



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

COURT (PLENARY)

**CASE OF ABDULAZIZ, CABALES AND BALKANDALI v. THE  
UNITED KINGDOM**

*(Application no. 9214/80; 9473/81; 9474/81)*

JUDGMENT

STRASBOURG

28 May 1985

**In the case of Abdulaziz, Cabales and Balkandali\*,**

The European Court of Human Rights, taking its decision in plenary session in pursuance of Rule 50 of the Rules of Court and composed of the following judges:

Mr. G. WIARDA, *President*,  
Mr. R. RYSSDAL,  
Mr. J. CREMONA,  
Mr. Thór VILHJÁLMSSON,  
Mr. W. GANSHOF VAN DER MEERSCH,  
Mr. D. EVRIGENIS,  
Mr. F. GÖLCÜKLÜ,  
Mr. F. MATSCHER,  
Mr. L.-E. PETTITI,  
Mr. B. WALSH,  
Sir Vincent EVANS,  
Mr. C. RUSSO,  
Mr. R. BERNHARDT,  
Mr. J. GERSING,

and also of Mr. M.-A. EISSEN, *Registrar*, and Mr. H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 27 and 28 September and 24 November 1984 and 23 and 24 April 1985,

Delivers the following judgment, which was adopted on the last-mentioned date:

## PROCEDURE

1. The present case was referred to the Court by the European Commission of Human Rights ("the Commission") on 14 October 1983, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). The case originated in three applications (nos. 9214/80, 9473/81 and 9474/81) against the United Kingdom of Great Britain and Northern Ireland lodged with the Commission in 1980 and 1981 under Article 25 (art. 25) by Mrs. Nargis Abdulaziz, Mrs. Arcely Cabales and Mrs. Sohair Balkandali. When she filed

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\* Note by the Registrar: The case is numbered 15/1983/71/107-109. The second figure indicates the year in which the case was referred to the Court and the first figure its place on the list of cases referred in that year; the last two figures indicate, respectively, the case's order on the list of cases and of originating applications (to the Commission) referred to the Court since its creation.

her application, Mrs. Abdulaziz was either stateless or a citizen of Malawi, Mrs. Cabales was a citizen of the Philippines and Mrs. Balkandali was a citizen of the United Kingdom and Colonies.

Mrs. Abdulaziz, who at the outset was designated by the initial X, subsequently consented to the disclosure of her identity.

As is explained in paragraph 48 below, a question arose during the proceedings before the Court as to the validity of the second applicant's marriage; for the sake of convenience, the present judgment will refer to her throughout as "Mrs. Cabales".

2. The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The request sought a decision from the Court as to the existence of violations of Article 3 (art. 3), Article 8 (art. 8) (taken alone or in conjunction with Article 14) (art. 14+8) and Article 13 (art. 13).

3. In response to the inquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicants stated that they wished to take part in the proceedings pending before the Court and designated the lawyer who would represent them (Rule 30).

4. The Chamber of seven judges to be constituted included, as ex officio members, Sir Vincent Evans, the elected judge of British nationality (Article 43 of the Convention) (art. 43), and Mr. G. Wiarda, the President of the Court (Rule 21 para. 3 (b)). On 27 October 1983, the President drew by lot, in the presence of the Registrar, the names of the five other members, namely Mr. R. Ryssdal, Mr. W. Ganshof van der Meersch, Mr. G. Lagergren, Mr. L. Liesch and Mr. R. Macdonald (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

5. Mr. Wiarda, who had assumed the office of President of the Chamber (Rule 21 para. 5), consulted, through the Registrar, the Agent of the United Kingdom Government ("the Government"), the Commission's Delegate and the applicants' representative on the necessity for a written procedure (Rule 37 para. 1). On 10 November 1983, he directed that the said Agent and representative should each have until 10 February 1984 to file a memorial and that the Delegate should be entitled to file, within two months from the date of the transmission to him by the Registrar of whichever of the aforesaid documents should last be filed, a memorial in reply. The President subsequently agreed to extend the Government's time-limit until 9 March 1984 and the applicants' until 30 March 1984.

The Government's memorial was filed with the registry on 12 March and the applicants' on 30 March 1984. By letter of 15 May, the Secretary to the Commission informed the Registrar that the Delegate would present his observations at the hearings.

6. On 22 May 1984, the Chamber decided under Rule 50 to relinquish jurisdiction forthwith in favour of the plenary Court.

7. After consulting, through the Registrar, the Agent of the Government, the Commission's Delegate and the applicants' representative, the President directed on 28 May that the oral proceedings should open on 25 September 1984.

8. The hearings were held in public at the Human Rights Building, Strasbourg, on the appointed day. Immediately before they opened, the Court had held a preparatory meeting.

There appeared before the Court:

- for the Government:

Mrs. A. GLOVER, Legal Adviser,  
Foreign and Commonwealth Office, *Agent,*

Lord RAWLINSON, Q.C., *Counsel,*

Mr. J. LAWS, Barrister-at-Law, *Counsel,*

Mrs. S. EVANS, Home Office, *Advisers;*

Mrs. J. REISZ, Home Office, *Advisers;*

Mr. R. FRIES, Home Office, *Advisers;*

- for the Commission:

Mr. J.A. CARRILLO, *Delegate;*

- for the applicants:

Mr. M. BELOFF, Q.C., *Counsel,*

Prof. R. HIGGINS, *Counsel,*

Mr. S. GROSZ, Solicitor.

The Court heard addresses by Lord Rawlinson for the Government, by Mr. Carrillo for the Commission and by Mr. Beloff for the applicants, as well as their replies to questions put by the Court and by several of its members.

9. On various dates between 27 July 1984 and 8 February 1985, the registry received from, as the case may be, the Government, the applicants or the Commission replies to questions which the Court had addressed on 7 August 1984 to those appearing before it, further memorials and observations and certain other documents.

## AS TO THE FACTS

10. The applicants are lawfully and permanently settled in the United Kingdom. In accordance with the immigration rules in force at the material time, Mr. Abdulaziz, Mr. Cabales and Mr. Balkandali were refused permission to remain with or join them in that country as their husbands. The applicants maintained that, on this account, they had been victims of a practice of discrimination on the grounds of sex, race and also, in the case of Mrs. Balkandali, birth, and that there had been violations of Article 3 (art. 3) of the Convention and of Article 8 (art. 8), taken alone or in conjunction

with Article 14 (art. 14+8). They further alleged that, contrary to Article 13 (art. 13), no effective domestic remedy existed for the aforesaid claims.

## I. DOMESTIC LAW AND PRACTICE

### A. History and background

11. The evolution of immigration controls in the United Kingdom has to be seen in the light of the history of the British Empire and the corresponding developments in nationality laws. Originally all persons born within or having a specified connection with the United Kingdom or the dominions owed allegiance to the Crown and were British subjects. A common British nationality was, however, difficult to reconcile with the independence of the self-governing countries of the Commonwealth into which the Empire was transformed. As the various territories concerned became independent, they introduced their own citizenship laws but, for the purposes of United Kingdom law, persons having the citizenship of an independent Commonwealth country retained a special status, known as "British subject" or "Commonwealth citizen" (these terms being synonymous). This status was also held by "citizens of the United Kingdom and Colonies". Prior to 1 January 1983, the latter citizenship was, briefly, acquired by birth within the United Kingdom or one of its remaining dependencies, by descent from a father having that citizenship, by naturalisation or by registration (British Nationality Act 1948).

12. Whereas aliens have been subject to continuing strict immigration controls over a long period, the same is not true of Commonwealth citizens. Until 1962, the latter, irrespective of their local citizenship, all had freedom to enter the United Kingdom for work and permanent residence, without any restriction. A rapid rise in the influx of immigrants, especially in 1960 and 1961, and the consequent danger of the rate of immigration exceeding the country's capacity to absorb them led to a radical change in this situation. The Commonwealth Immigrants Act 1962, and then the Commonwealth Immigrants Act 1968, restricted the right of entry of, and imposed immigration controls on, certain classes of Commonwealth citizens, including citizens of the United Kingdom and Colonies, who did not have close links to Britain.

### B. The Immigration Act 1971

13. The existing immigration laws were amended and replaced by the Immigration Act 1971 ("the 1971 Act"), which came into force on 1 January 1973. One of its main purposes was to assimilate immigration controls over incoming Commonwealth citizens having no close links to Britain to the

corresponding rules for aliens. The Act created two new categories of persons for immigration purposes, namely those having the right of abode in the United Kingdom ("patrials") and those not having that right ("non-patrials").

14. "Patrials" were to be free from immigration controls. The status of "patrial" was intended to designate Commonwealth citizens who "belonged" to the United Kingdom and, in summary, was conferred (by section 2 of the 1971 Act) on:

(a) citizens of the United Kingdom and Colonies who had acquired that citizenship by birth, adoption, naturalisation or registration in the British Islands (that is, the United Kingdom, the Channel Islands and the Isle of Man), or were the children or grandchildren of any such persons;

(b) citizens of the United Kingdom and Colonies who had at any time been settled in the British Islands for at least five years;

(c) other Commonwealth citizens who were the children of a person having citizenship of the United Kingdom and Colonies by virtue of birth in the British Islands;

(d) women, being Commonwealth citizens, who were or had been married to a man falling within any of the preceding categories.

15. Under section 1(2) of the 1971 Act, "non-patrials" (whether Commonwealth citizens or aliens) "may live, work and settle in the United Kingdom by permission and subject to such regulation and control of their entry into, stay in and departure from the United Kingdom as is imposed" by the Act.

Subject to certain exceptions not relevant to the present case, a "non-patrial" shall not enter the United Kingdom unless given leave to do so (section 3(1)). He may be given such leave (or, if he is already in the country, leave to remain) either for a limited or for an indefinite period; in the former case, the leave may be subject to conditions restricting employment or requiring registration with the police or both (*ibid.*). Where limited leave to enter or remain is granted, it may subsequently be varied, either as regards its duration or the conditions attaching thereto but, if the limit on duration is removed, any conditions attached to the leave cease to apply (section 3(3)). The power to give or refuse leave to enter is exercised by immigration officers but the power to give or vary leave to remain can be exercised only by the Home Secretary (section 4(1)).

