to national security, foreign relations or some other political category. The commission has jurisdiction if they come under any head of the composite class.

[60] In my view, therefore, the commission was wrong to say that s 15(3) should be 'read disjunctively'. All that is necessary is that the appellant should be given fair notice of the case which he has to meet, in accordance with r 10(1) of the 1998 rules. It is unnecessary to engage in what may be a barren dispute over whether those reasons can be said to concern national security or foreign relations or be otherwise political, provided that they fall within the composite class of reasons which gives the commission jurisdiction. What matters is not how the reasons are categorised but the reasons themselves and the facts relied upon to support them.

[61] I would therefore dismiss the appeal. The case should be remitted to the commission to hear and determine in accordance with the principles stated by the House.

Postscript

[62] I wrote this speech some three months before the recent events in New York and Washington. They are a reminder that in matters of national security, the cost of failure can be high. This seems to me to underline the need for the judicial arm of government to respect the decisions of ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security. It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove.

LORD CLYDE.

[63] My Lords, I have had the advantage of reading a draft of the speech of my noble and learned friend Lord Hoffmann. For the reasons he has given I too would dismiss this appeal.

LORD HUTTON.

[64] My Lords, I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Slynn of Hadley, Lord Steyn and Lord Hoffmann. I agree with them that the appeal should be dismissed on two grounds. The first is that the commission fell into error in holding that for a person to constitute a threat against national security he must engage in, promote, or encourage violent activity—

'which is targeted at the United Kingdom, its system of government or its people. This includes activities directed against the overthrow or destabilisation of a foreign government if that foreign government is likely to take reprisals against the United Kingdom which affect the security of the United Kingdom or of its nationals.' (See [1999] INLR 517 at 528.)

In my opinion the Court of Appeal ([2000] 3 All ER 778, [2000] 3 WLR 1240) was right to hold that the promotion of terrorism against any state is capable of being a threat to the security of the United Kingdom, and that there can be an overlap between the three situations referred to in s 15(3) of the Immigration Act 1971.

[65] Secondly, I agree with my noble and learned friends that the Court of Appeal was right to hold that the Secretary of State was concerned to assess the extent of future risk and that he was entitled to make a decision to deport on the ground that an individual is a danger to national security, viewing the case against him as a whole, although it cannot be proved to a high degree of probability that he has carried out any individual act which would justify the conclusion that he is a danger.

[66] I would dismiss the appeal.

Appeal dismissed.

Kate O'Hanlon Barrister.

Suresh v. Minister of Citizenship and Immigration et al.; United Nations High Commissioner for Refugees et al., Interveners

[Indexed as: Suresh v. Canada (Minister of Citizenship and Immigration)]

Court File No. 27790

Supreme Court of Canada
McLachlin C.J.C., L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

Heard: May 22, 2001
Judgment rendered: January 11, 2002

Immigration — Inadmissible and removable classes — Terrorism — Immigration Act giving Minister of Citizenship and Immigration discretion to refoule (return) refugee where refugee suspected terrorist and Minister of opinion that refugee a danger to security of Canada — Refugee alleging risk of torture in home country — Act constitutionally valid, but Minister required to exercise discretion in accordance with principles of fundamental justice — Barring extraordinary circumstances, deportation to torture violates principles of fundamental justice — Canadian Charter of Rights and Freedoms, s. 7 — Immigration Act, R.S.C. 1985, c. I-2, s. 53(1)(b).

Constitutional law — Charter of Rights — Fundamental justice — Immigration Act giving Minister of Citizenship and Immigration discretion to refoule (return) refugee where refugee suspected terrorist and Minister of opinion that refugee a danger to security of Canada — Refugee alleging risk of torture in home country — Act constitutionally valid, but Minister required to exercise discretion in accordance with principles of fundamental justice — Barring extraordinary circumstances, deportation to torture violates principles of fundamental justice — Canadian Charter of Rights and Freedoms, s. 7 — Immigration Act, R.S.C. 1985, c. I-2, s. 53(1)(b).

Administrative law — Duty to act fairly — Extent of duty — Where Minister of Citizenship and Immigration exercises discretion to deport refugee and refugee establishes prima facie case that he or she may face torture upon deportation, Minister must provide refugee with all relevant information and advice and with opportunity to address evidence in writing — Minister must then consider all relevant evidence and issue responsive written reasons — Canadian Charter of Rights and Freedoms, s. 7 — Immigration Act, R.S.C. 1985, c. I-2, s. 53(1)(b).

Constitutional law — Charter of Rights — Fundamental justice — Where Minister of Citizenship and Immigration exercises discretion to deport refugee and refugee establishes prima facie case that he or she may face torture upon deportation, Minister must provide refugee with all relevant information and advice and with opportunity to address evidence in writing — Minister must then consider all relevant evidence and issue responsive written reasons — Canadian Charter of Rights and Freedoms, s. 7 — Immigration Act, R.S.C. 1985, c. I-2, s. 53(1)(b).

Immigration — Inadmissible and removable classes — Terrorism — Immigration Act defining inadmissible classes of persons to include persons who there were reasonable grounds to believe had engaged in terrorism or were members of terrorist organization inadmissible to Canada — Definition of inadmissible classes not infringing freedom of expression or freedom of association — Refugee not to be deported unless inadmissible and constituting a danger to security of Canada — Canadian Charter of Rights and Freedoms, s. 2(b), (d) — Immigration Act, R.S.C. 1985, c. I-2, s. 19(1)(e)(iv)(C), (f)(ii), (iii)(B).

Constitutional law — Charter of Rights — Freedom of expression — Immigration Act defining inadmissible classes of persons to include persons who there were reasonable grounds to believe had engaged in terrorism or were members of terrorist organization inadmissible to Canada — Definition of inadmissible classes not infringing freedom of expression or freedom of association — Refugee not to be deported unless inadmissible and constituting a danger to security of Canada — Canadian Charter of Rights and Freedoms, s. 2(b), (d) — Immigration Act, R.S.C. 1985, c. I-2, s. 19(1)(e)(iv)(C), (f)(ii), (iii)(B).

Constitutional law — Charter of Rights — Freedom of association — Immigration Act defining inadmissible classes of persons to include persons who there were reasonable grounds to believe had engaged in terrorism or were members of terrorist organization inadmissible to Canada — Definition of inadmissible classes not infringing freedom of expression or freedom of association — Refugee not to be deported unless inadmissible and constituting a danger to security of Canada — Canadian Charter of Rights and Freedoms, s. 2(b), (d) — Immigration Act, R.S.C. 1985, c. I-2, s. 19(1)(e)(iv)(C), (f)(ii), (iii)(B).

Immigration — Inadmissible and removable classes — Terrorism — Immigration Act giving Minister of Citizenship and Immigration discretion to refoule (return) refugee where refugee suspected terrorist and Minister of opinion that refugee a danger to security of Canada — Refugee alleging risk of

torture in home country — International covenants imposing no non-derogable right against refoulement exposing person to torture — Peremptory norm against refoulement exposing person to torture not conflicting with Canada's domestic law — Peremptory norm relevant to defining principles of fundamental justice — Canadian Charter of Rights and Freedoms, s. 7 — Immigration Act, R.S.C. 1985, c. I-2, s. 53(1)(b) — International Covenant on Civil and Political Rights, 1966, [1976] Can. T.S. No. 47, arts. 4(2), 7 — Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, [1987] Can. T.S. No. 36, arts. 3(1), 16(2) — Convention Relating to the Status of Refugees, 1951, [1969] Can. T.S. No. 6, art. 33(1), (2).

International law — Human rights — Immigration Act giving Minister of Citizenship and Immigration discretion to refoule (return) refugee where refugee suspected terrorist and Minister of opinion that refugee a danger to security of Canada — Refugee alleging risk of torture in home country — International covenants imposing no non-derogable right against refoulement exposing person to torture — Peremptory norm against refoulement exposing person to torture not conflicting with Canada's domestic law — Peremptory norm relevant to defining principles of fundamental justice — Canadian Charter of Rights and Freedoms, s. 7 — Immigration Act, R.S.C. 1985, c. I-2, s. 53(1)(b) — International Covenant on Civil and Political Rights, 1966, [1976] Can. T.S. No. 47, arts. 4(2), 7 — Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, [1987] Can. T.S. No. 36, arts. 3(1), 16(2) — Convention Relating to the Status of Refugees, 1951, [1969] Can. T.S. No. 6, art. 33(1), (2).

Administrative law — Judicial review — Scope of review — Immigration Act giving Minister of Citizenship and Immigration discretion to refoule (return) refugee where refugee suspected terrorist and Minister of opinion that refugee a danger to security of Canada — Refugee alleging risk of torture in home country — Minister's decision reviewable on standard of patent unreasonableness — Immigration Act, R.S.C. 1985, c. I-2, s. 53(1)(b).

In 1991 a citizen of Sri Lanka was granted refugee status. Between 1991 and 1995 the refugee worked as a fundraiser with the World Tamil Movement (WTM). In 1995 the Solicitor General of Canada and the Minister of Citizenship and Immigration signed a certificate pursuant to s. 40.1 of the *Immigration Act*, R.S.C. 1985, c. I-2, alleging that there were reasonable grounds to believe that the refugee had engaged in terrorism or was a member of an organization that had engaged or would engage in terrorism and was therefore inadmissible under s. 19(1)(*e*)(iv)(C), (*f*)(ii) and (*f*)(iii)(B) of the Act. The certificate was based on the opinion of the Canadian Security Intelligence Service (CSIS), which advised the Minister that there were reasonable grounds to believe that the refugee was a member of the Liberation Tigers of Tamil Eelam (LTTE), a terrorist group. A judge of the Federal Court held that the issuance of the certificate was reasonable. He found that the refugee was a member of the LTTE, that the WTM was part of or supported the LTTE, that the refugee had obtained status by wilful misrepresentations, that there

were reasonable grounds to believe that the LTTE had engaged in terrorism, and that Tamils arrested by Sri Lankan authorities were badly mistreated and in a number of cases the mistreatment bordered on torture. Following a hearing, an adjudicator ordered the refugee deported on grounds of membership in a terrorist organization. In 1997 an analyst in the Department of Citizenship and Immigration prepared a memorandum concerning the refugee. The Minister then issued a letter pursuant to s. 53(1)(*b*) of the Act, expressing the view that the refugee posed a danger to the security of Canada. This finding enabled the Minister to refoule (return) the refugee to Sri Lanka, where he alleged he would be exposed to a risk of torture.

Article 7 of the *International Covenant on Civil and Political Rights, 1966*, [1976] Can. T.S. No. 47 (the ICCPR), provides that no one is to be subjected to torture. Article 4(2) states that there shall be no derogation from art. 7. Article 3(1) of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984*, [1987] Can. T.S. No. 36, prohibits refoulement which exposes a person to a risk of torture, while art. 16(2) states that the provisions of the Convention Against Torture "are without prejudice to the provisions of any other international instrument . . . which relates to extradition or expulsion". Article 33(1) of the *Convention Relating to the Status of Refugees, 1951*, [1969] Can. T.S. No. 6 (the Refugee Convention), prohibits refoulement which would threaten a refugee's "life or freedom . . . on account of his race, religion, nationality, membership of a particular social group or political opinion", but art. 33(2) states that the "benefit of the present provision may not . . . be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is".

The refugee applied for judicial review of the Minister's decision. The motions judge found that the refugee had failed to establish that there were substantial grounds for believing that he would be exposed to a risk of torture if returned to Sri Lanka, and dismissed his application. The refugee's appeal to the Federal Court of Appeal was dismissed.

On further appeal by the refugee to the Supreme Court of Canada, **held**, the appeal should be allowed and the matter remitted to the Minister.

Standard of review

The factors to be considered in determining the standard of review applicable to the Minister's decision to issue a danger opinion were the presence or absence of a privative clause, the relative expertise of the decision-maker, the purpose of the provision and the legislation generally, and the nature of the question. Although the Minister's opinion was not protected by a privative clause, it could only be appealed by leave of the Federal Court. The Minister had access to special information and expertise in matters of national security. The purpose of the legislation was to permit a humanitarian balance between the danger posed to Canadian society and the danger of persecution upon refoulement. The inquiry was highly fact-based and contextual. All four factors suggested that the decision to issue a danger opinion

under s. 53(1)(*b*) merited a wide degree of deference. The Minister's discretion was reviewable only where the Minister made a patently unreasonable decision.

The threshold finding of whether a refugee faced a substantial risk of torture, as an aspect of the larger s. 53(1)(*b*) opinion, also attracted deference by the reviewing court. The court could not reweigh the factors considered by the Minister but could intervene if the decision was not supported by the evidence or failed to consider the appropriate factors.

Constitutionality of the Immigration Act: The Minister's Discretion

Section 53 permitted deportation "to a country where the person's life or freedom would be threatened". Deportation to torture could deprive a refugee of liberty, security, and perhaps life. The question was therefore whether the deprivation was in accordance with the principles of fundamental justice. The inquiry into the principles of fundamental justice was to be informed not only by Canadian experience and jurisprudence but also by international law, including *jus cogens*. Determining whether deportation to torture violated the principle of fundamental justice required a balance between Canada's interest in combatting terrorism and the refugee's interest in not being deported to torture.

From the Canadian perspective, torture was unfair and fundamentally unjust, an instrument of terror rather than of justice. The guarantee of fundamental justice applied to deprivations of life, liberty, or security effected by actors other than our government, where there was a sufficient causal connection between our government's participation and the deprivation. International treaty norms were not strictly binding in Canada until they had been incorporated into Canadian law by enactment, but in seeking the meaning of the *Canadian Charter of Rights and Freedoms*, the courts could be informed by international law. There were three compelling indicia that the prohibition of torture was a peremptory norm in international law. First, a great number of multilateral instruments explicitly prohibited torture; second, no state had ever legalized torture or admitted to its deliberate practice; third, a number of international authorities stated that the prohibition on torture is an established peremptory norm. The clear import of the ICCPR and the Convention Against Torture was to foreclose a state from expelling a person to face torture. International law therefore rejected deportation to torture, even where national security interests were at stake.

Barring extraordinary circumstances, deportation to torture would generally violate the principles of fundamental justice. Insofar as the Act left open the possibility of deportation to torture, the Minister should generally decline to deport refugees where on the evidence there was a substantial risk of torture. Section 53(1)(*b*) did not violate s. 7 of the Charter, but the Minister was obliged to exercise the discretion conferred by s. 53 in a constitutional manner.

Constitutionality of the Immigration Act: "Security to Canada" and "Terrorism"

The phrase "danger to the security of Canada" was difficult to define. The determination of what constituted a "danger to the security of Canada" was highly

fact-based and political in a general sense. Support of terrorism abroad could raise a possibility of adverse repercussions on Canada's security. A person constituted a danger to the security of Canada if he or she posed a serious threat to the security of Canada, whether direct or indirect, and bearing in mind the fact that the security of one country was often dependent on the security of other nations. The threat had to be grounded on objectively reasonable suspicion based on evidence and the harm threatened had to be substantial rather than negligible. The term "danger to the security of Canada" gave those who might come within its ambit fair notice of the consequences of their conduct while adequately limiting law enforcement discretion. The phrase "danger to the security of Canada" in s. 53(1)(*b*) was not unconstitutionally vague.

It was not necessary to define "terrorism" exhaustively. "Terrorism" in s. 19 of the Act included, following the *International Convention for the Suppression of the Financing of Terrorism, 1999*, G.A. Res. 54/109, any "act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such an act, by its nature or context, was to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act". The term as used in the Act was sufficiently certain to be workable and fair. It was not unconstitutionally vague.

Constitutionality of the Immigration Act: Membership in a Terrorist Organization

The primary purpose of s. 19 of the Act was to refuse entry to persons who were or had been engaged in terrorism or who were or had been members of terrorist groups. The Act also used s. 19 for the purpose of defining the class of Convention refugees who could be deported under s. 53 because they constituted a danger to Canada. Section 2 of the Charter did not protect expressive or associational activities that constituted violence. While s. 2 did protect hate speech and perhaps even threats of violence, the restriction of such expression could be justified under s. 1. Expression taking the form of violence or terror, or directed towards violence or terror, was unlikely to be protected by the Charter. The Minister's discretion to deport under s. 53 was confined to persons who had been engaged in terrorism or who had been members of terrorist organizations and who also posed a threat to the security of Canada. As long as the Minister exercised her discretion in accordance with the Act, there was no violation of s. 2(*b*) or (*d*) of the Charter. Section 53 had to be read as permitting a refugee to establish that his or her continued residence in Canada would not be detrimental to Canada, notwithstanding proof that the person was associated with or a member of a terrorist organization.

Constitutionally Required Procedures

The following factors were to be considered in determining what procedural protections were required by the duty of fairness and the principles of fundamental justice: the nature of the decision made and the procedures followed in making it; the role of the decision within the statutory scheme; the importance of the decision to the individual affected; the legitimate expectations of the person affected; and the

choice of procedure of the agency itself. The decision to deport bore some resemblance to judicial proceedings. The nature of the statutory scheme suggested the need for strong procedural safeguards. There was a disturbing lack of parity between the procedures set up under s. 40.1 to ensure that certificates are issued fairly and the lack of protections under s. 53(1)(*b*). The right affected was highly significant, particularly where a person subject to a s. 53(1)(*b*) opinion might be subjected to torture. The Minister had to be allowed considerable discretion in choosing the procedure to be followed, but this deference had to be reconciled with the elevated level of procedural protections mandated by the serious situation of refugees who if deported might face torture and violations of human rights in which Canada could not be complicit. A person facing deportation to torture under s. 53(1)(*b*) had to be informed of the case to meet, had to be given an opportunity to respond to the case presented to the Minister, and to challenge the information of the Minister. The Minister had to provide written reasons for her decision; the reasons had to articulate and rationally sustain a finding that there were no substantial grounds to believe that the refugee would be subject to torture, execution or other cruel and unusual treatment, if the refugee had raised those arguments. The reasons had to emanate from the Minister herself rather than take the form of advice from an analyst.

The refugee made a *prima facie* showing that he might be tortured if returned to Sri Lanka. He was not provided with the required procedural safeguards. There was no s. 1 justification for the lack of these protections. A valid purpose for excepting some Convention refugees from the protection of s. 53(1) did not justify the Minister's failure to provide fair procedures where there was a risk of torture upon deportation. The case was therefore remanded to the Minister for reconsideration in accordance with the required procedures.

Cases referred to

Anisminic Ltd. v. Foreign Compensation Commission, [1969] 2 A.C. 147 — **refd to**

Baker v. Canada (Minister of Citizenship and Immigration) (1999), 174 D.L.R. (4th) 193, [1999] 2 S.C.R. 817, 14 Admin. L.R. (3d) 173, 1 Imm. L.R. (3d) 1, 243 N.R. 22, 89 A.C.W.S. (3d) 777 — **refd to**

Dagg v. Canada (Minister of Finance) (1997), 148 D.L.R. (4th) 385, [1997] 2 S.C.R. 403, 46 Admin. L.R. (2d) 155, 213 N.R. 161, 132 F.T.R. 55*n*, 72 A.C.W.S. (3d) 5 — **refd to**

Hat'm Abu Zayda v. State of Israel (1999), 38 I.L.M. 1471 — **refd to**

Kindler v. Canada (Minister of Justice) (1991), 84 D.L.R. (4th) 438, 67 C.C.C. (3d) 1, [1991] 2 S.C.R. 779, 8 C.R. (4th) 1, 6 C.R.R. (2d) 193, 129 N.R. 81, 45 F.T.R. 160*n*, 14 W.C.B. (2d) 30 — **refd to**

Knight v. Indian Head School Division No. 19 (1990), 69 D.L.R. (4th) 489, [1990] 1 S.C.R. 653, 43 Admin. L.R. 157, 30 C.C.E.L. 237, 90 C.L.L.C. ¶14,010, [1990] 3 W.W.R. 289, 83 Sask. R. 81, 106 N.R. 17, 20 A.C.W.S. (3d) 315 — **refd to**

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R.F.L. (4th) 63, 216 N.B.R. (2d) 25, 244 N.R. 276 *sub nom. New Brunswick (Minister of Health and Community Services) v. J.G. and D.V.*, 90 A.C.W.S. (3d) 698 — **refd to**

Old St. Boniface Residents Assn. Inc. v. Winnipeg (City) (1990), 75 D.L.R. (4th) 385, [1990] 3 S.C.R. 1170, 46 Admin. L.R. 161, 2 M.P.L.R. (2d) 217, [1991] 2 W.W.R. 145, 69 Man. R. (2d) 134, 116 N.R. 46, 24 A.C.W.S. (3d) 437 — **refd to**

Pezim v. British Columbia (Superintendent of Brokers) (1994), 114 D.L.R. (4th) 385, [1994] 2 S.C.R. 557, 22 Admin. L.R. (2d) 1, 14 B.L.R. (2d) 217, [1994] 7 W.W.R. 1, 75 W.A.C. 1, 92 B.C.L.R. (2d) 145, 168 N.R. 321, 48 A.C.W.S. (3d) 1279 — **refd to**

Prosecutor v. Furundzija (1998), 38 I.L.M. 317 — **refd to**

Pushpanathan v. Canada (Minister of Citizenship and Immigration) (1998), 160 D.L.R. (4th) 193, [1998] 1 S.C.R. 982, 11 Admin. L.R. (3d) 1, 43 Imm. L.R. (2d) 117, 226 N.R. 201, 79 A.C.W.S. (3d) 998, 38 W.C.B. (2d) 423 [supplementary reasons [1998] 1 S.C.R. 1222, 11 Admin. L.R. (3d) 130] — **refd to**

R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3), [1999] 2 W.L.R. 827 — **refd to**

R. v. Keegstra (1990), 61 C.C.C. (3d) 1, [1990] 3 S.C.R. 697, 1 C.R. (4th) 129, 3 C.R.R. (2d) 193, [1991] 2 W.W.R. 1, 77 Alta. L.R. (2d) 193, 114 A.R. 81, 117 N.R. 1, 11 W.C.B. (2d) 352 — **refd to**

R. v. Nova Scotia Pharmaceutical Society (1992), 93 D.L.R. (4th) 36, 74 C.C.C. (3d) 289, 43 C.P.R. (3d) 1, [1992] 2 S.C.R. 606, 15 C.R. (4th) 1, 10 C.R.R. (2d) 34, 114 N.S.R. (2d) 91, 139 N.R. 241, 34 A.C.W.S. (3d) 1092, 16 W.C.B. (2d) 460 — **refd to**

R. v. Schmidt (1987), 39 D.L.R. (4th) 18, 33 C.C.C. (3d) 193, [1987] 1 S.C.R. 500 *sub nom. Canada v. Schmidt*, 58 C.R. (3d) 1, 28 C.R.R. 280, 20 O.A.C. 161, 76 N.R. 12, 61 O.R. (2d) 530*n* — **refd to**

R. v. Smith (1987), 40 D.L.R. (4th) 435, 34 C.C.C. (3d) 97, [1987] 1 S.C.R. 1045, 58 C.R. (3d) 193, 31 C.R.R. 193, [1987] 5 W.W.R. 1, 15 B.C.L.R. (2d) 273, 75 N.R. 321 — **refd to**

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Reference re: Public Service Employee Relations Act (1987), 38 D.L.R. (4th) 161, [1987] 1 S.C.R. 313, 87 C.L.L.C. ¶14,021, 28 C.R.R. 305, [1987] 3 W.W.R. 577, 51 Alta. L.R. (2d) 97, 78 A.R. 1, 74 N.R. 99, 4 A.C.W.S. (3d) 138 *sub nom. Alberta Union of Provincial Employees and Attorney-General of Alberta (Re)* — **refd to**

Reference re: Section 94(2) of the Motor Vehicle Act (1985), 24 D.L.R. (4th) 536, 23 C.C.C. (3d) 289, [1985] 2 S.C.R. 486 *sub nom. B.C. Motor Vehicle Act (Re)*, 48 C.R. (3d) 289, 18 C.R.R. 30, 36 M.V.R. 240, [1986] 1 W.W.R. 481, 69 B.C.L.R. 145, 63 N.R. 266, 15 W.C.B. 343 — **refd to**

Secretary of State for the Home Department v. Rehman, [2001] 3 W.L.R. 877 — **refd to**

Sheehan v. Ontario (Criminal Injuries Compensation Board) (1974), 52 D.L.R. (3d) 728, 20 C.C.C. (2d) 167, 5 O.R. (2d) 781 [leave to appeal to S.C.C. refused 52 D.L.R. (3d) 728*n*, 20 C.C.C. (2d) 167*n*, 5 O.R. (2d) 781*n*] — **refd to**

Singh v. Canada (Minister of Employment and Immigration) (1985), 17 D.L.R. (4th) 422, [1985] 1 S.C.R. 177, 12 Admin. L.R. 137, 14 C.R.R. 13, 58 N.R. 1 — **refd to**

Slaight Communications Inc. v. Davidson (1989), 59 D.L.R. (4th) 416, [1989] 1 S.C.R. 1038, 26 C.C.E.L. 85, 89 C.L.L.C. ¶14,031, 40 C.R.R. 100, 93 N.R. 183, 15 A.C.W.S. (3d) 132 — **refd to**

Suresh (Re) (1997), 140 F.T.R. 88, 40 Imm. L.R. (2d) 247, 75 A.C.W.S. (3d) 887 — **refd to**

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Statutes referred to

Act to Amend the National Defence Act and to make consequential amendments to other Acts, S.C. 1998, c. 35

Canadian Charter of Rights and Freedoms
- s. 1
- s. 2 (*b*), (*d*)
- s. 7
- s. 12

Criminal Code, R.S.C. 1985, c. C-46
- s. 269.1 [enacted R.S.C. 1985, c. 10 (3rd Supp.), s. 2]

Immigration Act, R.S.C. 1985, c. I-2
- s. 2 [am. R.S.C. 1985, c. 28 (4th Supp.), s. 1; 1992, c. 49, s. 1; 1994, c. 31, s. 18; 1995, c. 15, s. 1]
- s. 19(1)(*e*) [rep. & sub. 1992, c. 49, s. 11(2)]
- s. 19(1)(*f*) [rep. & sub. 1992, c. 49, s. 11(2)]
- s. 40.1 [enacted R.S.C. 1985, c. 29 (4th Supp.), s. 4; am. 1992, c. 49, s. 31]
- s. 53(1) [rep. & sub. 1992, c. 49, s. 43(1); am. 1995, c. 15, s. 12]
- s. 82.1(1) [enacted R.S.C. 1985, c. 28 (4th Supp.), s. 19; rep. & sub. 1990, c. 8, s. 53; rep. & sub. 1992, c. 49, s. 73]
- s. 82.2 [enacted R.S.C. 1985, c. 28 (4th Supp.), s. 19; rep. & sub. 1990, c. 8, s. 54; rep. & sub. 1992, c. 49, s. 73]

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- art. 5

American Convention on Human Rights, November 22, 1969, 1144 U.N.T.S. 123
- art. 5

Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, December 10, 1984, [1987] Can. T.S. No. 36
- art. 1
- art. 2
- art. 3
- art. 16
- arts. 17-24

Convention for the Suppression of Unlawful Seizure of Aircraft, December 16, 1970, [1972] Can. T.S. No. 23

Convention on the Physical Protection of Nuclear Material, March 3, 1980 (1979), 18 I.L.M. 1419

Convention Relating to the Status of Refugees, July 28, 1951, [1969] Can. T.S. No. 6

Preamble
art. 33
Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, December 9, 1975, G.A. Res. 3452(XXX), UN Doc. A/10034
European Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, 213 U.N.T.S. 221
art. 3
Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, [1965] Can. T.S. No. 20, p. 25
art. 3
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APPEAL (with leave, 185 D.L.R. (4th) vii, 258 N.R. 197*n*) from an order of the Federal Court of Appeal, 183 D.L.R. (4th) 629, [2000] 2 F.C. 592, 18 Admin. L.R. (3d) 159, 5 Imm. L.R. (3d) 1, 252 N.R. 1, 180 F.T.R. 57*n*, 94 A.C.W.S. (3d) 731, [2000] F.C.J. No. 5 (QL), dismissing an appeal from an order of McKeown J., 173 F.T.R. 1, 65 C.R.R. (2d) 344, 50 Imm. L.R. (2d) 183, 89 A.C.W.S. (3d) 770, [1999] F.C.J. No. 865 (QL), dismissing a refugee's application for judicial review of an opinion letter issued by the Minister of Citizenship and Immigration under s. 53(1)(*b*) of the *Immigration Act* (Can.).

Barbara Jackman and *Ronald Poulton*, for appellant, Manickavasagam Suresh.