### **C. The Immigration Rules**

16. Under section 3(2) of the 1971 Act, the Home Secretary is obliged from time to time to lay before Parliament statements of the rules, or of any changes therein, laid down by him as to the practice to be followed in the administration of the Act for regulating entry into and stay in the United Kingdom. These rules contain instructions to immigration officers as to how

they shall exercise the statutory discretions given to them by the Act and statements of the manner in which the Home Secretary will exercise his own powers of control after entry. The rules are required to provide for the admission of persons coming for the purpose of taking employment, or for the purposes of study, or as visitors, or as dependants of persons lawfully in or entering the United Kingdom, but uniform provision does not have to be made for these categories and, in particular, account may be taken of citizenship or nationality (sections 1(4) and 3(2)). Thus, different rules can be and are made for nationals of the member States of the European Economic Community under Community law, and Irish citizens are in a special position.

17. The rules are subject to a negative resolution procedure whereby, if a resolution disapproving the Home Secretary's statement is passed by either House of Parliament within forty days of its being laid, he is required as soon as may be to make such changes as appear to him to be required in the circumstances and to lay the rules as amended before Parliament within forty days of the passing of the resolution (section 3(2)). The statement of rules thus amended is subject to the same procedure as the original statement. Because of the continuous nature of decision-making by immigration officers, the statement originally laid is not abrogated by any negative resolution; it will come into operation when made or on the date therein provided and will remain in force until replaced.

18. The exact legal status of the rules is of some complexity. This question was considered by the Court of Appeal in *R. v. Secretary of State for the Home Department, ex parte Hosenball* [1977] 3 All England Law Reports 452, when Lord Denning MR said:

"[The Home Secretary's rules] are not rules of law. They are rules of practice laid down for the guidance of immigration officers and tribunals who are entrusted with the administration of the [1971 Act]. They can be, and often are, prayed in aid by applicants before the courts in immigration cases. To some extent the courts must have regard to them because there are provisions in the Act itself, particularly in section 19, which show that in appeals to an adjudicator, if the immigration rules have not been complied with, then the appeal is to be allowed. In addition the courts always have regard to those rules, not only in matters where there is a right of appeal; but also in cases under prerogative writs where there is a question whether officers have acted fairly. But they are not rules in the nature of delegated legislation so as to amount to strict rules of law."

Lord Justice Geoffrey Lane also doubted whether the rules constituted delegated legislation. He observed: "These rules are very difficult to categorise or classify. They are in a class of their own. They are certainly a practical guide for ... immigration officers .... Indeed they are, as to large parts, ... little more than explanatory notes of the [1971 Act] itself." However, he noted that if Parliament disapproved of the rules, they were not thereby abrogated. Furthermore, at least as far as an adjudicator dealing with appeals was concerned, the rules had the force of law, although it

seemed that they could be departed from with the consent of the applicant himself.

Lord Justice Cumming-Bruce said:

"[The rules] are a totally different kind of publication from the rules that usually come into being under the authority delegated to Ministers under Acts of Parliament; ... they are not in my view in any sense of themselves of legislative force. It is true that ... the rules are given legal effect in the field of the appellate process to the adjudicator or the tribunal .... But the legal effect that the rules have in that limited field flows not from the fact that they have been published by the Minister and laid before Parliament, but because by section 19(2) of the [1971 Act] the rules are given an effect which is in a certain field clearly legally enforceable, and that is a quite different matter."

19. Notwithstanding that an application for entry clearance (see paragraph 22 (b) below) or leave to enter or remain may fall to be refused under the relevant immigration rules, the Home Secretary has a discretion, deriving from historic prerogative powers, to authorise in exceptional circumstances the grant of entry clearance or of leave to enter, or to allow a person to remain in the United Kingdom. Where the applicant is a husband seeking to join or remain with his wife settled in the United Kingdom, factors which the Home Secretary will consider include the extent of her ties with that country and of the hardship she might suffer by going to live abroad, and any recommendations by the immigration appellate authorities (see paragraphs 34-37 below).

#### **D. Position at the time of the events giving rise to the present case**

##### *1. Introduction*

20. The rules in force at the time of the events giving rise to the present case were contained in the "Statement of Changes in Immigration Rules" (HC 394), laid before Parliament on 20 February 1980 ("the 1980 Rules"); they applied to all decisions taken on or after 1 March 1980, except those relating to applications made on or before 14 November 1979. A draft of the rules had previously been included in a White Paper published in November 1979.

The 1980 Rules, which in paragraph 2 instructed immigration officers to carry out their duties without regard to the race, colour or religion of the intending entrant, detailed firstly the controls to be exercised on the entry into the United Kingdom of "non-patrials" and then those to be exercised after entry. The former depended on whether the individual concerned was coming for temporary purposes (for example, visitors or students), for employment or business or as a person of independent means, or for settlement. As under the rules previously in force, visitors were normally to be prohibited from taking employment and persons wishing to come for employment were subject to strict regulations as to work permits. The work-



permit requirements, however, did not apply to nationals of other member States of the European Economic Community nor to persons covered by the "United Kingdom ancestry rule"; under the latter rule, which had been in force since the 1971 Act came into operation, a Commonwealth citizen having a grandparent born in the British Islands and wishing to take or seek employment in the United Kingdom could obtain indefinite leave to enter even without a work permit. A further exception was to be found in the "working holiday rule", whereby young Commonwealth citizens could, without a permit, take employment incidental to an extended holiday being spent in the United Kingdom; however, the period of their stay could, under the 1980 Rules, not exceed two years. All these exceptions have been maintained in subsequent immigration rules.

21. A particular feature of the changes introduced by the 1980 Rules was the inclusion of a number of provisions directed towards implementing a policy of protecting the domestic labour market at a time of high unemployment by curtailing "primary immigration", that is immigration by someone who could be expected to seek full-time work in order to support a family. In taking these measures, the Government were concerned also to advance public tranquillity and, by exercising firm and fair immigration control, to assist in securing good community relations.

To these ends, among the changes effected was the introduction of stricter conditions for the grant of leave to a "non-patrial" husband or fiancé seeking to join or remain with his wife or fiancée settled in the United Kingdom. Previously, any such husband or fiancé would normally have been allowed to settle after a qualifying period, provided that the primary purpose of the marriage was not to obtain settlement in that country. These new measures were not extended to the wives and fiancées of settled men, a fact attributed by the Government to long-standing commitments (based allegedly on humanitarian, social and ethical reasons) to the reunification of the families of male immigrants. Nor did the new measures apply to nationals of other member States of the European Economic Community.

22. The relevant provisions of the 1980 Rules - and of their successors - are summarised below in terms of the following expressions.

(a) A person is "settled in the United Kingdom" when he or she is ordinarily resident there without having entered or remained in breach of the immigration laws, and is free from any restriction on the period for which he or she may remain (paragraph 1).

(b) An "entry clearance" (paragraphs 10-14) is a document (either a visa, an entry certificate or a Home Office letter of consent, depending on the nationality of the person concerned) which is to be taken by an immigration officer as evidence that the holder, although a "non-patrial", is eligible under the immigration rules for entry to the United Kingdom. It is obtained at British missions abroad or from the Home Office prior to arrival in the United Kingdom.

(c) A marriage or intended marriage is "non-qualifying" if there is reason to believe that:

- its primary purpose is to obtain admission to or settlement in the United Kingdom; or
  - the parties do not intend to live together permanently as man and wife;
- or
- the parties have not met (paragraphs 50, 52 and 117).

(d) There is "potential evasion of the rules" if there is reason to believe that a husband has remained in the United Kingdom in breach of the immigration rules before the marriage, that the marriage has taken place after a decision or recommendation that he be deported or that the marriage has terminated (paragraph 117).

(e) The "financial requirement" is a requirement that varies according to the circumstances of the particular case : basically it means that adequate maintenance and accommodation must be available to the person concerned without the need for recourse to public funds (paragraphs 42, 52 and 55).

2. *"Non-patrials" seeking to join a spouse or intended spouse settled in the United Kingdom*

23. Where a "non-patrial" whose spouse or intended spouse was "settled in the United Kingdom" came to that country for settlement, he or she would be admitted for that purpose provided that he or she held a current "entry clearance" and unless the circumstances specified in paragraph 13 of the 1980 Rules obtained (for example, false representations, medical grounds, criminal record, exclusion would be conducive to the public good).

(a) Where the intending entrant was a husband or fiancé, he could, under paragraphs 50 and 52, obtain an "entry clearance":

- (i) unless the marriage or intended marriage was "non-qualifying";
- (ii) if his wife or fiancée was a citizen of the United Kingdom and Colonies who or one of whose parents had been born in the United Kingdom; and
- (iii) if, in the cases of fiancés only, the "financial requirement" was satisfied.

(b) Where the intending entrant was a wife or fiancée, she could, under paragraphs 42, 43 and 55, obtain an "entry clearance" irrespective of the nationality of her husband or fiancé or of his own or his parents' place of birth. Here, there was no provision as to "non-qualifying" marriages, but the "financial requirement" had generally to be satisfied.

(c) Wives admitted under these rules would be given indefinite leave to enter; husbands would be initially admitted for twelve months and fiancés or fiancées for three months, with the possibility, subject to certain safeguards, of applying subsequently to the Home Office for indefinite leave (paragraphs 44, 51, 53, 55, 114 and 116).

3. *"Non-patrials" seeking to remain in the United Kingdom with a spouse settled there*

24. "Non-patrials" already admitted to the United Kingdom in a temporary capacity who subsequently married a person "settled in the United Kingdom" could also obtain permission to stay.

(a) Where the "non-patrial" seeking permission was a man, the basic conditions (paragraph 117) were that:

(i) his wife was a citizen of the United Kingdom and Colonies who or one of whose parents had been born in the United Kingdom; and

(ii) the marriage was not "non-qualifying" and there was not "potential evasion of the rules".

(b) Where the "non-patrial" seeking permission was a woman, she would normally be granted leave to remain on application (paragraph 115).

(c) Leave to remain granted under these rules would be, for wives, indefinite and, for husbands, for an initial period of twelve months with the possibility, subject again to the conditions referred to in sub-paragraph (a) (ii) above, of subsequent removal of the time-limit (paragraphs 115 and 117).

4. *General considerations regarding leave to remain*

25. Decisions on applications for leave to remain were taken in the light of all relevant facts; thus, even where the individual satisfied the formal requirements, permission would normally be refused if the circumstances specified in paragraph 88 of the 1980 Rules obtained (for example, false representations, non-compliance with the time-limit or conditions subject to which he or she had been admitted or given leave to remain, undesirable character, danger to national security).