Urszula Kaczmarczyk and *Cheryl D. Mitchell*, for respondents, Minister of Citizenship and Immigration and Attorney General of Canada.

John Terry and *Jennifer A. Orange*, for intervener, United Nations High Commissioner for Refugees.

Michael F. Battista and *Michael Bossin*, for intervener, Amnesty International (written submissions only).

Audrey Macklin, for intervener, Canadian Arab Federation.

Jack C. Martin and *Sharryn J. Aiken*, for intervener, Canadian Council for Refugees.

Jamie Cameron, for intervener, Federation of Associations of Canadian Tamils (written submissions only).

David Cole, for intervener, Centre for Constitutional Rights (written submissions only).

David Matas, for intervener, Canadian Bar Association.

Marlys Edwardh and *Breese Davies*, for intervener, Canadian Council of Churches (written submissions only).

[1] BY THE COURT:—In this appeal we hold that Suresh is entitled to a new deportation hearing under the *Immigration Act*, R.S.C. 1985, c. I-2. Suresh came to Canada from Sri Lanka in 1990. He was recognized as a Convention refugee in 1991 and applied for landed immigrant status. In 1995 the government detained him and started proceedings to deport him to Sri Lanka on grounds he was a member and fundraiser for the Liberation Tigers of Tamil Eelam (LTTE), an organization alleged to engage in terrorist activity in Sri Lanka. Suresh challenged the order for his deportation on various grounds of substance and procedure. In these reasons we examine the *Immigration Act* and the *Canadian Charter of Rights and Freedoms*, and find that deportation to face torture is generally unconstitutional and that some of the procedures followed in Suresh's case did not meet the required constitutional standards. We therefore conclude that Suresh is entitled to a new hearing.

[2] The appeal requires us to consider a number of issues: the standard to be applied in reviewing a ministerial decision to deport; whether the *Charter* precludes deportation to a country where the refugee faces torture or death; whether deportation on the basis of mere membership in an alleged terrorist organization unjustifiably infringes the *Charter* rights of free expression and free association; whether "terrorism" and "danger to the security of Canada" are unconstitutionally vague; and whether the deportation scheme contains adequate procedural safeguards to ensure that refugees are not expelled to a risk of torture or death.

[3] The issues engage concerns and values fundamental to Canada and indeed the world. On the one hand stands the manifest evil of terrorism and the random and arbitrary taking of innocent lives, rippling out in an ever-widening spiral of loss and fear. Governments, expressing the will of the governed, need the legal tools to effectively meet this challenge.

[4] On the other hand stands the need to ensure that those legal tools do not undermine values that are fundamental to our democratic society — liberty, the rule of law, and the principles of fundamental justice — values that lie at the heart of the Canadian constitutional order and the international instruments that Canada has signed. In the end, it would be a Pyrrhic victory if terrorism were defeated at the cost of sacrificing our commitment to those values. Parliament's challenge is to draft laws that effectively combat terrorism and conform to the requirements of our Constitution and our international commitments.

[5] We conclude that to deport a refugee to face a substantial risk of torture would generally violate s. 7 of the *Charter*. The Minister must exercise her discretion to deport under the *Immigration Act* accordingly. Properly applied, the legislation conforms to the *Charter*. We reject the arguments that the terms "danger to the security of Canada" and "terrorism" are unconstitutionally vague and that ss. 19 and 53(1)(*b*) of the Act violate the *Charter* guarantees of free expression and free association, and conclude that the Act's impugned procedures, properly followed, are constitutional. We believe these findings leave ample scope to Parliament to adopt new laws and devise new approaches to the pressing problem of terrorism.

[6] Applying these conclusions, we find that the appellant Suresh made a *prima facie* case showing a substantial risk of torture if deported to Sri Lanka, and that his hearing did not provide the procedural safeguards required to protect his right not to be expelled to a risk of torture or death. This means that the case must be remanded to the Minister for reconsideration. The immediate result is that Suresh will remain in Canada until his new hearing is complete. Parliament's scheme read in light of the Canadian Constitution requires no less.

I. FACTS AND JUDICIAL PROCEEDINGS

[7] The appellant, Manickavasagam Suresh, was born in 1955. He is a Sri Lankan citizen of Tamil descent. Suresh entered Canada in

October 1990, and was recognized as a Convention refugee by the Refugee Division of the Immigration and Refugee Board in April 1991. Recognition as a Convention refugee has a number of legal consequences; the one most directly relevant to this appeal is that, under s. 53(1) of the *Immigration Act*, generally the government may not return ("*refouler*") a Convention refugee "to a country where the person's life or freedom would be threatened for reasons of race, religion, nationality, membership in a particular social group or political opinion".

[8] In the summer of 1991, the appellant applied for landed immigrant status in Canada. His application was not finalized because, in late 1995, the Solicitor General of Canada and the Minister of Citizenship and Immigration commenced proceedings to deport Suresh to Sri Lanka on security grounds.

[9] The first step in the procedure was a certificate under s. 40.1 of the *Immigration Act* alleging that Suresh was inadmissible to Canada on security grounds. The Solicitor General and the Minister filed the certificate with the Federal Court of Canada on October 17, 1995, and Suresh was detained the following day.

[10] The s. 40.1 certificate was based on the opinion of the Canadian Security Intelligence Service (CSIS) that Suresh is a member of the LTTE, an organization that, according to CSIS, is engaged in terrorist activity in Sri Lanka and functions in Canada under the auspices of the World Tamil Movement (WTM). LTTE supports the cause of Tamils in the ongoing Sri Lankan civil war. The struggle is a protracted and bitter one. The Tamils are in rebellion against the democratically elected government of Sri Lanka. Their grievances are deep-rooted, and atrocities appear to be commonplace on both sides. The conflict has its roots in measures taken by a past government which, in the view of the Tamil minority, deprived it of basic linguistic, cultural and political rights. Subsequent governments have made attempts to accommodate these grievances, find a political solution, and re-establish civilian controls on the security and defence establishments, but a solution has yet to be found.

[11] Human rights reporting on the practices of the Sri Lanka security forces indicates that the use of torture is widespread, particularly against persons suspected of membership in the LTTE.

In a report dated 2001, Amnesty International cites frequent incidents of torture by the police and army, including a report that five labourers arrested on suspicion of involvement with the LTTE were tortured by police. One of them died apparently as a result of the torture.

[12] The s. 40.1 certificate was referred to the Federal Court for determination "whether the certificate filed by the Minister and the Solicitor General is reasonable on the basis of the evidence and information available" as required by s. 40.1(4)(*d*) — the second step in the deportation procedure. Pursuant to s. 40.1(5), the designated judge is entitled to receive and consider any evidence the judge "sees fit, whether or not the evidence or information is or would be admissible in a court of law".

[13] In August 1997, after 50 days of hearings, Teitelbaum J. upheld the s. 40.1 certificate, finding it "reasonable" under s. 40.1(4)(*d*) of the Act: (1997), 140 F.T.R. 88 (T.D.). Specifically, Teitelbaum J. found that: (1) Suresh had been a member of the LTTE since his youth and is now (or was at the time of Teitelbaum J.'s consideration) a member of the LTTE executive; (2) the WTM is part of the LTTE or at least an organization that supports the activities of the LTTE; (3) Suresh obtained refugee status "by wilful misrepresentation of facts" and lacks credibility; (4) there are reasonable grounds to believe the LTTE has committed terrorist acts; and (5) Tamils arrested by Sri Lankan authorities are badly mistreated and in a number of cases the mistreatment bordered on torture.

[14] A deportation hearing followed — the third step in the deportation procedure. The adjudicator found no reasonable grounds to conclude Suresh was directly engaged in terrorism under s. 19(1)(*f*)(ii), but held that he should be deported on grounds of membership in a terrorist organization under ss. 19(1)(*f*)(iii)(B) and 19(1)(*e*)(iv)(C).

[15] On the same day, September 17, 1997, the Minister took the fourth step in the deportation process, notifying Suresh that she was considering issuing an opinion declaring him to be a danger to the security of Canada under s. 53(1)(*b*) of the Act, which permits the Minister to deport a refugee on security grounds even where the refugee's "life or freedom" would be threatened by the return. In response to the Minister's notification, Suresh submitted written arguments and documentary evidence, including reports indicating

the incidence of torture, disappearances, and killings of suspected members of LTTE.

[16] Donald Gautier, an immigration officer for Citizenship and Immigration Canada, considered the submissions and recommended that the Minister issue an opinion under s. 53(1)(*b*) that Suresh constituted a danger to the security of Canada. Noting Suresh's links to LTTE, he stated that "[t]o allow Mr. Suresh to remain in this country and continue his activities runs counter to Canada's international commitments in the fight against terrorism". At the same time, Mr. Gautier acknowledged that "Mr. Suresh is not known to have personally committed any acts of violence either in Canada or Sri Lanka" and that his activities on Canadian soil were "non-violent" in nature. Gautier found that Suresh faced a risk on returning to Sri Lanka, but this was difficult to assess; might be tempered by his high profile; and was counterbalanced by Suresh's terrorist activities in Canada. He concluded that, "on balance, there are insufficient humanitarian and compassionate considerations present to warrant extraordinary consideration". Accordingly, on January 6, 1998, the Minister issued an opinion that Suresh constituted a danger to the security of Canada and should be deported pursuant to s. 53(1)(*b*). Suresh was not provided with a copy of Mr. Gautier's memorandum, nor was he provided an opportunity to respond to it orally or in writing. No reasons are required under s. 53(1)(*b*) of the *Immigration Act* and none was given.

[17] Suresh applied to the Federal Court for judicial review, alleging that the Minister's decision was unreasonable; that the procedures under the Act, which did not require an oral hearing and independent decision-maker, were unfair; and that the Act unconstitutionally violated ss. 7 and 2 of the *Charter*. McKeown J. (1999), 65 C.R.R. (2d) 344, dismissed the application on all grounds. In his view, the Minister's decision was not unreasonable and the Act was constitutional.

[18] On the s. 7 challenge, McKeown J. found that the Minister, weighing the risk of exposing Suresh to torture against the danger that Suresh posed to the security of Canada, had satisfied the requirements of fundamental justice. McKeown J. acknowledged that the s. 7 *Charter* analysis should be informed by international law, and by the *Convention against Torture and other Cruel,*

Inhuman or Degrading Treatment or Punishment, Can. T.S. 1987 No. 36 (CAT), in particular. However, the CAT applies only where there are "substantial grounds" to believe that the person in question would be in danger of being tortured. Suresh had not met this test he held, in part because he had not submitted to the Minister a personal statement outlining why he believed he was at risk. McKeown J. concluded that the appellant's expulsion would not "shock the conscience" of Canadians, the test for unconstitutionality under s. 7 of the *Charter*.

[19] On the s. 2 challenge, McKeown J. found that Suresh's activities as a fundraiser could not be considered "expression" under s. 2(*b*), since those activities were conducted in the service of a violent organization. He also found that Suresh's activities were not protected under s. 2(*d*), since the association in question existed to commit acts of violence. As to Suresh's vagueness arguments, McKeown J. held that neither the term "danger to the security of Canada" nor the term "terrorism" is unconstitutionally vague. Accordingly, McKeown J. dismissed the application.

[20] Suresh appealed to the Federal Court of Appeal. It too dismissed his application. Robertson J.A., for the court, held that the right under international law to be free from torture was limited by a country's right to expel those who pose a security risk: [2000] 2 F.C. 592, 183 D.L.R. (4th) 629. He held, at paras. 31-32, that the *Convention Relating to the Status of Refugees*, Can. T.S. 1969 No. 6 (*Refugee Convention*), permits derogation from the prohibition against deportation to torture and that, in any event, Canadian statutory law supersedes customary international law. He agreed with McKeown J. that fundraising to support terrorist violence was not protected under s. 2. He also agreed that the *Immigration Act* procedures were adequate; in particular, no oral hearing was required to assess the risk of torture upon deportation. Finally, he agreed that neither the term "danger to the security of Canada" nor the term "terrorism" is unconstitutionally vague.

[21] Robertson J.A. rejected Suresh's argument that s. 53(1)(*b*) of the Act is unconstitutional insofar as it permits the Minister to expel a refugee to torture. He held that while deportation to torture violates s. 7's guarantee of the right to life, liberty and security of person, the violation was justified under s. 1. The objective of preventing

Canada from becoming a haven for terrorist organizations was pressing and substantial and the deportation provision was a proportionate response to that objective bearing in mind the limitations on the power of deportation, its use as a measure of last resort and Canada's international obligations to combat terrorism. Expulsion of a refugee who is a danger to the security of Canada would not violate the sense of justice or "shock the conscience" of most Canadians, notwithstanding that the refugee might face torture on return, because Canada would be neither the first nor the last link in the chain of causation leading to torture, but merely an involuntary intermediary.

[22] Finally, Robertson J.A. rejected the alternate argument that s. 53(1)(*b*), if constitutional, violated Suresh's s. 7 right to security in its application. The administrative decision to deport Suresh properly considered the risk Suresh posed to Canada, acknowledged the risk of torture Suresh would face upon return to Sri Lanka, noted factors that might reduce the risk, and held that on balance it was outweighed by Canada's interest in its own security.

[23] Suresh now appeals to this Court.

II. RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

[24]

Canadian Charter of Rights and Freedoms

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

2. Everyone has the following fundamental freedoms:

. . . . .

(*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

. . . . .

(*d*) freedom of association.

. . . . .

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Immigration Act, R.S.C. 1985, c. I-2

19(1) No person shall be granted admission who is a member of any of the following classes:

. . . . .

(*e*) persons who there are reasonable grounds to believe

. . . . .

(iv) are members of an organization that there are reasonable grounds to believe will

. . . . .

(C) engage in terrorism;

(*f*) persons who there are reasonable grounds to believe

. . . . .

(ii) have engaged in terrorism, or

(iii) are or were members of an organization that there are reasonable grounds to believe is or was engaged in

. . . . .

(B) terrorism,

except persons who have satisfied the Minister that their admission would not be detrimental to the national interest;

. . . . .

53(1) Notwithstanding subsections 52(2) and (3), no person who is determined under this Act or the regulations to be a Convention refugee, nor any person who has been determined to be not eligible to have a claim to be a Convention refugee determined by the Refugee Division on the basis that the person is a person described in paragraph 46.01(1)(*a*), shall be removed from Canada to a country where the person's life or freedom would be threatened for reasons of race, religion, nationality, membership in a particular social group or political opinion unless

. . . . .

(*b*) the person is a member of an inadmissible class described in paragraph 19(1)(*e*), (*f*), (*g*), (*j*), (*k*) or (*l*) and the Minister is of the opinion that the person constitutes a danger to the security of Canada . . .

III. ISSUES

[25] We propose to consider the issues in the following order:

1. What is the appropriate standard of review with respect to ministerial decisions under s. 53(1)(*b*) of the *Immigration Act*?
2. Are the conditions for deportation in the *Immigration Act* constitutional?

   (a) Does the Act permit deportation to torture contrary to the *Charter*?

   (b) Are the terms "danger to the security of Canada" and "terrorism" unconstitutionally vague?

   (c) Does deportation for membership in a terrorist organization unjustifiably violate the *Charter* guarantees of freedom of expression and freedom of association?

3. Are the procedures for deportation set out in the *Immigration Act* constitutionally valid?
4. Examining Suresh's case in light of the conclusions to the foregoing questions, should the Minister's order be set aside and a new hearing ordered?

IV. ANALYSIS

1. Standard of Review

[26] This appeal involves a consideration of four types of issues: (1) constitutional review of the provisions of the *Immigration Act*; (2) whether Suresh's presence in Canada constitutes a danger to national security; (3) whether Suresh faces a substantial risk of torture upon return to Sri Lanka; and (4) whether the procedures used by the Minister under the Act were adequate to protect Suresh's constitutional rights.

[27] The issues of the constitutionality of the deportation provisions of the *Immigration Act* do not involve review of ministerial decision-making. The fourth issue of the adequacy of the procedures under the Act will be considered separately later in these reasons. At this point, our inquiry is into the standard of review to be applied to the second and third issues — the Minister's decisions on whether Suresh poses a risk to the security of Canada and whether he faces a substantial risk of torture on deportation. The latter was characterized by Robertson J.A. as a constitutional decision and hence requires separate treatment. It is our view that the threshold question is factual, that is whether there is a substantial risk of torture if the appellant is sent back, although this inquiry is mandated by s. 7 of the *Charter*. The constitutional issue is whether it would shock the Canadian conscience to deport Suresh once a substantial risk of torture has been established. This is when s. 7 is engaged. Since we are ordering a new hearing on procedural grounds, we are not required in this appeal to review the Minister's decisions on whether Suresh's presence constitutes a danger to the security of Canada and whether he faces a substantial risk of torture on deportation. However, we offer the following comments to assist courts in future ministerial review.

[28] The trial judge and the Court of Appeal rejected Suresh's submission that the highest standard of review should apply to the determination of the rights of refugees. Robertson J.A., while

inclined to apply a deferential standard of review to whether Suresh constituted a danger to the security of Canada, concluded that the decision could be maintained on any standard. Robertson J.A. went on to state (at paras. 131-36) that while the Act and the Constitution place constraints on the Minister's exercise of her discretion, these do not extend to a judicially imposed obligation to give particular weight to particular factors. On the question of whether he would face a substantial risk of torture on return, a question that he viewed as constitutional rather than merely one of judicial review, Robertson J.A. did not determine the applicable standard of review, concluding that even on the stringent standard of correctness the Minister's decision should be upheld.

[29] The first question is what standard should be adopted with respect to the Minister's decision that a refugee constitutes a danger to the security of Canada. We agree with Robertson J.A. that the reviewing court should adopt a deferential approach to this question and should set aside the Minister's discretionary decision if it is patently unreasonable in the sense that it was made arbitrarily or in bad faith, it cannot be supported on the evidence, or the Minister failed to consider the appropriate factors. The court should not reweigh the factors or interfere merely because it would have come to a different conclusion.

[30] This conclusion is mandated by *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, 160 D.L.R. (4th) 193, which reviewed the principles for determining the standard of review according to the functional and pragmatic approach. In *Pushpanathan*, the Court emphasized that the ultimate question is always what the legislature intended. One looks to the language of the statute as well as a number of factors to determine that intention. Here the language of the Act (the Minister must be "of the *opinion*" that the person constitutes a danger to the security of Canada) suggests a standard of deference. So, on the whole, do the factors to be considered: (1) the presence or absence of a clause negating the right of appeal; (2) the relative expertise of the decision-maker; (3) the purpose of the provision and the legislation generally; and (4) the nature of the question (*Pushpanathan*, *supra*, at paras. 29-38).

[31] The first factor suggests that Parliament intended only a limited right of appeal. Although the Minister's s. 53(1)(*b*) opinion is not

protected by a privative clause, it may only be appealed by leave of the Federal Court—Trial Division (s. 82.1(1)), and that leave decision may not itself be appealed (s. 82.2)). The second factor, the relative expertise of the decision-maker, again favours deference. As stated in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193, "[t]he fact that the formal decision-maker is the Minister is a factor militating in favour of deference" (para. 59). The Minister, as noted by Lord Hoffmann in *Secretary of State for the Home Department v. Rehman*, [2001] 3 W.L.R. 877, at para. 62, "has access to special information and expertise in . . . matters [of national security]". The third factor — the purpose of the legislation — again favours deference. This purpose, as discussed in *Pushpanathan*, *supra*, at para. 73, is to permit a "humanitarian balance" of various interests — "the seriousness of the danger posed to Canadian society" on the one hand, and "the danger of persecution upon *refoulement*" on the other. Again, the Minister is in a superior position to a court in making this assessment. Finally, the nature of the case points to deference. The inquiry is highly fact-based and contextual. As in *Baker*, *supra*, at para. 61, the s. 53(1)(*b*) danger opinion "involves a considerable appreciation of the facts of that person's case, and is not one which involves the application or interpretation of definitive legal rules", suggesting it merits a wide degree of deference.

[32] These factors suggest that Parliament intended to grant the Minister a broad discretion in issuing a s. 53(1)(*b*) opinion, reviewable only where the Minister makes a patently unreasonable decision. It is true that the question of whether a refugee constitutes a danger to the security of Canada relates to human rights and engages fundamental human interests. However, it is our view that a deferential standard of ministerial review will not prevent human rights issues from being fully addressed, provided proper procedural safeguards are in place and provided that any decision to deport meets the constitutional requirements of the *Charter*.

[33] The House of Lords has taken the same view in *Rehman*, *supra*. Lord Hoffmann, following the events of September 11, 2001, added the following postscript to his speech (at para. 62):

> I wrote this speech some three months before the recent events in New York and Washington. They are a reminder that in matters of national security, the cost of failure can be high. *This seems to me to underline the need for the*

> *judicial arm of government to respect the decisions of ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security.* It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove. [Emphasis added.]

[34] It follows that the weighing of relevant factors is not the function of a court reviewing the exercise of ministerial discretion (see, for instance, *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 at p. 607, 114 D.L.R. (4th) 385, where Iacobucci J. explained that a reviewing court should not disturb a decision based on a "broad discretion" unless the tribunal has "made some error in principle in exercising its discretion or has exercised its discretion in a capricious or vexatious manner").

[35] The Court's recent decision in *Baker*, *supra*, did not depart from this view. Rather, it confirmed that the pragmatic and functional approach should be applied to all types of administrative decisions in recognition of the fact that a uniform approach to the determination of the proper standard of review is preferable, and that there may be special situations where even traditionally discretionary decisions will best be reviewed according to a standard other than the deferential standard which was universally applied in the past to ministerial decisions (see *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, 148 D.L.R. (4th) 385).

[36] The Court specified in *Baker*, *supra*, that a nuanced approach to determining the appropriate standard of review was necessary given the difficulty in rigidly classifying discretionary and non-discretionary decisions (paras. 54 and 55). The Court also made it clear in *Baker* that its approach "should not be seen as reducing the level of deference given to decisions of a highly discretionary nature" (para. 56) and, moreover, that any ministerial obligation to consider certain factors "gives the applicant no right to a particular outcome or to the application of a particular legal test" (para. 74). To the extent this Court reviewed the Minister's discretion in that case, its decision was based on the ministerial delegate's failure to comply with *self-imposed* ministerial guidelines, as reflected in the objectives of the Act, international treaty obligations and,

most importantly, a set of published instructions to immigration officers.

[37] The passages in *Baker* referring to the "weight" of particular factors (see paras. 68 and 73-75) must be read in this context. It is the Minister who was obliged to give proper weight to the relevant factors and none other. *Baker* does not authorize courts reviewing decisions on the discretionary end of the spectrum to engage in a new weighing process, but draws on an established line of cases concerning the failure of ministerial delegates to consider and weigh implied limitations and/or patently relevant factors: see *Anisminic Ltd. v. Foreign Compensation Commission*, [1969] 2 A.C. 147 (H.L.); *Sheehan v. Ontario (Criminal Injuries Compensation Board)* (1974), 52 D.L.R. (3d) 728 (Ont. C.A.); *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2, 137 D.L.R. (3d) 558; *Dagg, supra*, at paras. 111-12, *per* La Forest J. (dissenting on other grounds).

[38] This standard appropriately reflects the different obligations of Parliament, the Minister and the reviewing court. Parliament's task is to establish the criteria and procedures governing deportation, within the limits of the Constitution. The Minister's task is to make a decision that conforms to Parliament's criteria and procedures as well as the Constitution. The court's task, if called upon to review the Minister's decision, is to determine whether the Minister has exercised her decision-making power within the constraints imposed by Parliament's legislation and the Constitution. If the Minister has considered the appropriate factors in conformity with these constraints, the court must uphold her decision. It cannot set it aside even if it would have weighed the factors differently and arrived at a different conclusion.

[39] This brings us to the question of the standard of review of the Minister's decision on whether the refugee faces a substantial risk of torture upon deportation. This question is characterized as constitutional by Robertson J.A., to the extent that the Minister's decision to deport to torture must ultimately conform to s. 7 of the *Charter*: see *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, 84 D.L.R. (4th) 438, *per* La Forest J.; and *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7, 195 D.L.R. (4th) 1, at para. 32. As mentioned earlier, whether there is a substantial risk of torture if Suresh is deported is a threshold question. The threshold question here is in large part a fact-driven inquiry. It requires consideration of

the human rights record of the home state, the personal risk faced by the claimant, any assurances that the claimant will not be tortured and their worth and, in that respect, the ability of the home state to control its own security forces, and more. It may also involve a reassessment of the refugee's initial claim and a determination of whether a third country is willing to accept the refugee. Such issues are largely outside the realm of expertise of reviewing courts and possess a negligible legal dimension. We are accordingly of the view that the threshold finding of whether Suresh faces a substantial risk of torture, as an aspect of the larger s. 53(1)(*b*) opinion, attracts deference by the reviewing court to the Minister's decision. The court may not reweigh the factors considered by the Minister, but may intervene if the decision is not supported by the evidence or fails to consider the appropriate factors. It must be recognized that the nature of the evidence required may be limited by the nature of the inquiry. This is consistent with the reasoning of this Court in *Kindler*, *supra*, at pp. 836-37, where considerable deference was shown to ministerial decisions involving similar considerations in the context of a constitutional revision, that is in the context of a decision where the s. 7 interest was engaged.

[40] Before leaving the issue of standard of review, it is useful to underline the distinction between standard of review and the evidence required to establish particular facts in issue. For example, some authors suggest a lower evidentiary standard may govern decisions at entry (under ss. 2 and 19 of the Act) than applies to decisions to deport a landed Convention refugee under s. 53(1)(*b*): see J.C. Hathaway and C.J. Harvey, "Framing Refugee Protection in the New World Disorder" (2001), 34 *Cornell Int'l L.J.* 257, at p. 288. This does not imply different standards of review. Different administrative decisions involve different factors, stemming from the statutory scheme and the particular issues raised. Yet the same standard of review may apply.

[41] We conclude that in reviewing ministerial decisions to deport under the Act, courts must accord deference to those decisions. If the Minister has considered the correct factors, the courts should not reweigh them. Provided the s. 53(1)(*b*) decision is not patently unreasonable — unreasonable on its face, unsupported by evidence, or vitiated by failure to consider the proper factors or apply the appropriate procedures — it should be upheld. At the same time, the

courts have an important role to play in ensuring that the Minister has considered the relevant factors and complied with the requirements of the Act and the Constitution.

2. *Are the Conditions for Deportation in the Immigration Act Constitutional?*

(a) Does the Act Permit Deportation to Torture Contrary to the Charter?

[42] Suresh opposes his deportation to Sri Lanka on the ground, among others, that on return he faces a substantial risk of torture. McKeown J. found that Suresh had not shown that he personally would risk torture according to the "substantial grounds" test. His finding seems to conflict with that of the immigration officer who acknowledged "that there is a risk to Mr. Suresh on his return to Sri Lanka", but concluded that "this is counterbalanced by the serious terrorist activities to which he has been a party". Acting on these findings, the Minister ordered Suresh deported.

[43] Section 53 of the *Immigration Act* permits deportation "to a country where the person's life or freedom would be threatened". The question is whether such deportation violates s. 7 of the *Charter*. "Torture" is defined in art. 1 of the CAT as including the unlawful use of psychological or physical techniques to intentionally inflict severe pain and suffering on another, when such pain or suffering is inflicted by or with the consent of public officials. A similar definition of "torture" may be found in s. 269.1 of the *Criminal Code*, R.S.C. 1985, c. C-46.

[44] Section 7 of the *Charter* guarantees "everyone . . . the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice". It is conceded that "everyone" includes refugees and that deportation to torture may deprive a refugee of liberty, security and perhaps life. The only question is whether this deprivation is in accordance with the principles of fundamental justice. If it is not, s. 7 is violated and, barring justification of the violation under s. 1 of the *Charter*, deportation to torture is unconstitutional.

[45] The principles of fundamental justice are to be found in "the basic tenets of our legal system": *Burns*, *supra*, at para. 70. "They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system": *Re B.C.*

Motor Vehicle Act, [1985] 2 S.C.R. 486 at p. 503, 24 D.L.R. (4th) 536 *sub nom. Reference re: Section 94(2) of the Motor Vehicle Act*. The relevant principles of fundamental justice are determined by a contextual approach that "takes into account the nature of the decision to be made": *Kindler*, *supra*, at p. 848, *per* McLachlin J. (as she then was). The approach is essentially one of balancing. As we said in *Burns*, "[i]t is inherent in the . . . balancing process that the outcome may well vary from case to case depending on the mix of contextual factors put into the balance" (para. 65). Deportation to torture, for example, requires us to consider a variety of factors, including the circumstances or conditions of the potential deportee, the danger that the deportee presents to Canadians or the country's security, and the threat of terrorism to Canada. In contexts in which the most significant considerations are general ones, it is likely that the balance will be struck the same way in most cases. It would be impossible to say in advance, however, that the balance will necessarily be struck the same way in every case.