## **E. Subsequent developments**

### *1. Introduction*

26. One result of the 1971 Act was that the right of abode in the United Kingdom became divorced from nationality : thus, a number of citizens of the United Kingdom and Colonies did not have that right (for example, because they had not been born in the British Islands; see paragraph 14 (a) above), whereas it was enjoyed by a number of persons who were not such citizens (for example, Commonwealth citizens having an ancestral link with the United Kingdom; see paragraph 14 (c) above). With a view to bringing citizenship and immigration laws into line, the position was substantially amended by the British Nationality Act 1981, which came into force on 1 January 1983. So far as is relevant for the present purposes, that Act:

(a) replaced citizenship of the United Kingdom and Colonies (see paragraph 11 in fine above) with three separate citizenships, "British", "British Dependent Territories" and "British Overseas";

(b) provided, in section 11(1), that on 1 January 1983 "British citizenship" was to be acquired by persons who were then citizens of the United Kingdom and Colonies and had the right of abode in the United Kingdom under the 1971 Act; this category could include a person who was neither born nor had a parent born in the United Kingdom (see paragraph 14 (b) above);

(c) laid down detailed provisions on the acquisition of British citizenship by persons born after 1 January 1983;

(d) contained, in section 6 and Schedule 1, detailed provisions on naturalisation as a British citizen on the basis of residence in the United Kingdom, the grant of a certificate of naturalisation being at the discretion of the Home Secretary;

(e) amended the 1971 Act by providing in section 39 that the right of abode in the United Kingdom - use of the expressions "patrial" and "non-patrial" was abandoned - and the consequential freedom from immigration controls were in future to be enjoyed only by British citizens and by such Commonwealth citizens as on 31 December 1982 had the right of abode under the 1971 Act.

## *2. The 1982 immigration rules*

27. On 6 December 1982, after debates in the House of Commons and the House of Lords, the Home Secretary laid before Parliament a Statement of Changes in Immigration Rules (HC 66; "the 1982 Rules"), intended to harmonise the immigration rules with the British Nationality Act 1981 and expressed to come into force on 1 January 1983. However, on 15 December 1982 the House of Commons passed a resolution disapproving the Statement, some Members finding the changes too lax and others, insufficient. Since by 1 January 1983 no further changes had been laid before Parliament, the 1982 Rules came into force on that date, notwithstanding the negative resolution (see paragraph 17 above).

28. The 1982 Rules made no changes to the regime governing wives and fiancées, described in paragraphs 23-25 above. The regime governing a husband or fiancé was modified in the following main respects.

(a) The requirement that, for him to be eligible for leave to enter or remain, his wife or fiancée had to be a citizen of the United Kingdom and Colonies born or having a parent born in the United Kingdom was, under paragraphs 41, 54 and 126, replaced by a requirement that she be a British citizen. The place of her own or her parents' birth ceased to be material since British citizens could include persons without the territorial birth link (for example, a woman born in a former Colony but having the right of

abode in the United Kingdom by virtue of long residence there; see paragraphs 14 (b) and 26 (b) above).

(b) By virtue of paragraphs 41, 54 and 126, the onus of proof was reversed, so that it became for the man seeking leave to enter or remain to show that the marriage was not "non-qualifying" or, in cases to which paragraph 126 applied, that there was not "potential evasion of the rules".

(c) Leave to remain for settlement following marriage, granted to a man admitted in a temporary capacity (cf. paragraph 24 (c) above), would be for an initial period of twelve months, followed by a further period of twelve months and then by the possibility, subject again to the conditions referred to in sub-paragraph (b) above, of subsequent removal of the time-limit (paragraph 126).

29. No provision was made in the 1982 Rules for women settled in the United Kingdom who were not British citizens to be joined by their husbands, although leave could be granted by the Home Secretary in the exercise of his extra-statutory discretion (see paragraph 19 above). These women could also apply for naturalisation as British citizens on the basis of residence, under section 6 of the British Nationality Act 1981 (see paragraph 26 (d) above).

### *3. The 1983 immigration rules*

30. On 9 February 1983, a further Statement of Changes in Immigration Rules (HC 169; "the 1983 Rules") was laid before Parliament. A motion disapproving these rules was defeated in the House of Commons and they came into force on 16 February 1983.

31. The 1983 Rules again did not modify the regime governing wives and fiancées. That governing husbands was amended, so far as is material to the present case, in that, under paragraph 126, the position concerning the length of leave to remain granted to a man already in the United Kingdom reverted to that obtaining under the 1980 Rules (that is, initial leave of twelve months, followed by the possibility of indefinite leave; see paragraph 24 (c) above). This change was coupled with a transitional provision (paragraph 177) concerning men who, whilst the 1982 Rules were in force (see paragraph 28 (c) above), had been granted thereunder an extension of stay for a second period of twelve months: they were entitled to apply immediately for indefinite leave without awaiting the expiry of that period.

32. There was no change in the position concerning women settled in the United Kingdom who were not British citizens, described in paragraph 29 above.

## **F. Sanctions**

33. Under sections 3(5)(a), 3(6), 5, 6, 7 and 24(1)(b) of the 1971 Act, a person not having the right of abode in the United Kingdom and having only limited leave to enter or remain in that country who overstays the period of leave or fails to observe a condition attached thereto:

(a) commits a criminal offence punishable with a fine of not more than £200 or imprisonment of not more than six months or both, to which penalties the court may, with certain exceptions, add a recommendation for deportation; and

(b) is, with certain exceptions, liable to deportation, although he cannot be compelled to leave unless the Home Secretary decides to make a deportation order against him.

## **G. Appeals**

34. Appellate authorities in immigration matters were established by the Immigration Appeals Act 1969. They consist of:

(a) adjudicators, who sit alone and are appointed by the Home Secretary;

(b) the Immigration Appeal Tribunal which sits in divisions of at least three members; the members are appointed by the Lord Chancellor and a certain number must be lawyers.

There is no further right of appeal as such to the ordinary courts, but decisions of the appellate authorities are susceptible to judicial review by the High Court on the ground of such matters as error of law or unreasonableness. Judicial review of immigration decisions may also cover questions of an abuse or excess of power by the Home Secretary or whether an immigration officer acted impartially and fairly.

35. Under sections 13, 14 and 15 of the 1971 Act, an appeal may, subject to certain exceptions, be made to an adjudicator against, inter alia:

(a) refusal of leave to enter the United Kingdom or of an entry clearance;

(b) variation of, or refusal to vary, a limited leave to remain in the United Kingdom;

(c) a decision to make a deportation order.

An appellant shall not be required to leave the United Kingdom by reason of the expiration of his leave so long as his appeal is pending against a refusal to enlarge or remove the limit on the duration of the leave. However, no appeal lies against refusal of an extension of leave to remain if application therefor was made after expiry of the existing leave.

36. Except as otherwise provided by the 1971 Act, an adjudicator is, under section 19(1), to allow an appeal only if he considers:

(a) that the decision or action in question was not in accordance with the law or any immigration rules applicable to the case; or

(b) that, where the decision or action involved the exercise of a discretion by the Home Secretary or an officer, that discretion should have been exercised differently.

If, however, the decision or action is in accordance with the rules, the adjudicator may not review a refusal by the Home Secretary of a request, by the person concerned, that he should depart from the rules (section 19(2)).

Where an appeal is allowed, the adjudicator must give such directions for giving effect to his decision as he thinks requisite and may also make further recommendations; the directions are binding on the Home Secretary except so long as an appeal to the Immigration Appeal Tribunal can be brought or is pending (sections 19(3) and 20(2)).

37. Any party to an appeal to an adjudicator may appeal against his decision to the Immigration Appeal Tribunal, which may affirm that decision or make any other decision which the adjudicator could have made; it also has similar duties and powers in the matter of directions and recommendations. As the law stood at the relevant time, leave to appeal had generally to be obtained; it had to be granted, *inter alia*, if determination of the appeal turned upon an arguable point of law (section 20(1) of the 1971 Act and Rule 14 of the Immigration Appeals (Procedure) Rules 1972).

#### **H. Statistics**

38. (a) The Government estimated total immigration into the United Kingdom from the New Commonwealth (that is, the Commonwealth except Australia, Canada and New Zealand) at 500,000 in the period from 1955 to mid-1962. It was thought that by the latter date some 600 million people had the right of abode (see paragraphs 13-14 above) in the United Kingdom. Between mid-1962 and the end of 1981, a further 900,000 people were estimated to have settled in that country from the New Commonwealth and Pakistan, some 420,000 from non-Commonwealth countries other than Pakistan and some 94,000 from the Old Commonwealth (Australia, Canada and New Zealand); relatively few countries were said to have accounted for most of this immigration.

The official estimates for 1981 show that the population of the United Kingdom (53.7 million) included 2.2 million persons of New Commonwealth and Pakistan origin (of whom about 1 million were in the Greater London area) and 1.2 million other persons not born in the United Kingdom (including those born in the Old Commonwealth but not those born in the Republic of Ireland). It is estimated that the population of New Commonwealth and Pakistan origin could rise to 2.5 million by 1986 and 3 million (5 per cent of the projected total population) by 1991.

(b) According to the Government, some 3,500 persons entered the United Kingdom annually under the "United Kingdom ancestry rule" (see paragraph 20 above), but many of them emigrated after a few years.

(c) In 1980-1983, there was an average net annual emigration from the United Kingdom of about 44,000, but the population density in 1981 - 229 persons per square kilometer or 355 persons per square kilometer for England alone - was higher than that of any other member State of the European Communities.

(d) Statistics supplied by the Government showed that in Great Britain in 1981 90 per cent of all men of working age and 63 per cent of all women of working age were "economically active" (that is, either in employment, or self-employed, or unemployed). The corresponding figures for persons coming from the Indian sub-continent were 86 per cent for men and 41 per cent for women and, for persons coming from the West Indies or Guyana, 90 per cent for men and 70 per cent for women. The statistics also disclosed that a considerably higher proportion of "economically active" women (particularly married women) than men were in part-time employment only - 47 per cent of married women, compared with 2.3 per cent of men.

Recent years have seen a high level of unemployment in the United Kingdom. In 1983, 15.3 per cent of "economically active" men and 8.4 per cent of "economically active" women were unemployed, as measured by official figures based on persons claiming unemployment benefit. There was a marked increase between 1980 and 1981, when the figures rose from 7.9 to 12.5 per cent and from 4.3 to 6.4 per cent, respectively.

(e) The Government also produced to the Court detailed statistics in support of their claim that the overall effect of the 1980 Rules had been to lead to an annual reduction of up to 5,700 (rather than 2,000, as they had estimated before the Commission) in the number of husbands either accepted for settlement or applying successfully to come for settlement from all parts of the world. They recognised, however, that part - though not a major part - of this figure might represent a decrease attributable to economic conditions. In their submission, this reduction was of a considerable scale when viewed in relation to the figures for the total number of persons accepted for settlement into the United Kingdom. The latter figures (about one-half of which were in each year accounted for by wives and children of men already settled in the country) were: over 80,000 in 1975 and in 1976; around 70,000 in each year from 1977 to 1980; 59,100 in 1981; 53,900 in 1982; and 53,500 in 1983. The number of men accepted for settlement by reason of marriage was 11,190 in 1975; 11,060 in 1976; 5,610 in 1977; 9,330 in 1978; 9,900 in 1979; 9,160 in 1980; 6,690 in 1981; 6,070 in 1982; and 5,210 in 1983. The number of women so accepted was 19,890 in 1977; 18,950 in 1978; 19,780 in 1979; 15,430 in 1980; 16,760 in 1981; 15,490 in 1982; and 16,800 in 1983.

The claimed reduction of 5,700 per annum was questioned by the applicants on the following grounds: it was based on a comparison with the figures for 1979, a year in which the number of applications from the Indian sub-continent was artificially high; in order to take account of the delays in



processing applications and the twelve-month waiting-period before indefinite leave to remain would be granted, a more meaningful comparison would be between the 1981 and the 1983 figures; no account was taken of the natural decline in applications; and no account was taken of persons properly excluded (for example, on the ground that the marriage was not genuine).

## II. THE PARTICULAR CIRCUMSTANCES OF THE CASE

### A. Mrs. Abdulaziz

39. Mrs. Nargis Abdulaziz is permanently and lawfully resident in the United Kingdom with the right to remain indefinitely. She was born in Malawi in 1948 and brought up in that country. Her parents were also born there. According to her, she was a citizen of Malawi at birth but, being of Indian origin, was subsequently deprived of that citizenship and is now stateless. She holds a Malawian travel document.

This applicant went to the United Kingdom on 23 December 1977. She was given leave, as a "non-patrial" (see paragraphs 13-15 above), to enter as a visitor, leave which was subsequently extended on three occasions. Since special vouchers had been allocated to members of her family enabling them to settle in the United Kingdom, an application was made on her behalf for indefinite leave to remain. On 16 May 1979 as an act of discretion outside the immigration rules (see paragraph 19 above), she was given such leave, essentially on the ground that she was an unmarried woman with little prospect of marriage who formed part of a close family, including her father and mother, settled in the United Kingdom.

40. Mr. Ibramobai Abdulaziz is a Portuguese national who was born in Daman, a former Portuguese territory in India, in 1951. He emigrated to Portugal in 1978. On 4 October 1979, he was admitted, as a "non-patrial", to the United Kingdom for six months as a visitor. He met the applicant six days later and they became engaged to be married on 27 November. They were married on 8 December 1979 and, during the following week, Mrs. Abdulaziz applied for leave for her husband to remain permanently in the United Kingdom. Shortly afterwards, the Joint Council for the Welfare of Immigrants also applied for leave for him to remain, for a period of twelve months.

41. After Mr. and Mrs. Abdulaziz had been interviewed at the Home Office on 6 June 1980, her application was refused, on 1 July, on the ground that she was not a citizen of the United Kingdom and Colonies who, or one of whose parents, had been born in the United Kingdom (paragraph 117 of the 1980 Rules; see paragraph 24 (a) (i) above).

Mr. Abdulaziz appealed to an adjudicator (see paragraphs 34-36 above) against this decision but the appeal was dismissed on 6 October 1981 as he did not qualify for leave to remain under the 1980 Rules. The adjudicator pointed out that, had the application been made before 14 November 1979 or the decision taken before 1 March 1980, Mr. Abdulaziz would have been admitted, under the previous rules (see paragraphs 20 and 21 above). Leave to appeal to the Immigration Appeal Tribunal was refused by the Tribunal on 9 December 1981 on the ground that the determination of the appeal did not turn on any arguable point of law and that leave to appeal was not otherwise merited (see paragraph 37 above).

42. Subsequently Mr. Abdulaziz remained, and still remains, in the United Kingdom, without leave. He is currently employed as a chef in a restaurant; his wife does not work. A son was born to the couple in October 1982. Representations through Members of Parliament to the Home Office have been rejected, basically on the ground that the couple could live together in Portugal and that the circumstances of the case were not such as to warrant exceptional treatment. In a letter of 24 February 1982 to one Member, the Minister of State at the Home Office indicated that the authorities would shortly be advising Mr. Abdulaziz to depart without delay, adding that if he did not, "consideration will have to be given to enforcing his departure"; however, a letter of 29 November 1982 to another Member stated that "[the Minister did] not propose for the time being to take any action regarding [Mr. Abdulaziz's] removal". In fact, the authorities have not to date instituted any criminal or deportation proceedings (see paragraph 33 above) against him; their decision, according to the Government, was taken in the light of all the circumstances, including the Commission's decision on the admissibility of Mrs. Abdulaziz's application (see paragraph 55 below).

The couple's situation has not until now been changed by the 1982 or the 1983 Rules since Mrs. Abdulaziz, although settled in the United Kingdom, is not a British citizen (see paragraphs 27-32 above). She has, however, applied, on 16 August 1984, for naturalisation as such a citizen, under section 6 of the British Nationality Act 1981 (see paragraph 26 (d) above).

43. At the Home Office interview, Mr. Abdulaziz said that his wife could not be expected to live in Portugal because she had always been close to her family and because her sick father - who in fact died in September 1980 - needed her company. Before the Commission and the Court, she claimed that her health was under strain because of her husband's settlement problems and that humanitarian considerations prevented her going to Portugal, a country where she had no family and whose language she did not speak. The Government maintain that there is no obstacle whatever to her going with her husband to live in Portugal.

**B. Mrs. Cabales**

44. Mrs. Arcely Cabales is permanently and lawfully resident in the United Kingdom with the right to remain indefinitely. She was born in the Philippines in 1939 and was brought up there, and is of Asian origin. She had the nationality of that country until 1984 (see paragraph 47 below). Her parents were born and live in the Philippines.

This applicant went to the United Kingdom in 1967 with a work permit for employment as a nursing assistant and was admitted, as a "non-patrial" (see paragraphs 13-15 above), for twelve months. She remained in approved work thereafter and, on 10 June 1971, the conditions attached to her stay were removed and she was allowed to remain in the United Kingdom indefinitely. She is now employed, and has an established career, as a State-enrolled nurse.

45. Mr. Ludovico Cabales is a citizen of the Philippines, born in that country in 1937. He met the applicant in Manila in 1977 when she was on holiday and again in 1979 when she was there for one or two months. During the latter period, the couple became engaged. On 23 April 1980, they went through a ceremony of marriage in the Philippines. The applicant returned to the United Kingdom shortly afterwards to take up her job again. In May 1980, she informed the Home Office of the marriage and applied for leave for Mr. Cabales to enter the United Kingdom, a request which she repeated in August. On 27 November, he, being a "non-patrial", applied to the British Embassy in Manila for a visa to join his wife for settlement in the United Kingdom.

46. After Mrs. Cabales had supplied certain further information requested by it, the Home Office wrote to her on 23 February 1981 to advise her that the visa application had been refused on the ground that she was not a citizen of the United Kingdom and Colonies who, or one of whose parents, had been born in the United Kingdom (paragraph 50 of the 1980 Rules; see paragraph 23 (a) (ii) above). Notice of the decision was not handed to Mr. Cabales until 12 November 1981 as he had failed to respond to an invitation of March 1981 to attend at the Manila Embassy for that purpose.

On 20 August 1981, the Joint Council for the Welfare of Immigrants wrote to the Home Office Immigration and Nationality Department, seeking a review of this decision. However, on 13 January 1982, the Department, having considered the circumstances, informed the Council of its decision to maintain the refusal. Mr. Cabales had on 8 December 1981 lodged an appeal with an adjudicator (see paragraphs 34-36 above) against the decision but the appeal was dismissed on 25 July 1983 on the ground that the visa officer's decision was in accordance with the law and the immigration rules. The adjudicator, who noted that Mrs. Cabales had not taken legal advice but had thought at the time of the marriage ceremony that a forthcoming change

in the law would allow Mr. Cabales to be admitted, expressed the hope that the authorities would look at the case sympathetically. This was not initially recognised by the authorities as a recommendation, but the Home Secretary subsequently concluded that there were not sufficient grounds for acting outside the immigration rules. There is no record of an application for leave to appeal to the Immigration Appeal Tribunal. Representations to the Home Office were also rejected, basically on the ground that the couple could live together in the Philippines and that there were not sufficient reasons for the Home Secretary to exercise his extra-statutory discretion.

47. Between April 1980 and December 1984, Mr. Cabales continued to live in the Philippines and the couple were separated, apart from a short period in 1983 when Mrs. Cabales visited that country. However, following an application made by her in November 1982 under section 6 of the British Nationality Act 1981 (see paragraph 26 (d) above), Mrs. Cabales obtained naturalisation as a British citizen with effect from 18 April 1984; she thereby lost her Philippine citizenship. On 10 July 1984, Mr. Cabales applied for entry clearance for permanent settlement as the husband of a British citizen, under paragraph 54 of the 1983 Rules (see paragraphs 30-31 above). For the reasons and in the circumstances indicated in the following paragraph, this application was refused on 1 October 1984 but, on the following day, Mr. Cabales applied for and was granted a visa entitling him to enter the United Kingdom for three months for the purposes of marriage. He arrived in that country on 19 December 1984 and the parties were married there on 26 January 1985. On 4 February, he was granted leave to remain as a husband for the next twelve months; on the expiry of that period, he will be eligible to apply for indefinite leave.

48. In a memorial filed with the Court on 27 July 1984, the Government questioned the validity of the 1980 marriage (see paragraph 45 above). Under Articles 53 and 80 of the Philippine Civil Code, a marriage solemnised without a licence was to be considered void, save in the case of a "marriage of exceptional character", that is one between persons who have lived together as husband and wife for at least five years (Article 76). The Cabales marriage contract recited that the ceremony the couple went through in 1980 had been performed, without a licence, under Article 76. The parties had stated in a contemporaneous affidavit that they had previously cohabited for at least five years, but according to Mrs. Cabales' version of the facts this could not be so since she had not met Mr. Cabales until 1977 (see paragraph 45 above). According to the Government, the requirements of Article 76 were therefore not satisfied and the marriage thus had to be considered void.