[46] The inquiry into the principles of fundamental justice is informed not only by Canadian experience and jurisprudence, but also by international law, including *jus cogens*. This takes into account Canada's international obligations and values as expressed in "[t]he various sources of international human rights law — declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, [and] customary norms": *Burns*, paras. 79-81; *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 at p. 348, 38 D.L.R. (4th) 161, *per* Dickson C.J. (dissenting); see also *Re B.C. Motor Vehicle Act*, *supra*, at p. 512; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 at pp. 1056-57, 59 D.L.R. (4th) 416; *R. v. Keegstra*, [1990] 3 S.C.R. 697, at p. 750; and *Baker*, *supra*.

[47] Determining whether deportation to torture violates the principles of fundamental justice requires us to balance Canada's interest in combatting terrorism and the Convention refugee's interest in not being deported to torture. Canada has a legitimate and compelling interest in combatting terrorism. But it is also committed to fundamental justice. The notion of proportionality is fundamental to our constitutional system. Thus we must ask whether the government's proposed response is reasonable in relation to the threat. In the past, we have held that some responses are so extreme that they are *per se*

disproportionate to any legitimate government interest: see *Burns*, *supra*. We must ask whether deporting a refugee to torture would be such a response.

[48] With these thoughts in mind, we turn to the question of whether the government may, consistent with the principles of fundamental justice, expel a suspected terrorist to face torture elsewhere: first from the Canadian perspective; then from the perspective of the international norms that inform s. 7.

(i) The Canadian Perspective

[49] The inquiry at this stage is whether, viewed from a Canadian perspective, returning a refugee to the risk of torture because of security concerns violates the principles of fundamental justice where the deportation is effected for reasons of national security. A variety of phrases has been used to describe conduct that would violate fundamental justice. The most frequent is "conduct that would shock the Canadian conscience": see *Kindler*, *supra*, at p. 852, and *Burns*, *supra*, at para. 60. Without resorting to opinion polls, which may vary with the mood of the moment, is the conduct fundamentally unacceptable to our notions of fair practice and justice?

[50] It can be confidently stated that Canadians do not accept torture as fair or compatible with justice. Torture finds no condonation in our *Criminal Code*; indeed the *Code* prohibits it (see, for example, s. 269.1). The Canadian people, speaking through their elected representatives, have rejected all forms of state-sanctioned torture. Our courts ensure that confessions cannot be obtained by threats or force. The last vestiges of the death penalty were abolished in 1998 and Canada has not executed anyone since 1962: see *An Act to Amend the National Defence Act and to make consequential amendments to other Acts*, S.C. 1998, c. 35. In *Burns*, the then Minister of Justice, in his decision on the order to extradite the respondents Burns and Rafay, emphasized that "in Canada, Parliament has decided that capital punishment is not an appropriate penalty for crimes committed here, and I am firmly committed to that position" (para. 76). While we would hesitate to draw a direct equation between government policy or public opinion at any particular moment and the principles of fundamental justice, the fact that successive governments and Parliaments have refused to inflict torture and the death penalty surely reflects a fundamental Canadian belief about the appropriate limits of a criminal justice system.

[51] When Canada adopted the *Charter* in 1982, it affirmed the opposition of the Canadian people to government-sanctioned torture by proscribing cruel and unusual treatment or punishment in s. 12. A punishment is cruel and unusual if it "is so excessive as to outrage standards of decency": see *R. v. Smith*, [1987] 1 S.C.R. 1045 at pp. 1072-73, 40 D.L.R. (4th) 435, *per* Lamer J. (as he then was). It must be so inherently repugnant that it could never be an appropriate punishment, however egregious the offence. Torture falls into this category. The prospect of torture induces fear and its consequences may be devastating, irreversible, indeed, fatal. Torture may be meted out indiscriminately or arbitrarily for no particular offence. Torture has as its end the denial of a person's humanity; this end is outside the legitimate domain of a criminal justice system: see, generally, E. Scarry, *The Body in Pain: The Making and Unmaking of the World* (1985), at pp. 27-59. Torture is an instrument of terror and not of justice. As Lamer J. stated in *Smith*, *supra*, at pp. 1073-74, "some punishments or treatments will always be grossly disproportionate and will always outrage our standards of decency: for example, the infliction of corporal punishment". As such, torture is seen in Canada as fundamentally unjust.

[52] We may thus conclude that Canadians reject government-sanctioned torture in the domestic context. However, this appeal focuses on the prospect of Canada expelling a person to face torture in another country. This raises the question whether s. 7 is implicated at all. On one theory, our inquiry need be concerned only with the Minister's act of deporting and not with the possible consequences that the expelled refugee may face upon arriving in the destination country. If our s. 7 analysis is confined to what occurs on Canadian soil as a necessary and immediate result of the Minister's decision, torture does not enter the picture. If, on the other hand, our analysis must take into account what may happen to the refugee in the destination country, we surely cannot ignore the possibility of grievous consequences such as torture and death, if a risk of those consequences is established.

[53] We discussed this issue at some length in *Burns*, *supra*. In that case, the United States sought the extradition of two Canadian citizens to face aggravated first degree murder charges in the state of Washington. The respondents Burns and Rafay contested the extradition on the grounds that the Minister had not sought assurances

that the death penalty would not be imposed. We rejected the respondents' argument that extradition in such circumstances would violate their s. 12 right not to be subjected to cruel and unusual treatment or punishment, finding that the nexus between the extradition order and the mere possibility of capital punishment was too remote to engage s. 12. We agreed, however, with the respondents' argument under s. 7, writing that "[s]ection 7 is concerned not only with the act of extraditing, but also the *potential* consequences of the act of extradition" (para. 60 (emphasis in original)). We cited, in particular, *Canada v. Schmidt*, [1987] 1 S.C.R. 500 at p. 522, 39 D.L.R. (4th) 18 *sub nom. R. v. Schmidt*, in which La Forest J. recognized that "in some circumstances the manner in which the foreign state will deal with the fugitive on surrender, whether that course of conduct is justifiable or not under the law of that country, may be such that it would violate the principles of fundamental justice to surrender an accused under those circumstances". In that case, La Forest J. referred specifically to the possibility that a country seeking extradition might torture the accused on return.

[54] While the instant case arises in the context of deportation and not extradition, we see no reason that the principle enunciated in *Burns* should not apply with equal force here. In *Burns*, nothing in our s. 7 analysis turned on the fact that the case arose in the context of extradition rather than refoulement. Rather, the governing principle was a general one — namely, that the guarantee of fundamental justice applies even to deprivations of life, liberty or security effected by actors other than our government, if there is a sufficient causal connection between our government's participation and the deprivation ultimately effected. We reaffirm that principle here. At least where Canada's participation is a necessary precondition for the deprivation and where the deprivation is an entirely foreseeable consequence of Canada's participation, the government does not avoid the guarantee of fundamental justice merely because the deprivation in question would be effected by someone else's hand.

[55] We therefore disagree with the Court of Appeal's suggestion that, in expelling a refugee to a risk of torture, Canada acts only as an "involuntary intermediary" (para. 120). Without Canada's action, there would be no risk of torture. Accordingly, we cannot pretend that Canada is merely a passive participant. That is not to say, of course, that *any* action by Canada that results in a person being

tortured or put to death would violate s. 7. There is always the question, as there is in this case, of whether there is a *sufficient* connection between Canada's action and the deprivation of life, liberty, or security.

[56] While this Court has never directly addressed the issue of whether deportation to torture would be inconsistent with fundamental justice, we have indicated on several occasions that extraditing a person to face torture would be inconsistent with fundamental justice. As we mentioned above, in *Schmidt*, *supra*, La Forest J. noted that s. 7 is concerned not only with the immediate consequences of an extradition order but also with "the manner in which the foreign state will deal with the fugitive on surrender, whether that course of conduct is justifiable or not under the law of that country" (p. 522). La Forest J. went on to specifically identify the possibility that the requesting country might torture the accused and then to state that "[s]ituations falling far short of this may well arise where the nature of the criminal procedures or penalties in a foreign country sufficiently shocks the conscience as to make a decision to surrender a fugitive for trial there one that breaches the principles of fundamental justice enshrined in s. 7" (p. 522).

[57] A similar view was expressed by McLachlin J. in *Kindler*, *supra*. In that case, McLachlin J. wrote that in some instances the "social consensus" as to whether extradition would violate fundamental justice would be clear. "This would be the case if, for instance, the fugitive faced torture on return to his or her home country" (p. 851). Concurring, La Forest J. wrote, similarly, that "[t]here are, of course, situations where the punishment imposed following surrender — torture, for example — would be so outrageous to the values of the Canadian community that the surrender would be unacceptable" (p. 832).

[58] Canadian jurisprudence does not suggest that Canada may never deport a person to face treatment elsewhere that would be unconstitutional if imposed by Canada directly, on Canadian soil. To repeat, the appropriate approach is essentially one of balancing. The outcome will depend not only on considerations inherent in the general context but also on considerations related to the circumstances and condition of the particular person whom the government seeks to expel. On the one hand stands the state's genuine interest in combatting terrorism, preventing Canada from becoming a safe

haven for terrorists, and protecting public security. On the other hand stands Canada's constitutional commitment to liberty and fair process. This said, Canadian jurisprudence suggests that this balance will usually come down against expelling a person to face torture elsewhere.

(ii) The International Perspective

[59] We have examined the argument that from the perspective of Canadian law to deport a Convention refugee to torture violates the principles of fundamental justice. However, that does not end the inquiry. The provisions of the *Immigration Act* dealing with deportation must be considered in their international context: *Pushpanathan*, *supra*. Similarly, the principles of fundamental justice expressed in s. 7 of the *Charter* and the limits on rights that may be justified under s. 1 of the *Charter* cannot be considered in isolation from the international norms which they reflect. A complete understanding of the Act and the *Charter* requires consideration of the international perspective.

[60] International treaty norms are not, strictly speaking, binding in Canada unless they have been incorporated into Canadian law by enactment. However, in seeking the meaning of the Canadian Constitution, the courts may be informed by international law. Our concern is not with Canada's international obligations *qua* obligations; rather, our concern is with the principles of fundamental justice. We look to international law as evidence of these principles and not as controlling in itself.

[61] It has been submitted by the intervener, Amnesty International, that the absolute prohibition on torture is a peremptory norm of customary international law, or *jus cogens*. Articles 53 and 64 of the *Vienna Convention on the Law of Treaties*, Can. T.S. 1980 No. 37, provide that existing or new peremptory norms prevail over treaties. Article 53 defines a "peremptory norm" as

> . . . a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

This raises the question of whether the prohibition on torture is a peremptory norm. Peremptory norms develop over time and by general consensus of the international community. This is the difficulty in interpreting international law; it is often impossible to pinpoint

when a norm is generally accepted and to identify who makes up the international community. As noted by L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status* (1988), at pp. 723-24:

> The clarification of the notion of jus cogens in international law is advancing, but is still far from being completed.
>
> On the other hand, the international community of States has been *inactive in stating expressly* which norms it recognizes as peremptory in the present-day international law. In the opinion of the present writer, this inactivity, and the consequent uncertainty as to which norms are peremptory, constitute at present *the main problem of the viability of jus cogens*. [Emphasis in original.]

[62] In the case at bar, there are three compelling indicia that the prohibition of torture is a peremptory norm. First, there is the great number of multilateral instruments that explicitly prohibit torture: see *Geneva Convention Relative to the Treatment of Prisoners of War*, Can. T.S. 1965 No. 20, p. 84 (1949), art. 3; *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Can. T.S. 1965 No. 20, p. 25 (1949), art. 3; *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, Can. T.S. 1965 No. 20, p. 55 (1949), art. 3; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Can. T.S. 1965 No. 20, p. 163 (1949), art. 3; *Universal Declaration of Human Rights*, G.A. Res. 217A (III), UN Doc. A/810, at 71 (1948), art. 5; *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 3452 (XXX), UN Doc. A/10034 (1975); *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47 (ICCPR) (1966), art. 7; *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 221 (1950), art. 3; *American Convention on Human Rights*, 1144 U.N.T.S. 123 (1969), art. 5; *African Charter on Human and Peoples' Rights* (1982), 21 I.L.M. 58 (1981), art. 5; *Universal Islamic Declaration of Human Rights* (1981), 9 *The Muslim World League Journal* 25 (1981), art. VII.

[63] Second, Amnesty International submitted that no state has ever legalized torture or admitted to its deliberate practice and that governments accused of practising torture regularly deny their involvement, placing responsibility on individual state agents or groups outside the government's control. Therefore, it argues that

the weight of these domestic practices is further evidence of a universal acceptance of the prohibition on torture. Counsel for the respondents, while not conceding this point, did not refer this Court to any evidence of state practice to contradict this submission. However, it is noted in most academic writings that most, if not all states have officially prohibited the use of torture as part of their administrative practices, see: Hannikainen, *supra*, at p. 503.

[64] Last, a number of international authorities state that the prohibition on torture is an established peremptory norm: see Hannikainen, *supra*, at p. 509; M.N. Shaw, *International Law* (4th ed. 1997), at pp. 203-4; *Prosecutor v. Furundzija* (1998), 38 I.L.M. 317 (1999) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber); *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)*, [1999] 2 W.L.R. 827 (H.L.). Others do not explicitly set it out as a peremptory norm; however, they do generally accept that the protection of human rights or humanitarian rights is a peremptory norm: see I. Brownlie, *Principles of Public International Law* (5th ed. 1998), at p. 515 and C. Emanuelli, *Droit international public: Contribution à l'étude du droit international selon une perspective canadienne* (1998), at sections 251, 1394 and 1396.

[65] Although this Court is not being asked to pronounce on the status of the prohibition on torture in international law, the fact that such a principle is included in numerous multilateral instruments, that it does not form part of any known domestic administrative practice, and that it is considered by many academics to be an emerging, if not established peremptory norm, suggests that it cannot be easily derogated from. With this in mind, we now turn to the interpretation of the conflicting instruments at issue in this case.

[66] Deportation to torture is prohibited by both the ICCPR, which Canada ratified in 1976, and the CAT, which Canada ratified in 1987. The relevant provisions of the ICCPR read:

> Article 4
>
> 1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law . . .

2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

. . . . .