At the hearings on 25 September 1984, the applicant's counsel expressed the view that, assuming a defect existed, it was purely formal and the status of Mr. and Mrs. Cabales could be regarded as akin to that of the parties to a common-law marriage. Her representative subsequently filed with the Court

details of the advice he had received from Philippine lawyers, to the effect that under the law of that country the marriage was to be presumed valid unless and until it was declared void by a court. The Government replied that they had been advised that the marriage was void ab initio and that no judicial decree was necessary to establish its invalidity. This opinion was contradicted in further advice obtained on behalf of Mrs. Cabales.

Mr. and Mrs. Cabales were interviewed by the United Kingdom authorities in August and September 1984. They adduced no evidence to alter the Government's conclusion that the marriage was void. However, Mrs. Cabales stated that if Mr. Cabales were admitted to the United Kingdom, the couple would go through a ceremony of marriage in that country. It was in these circumstances that in October 1984 Mr. Cabales was refused leave to settle as a husband but was regarded as eligible, under the 1983 Rules, for leave to enter the United Kingdom temporarily as the fiancé of a British citizen.

49. Before the Commission and the Court, Mrs. Cabales submitted that there would have been real obstacles to her returning to live in the Philippines: she was too old, her qualifications were not recognised there and, by working in the United Kingdom, she was able to support financially her parents and other members of her family. These claims were contested by the Government, in particular on the ground that it was unrealistic to suppose that her nursing skills could not be put to good use in the Philippines.

### **C. Mrs. Balkandali**

50. Mrs. Sohair Balkandali is permanently and lawfully resident in the United Kingdom with the right to remain indefinitely. She was born in Egypt in 1946 or 1948. Her parents were born and live in that country.

This applicant first went to the United Kingdom in November 1973 and was given leave, as a "non-patrial" (see paragraphs 13-15 above), to enter as a visitor for one month. Subsequently, she obtained several further leaves to remain, as a visitor or a student, the last being until August 1976. She has a high level of university education. In 1978, she married a Mr. Corbett, a citizen of the United Kingdom and Colonies, and, five days later, was given indefinite leave to remain in the United Kingdom, by virtue of her marriage, under the provisions then in force. On 26 October 1979, again by virtue of her marriage, she obtained registration as a citizen of the United Kingdom and Colonies under the British Nationality Act 1948, as a result of which she became a "patrial" (see paragraphs 11 in fine and 14 (a) above). At that time, she was already separated from Mr. Corbett and the marriage was dissolved in October 1980.

51. Mr. Bekir Balkandali is a Turkish national born in Turkey on 9 April 1946. In January 1979, he was granted leave, as a "non-patrial", to enter the

United Kingdom, apparently as a visitor, for one month. Subsequently, he obtained leave to remain as a student until 31 March 1980. His application of 2 April for an extension of this leave was refused on 23 September 1980 because he had not attended his course of studies and the Home Secretary was not satisfied that he was a genuine student who intended to leave the country on their conclusion. Since his application for an extension had been made after his leave had expired, he had no right of appeal under the 1971 Act (see paragraph 35 above); he was advised to leave the United Kingdom and warned of the risk of criminal or deportation proceedings (see paragraph 33 above) if he did not.

52. Since the autumn of 1979, the applicant had been living with Mr. Balkandali. In April 1980 they had a son, who has the right of abode in the United Kingdom. On 14 October 1980, an application was made by the Joint Council for the Welfare of Immigrants for leave for Mr. Balkandali to remain in the United Kingdom until he married his fiancée, the applicant. They were interviewed together by Home Office officials on 30 March 1981 and produced evidence of their marriage, which had been celebrated in January 1981. The application was therefore treated as one to remain as the husband of a woman settled in the United Kingdom.

Leave was refused on 14 May 1981 on the ground that Mrs. Balkandali was not a citizen of the United Kingdom and Colonies who, or one of whose parents, had been born in the United Kingdom (paragraph 117 of the 1980 Rules; see paragraph 24 (a) (i) above). There was no right of appeal against this decision as Mr. Balkandali had no current leave to remain at the time when his application was made (see paragraph 35 above). Representations through a Member of Parliament to the Home Office were rejected, basically on the ground that the couple could live together in Turkey and that there were not sufficient compelling compassionate circumstances to warrant exceptional treatment outside the immigration rules. In a letter of 18 December 1981 to the Member, the Minister of State at the Home Office wrote that "Mr. Balkandali should now make arrangements to leave the United Kingdom forthwith, otherwise arrangements will be made to enforce his departure"; however, a letter of 3 December 1982 to the Member stated that "[the Minister did] not propose for the time being to take any action against [Mr. Balkandali]". In fact, the authorities did not at any time institute criminal or deportation proceedings (see paragraph 33 above) against him; their decision, according to the Government, was taken in the light of all the circumstances, including the Commission's decision on the admissibility of Mrs. Balkandali's application (see paragraph 55 below).

53. On 20 January 1983, as the husband of a British citizen, Mr. Balkandali was given twelve months' leave to remain in the United Kingdom in accordance with paragraph 126 of the 1982 Rules (see paragraph 28 (a) above); this was possible because, on 1 January 1983, Mrs. Balkandali had automatically acquired British citizenship by virtue of the

British Nationality Act 1981 (see paragraph 26 (b) above). Mr. Balkandali subsequently applied for indefinite leave to remain and this was granted on 18 January 1984 under paragraph 177 of the 1983 Rules (see paragraph 31 above). In September 1984, he was working in the catering business and planned shortly to open a restaurant; his wife was working two days a week in a creche.

54. Before the Commission and the Court, Mrs. Balkandali submitted that there would have been real obstacles to her going with her husband to live in Turkey: she cited her strong ties to the United Kingdom and alleged that as an educated woman and the mother of an illegitimate child she would have been treated as a social outcast in Turkey. The Government maintain that there were no real obstacles.

## PROCEEDINGS BEFORE THE COMMISSION

55. The application of Mrs. Abdulaziz (no. 9214/80) was lodged with the Commission on 11 December 1980 and those of Mrs. Cabales (no. 9473/81) and Mrs. Balkandali (no. 9474/81) on 10 August 1981. Each applicant claimed to be the victim of a practice authorised by Parliament and contained in the 1980 Rules, which practice was incompatible with the Convention, and alleged violations of Article 3 (art. 3), Article 8 (art. 8) (taken alone and in conjunction with Article 14) (art. 14+8)) and Article 13 (art. 13).

56. On 11 May 1982, the Commission declared the three applications admissible and ordered their joinder in pursuance of Rule 29 of its Rules of Procedure.

In its report adopted on 12 May 1983 (Article 31) (art. 31), the Commission expressed the opinion:

- that there had been a violation of Article 14, in conjunction with Article 8 (art. 14+8), on the ground of sexual discrimination (unanimously);
- that there had been no violation of the same Articles (art. 14+8), on the ground of racial discrimination (nine votes to three);
- that the original application of the 1980 Rules in the case of Mrs. Balkandali constituted discrimination on the ground of birth, contrary to Article 14 in conjunction with Article 8 (art. 14+8) (eleven votes with one abstention);
- that the absence of effective domestic remedies for the applicants' claims under Articles 3, 8 and 14 (art. 3, art. 8, art. 14) constituted a violation of Article 13 (art. 13) (eleven votes to one);
- that it was not necessary to pursue a further examination of the matter in the light of Articles 3 and 8 (art. 3, art. 8). The full text of the

Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to the present judgment.

## FINAL SUBMISSIONS MADE TO THE COURT BY THE GOVERNMENT AND BY THE APPLICANTS

57. At the hearings on 25 September 1984, the Government submitted that Mrs. Cabales' application was inadmissible *ratione materiae*. In other respects, they maintained in substance the submissions set out in their memorial of 12 March 1984, whereby they had requested the Court:

"(1) With regard to Articles 8 and 14 (art. 8, art. 14)

(a) to decide and declare that matters of immigration control lie outside the scope of Article 8 (art. 8), so that no complaints based on the application of immigration control can succeed under Article 8 (art. 8), or under Article 14 taken together with Article 8 (art. 14+8);

(b) to decide and declare that upon an examination of the facts of these cases, the matters complained of lie outside the scope of Article 8 (art. 8), with the consequence mentioned above;

(c) to decide and declare, if necessary, that any discrimination under Article 14 (art. 14) is objectively and reasonably justified and not disproportionate to the aims of the measures in question;

(d) to decide and declare, if necessary, that if there has been any interference with the exercise of rights arising under Article 8 (art. 8) in these applications, it is in accordance with the law and necessary in a democratic society in the interests of the economic well-being of the country, the prevention of disorder, and the protection of the rights and freedoms of others;

(2) With regard to Article 3 (art. 3), to decide and declare that the facts of these cases are not capable of amounting, alternatively do not amount, to inhuman or degrading treatment under that Article (art. 3);

(3) To decide and declare that Article 13 (art. 13) has no application to these cases, since the complaints fall outside the scope of Articles 3, 8 and 14 (art. 3, art. 8, art. 14); in any event to hold that as regards the immigration rules there is no obligation to provide a domestic remedy under that Article (art. 13); alternatively to hold that insofar as Article 13 (art. 13) does impose, on the facts, any obligation to provide a domestic remedy in relation to any of the matters complained of, that obligation is fulfilled."

The applicants, for their part, maintained in substance the submissions set out in their memorial of 30 March 1984, whereby they had requested the Court to decide and declare:



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"1. that the applicants are victims of a practice in violation of their right to respect for family life, contrary to Article 8 (art. 8) of the Convention;

2. that they are further victims of a practice of discrimination in the securement of their said right

(a) in respect of all three applicants, on the grounds of sex and race; and

(b) in respect of Mrs. Balkandali, on the ground of birth, contrary to Article 14 in conjunction with Article 8 (art. 14+8) of the Convention;

3. that such discrimination constituted degrading treatment contrary to Article 3 (art. 3) of the Convention;

4. that the absence of effective remedies for the applicants' claims under Articles 3, 8 and 14 (art. 3, art. 8, art. 14) constituted a violation of Article 13 (art. 13) of the Convention;

5. that the United Kingdom Government should pay appropriate compensation, including costs, to the applicants by way of just satisfaction."

## AS TO THE LAW

### I. ALLEGED VIOLATION OF ARTICLE 8 (art. 8)

58. The applicants claimed to be victims of a practice in violation of their right to respect for family life, guaranteed by Article 8 (art. 8) of the Convention, which reads as follows:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

#### **A. Applicability of Article 8 (art. 8)**

59. The Government's principal submission was that neither Article 8 (art. 8) nor any other Article of the Convention applied to immigration control, for which Protocol No. 4 (P4) was the only appropriate text. In their opinion, the fact that that Protocol (P4) was, as stated in its preamble, designed to afford rights additional to those protected by Section I of the

Convention conclusively demonstrated that rights in the field of immigration were not already accorded by the Convention itself, and in particular by Article 8 (art. 8) thereof. Furthermore, the applicants were claiming a right which was not secured to aliens, even by the Protocol (P4), an instrument that in any event had not been ratified by the United Kingdom.

The Commission rejected this argument at the admissibility stage. In doing so, it confirmed - and the applicants now relied on - its established case-law: the right of a foreigner to enter or remain in a country was not as such guaranteed by the Convention, but immigration controls had to be exercised consistently with Convention obligations, and the exclusion of a person from a State where members of his family were living might raise an issue under Article 8 (art. 8).

60. The Court is unable to accept the Government's submission.

The applicants are not the husbands but the wives, and they are complaining not of being refused leave to enter or remain in the United Kingdom but, as persons lawfully settled in that country, of being deprived (Mrs. Cabales), or threatened with deprivation (Mrs. Abdulaziz and Mrs. Balkandali), of the society of their spouses there.

Above all, the Court recalls that the Convention and its Protocols must be read as a whole; consequently a matter dealt with mainly by one of their provisions may also, in some of its aspects, be subject to other provisions thereof (see the "Belgian Linguistic" judgment of 23 July 1968, Series A no. 6, p. 33, para. 7). Thus, although some aspects of the right to enter a country are governed by Protocol No. 4 as regards States bound by that instrument, it is not to be excluded that measures taken in the field of immigration may affect the right to respect for family life under Article 8 (art. 8). The Court accordingly agrees on this point with the Commission.

61. In the alternative, the Government advanced two further arguments to support their contention that Article 8 (art. 8) was not applicable.

Firstly, the Article (art. 8) was said to guarantee respect solely for existing family life, whereas here the couples concerned had not, at the time when the request was made for permission for the man to enter or remain in the United Kingdom, established any such life with the legitimate expectation of the enjoyment of it in that country.

Secondly, since there was no obstacle to the couples' living together in, respectively, Portugal, the Philippines or Turkey, they were in reality claiming a right to choose their country of residence, something that was not guaranteed by Article 8 (art. 8).

These arguments were contested by the applicants. Whilst the Commission did not examine the applications under Article 8 (art. 8) taken alone, it considered that they did not lie outside its scope.

62. The Court recalls that, by guaranteeing the right to respect for family life, Article 8 (art. 8) "presupposes the existence of a family" (see the

Marckx judgment of 13 June 1979, Series A no. 31, p. 14, para. 31). However, this does not mean that all intended family life falls entirely outside its ambit. Whatever else the word "family" may mean, it must at any rate include the relationship that arises from a lawful and genuine marriage, such as that contracted by Mr. and Mrs. Abdulaziz and Mr. and Mrs. Balkandali, even if a family life of the kind referred to by the Government has not yet been fully established. Those marriages must be considered sufficient to attract such respect as may be due under Article 8 (art. 8).

Furthermore, the expression "family life", in the case of a married couple, normally comprises cohabitation. The latter proposition is reinforced by the existence of Article 12 (art. 12), for it is scarcely conceivable that the right to found a family should not encompass the right to live together. The Court further notes that Mr. and Mrs. Abdulaziz had not only contracted marriage but had also cohabited for a certain period before Mr. Abdulaziz was refused leave to remain in the United Kingdom (see paragraphs 40-41 above). Mr. and Mrs. Balkandali had also cohabited and had a son, although they were not married until after Mr. Balkandali's leave to remain as a student had expired and an extension been refused; their cohabitation was continuing when his application for leave to remain as a husband was rejected (see paragraphs 51-52 above).

63. The case of Mrs. Cabales has to be considered separately, having regard to the question raised as to the validity of her marriage (see paragraph 48 above). The Government argued that, in the circumstances, her application was inadmissible *ratione materiae* and thus did not have to be examined by the Court.

Although this plea was framed in terms of admissibility, the Court is of the opinion that it goes to the merits of the application and is therefore preferably dealt with on that basis (see, *mutatis mutandis*, the Airey judgment of 9 October 1979, Series A no. 32, p. 10, para. 18).

The Court does not consider that it has to resolve the difference of opinion that has arisen concerning the effect of Philippine law. Mr. and Mrs. Cabales had gone through a ceremony of marriage (see paragraph 45 above) and the evidence before the Court confirms that they believed themselves to be married and that they genuinely wished to cohabit and lead a normal family life. And indeed they subsequently did so. In the circumstances, the committed relationship thus established was sufficient to attract the application of Article 8 (art. 8).

64. There remains the Government's argument concerning choice of country of residence. The Court considers that this goes more to the degree of respect for family life which must be afforded and will therefore examine it in that context (see paragraph 68 below).

65. To sum up, each of the applicants had to a sufficient degree entered upon "family" life for the purposes of Article 8 (art. 8); that provision is therefore applicable in the present case.

In view of the importance of the issues involved, the Court, unlike the Commission, considers that it has to determine whether there has been a violation of Article 8 (art. 8) taken alone.

### **B. Compliance with Article 8 (art. 8)**

66. The applicants contended that respect for family life - which in their cases the United Kingdom had to secure within its own jurisdiction - encompassed the right to establish one's home in the State of one's nationality or lawful residence; subject only to the provisions of paragraph 2 of Article 8 (art. 8-2), the dilemma either of moving abroad or of being separated from one's spouse was inconsistent with this principle. Furthermore, hindrance in fact was just as relevant as hindrance in law: for the couples to live in, respectively, Portugal, the Philippines or Turkey would involve or would have involved them in serious difficulties (see paragraphs 43, 49 and 54 above), although there was no legal impediment to their doing so.

67. The Court recalls that, although the essential object of Article 8 (art. 8) is to protect the individual against arbitrary interference by the public authorities, there may in addition be positive obligations inherent in an effective "respect" for family life (see the above-mentioned *Marckx* judgment, Series A no. 31, p. 15, para. 31). However, especially as far as those positive obligations are concerned, the notion of "respect" is not clear-cut: having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case. Accordingly, this is an area in which the Contracting Parties enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals (see, amongst other authorities, *mutatis mutandis*, the above-mentioned "Belgian Linguistic" judgment, Series A no. 6, p. 32, para. 5; the *National Union of Belgian Police* judgment of 27 October 1975, Series A no. 19, p. 18, para. 39; the above-mentioned *Marckx* judgment, Series A no. 31, p. 15, para. 31; and the *Rasmussen* judgment of 28 November 1984, Series A no. 87, p. 15, para. 40). In particular, in the area now under consideration, the extent of a State's obligation to admit to its territory relatives of settled immigrants will vary according to the particular circumstances of the persons involved. Moreover, the Court cannot ignore that the present case is concerned not only with family life but also with immigration and that, as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory.

68. The Court observes that the present proceedings do not relate to immigrants who already had a family which they left behind in another country until they had achieved settled status in the United Kingdom. It was

only after becoming settled in the United Kingdom, as single persons, that the applicants contracted marriage (see paragraphs 39-40, 44-45 and 50-52 above). The duty imposed by Article 8 (art. 8) cannot be considered as extending to a general obligation on the part of a Contracting State to respect the choice by married couples of the country of their matrimonial residence and to accept the non-national spouses for settlement in that country.

In the present case, the applicants have not shown that there were obstacles to establishing family life in their own or their husbands' home countries or that there were special reasons why that could not be expected of them.

In addition, at the time of their marriage

(i) Mrs. Abdulaziz knew that her husband had been admitted to the United Kingdom for a limited period as a visitor only and that it would be necessary for him to make an application to remain permanently, and she could have known, in the light of draft provisions already published (see paragraph 20 above), that this would probably be refused;

(ii) Mrs. Balkandali must have been aware that her husband's leave to remain temporarily as a student had already expired, that his residence in the United Kingdom was therefore unlawful and that under the 1980 Rules, which were then in force, his acceptance for settlement could not be expected.

In the case of Mrs. Cabales, who had never cohabited with Mr. Cabales in the United Kingdom, she should have known that he would require leave to enter and that under the rules then in force this would be refused.

69. There was accordingly no "lack of respect" for family life and, hence, no breach of Article 8 (art. 8) taken alone.

## II. ALLEGED VIOLATION OF ARTICLE 14 TAKEN TOGETHER WITH ARTICLE 8 (art. 14+8)

### A. Introduction

70. The applicants claimed that, as a result of unjustified differences of treatment in securing the right to respect for their family life, based on sex, race and also - in the case of Mrs. Balkandali - birth, they had been victims of a violation of Article 14 of the Convention, taken together with Article 8 (art. 14+8). The former Article (art. 14) reads as follows:

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

In the event that the Court should find Article 8 (art. 8) to be applicable in the present case, the Government denied that there was any difference of treatment on the ground of race and submitted that since the differences of treatment on the ground of sex and of birth had objective and reasonable justifications and were proportionate to the aims pursued, they were compatible with Article 14 (art. 14).

71. According to the Court's established case-law, Article 14 (art. 14) complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Article 14 (art. 14) does not necessarily presuppose a breach of those provisions - and to this extent it is autonomous -, there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter (see, *inter alia*, the above-mentioned Rasmussen judgment, Series A no. 87, p. 12, para. 29).

The Court has found Article 8 (art. 8) to be applicable (see paragraph 65 above). Although the United Kingdom was not obliged to accept Mr. Abdulaziz, Mr. Cabales and Mr. Balkandali for settlement and the Court therefore did not find a violation of Article 8 (art. 8) taken alone (see paragraphs 68-69 above), the facts at issue nevertheless fall within the ambit of that Article (art. 8). In this respect, a parallel may be drawn, *mutatis mutandis*, with the National Union of Belgian Police case (see the judgment of 27 October 1975, Series A no. 19, p. 20, para. 45).