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

While the provisions of the ICCPR do not themselves specifically address the permissibility of a state's expelling a person to face torture elsewhere, General Comment No. 20 to the ICCPR makes clear that art. 7 is intended to cover that scenario, explaining that "States parties must not expose individuals to the danger of torture . . . upon return to another country by way of their extradition, expulsion, or refoulement" (para. 9).

[67] We do not share Robertson J.A.'s view that General Comment No. 20 should be disregarded because it "contradicts" the clear language of art. 7. In our view, there is no contradiction between the two provisions. General Comment No. 20 does not run counter to art. 7; rather, it explains it. Nothing would prevent a state from adhering both to art. 7 and to General Comment No. 20, and General Comment No. 20 does not detract from rights preserved or provided by art. 7. The clear import of the ICCPR, read together with the General Comments, is to foreclose a state from expelling a person to face torture elsewhere.

[68] The CAT takes the same stand. The relevant provisions of that document read:

Article 1

1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

Article 2

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

2. No exceptional circumstances whatsoever . . . may be invoked as a justification of torture.

. . . . .

Article 3

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. [Emphasis added.]

. . . . .

Article 16

. . . . .

2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.

The CAT's import is clear: a state is not to expel a person to face torture, which includes both the physical and mental infliction of pain and suffering, elsewhere.

[69] Robertson J.A., however, held that the CAT's clear proscription of deportation to torture must defer to art. 33(2) of the *Refugee Convention*, which permits a country to refoule a refugee who is a danger to the country's security. The relevant provisions of the *Refugee Convention* state:

Article 33

1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

[70] Article 33 of the *Refugee Convention* appears on its face to stand in opposition to the categorical rejection of deportation to torture in the CAT. Robertson J.A., faced with this apparent contradiction, attempted to read the two conventions in a way that minimized the contradiction, holding that the anti-deportation provisions of the CAT were not binding, but derogable.

[71] We are not convinced that the contradiction can be resolved in this way. It is not apparent to us that the clear prohibitions on

torture in the CAT were intended to be derogable. First, the absence of an express prohibition against derogation in art. 3 of the CAT together with the "without prejudice" language of art. 16 do not seem to permit derogation. Nor does it follow from the assertion in art. 2(2) of CAT that "[n]o exceptional circumstances . . . may be invoked as a justification of torture", that the absence of such a clause in the art. 3 refoulement provision permits acts leading to torture in exceptional circumstances. Moreover, the history of art. 16 of the CAT suggests that it was intended to leave the door open to other legal instruments providing greater protection, not to serve as the means for reducing protection. During the deliberations of the Working Group that drafted the CAT, art. 16 was characterized as a "saving clause affirming the continued validity of other instruments prohibiting punishments or cruel, inhuman, or degrading treatment": *Convention against Torture, travaux préparatoires*, at p. 66. This undermines the suggestion that art. 16 can be used as a means of narrowing the scope of protection that the CAT was intended to provide.

[72] In our view, the prohibition in the ICCPR and the CAT on returning a refugee to face a risk of torture reflects the prevailing international norm. Article 33 of the *Refugee Convention* protects, in a limited way, refugees from threats to life and freedom from all sources. By contrast, the CAT protects everyone, without derogation, from state-sponsored torture. Moreover, the *Refugee Convention* itself expresses a "profound concern for refugees" and its principal purpose is to "assure refugees the widest possible exercise of . . . fundamental rights and freedoms" (Preamble). This negates the suggestion that the provisions of the *Refugee Convention* should be used to deny rights that other legal instruments make universally available to *everyone*.

[73] Recognition of the dominant status of the CAT in international law is consistent with the position taken by the UN Committee against Torture, which has applied art. 3(1) even to individuals who have terrorist associations. (The CAT provides for the creation of a Committee against Torture to monitor compliance with the treaty: see CAT, Part II, arts. 17-24.) More particularly, the Committee against Torture has advised that Canada should "[c]omply fully with article 3(1) . . . whether or not the individual is a serious criminal or security risk": see Committee against Torture, *Conclusions and*

Recommendations of the Committee against Torture: Canada, CAT/C/XXV/Concl.4, at para. 6(a).

[74] Finally, we note that the Supreme Court of Israel sitting as the High Court of Justice and the House of Lords have rejected torture as a legitimate tool to use in combatting terrorism and protecting national security: *Hat'm Abu Zayda v. State of Israel* (1999), 38 I.L.M. 1471; *Rehman*, *supra*, at para. 54, *per* Lord Hoffmann.

[75] We conclude that the better view is that international law rejects deportation to torture, even where national security interests are at stake. This is the norm which best informs the content of the principles of fundamental justice under s. 7 of the *Charter*.

(iii) Application to Section 53(1)(b) of the Immigration Act

[76] The Canadian rejection of torture is reflected in the international conventions to which Canada is a party. The Canadian and international perspectives in turn inform our constitutional norms. The rejection of state action leading to torture generally, and deportation to torture specifically, is virtually categoric. Indeed, both domestic and international jurisprudence suggest that torture is so abhorrent that it will almost always be disproportionate to interests on the other side of the balance, even security interests. This suggests that, barring extraordinary circumstances, deportation to torture will generally violate the principles of fundamental justice protected by s. 7 of the *Charter*. To paraphrase Lord Hoffmann in *Rehman*, *supra*, at para. 54, states must find some other way of ensuring national security.

[77] The Minister is obliged to exercise the discretion conferred upon her by the *Immigration Act* in accordance with the Constitution. This requires the Minister to balance the relevant factors in the case before her. As stated in *Rehman*, *supra*, at para. 56, *per* Lord Hoffmann:

> The question of whether the risk to national security is sufficient to justify the appellant's deportation cannot be answered by taking each allegation *seriatim* and deciding whether it has been established to some standard of proof. It is a question of evaluation and judgment, in which it is necessary to take into account not only the degree of probability of prejudice to national security but also the importance of the security interest at stake and the serious consequences of deportation for the deportee.

Similarly, Lord Slynn of Hadley stated, at para. 16:

> Whether there is . . . a real possibility [of an adverse effect on the U.K. even if it is not direct or immediate] is a matter which has to be weighed up by the

> Secretary of State and balanced against the possible injustice to th[e] individual if a deportation order is made.

In Canada, the balance struck by the Minister must conform to the principles of fundamental justice under s. 7 of the *Charter*. It follows that insofar as the *Immigration Act* leaves open the possibility of deportation to torture, the Minister should generally decline to deport refugees where on the evidence there is a substantial risk of torture.

[78] We do not exclude the possibility that in exceptional circumstances, deportation to face torture might be justified, either as a consequence of the balancing process mandated by s. 7 of the *Charter* or under s. 1. (A violation of s. 7 will be saved by s. 1 "only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like": see *Re B.C. Motor Vehicle Act*, *supra*, at p. 518; and *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, 177 D.L.R. (4th) 124, at para. 99.) Insofar as Canada is unable to deport a person where there are substantial grounds to believe he or she would be tortured on return, this is not because art. 3 of the CAT directly constrains the actions of the Canadian government, but because the fundamental justice balance under s. 7 of the *Charter* generally precludes deportation to torture when applied on a case-by-case basis. We may predict that it will rarely be struck in favour of expulsion where there is a serious risk of torture. However, as the matter is one of balance, precise prediction is elusive. The ambit of an exceptional discretion to deport to torture, if any, must await future cases.

[79] In these circumstances, s. 53(1)(*b*) does not violate s. 7 of the *Charter*. What is at issue is not the legislation, but the Minister's obligation to exercise the discretion s. 53 confers in a constitutional manner.

(b) Are the Terms "Danger to the Security of Canada" and "Terrorism" Unconstitutionally Vague?

(i) "Danger to the Security of Canada"

[80] In order to deny the benefit of s. 53(1) to a person seeking its protection, the Minister must certify that the person constitutes a "danger to the security of Canada". Suresh argues that this phrase is unconstitutionally vague.

[81] A vague law may be unconstitutional for either of two reasons: (1) because it fails to give those who might come within the

ambit of the provision fair notice of the consequences of their conduct; or (2) because it fails to adequately limit law enforcement discretion: see *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, 93 D.L.R. (4th) 36. In the same case, this Court held that "a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate" (p. 643).

[82] Robertson J.A. found that the phrase "danger to the security of Canada", which is not defined in the *Immigration Act*, is not unconstitutionally vague (paras. 56-64). He conceded that the phrase was imprecise but reasoned that whether a person poses a danger to the security of Canada could be determined by "the individual's degree of association or complicity with a terrorist organization" (para. 63). The government similarly argues that the phrase is not unconstitutionally vague; it contends that the phrase "refer[s] to the possibility that someone's presence is harmful to national security in terms of the inadmissible classes" listed in s. 19 and referred to in s. 53. It suggests that the phrase can be "interpreted in the light of international law as a whole" and submits that the security of Canada is dependent on the security of other countries. On this interpretation, it need not be shown that the person's presence in Canada poses a risk here. All that need be shown is that deportation may have a result that, viewed generally, enhances the security of Canada.

[83] We agree with the government and Robertson J.A. that the phrase "danger to the security of Canada" is not unconstitutionally vague. However, we do not interpret the phrase exactly as he or the government suggests. We would not conflate s. 19's reference to membership in a terrorist movement with "danger to the security of Canada". While the two may be related, "danger to the security of Canada", in our view, must mean something more than just "person described in s. 19".

[84] We would also, contrary to the government's submission, distinguish "danger to the security of Canada" from "danger to the public", although we recognize that the two phrases may overlap. The latter phrase clearly is intended to address threats to individuals in Canada, but its application is restricted by requiring that any individual who is declared to be a "danger to the public" have been convicted of a serious offence: *Immigration Act*, s. 53(1)(*a*), (*c*), and (*d*). The government's suggested reading of "danger to the security of Canada" effectively does an end-run around the requirement in

art. 33(2) of the *Refugee Convention* that no one may be refouled as a danger to the community of the country unless he has first been convicted by a final judgment of a particularly serious crime.

[85] Subject to these qualifications, we accept that a fair, large and liberal interpretation in accordance with international norms must be accorded to "danger to the security of Canada" in deportation legislation. We recognize that "danger to the security of Canada" is difficult to define. We also accept that the determination of what constitutes a "danger to the security of Canada" is highly fact-based and political in a general sense. All this suggests a broad and flexible approach to national security and, as discussed above, a deferential standard of judicial review. Provided the Minister is able to show evidence that reasonably supports a finding of danger to the security of Canada, courts should not interfere with the Minister's decision.

[86] The question arises whether the Minister must present direct evidence of a specific danger to the security of *Canada*. It has been argued that under international law the state must prove a connection between the terrorist activity and the security of the deporting country: Hathaway and Harvey, *supra*, at pp. 289-90. It has also been suggested that the *travaux préparatoires* to the *Refugee Convention* indicate that threats to the security of another state were not intended to qualify as a danger sufficient to permit refoulement to torture. Threats to the security of another state were arguably not intended to come within the term, nor were general concerns about terrorism intended to be sufficient: see *Refugee Convention, travaux préparatoires*, A/CONF.2/SR.16, at p. 8 ("Among the great mass of refugees it was inevitable that some persons should be tempted to engage in activities on behalf of a foreign Power against the country of their asylum, and it would be unreasonable to expect the latter not to safeguard itself against such a contingency"); see A. Grahl-Madsen, *Commentary on the Refugee Convention, 1951* (1997), at p. 236 (" '[T]he security of the country' is invoked against acts of a rather serious nature endangering directly or indirectly the constitution (Government), the territorial integrity, the independence, or the external peace of the country concerned").

[87] Whatever the historic validity of insisting on direct proof of specific danger to the deporting country, as matters have evolved, we believe courts may now conclude that the support of terrorism

abroad raises a possibility of adverse repercussions on Canada's security: see *Rehman*, *supra*, *per* Lord Slynn of Hadley, at paras. 16 and 17. International conventions must be interpreted in the light of current conditions. It may once have made sense to suggest that terrorism in one country did not necessarily implicate other countries. But after the year 2001, that approach is no longer valid.

[88] First, the global transport and money networks that feed terrorism abroad have the potential to touch all countries, including Canada, and to thus implicate them in the terrorist activity. Second, terrorism itself is a worldwide phenomenon. The terrorist cause may focus on a distant locale, but the violent acts that support it may be close at hand. Third, preventive or precautionary state action may be justified; not only an immediate threat but also possible future risks must be considered. Fourth, Canada's national security may be promoted by reciprocal co-operation between Canada and other states in combating international terrorism. These considerations lead us to conclude that to insist on direct proof of a specific threat to Canada as the test for "danger to the security of Canada" is to set the bar too high. There must be a real and serious possibility of adverse effect to Canada. But the threat need not be direct; rather it may be grounded in distant events that indirectly have a real possibility of harming Canadian security.

[89] While the phrase "danger to the security of Canada" must be interpreted flexibly, and while courts need not insist on direct proof that the danger targets Canada specifically, the fact remains that to refoule a refugee under s. 53(1)(*b*) to torture requires evidence of a serious threat to national security. To suggest that something less than serious threats founded on evidence would suffice to deport a refugee to torture would be to condone unconstitutional application of the *Immigration Act*. Insofar as possible, statutes must be interpreted to conform to the Constitution. This supports the conclusion that while "danger to the security of Canada" must be given a fair, large and liberal interpretation, it nevertheless demands proof of a potentially serious threat.

[90] These considerations lead us to conclude that a person constitutes a "danger to the security of Canada" if he or she poses a serious threat to the security of Canada, whether direct or indirect, and bearing in mind the fact that the security of one country is often dependent on the security of other nations. The threat must be

"serious", in the sense that it must be grounded on objectively reasonable suspicion based on evidence and in the sense that the threatened harm must be substantial rather than negligible.

[91] This definition of "danger to the security of Canada" does not mean that Canada is unable to deport those who pose a risk to individual Canadians, but not the country. A different provision, the "danger to the *public*" provision, allows the government to deport those who pose no danger to the security of the country *per se* — those who pose a danger to Canadians, as opposed to a danger to Canada — provided they have committed a serious crime. Moreover, if a refugee is wanted for crimes in a country that will not torture him or her on return, the government may be free to extradite him or her to face those charges, whether or not he or she has committed crimes in Canada.

[92] We are satisfied that the term "danger to the security of Canada", defined as here suggested, gives those who might come within the ambit of the provision fair notice of the consequences of their conduct, while adequately limiting law enforcement discretion. We hold, therefore, that the term is not unconstitutionally vague.