Article 14 (art. 14) also is therefore applicable.

72. For the purposes of Article 14 (art. 14), a difference of treatment is discriminatory if it "has no objective and reasonable justification", that is, if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised" (see, *inter alia*, the above-mentioned "Belgian Linguistic" judgment, Series A no. 6, p. 34, para. 10, the above-mentioned Marckx judgment, Series A no. 31, p. 16, para. 33, and the above-mentioned Rasmussen judgment, Series A no. 87, p. 14, para. 38).

The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law (see the above-mentioned Rasmussen judgment, *ibid.*, p. 15, para. 40), but it is for the Court to give the final ruling in this respect.

73. In the particular circumstances of the case, the Court considers that it must examine in turn the three grounds on which it was alleged that a discriminatory difference of treatment was based.

**B. Alleged discrimination on the ground of sex**

74. As regards the alleged discrimination on the ground of sex, it was not disputed that under the 1980 Rules it was easier for a man settled in the United Kingdom than for a woman so settled to obtain permission for his or her non-national spouse to enter or remain in the country for settlement (see paragraphs 23-25 above). Argument centred on the question whether this difference had an objective and reasonable justification.

75. According to the Government, the difference of treatment complained of had the aim of limiting "primary immigration" (see paragraph 21 above) and was justified by the need to protect the domestic labour market at a time of high unemployment. They placed strong reliance on the margin of appreciation enjoyed by the Contracting States in this area and laid particular stress on what they described as a statistical fact: men were more likely to seek work than women, with the result that male immigrants would have a greater impact than female immigrants on the said market. Furthermore, the reduction, attributed by the Government to the 1980 Rules, of approximately 5,700 per annum in the number of husbands accepted for settlement in the United Kingdom (see paragraph 38 (e) above) was claimed to be significant. This was said to be so especially when the reduction was viewed in relation to its cumulative effect over the years and to the total number of acceptances for settlement.

This view was contested by the applicants. For them, the Government's plea ignored the modern role of women and the fact that men may be self-employed and also, as was exemplified by the case of Mr. Balkandali (see paragraph 53 above), create rather than seek jobs. Furthermore, the Government's figure of 5,700 was said to be insignificant and, for a number of reasons, in any event unreliable (see paragraph 38 (e) in fine above).

76. The Government further contended that the measures in question were justified by the need to maintain effective immigration control, which benefited settled immigrants as well as the indigenous population. Immigration caused strains on society; the Government's aim was to advance public tranquillity, and a firm and fair control secured good relations between the different communities living in the United Kingdom.

To this, the applicants replied that the racial prejudice of the United Kingdom population could not be advanced as a justification for the measures.

77. In its report, the Commission considered that, when seen in the context of the immigration of other groups, annual emigration and unemployment and economic activity rates, the impact on the domestic labour market of an annual reduction of 2,000 (as then estimated by the Government) in the number of husbands accepted for settlement in the United Kingdom (see paragraph 38 (e) above) was not of a size or importance to justify a difference of treatment on the ground of sex and the

detrimental consequences thereof on the family life of the women concerned. Furthermore, the long-standing commitment to the reunification of the families of male immigrants, to which the Government had referred as a reason for accepting wives whilst excluding husbands, no longer corresponded to modern requirements as to the equal treatment of the sexes. Neither was it established that race relations or immigration controls were enhanced by the rules: they might create resentment in part of the immigrant population and it had not been shown that it was more difficult to limit abuses by non-national husbands than by other immigrant groups. The Commission unanimously concluded that there had been discrimination on the ground of sex, contrary to Article 14 (art. 14), in securing the applicants' right to respect for family life, the application of the relevant rules being disproportionate to the purported aims.

At the hearings before the Court, the Commission's Delegate stated that this conclusion was not affected by the Government's revised figure (about 5,700) for the annual reduction in the number of husbands accepted for settlement.

78. The Court accepts that the 1980 Rules had the aim of protecting the domestic labour market. The fact that, as was suggested by the applicants, this aim might have been further advanced by the abolition of the "United Kingdom ancestry" and the "working holiday" rules (see paragraph 20 above) in no way alters this finding. Neither does the Court perceive any conclusive evidence to contradict it in the Parliamentary debates, on which the applicants also relied. It is true, as they pointed out, that unemployment in the United Kingdom in 1980 was lower than in subsequent years, but it had nevertheless already attained a significant level and there was a considerable increase as compared with previous years (see paragraph 38 (d) above).

Whilst the aforesaid aim was without doubt legitimate, this does not in itself establish the legitimacy of the difference made in the 1980 Rules as to the possibility for male and female immigrants settled in the United Kingdom to obtain permission for, on the one hand, their non-national wives or fiancées and, on the other hand, their non-national husbands or fiancés to enter or remain in the country.

Although the Contracting States enjoy a certain "margin of appreciation" in assessing whether and to what extent differences in otherwise similar situations justify a different treatment, the scope of this margin will vary according to the circumstances, the subject-matter and its background (see the above-mentioned Rasmussen judgment, Series A no. 87, p. 15, para. 40).

As to the present matter, it can be said that the advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe. This means that very weighty reasons would have to be



advanced before a difference of treatment on the ground of sex could be regarded as compatible with the Convention.

79. In the Court's opinion, the Government's arguments summarised in paragraph 75 above are not convincing.

It may be correct that on average there is a greater percentage of men of working age than of women of working age who are "economically active" (for Great Britain 90 per cent of the men and 63 per cent of the women) and that comparable figures hold good for immigrants (according to the statistics, 86 per cent for men and 41 per cent for women for immigrants from the Indian sub-continent and 90 per cent for men and 70 per cent for women for immigrants from the West Indies and Guyana) (see paragraph 38 (d) above).

Nevertheless, this does not show that similar differences in fact exist - or would but for the effect of the 1980 Rules have existed - as regards the respective impact on the United Kingdom labour market of immigrant wives and of immigrant husbands. In this connection, other factors must also be taken into account. Being "economically active" does not always mean that one is seeking to be employed by someone else. Moreover, although a greater number of men than of women may be inclined to seek employment, immigrant husbands were already by far outnumbered, before the introduction of the 1980 Rules, by immigrant wives (see paragraph 38 (e) above), many of whom were also "economically active". Whilst a considerable proportion of those wives, in so far as they were "economically active", were engaged in part-time work, the impact on the domestic labour market of women immigrants as compared with men ought not to be underestimated.

In any event, the Court is not convinced that the difference that may nevertheless exist between the respective impact of men and of women on the domestic labour market is sufficiently important to justify the difference of treatment, complained of by the applicants, as to the possibility for a person settled in the United Kingdom to be joined by, as the case may be, his wife or her husband.

80. In this context the Government stressed the importance of the effect on the immigration of husbands of the restrictions contained in the 1980 Rules, which had led, according to their estimate, to an annual reduction of 5,700 (rather than 2,000, as mentioned in the Commission's report) in the number of husbands accepted for settlement.

Without expressing a conclusion on the correctness of the figure of 5,700, the Court notes that in point of time the claimed reduction coincided with a significant increase in unemployment in the United Kingdom and that the Government accepted that some part of the reduction was due to economic conditions rather than to the 1980 Rules themselves (see paragraph 38 (d) and (e) above).

In any event, for the reasons stated in paragraph 79 above, the reduction achieved does not justify the difference in treatment between men and women.

81. The Court accepts that the 1980 Rules also had, as the Government stated, the aim of advancing public tranquillity. However, it is not persuaded that this aim was served by the distinction drawn in those rules between husbands and wives.

82. There remains a more general argument advanced by the Government, namely that the United Kingdom was not in violation of Article 14 (art. 14) by reason of the fact that it acted more generously in some respects - that is, as regards the admission of non-national wives and fiancées of men settled in the country - than the Convention required.

The Court cannot accept this argument. It would point out that Article 14 (art. 14) is concerned with the avoidance of discrimination in the enjoyment of the Convention rights in so far as the requirements of the Convention as to those rights can be complied with in different ways. The notion of discrimination within the meaning of Article 14 (art. 14) includes in general cases where a person or group is treated, without proper justification, less favourably than another, even though the more favourable treatment is not called for by the Convention.

83. The Court thus concludes that the applicants have been victims of discrimination on the ground of sex, in violation of Article 14 taken together with Article 8 (art. 14+8).

### **C. Alleged discrimination on the ground of race**

84. As regards the alleged discrimination on the ground of race, the applicants relied on the opinion of a minority of the Commission. They referred, *inter alia*, to the whole history of and background to the United Kingdom immigration legislation (see paragraphs 11-15 above) and to the Parliamentary debates on the immigration rules.

In contesting this claim, the Government submitted that the 1980 Rules were not racially motivated, their aim being to limit "primary immigration" (see paragraph 21 above).

A majority of the Commission concluded that there had been no violation of Article 14 (art. 14) under this head. Most immigration policies - restricting, as they do, free entry - differentiated on the basis of people's nationality, and indirectly their race, ethnic origin and possibly their colour. Whilst a Contracting State could not implement "policies of a purely racist nature", to give preferential treatment to its nationals or to persons from countries with which it had the closest links did not constitute "racial discrimination". The effect in practice of the United Kingdom rules did not mean that they were abhorrent on the grounds of racial discrimination, there being no evidence of an actual difference of treatment on grounds of race.

A minority of the Commission, on the other hand, noted that the main effect of the rules was to prevent immigration from the New Commonwealth and Pakistan. This was not coincidental: the legislative history showed that the intention was to "lower the number of coloured immigrants". By their effect and purpose, the rules were indirectly racist and there had thus been a violation of Article 14 (art. 14) under this head in the cases of Mrs. Abdulaziz and Mrs. Cabales.

85. The Court agrees in this respect with the majority of the Commission.

The 1980 Rules, which were applicable in general to all "non-patrials" wanting to enter and settle in the United Kingdom, did not contain regulations differentiating between persons or groups on the ground of their race or ethnic origin. The rules included in paragraph 2 a specific instruction to immigration officers to carry out their duties without regard to the race, colour or religion of the intending entrant (see paragraph 20 above), and they were applicable across the board to intending immigrants from all parts of the world, irrespective of their race or origin.

As the Court has already accepted, the main and essential purpose of the 1980 Rules was to curtail "primary immigration" in order to protect the labour market at a time of high unemployment. This means that their reinforcement of the restrictions on immigration was grounded not on objections regarding the origin of the non-nationals wanting to enter the country but on the need to stem the flow of immigrants at the relevant time.