(ii) "Terrorism"

[93] The term "terrorism" is found in s. 19 of the *Immigration Act*, dealing with denial of refugee status upon arrival in Canada. The Minister interpreted s. 19 as applying to terrorist acts post-admission and relied on alleged terrorist associations in Canada in seeking Suresh's deportation under s. 53(1)(*b*), which refers to a class of persons falling under s. 19. We do not in these reasons seek to define "terrorism" exhaustively — a notoriously difficult endeavour — but content ourselves with finding that the term provides a sufficient basis for adjudication and hence is not unconstitutionally vague. We share the view of Robertson J.A. that the term is not inherently ambiguous "even if the full meaning . . . must be determined on an incremental basis" (para. 69).

[94] One searches in vain for an authoritative definition of "terrorism". The *Immigration Act* does not define the term. Further, there is no single definition that is accepted internationally. The absence of an authoritative definition means that, at least at the margins, "the term is open to politicized manipulation, conjecture, and polemical interpretation": Factum of the intervener Canadian Arab Federation (CAF), at para. 8; see also W.R. Farrell, *The U.S.*

Government Response to Terrorism: In Search of an Effective Strategy (1982), at p. 6 ("The term [terrorism] is somewhat 'Humpty Dumpty' — anything we choose it to be"); O. Schachter, "The Extraterritorial Use of Force against Terrorist Bases" (1989), 11 *Houston J. Int'l L.* 309, at p. 309 ("[n]o single inclusive definition of international terrorism has been accepted by the United Nations or in a generally accepted multilateral treaty"); G. Levitt, "Is 'Terrorism' Worth Defining?" (1986), 13 *Ohio N.U. L. Rev.* 97, at p. 97 ("The search for a legal definition of terrorism in some ways resembles the quest for the Holy Grail"); C.C. Joyner, "Offshore Maritime Terrorism: International Implications and Legal Response" (1983), 36 *Naval War Col. Rev.* 16, at p. 20 (terrorism's "exact status under international law remains open to conjecture and polemical interpretation"); and J.B. Bell, *A Time of Terror: How Democratic Societies Respond to Revolutionary Violence* (1978), at p. x ("The very word [terrorism] becomes a litmus test for dearly held beliefs, so that a brief conversation on terrorist matters with almost anyone reveals a special world view, an interpretation of the nature of man, and a glimpse into a desired future").

[95] Even amongst those who agree on the definition of the term, there is considerable disagreement as to whom the term should be attached: see, e.g., I.M. Porras, "On Terrorism: Reflections on Violence and the Outlaw" (1994), *Utah L. Rev.* 119, at p. 124 (noting the general view that "terrorism" is poorly defined but stating that "[w]ith 'terrorism' . . . everyone means the same thing. What changes is not the meaning of the word, but rather the groups and activities that each person would include or exclude from the list"); D. Kash, "Abductions of Terrorists in International Airspace and on the High Seas" (1993), 8 *Fla. J. Int'l L.* 65, at p. 72 ("[A]n act that one state considers terrorism, another may consider as a valid exercise of resistance"). Perhaps the most striking example of the politicized nature of the term is that Nelson Mandela's African National Congress was, during the apartheid era, routinely labelled a terrorist organization, not only by the South African government but by much of the international community.

[96] We are not persuaded, however, that the term "terrorism" is so unsettled that it cannot set the proper boundaries of legal adjudication. The recently negotiated *International Convention for the Suppression of the Financing of Terrorism*, G.A. Res. 54/109,

December 9, 1999, approaches the definitional problem in two ways. First, it employs a functional definition in art. 2(1)(a), defining "terrorism" as "[a]n act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex". The annex lists nine treaties that are commonly viewed as relating to terrorist acts, such as the *Convention for the Suppression of Unlawful Seizure of Aircraft*, Can. T.S. 1972 No. 23, the *Convention on the Physical Protection of Nuclear Material* (1979), 18 I.L.M. 1419 and the *International Convention for the Suppression of Terrorist Bombings* (1998), 37 I.L.M. 249. Second, the Convention supplements this offence-based list with a stipulative definition of "terrorism". Article 2(1)(*b*) defines "terrorism" as:

> Any . . . act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

[97] In its submission to this Court, the CAF argued that this Court should adopt a functional definition of "terrorism", rather than a stipulative one. The argument is that defining "terrorism" by reference to specific acts of violence (e.g. "hijacking, hostage-taking, and terrorist bombing") would minimize politicization of the term (CAF factum, at paras. 11-14). It is true that the functional approach has received strong support from international law scholars and state representatives — support that is evidenced by the numerous international legal instruments that eschew stipulative definitions in favour of prohibitions on specific acts of violence. While we are not unaware of the danger that the term "terrorism" may be manipulated, we are not persuaded that it is necessary or advisable to altogether eschew a stipulative definition of the term in favour of a list that may change over time and that may in the end necessitate distinguishing some (proscribed) acts from other (non-proscribed) acts by reliance on a term like "terrorism". (We note that the CAF, in listing acts, at para. 11, that might be prohibited under a functional definition, lists "terrorist bombing" — a category that clearly would not avoid the necessity of defining "terrorism".)

[98] In our view, it may safely be concluded, following the *International Convention for the Suppression of the Financing of Terrorism*, that "terrorism" in s. 19 of the Act includes any "act intended to cause death or serious bodily injury to a civilian, or to

any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act". This definition catches the essence of what the world understands by "terrorism". Particular cases on the fringes of terrorist activity will inevitably provoke disagreement. Parliament is not prevented from adopting more detailed or different definitions of "terrorism". The issue here is whether the term as used in the *Immigration Act* is sufficiently certain to be workable, fair and constitutional. We believe that it is.

(iii) Conclusion

[99] We conclude that the terms "danger to the security of Canada" and "terrorism" are not unconstitutionally vague. Applying them to the facts found in this case, they would *prima facie* permit the deportation of Suresh provided the Minister certifies him to be a substantial danger to Canada and provided he is found to be engaged in terrorism or a member of a terrorist organization as set out in s. 19(1)(*e*) and (*f*) of the *Immigration Act*.

(c) Does Deportation for Membership in a Terrorist Organization Unjustifiably Violate the Charter Guarantees of Freedom of Expression and Freedom of Association?

[100] Suresh argues that the Minister's issuance of the certificate under s. 40.1 of the *Immigration Act* and the order declaring him a danger to the security of Canada under s. 53(1)(*b*) on the ground that he was a member of the LTTE violate his *Charter* rights of free expression and free association and cannot be justified. He points out that he has not been involved in actual terrorist activity in Canada, but merely in fundraising and support activities that may, in some part, contribute to the civil war efforts of Tamils in Sri Lanka. He also points out that it is not a criminal offence to belong to such an organization and that the government seeks to deport him for something that Canadian citizens may lawfully do without sanction. He suggests that inclusion of mere membership in an organization that has been or will be involved in acts of terrorism unjustifiably limits the freedom of Convention refugees to express their views on dissident movements outside the country, as well as their freedom to associate with other people in Canada who come from similar backgrounds. He points out that the alleged terrorist organizations he was

found to have been a member of are engaged in many positive endeavours to improve the lives of people in Canada and are not involved in violence here.

[101] The government, for its part, argues that support of organizations that have engaged in or may assist terrorism is not constitutionally protected expression or association. It argues that constitutional rights cannot be extended to inflict harm on others. This is so, in the government's submission, even though many of the activities of the organization may be laudable. Accordingly, it says, ss. 2(*b*) and 2(*d*) of the *Charter* do not apply.

[102] Section 19 of the *Immigration Act* applies to the entry of refugees into Canada. The *Refugee Convention*, and following it the *Immigration Act*, distinguish between the power of a state to refuse entry to a refugee, and its power to deport or "*refouler*" the refugee once the refugee is established in the country as a Convention refugee. The powers of a state to refuse entry are broader than to deport. The broader powers to refuse entry are based *inter alia* on the need to prevent criminals escaping justice in their own country from entering into Canada. No doubt the natural desire of states to reject unsuitable persons who by their conduct have put themselves "beyond the pale" also is a factor. See, generally, Hathaway and Harvey, *supra*.

[103] The main purport of s. 19(1) is to permit Canada to refuse entry to persons who are or have been engaged in terrorism or who are or have been members of terrorist organizations. However, the *Immigration Act* uses s. 19(1) in a second and different way. It uses it in s. 53(1), the deportation section, to define the class of Convention refugees who may be deported because they constitute a danger to the security of Canada. Thus a Convention refugee like Suresh may be deported if he comes within a class of persons defined in s. 19(1) and constitutes a danger to the security of Canada.

[104] At this point, an ambiguity in the combination of ss. 53 and 19 arises. Is the class of persons designated by the reference to s. 19 those persons *who at entry* were or had been associated with terrorist acts or members of terrorist organizations? Or was Parliament's intention to include those who *after entry* committed terrorist acts or were members of terrorist organizations? The Minister interprets s. 19, as incorporated into s. 53, as including conduct of refugees after entry.

[105] We do not find it necessary to resolve this ambiguity, as in our opinion on either interpretation, s. 19 as incorporated into s. 53 does not breach the rights of free expression and association guaranteed by s. 2(*b*) and (*d*) of the *Charter*. If s. 19, as used in s. 53, is interpreted as referring only to conduct prior to the point of entry, no constitutional problem arises. On the other hand, if it is interpreted as referring to post-entry conduct, we are satisfied that the conduct caught by the section, interpreted properly by the Minister, fails to attract constitutional protection because it would be conduct associated with violent activity.

[106] Section 53, as discussed earlier in connection with deportation to face torture, requires the Minister to balance a variety of factors relating on the one hand to concerns of national security, and to fair process to the Convention refugee on the other. In balancing these factors, the Minister must exercise her discretion in conformity with the values of the *Charter*.

[107] It is established that s. 2 of the *Charter* does not protect expressive or associational activities that constitute violence: *Keegstra*, *supra*. This Court has, it is true, given a broad interpretation to freedom of expression, extending it, for example, to hate speech and perhaps even threats of violence: *Keegstra*; *R v. Zundel*, [1992] 2 S.C.R. 731, 95 D.L.R. (4th) 202. At the same time, the Court has made plain that the restriction of such expression may be justified under s. 1 of the *Charter*: see *Keegstra*, at pp. 732-33. The effect of s. 2(*b*) and the justification analysis under s. 1 of the *Charter* suggest that expression taking the form of violence or terror, or directed towards violence or terror, is unlikely to find shelter in the guarantees of the *Charter*.

[108] The Minister's discretion to deport under s. 53 of the *Immigration Act* is confined, on any interpretation of the section, to persons who have been engaged in terrorism or are members of terrorist organizations, and who also pose a threat to the security of Canada. Persons associated with terrorism or terrorist organizations — the focus of this argument — are, on the approach to terrorism suggested above, persons who are or have been associated with things directed at violence, if not violence itself. It follows that so long as the Minister exercises her discretion in accordance with the Act, there will be no s. 2(*b*) or (*d*) *Charter* violation.

[109] Suresh argues that s. 19 is so broadly drafted that it has the potential to catch persons who are members of or participate in the

activities of a terrorist organization in ignorance of its terrorist activities. He points out that many organizations alleged to support terrorism also support humanitarian aid both in Canada and abroad. Indeed, he argues that this is so of the LTTE, the association to which he is alleged to belong. While it seems clear on the evidence that Suresh was not ignorant of the LTTE's terrorist activities, he argues that it may be otherwise for others who were members or contributed to its activities. Thus without knowingly advocating terrorism and violence, they may be found to be part of the organization and hence subject to deportation. This, he argues, would clearly violate s. 2(*b*) and (*d*) of the *Charter*.

[110] We believe that it was not the intention of Parliament to include in the s. 19 class of suspect persons those who innocently contribute to or become members of terrorist organizations. This is supported by the provision found at the end of s. 19, which exempts from the s. 19 classes "persons who have satisfied the Minister that their admission would not be detrimental to the national interest". Section 19 must therefore be read as permitting a refugee to establish that his or her continued residence in Canada will not be detrimental to Canada, notwithstanding proof that the person is associated with or is a member of a terrorist organization. This permits a refugee to establish that the alleged association with the terrorist group was innocent. In such case, the Minister, exercising her discretion constitutionally, would find that the refugee does not fall within the targeted s. 19 class of persons eligible for deportation on national security grounds.

[111] It follows that the appellant has not established that s. 53's reference to s. 19 unjustifiably violates his *Charter* rights of freedom of expression and freedom of association. Moreover, since there is no s. 2 violation, there is no basis to interfere with the s. 40.1 certificate that was issued in October 1995.

[112] This brings us to Suresh's final argument, that the process by which the Minister assessed the risk of torture he faces should he be returned to Sri Lanka was flawed and violated his constitutional rights by unjustly exposing him to the risk of torture.

3. Are the Procedures for Deportation Set Out in the Immigration Act Constitutionally Valid?

[113] This appeal requires us to determine the procedural protections to which an individual is entitled under s. 7 of the *Charter*. In doing so, we find it helpful to consider the common law approach to

procedural fairness articulated by L'Heureux-Dubé J. in *Baker*, *supra*. In elaborating what is required by way of procedural protection under s. 7 of the *Charter* in cases of this kind, we wish to emphasize that our proposals should be applied in a manner sensitive to the context of specific factual situations. What is important are the basic principles underlying these procedural protections. The principles of fundamental justice of which s. 7 speaks, though not identical to the duty of fairness elucidated in *Baker*, are the same principles underlying that duty. As Professor Hogg has said, "The common law rules [of procedural fairness] are in fact basic tenets of the legal system, and they have evolved in response to the same values and objectives as s. 7": see P.W. Hogg, *Constitutional Law of Canada*, (looseleaf) Vol. 2, at para. 44.20. In *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 at pp. 212-13, 17 D.L.R. (4th) 422, Wilson J. recognized that the principles of fundamental justice demand, at a minimum, compliance with the common law requirements of procedural fairness. Section 7 protects substantive as well as procedural rights: *Re B.C. Motor Vehicle Act*, *supra*. Insofar as procedural rights are concerned, the common law doctrine summarized in *Baker*, *supra*, properly recognizes the ingredients of fundamental justice.

[114] We therefore find it appropriate to look to the factors discussed in *Baker* in determining not only whether the common law duty of fairness has been met, but also in deciding whether the safeguards provided satisfy the demands of s. 7. In saying this, we emphasize that, as is the case for the substantive aspects of s. 7 in connection with deportation to torture, we look to the common law factors not as an end in themselves, but to inform the s. 7 procedural analysis. At the end of the day, the common law is not constitutionalized; it is used to inform the constitutional principles that apply to this case.

[115] What is required by the duty of fairness — and therefore the principles of fundamental justice — is that the issue at hand be decided in the context of the statute involved and the rights affected: *Baker*, *supra*, at para. 21; *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 at p. 682, 69 D.L.R. (4th) 489; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, 75 D.L.R. (4th) 385, *per* Sopinka J. More specifically, deciding what procedural protections must be provided involves a consideration

of the following factors: (1) the nature of the decision made and the procedures followed in making it, that is, "'the closeness of the administrative process to the judicial process'"; (2) the role of the particular decision within the statutory scheme; (3) the importance of the decision to the individual affected; (4) the legitimate expectations of the person challenging the decision where undertakings were made concerning the procedure to be followed; and (5) the choice of procedure made by the agency itself: *Baker*, *supra*, at paras. 23-27. This is not to say that other factors or considerations may not be involved. This list of factors is non-exhaustive in determining the common law duty of fairness: *Baker*, *supra*, at para. 28. It must necessarily be so in determining the procedures demanded by the principles of fundamental justice.

[116] The nature of the decision to deport bears some resemblance to judicial proceedings. While the decision is of a serious nature and made by an individual on the basis of evaluating and weighing risks, it is also a decision to which discretion must attach. The Minister must evaluate not only the past actions of and present dangers to an individual under her consideration pursuant to s. 53, but also the future behaviour of that individual. We conclude that the nature of the decision militates neither in favour of particularly strong, nor particularly weak, procedural safeguards.

[117] The nature of the statutory scheme suggests the need for strong procedural safeguards. While the procedures set up under s. 40.1 of the *Immigration Act* are extensive and aim to ensure that certificates under that section are issued fairly and allow for meaningful participation by the person involved, there is a disturbing lack of parity between these protections and the lack of protections under s. 53(1)(*b*). In the latter case, there is no provision for a hearing, no requirement of written or oral reasons, no right of appeal — no procedures at all, in fact. As L'Heureux-Dubé J. stated in *Baker*, *supra*, "[g]reater procedural protections . . . will be required when no appeal procedure is provided within the statute, or when the decision is determinative of the issue and further requests cannot be submitted" (para. 24). This is particularly so where, as here, Parliament elsewhere in the Act has constructed fair and systematic procedures for similar measures.

[118] The third factor requires us to consider the importance of the right affected. As discussed above, the appellant's interest in

remaining in Canada is highly significant, not only because of his status as a Convention refugee, but also because of the risk of torture he may face on return to Sri Lanka as a member of the LTTE. The greater the effect on the life of the individual by the decision, the greater the need for procedural protections to meet the common law duty of fairness and the requirements of fundamental justice under s. 7 of the *Charter*. Deportation from Canada engages serious personal, financial and emotional consequences. It follows that this factor militates in favour of heightened procedural protections under s. 53(1)(*b*). Where, as here, a person subject to a s. 53(1)(*b*) opinion may be subjected to torture, this factor requires even more substantial protections.

[119] As discussed above, art. 3 of the CAT, which explicitly prohibits the deportation of persons to states where there are "substantial grounds" for believing that the person would be "in danger of being subjected to torture", informs s. 7 of the *Charter*. It is only reasonable that the same executive that bound itself to the CAT intends to act in accordance with the CAT's plain meaning. Given Canada's commitment to the CAT, we find that the appellant had the right to procedural safeguards, at the s. 53(1)(*b*) stage of the proceedings. More particularly, the phrase "substantial grounds" raises a duty to afford an opportunity to demonstrate and defend those grounds.

[120] The final factor we consider is the choice of procedures made by the agency. In this case, the Minister is free under the terms of the statute to choose whatever procedures she wishes in making a s. 53(1)(*b*) decision. As noted above, the Minister must be allowed considerable discretion in evaluating future risk and security concerns. This factor also suggests a degree of deference to the Minister's choice of procedures since Parliament has signalled the difficulty of the decision by leaving to the Minister the choice of how best to make it. At the same time, this need for deference must be reconciled with the elevated level of procedural protections mandated by the serious situation of refugees like Suresh, who if deported may face torture and violations of human rights in which Canada can neither constitutionally, nor under its international treaty obligations, be complicit.

[121] Weighing these factors together with all the circumstances, we are of the opinion that the procedural protections required by

s. 7 in this case do not extend to the level of requiring the Minister to conduct a full oral hearing or a complete judicial process. However, they require more than the procedure required by the Act under s. 53(1)(*b*) — that is, none — and they require more than Suresh received.

[122] We find that a person facing deportation to torture under s. 53(1)(*b*) must be informed of the case to be met. Subject to privilege or similar valid reasons for reduced disclosure, such as safeguarding confidential public security documents, this means that the material on which the Minister is basing her decision must be provided to the individual, including memoranda such as Mr. Gautier's recommendation to the Minister. Furthermore, fundamental justice requires that an opportunity be provided to respond to the case presented to the Minister. While the Minister accepted written submissions from the appellant in this case, in the absence of access to the materials she was receiving from her staff and on which she based much of her decision, Suresh and his counsel had no knowledge of which factors they specifically needed to address, nor any chance to correct any factual inaccuracies or mischaracterizations. Fundamental justice requires that written submissions be accepted from the subject of the order *after* the subject has been provided with an opportunity to examine the material being used against him or her. The Minister must then consider these submissions along with the submissions made by the Minister's staff.

[123] Not only must the refugee be informed of the case to be met, the refugee must also be given an opportunity to challenge the information of the Minister where issues as to its validity arise. Thus the refugee should be permitted to present evidence pursuant to s. 19 of the Act showing that his or her continued presence in Canada will not be detrimental to Canada, notwithstanding evidence of association with a terrorist organization. The same applies to the risk of torture on return. Where the Minister is relying on written assurances from a foreign government that a person would not be tortured, the refugee must be given an opportunity to present evidence and make submissions as to the value of such assurances.

[124] It may be useful to comment further on assurances. A distinction may be drawn between assurances given by a state that it will not apply the death penalty (through a legal process) and assurances by a state that it will not resort to torture (an illegal process).

We would signal the difficulty in relying too heavily on assurances by a state that it will refrain from torture in the future when it has engaged in illegal torture or allowed others to do so on its territory in the past. This difficulty becomes acute in cases where torture is inflicted not only with the collusion but through the impotence of the state in controlling the behaviour of its officials. Hence the need to distinguish between assurances regarding the death penalty and assurances regarding torture. The former are easier to monitor and generally more reliable than the latter.

[125] In evaluating assurances by a foreign government, the Minister may also wish to take into account the human rights record of the government giving the assurances, the government's record in complying with its assurances, and the capacity of the government to fulfill the assurances, particularly where there is doubt about the government's ability to control its security forces. In addition, it must be remembered that before becoming a Convention refugee, the individual involved must establish a well-founded fear of persecution (although not necessarily torture) if deported.

[126] The Minister must provide written reasons for her decision. These reasons must articulate and rationally sustain a finding that there are no substantial grounds to believe that the individual who is the subject of a s. 53(1)(*b*) declaration will be subjected to torture, execution or other cruel or unusual treatment, so long as the person under consideration has raised those arguments. The reasons must also articulate why, subject to privilege or valid legal reasons for not disclosing detailed information, the Minister believes the individual to be a danger to the security of Canada as required by the Act. In addition, the reasons must also emanate from the person making the decision, in this case the Minister, rather than take the form of advice or suggestion, such as the memorandum of Mr. Gautier. Mr. Gautier's report, explaining to the Minister the position of Citizenship and Immigration Canada, is more like a prosecutor's brief than a statement of reasons for a decision.

[127] These procedural protections need not be invoked in every case, as not every case of deportation of a Convention refugee under s. 53(1)(*b*) will involve risk to an individual's fundamental right to be protected from torture or similar abuses. It is for the refugee to establish a threshold showing that a risk of torture or similar abuse

exists before the Minister is obliged to consider fully the possibility. This showing need not be *proof* of the risk of torture to that person, but the individual must make out a *prima facie* case that there *may* be a risk of torture upon deportation. If the refugee establishes that torture is a real possibility, the Minister must provide the refugee with all the relevant information and advice she intends to rely on, provide the refugee an opportunity to address that evidence in writing, and after considering all the relevant information, issue responsive written reasons. This is the minimum required to meet the duty of fairness and fulfill the requirements of fundamental justice under s. 7 of the *Charter*.

[128] The Minister argues that even if the procedures used violated Suresh's s. 7 rights, that violation is justified as a reasonable limit under s. 1 of the *Charter*. Despite the legitimate purpose of s. 53(1)(*b*) of the *Immigration Act* in striking a balance between the need to fulfill Canada's commitments with respect to refugees and the maintenance of the safety and good order of Canadian society, the lack of basic procedural protections provided to Suresh cannot be justified by s. 1 in our view. Valid objectives do not, without more, suffice to justify limitations on rights. The limitations must be connected to the objective and be proportional. Here the connection is lacking. A valid purpose for excepting some Convention refugees from the protection of s. 53(1) of the Act does not justify the failure of the Minister to provide fair procedures where this exception involves a risk of torture upon deportation. Nor do the alleged fundraising activities of Suresh rise to the level of exceptional conditions contemplated by Lamer J. in *Re B.C. Motor Vehicle Act*, *supra*. Consequently, the issuance of a s. 53(1)(*b*) opinion relating to him without the procedural protections mandated by s. 7 is not justified under s. 1.

4. *Should the Minister's Order be Set Aside and a New Hearing Ordered?*

[129] We conclude that generally to deport a refugee, where there are grounds to believe that this would subject the refugee to a substantial risk of torture, would unconstitutionally violate the *Charter*'s s. 7 guarantee of life, liberty and security of the person. This said, we leave open the possibility that in an exceptional case such deportation might be justified either in the balancing approach

under ss. 7 or 1 of the *Charter*. We reject the argument that the terms "danger to the security of Canada" and "terrorism" are unconstitutionally vague. We also reject the argument that s. 53, by its reference to s. 19, unconstitutionally violates the *Charter* guarantees of freedom of expression and association. Finally, we conclude that the procedures for deportation under the *Immigration Act*, when applied in accordance with the safeguards outlined in these reasons, are constitutional.

[130] Applying these conclusions in the instant case, we find that Suresh made a *prima facie* showing that he might be tortured on return if expelled to Sri Lanka. Accordingly, he should have been provided with the procedural safeguards necessary to protect his s. 7 right not to be expelled to torture. He was not provided the required safeguards. We therefore remand the case to the Minister for reconsideration in accordance with the procedures set out in these reasons.

V. CONCLUSION

[131] The appeal is allowed with costs throughout on a party-and-party basis. The constitutional questions are answered as follows:

1. Does s. 53(1)(*b*) of the *Immigration Act*, R.S.C. 1985, c. I-2, offend s. 7 of the *Canadian Charter of Rights and Freedoms* to the extent that it does not prohibit the Minister of Citizenship and Immigration from removing a person from Canada to a country where the person may face a risk of torture?

Answer: No.

2. If the answer to question 1 is in the affirmative, is s. 53(1)(*b*) of the *Immigration Act* a reasonable limit within the meaning of s. 1 of the *Charter* on the rights of a person who may face a risk of torture if removed to a particular country?

Answer: It is not necessary to answer this question.

3. Do ss. 19(1)(*e*)(iv)(C), 19(1)(*f*)(ii) and 19(1)(*f*)(iii)(B) of the *Immigration Act* infringe the freedoms guaranteed under ss. 2(*b*) and 2(*d*) of the *Charter*?

Answer: Section 19(1) of the *Immigration Act*, as incorporated by s. 53(1), does not infringe ss. 2(*b*) and 2(*d*) of the *Charter*.

4. If the answer to question 3 is in the affirmative, are ss. 19(1)(*e*)(iv)(C), 19(1)(*f*)(ii) and 19(1)(*f*)(iii)(B) of the *Immigration Act* a reasonable limit on the rights of a person within the meaning of s. 1 of the *Charter*?

Answer: It is not necessary to answer this question.

5. Is the term "danger to the security of Canada" found in s. 53(1)(*b*) of the *Immigration Act* and/or the term "terrorism" found in s. 19(1)(*e*) and (*f*)

of the *Immigration Act* void for vagueness and therefore contrary to the principles of fundamental justice under s. 7 of the *Charter*?

Answer: No.

6. If the answer to question 5 is in the affirmative, are ss. 53(1)(*b*) and/or s. 19(1)(*e*) and (*f*) of the *Immigration Act* a reasonable limit on the rights of a person within the meaning of s. 1 of the *Charter*?

Answer: It is not necessary to answer this question.

Appeal allowed.

Ahani v. Minister of Citizenship and Immigration et al.

[Indexed as: Ahani v. Canada (Minister of Citizenship and Immigration)]

Court File No. 27792

Supreme Court of Canada
McLachlin C.J.C., L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

Heard: May 22, 2001
Judgment rendered: January 11, 2002

Immigration — Inadmissible and removable classes — Terrorism — Citizen of Iran granted refugee status — Canadian security officials later concluding that refugee worked for Iranian ministry involved in terrorism — Minister finding that refugee a serious risk to security of Canada and that refugee faced minimal risk of harm if returned to Iran — Refugee fully informed of case against him and given opportunity to respond — Any defect in procedure not prejudicing refugee — Minister's opinion not patently unreasonable — Canadian Charter of Rights and Freedoms, s. 7 — Immigration Act, R.S.C. 1985, c. I-2, s. 53(1)(b).

Constitutional law — Charter of Rights — Fundamental justice — Citizen of Iran granted refugee status — Canadian security officials later concluding that refugee worked for Iranian ministry involved in terrorism — Minister finding that refugee a serious risk to security of Canada and that refugee faced minimal risk of harm if returned to Iran — Refugee fully informed of case against him and given opportunity to respond — Any defect in procedure not prejudicing refugee — Minister's opinion not patently unreasonable — Canadian Charter of Rights and Freedoms, s. 7 — Immigration Act, R.S.C. 1985, c. I-2, s. 53(1)(b).

Administrative law — Duty to act fairly — Extent of duty — Citizen of Iran granted refugee status — Canadian security officials later concluding that refugee worked for Iranian ministry involved in terrorism — Minister finding