That the mass immigration against which the rules were directed consisted mainly of would-be immigrants from the New Commonwealth and Pakistan, and that as a result they affected at the material time fewer white people than others, is not a sufficient reason to consider them as racist in character: it is an effect which derives not from the content of the 1980 Rules but from the fact that, among those wishing to immigrate, some ethnic groups outnumbered others.

The Court concludes from the foregoing that the 1980 Rules made no distinction on the ground of race and were therefore not discriminatory on that account. This conclusion is not altered by the following two arguments on which the applicants relied.

(a) The requirement that the wife or fiancée of the intending entrant be born or have a parent born in the United Kingdom and also the "United Kingdom ancestry rule" (see paragraphs 23, 24 and 20 above) were said to favour persons of a particular ethnic origin. However, the Court regards these provisions as being exceptions designed for the benefit of persons having close links with the United Kingdom, which do not affect the general tenor of the rules.

(b) The requirement that the parties to the marriage or intended marriage must have met (see paragraphs 22-24 above) was said to operate to the disadvantage of individuals from the Indian sub-continent, where the

practice of arranged marriages is customary. In the Court's view, however, such a requirement cannot be taken as an indication of racial discrimination: its main purpose was to prevent evasion of the rules by means of bogus marriages or engagements. It is, besides, a requirement that has nothing to do with the present cases.

86. The Court accordingly holds that the applicants have not been victims of discrimination on the ground of race.

#### **D. Alleged discrimination on the ground of birth**

87. Mrs. Balkandali claimed that she had also been the victim of discrimination on the ground of birth, in that, as between women citizens of the United Kingdom and Colonies settled in the United Kingdom, only those born or having a parent born in that country could, under the 1980 Rules, have their non-national husband accepted for settlement there (see paragraphs 23-24 above).

It was not disputed that the 1980 Rules established a difference of treatment on the ground of birth, argument being centred on the question whether it had an objective and reasonable justification.

In addition to relying on the Commission's report, Mrs. Balkandali submitted that the elimination of this distinction from subsequent immigration rules (see paragraph 28 (a) above) demonstrated that it was not previously justified.

The Government maintained that the difference in question was justified by the concern to avoid the hardship which women having close ties to the United Kingdom would encounter if, on marriage, they were obliged to move abroad in order to remain with their husbands.

The Commission considered that, notwithstanding the subsequent elimination of this difference, the general interest and the possibly temporary nature of immigration rules required it to express an opinion. It took the view that a difference of treatment based on the mere accident of birth, without regard to the individual's personal circumstances or merits, constituted discrimination in violation of Article 14 (art. 14).

88. The Court is unable to share the Commission's opinion. The aim cited by the Government is unquestionably legitimate, for the purposes of Article 14 (art. 14). It is true that a person who, like Mrs. Balkandali, has been settled in a country for several years may also have formed close ties with it, even if he or she was not born there. Nevertheless, there are in general persuasive social reasons for giving special treatment to those whose link with a country stems from birth within it. The difference of treatment must therefore be regarded as having had an objective and reasonable justification and, in particular, its results have not been shown to transgress the principle of proportionality. This conclusion is not altered by the fact that the immigration rules were subsequently amended on this point.

89. The Court thus holds that Mrs. Balkandali was not the victim of discrimination on the ground of birth.

### III. ALLEGED VIOLATION OF ARTICLE 3 (art. 3)

90. The applicants claimed to have been subjected to degrading treatment, in violation of Article 3 (art. 3), which reads:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

In their view, the discrimination against them constituted an affront to human dignity. They also referred to Mr. and Mrs. Cabales' lengthy separation and to the anxiety and stress undergone by Mrs. Abdulaziz and Mrs. Balkandali.

The Government contested this claim on various grounds. According to the Commission, Article 14 (art. 14) incorporated a condemnation of the degrading aspects of sexual and other forms of discrimination and no separate issues arose under Article 3 (art. 3).

91. The Court observes that the difference of treatment complained of did not denote any contempt or lack of respect for the personality of the applicants and that it was not designed to, and did not, humiliate or debase but was intended solely to achieve the aims referred to in paragraphs 75, 76, 78 and 81 above (see the *Albert and Le Compte* judgment of 10 February 1983, Series A no. 58, p. 13, para. 22). It cannot therefore be regarded as "degrading".

There was accordingly no violation of Article 3 (art. 3).

### IV. ALLEGED VIOLATION OF ARTICLE 13 (art. 13)

92. The applicants alleged that they had had no effective remedy for their complaints under Articles 3, 8 and 14 (art. 3, art. 8, art. 14) and that there had accordingly been a breach of Article 13 (art. 13), which reads:

"Everyone whose rights and freedoms as set forth in [the] 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."

In the event that the Court should find Articles 3, 8 and 14 (art. 3, art. 8, art. 14) to be applicable, the Government contended that the immigration rules, though not constituting delegated legislation, fell within the principle enunciated by the Commission in its report in the case of *Young, James and Webster* (Series B no. 39, p. 49), namely that Article 13 (art. 13) does not require that a remedy be provided for controlling the conformity of a law with the Convention. In the alternative, they submitted that the remedies that were available to the applicants were "effective".

The Commission considered that the immigration rules fell outside the aforementioned principle. Having reviewed the available channels of complaint, it concluded that there had been a violation of Article 13 (art. 13).

93. The Court has found that the discrimination on the ground of sex of which Mrs. Abdulaziz, Mrs. Cabales and Mrs. Balkandali were victims was the result of norms that were in this respect incompatible with the Convention. In this regard, since the United Kingdom has not incorporated the Convention into its domestic law, there could be no "effective remedy" as required by Article 13 (art. 13) (see the Silver and Others judgment of 25 March 1983, Series A no. 61, pp. 42-44, paras. 111-119, and the Campbell and Fell judgment of 28 June 1984, Series A no. 80, p. 52, para. 127). Recourse to the available channels of complaint (the immigration appeals system, representations to the Home Secretary, application for judicial review; see paragraphs 19 and 34-37 above) could have been effective only if the complainant alleged that the discrimination resulted from a misapplication of the 1980 Rules. Yet here no such allegation was made nor was it suggested that that discrimination in any other way contravened domestic law.

The Court accordingly concludes that there has been a violation of Article 13 (art. 13).

## V. APPLICATION OF ARTICLE 50 (art. 50)

94. Mrs. Abdulaziz, Mrs. Cabales and Mrs. Balkandali claimed, for "moral damage" and costs and expenses, just satisfaction under Article 50 (art. 50), which reads:

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

All the applicants, including Mrs. Cabales, have been victims of a breach of Article 14 taken in conjunction with Article 8 (art. 14+8) (see paragraphs 63 and 83 above), with the result that Article 50 (art. 50) is applicable as regards each of them.

### A. Damage

95. The applicants sought "substantial", but unquantified, compensation for non-pecuniary damage in the form of distress, humiliation and anxiety. They stated that the interference complained of concerned a vital element in society, namely family life; that sexual discrimination was universally

condemned; and that the existence of a practice in breach of the Convention was an aggravating factor. They also cited, inter alia, the adverse effects on the development of family ties and on the making of long-term plans; the threat of criminal or deportation proceedings against Mr. Abdulaziz and Mr. Balkandali (see paragraph 33 above); the lengthy separation of Mr. and Mrs. Cabales; and the fact that Mr. Abdulaziz would have been accepted for settlement in the United Kingdom under the rules in force at the dates of his marriage and of his application for leave to remain (see paragraph 41 above). Mrs. Balkandali added that the subsequent grant to her husband of leave to remain (see paragraph 53 above) had afforded no reparation for her previous distress.

The Government contended firstly that an award of just satisfaction to Mrs. Abdulaziz and Mrs. Balkandali was not "necessary": there was no evidence of the alleged damage nor had it been proved that any damage was the result of the violations that might be found by the Court. In the alternative, they submitted that a finding of violation would of itself constitute sufficient just satisfaction: at the time of their marriage, the couples concerned knew that they were not entitled to live together in the United Kingdom; in fact, they had not been prevented from doing so; and since they could have lived in Portugal or Turkey, family ties and long-term plans had not been adversely affected. Similar pleas were advanced concerning Mrs. Cabales.

96. By reason of its very nature, non-pecuniary damage of the kind alleged cannot always be the object of concrete proof. However, it is reasonable to assume that persons who, like the applicants, find themselves faced with problems relating to the continuation or inception of their married life may suffer distress and anxiety. Nevertheless, having regard in particular to the factors relied on by the Government in their alternative submission, the Court considers that in the circumstances of these cases its findings of violation of themselves constitute sufficient just satisfaction. The applicants' claim for monetary compensation cannot therefore be accepted.

### **B. Costs and expenses**

97. The applicants claimed in respect of their costs and expenses referable to the proceedings before the Convention institutions - subject to deduction of the amounts they had received by way of legal aid and of a donation of £342.83 - the following sums (exclusive of any value added tax):

- (a) £14,955.61 for the fees and disbursements of Messrs. Bindman & Partners, solicitors;
- (b) £8,745 for the fees of Mr. Michael Beloff, Q.C.;

(c) £5,411 for the fees of junior counsel (Mrs. Dangor up to March 1984 and Prof. Higgins thereafter);

(d) U.S.\$ 120.75, being the one-half not reimbursed out of the Court's legal aid fund of fees paid to Messrs. Sycip, Salazar, Feliciano & Hernandez for advice on Philippine law relative to Mrs. Cabales' marriage.

98. The Government indicated that they were prepared to pay such amounts as were in accordance with the Court's practice in the matter and were not covered by the applicants' legal aid. With the exception of the points mentioned in the following paragraph, the Government did not assert that the claim failed to satisfy the Court's criteria in the matter (see, amongst many other authorities, the Zimmermann and Steiner judgment of 13 July 1983, Series A no. 66, p. 14, para. 36); in particular, they did not contest that the applicants had incurred liability for costs additional to those covered by their legal aid (cf., inter alia, the Airey judgment of 6 February 1981, Series A no. 41, p. 9, para. 13). Subject to an examination of those points, the Court therefore retains the whole of the claim.

99. (a) The Government observed that the fees claimed in respect of junior counsel were, as compared with those claimed for leading counsel, higher than would, by convention, be paid in domestic litigation. The applicants disputed the existence of an inflexible rule in this respect.

The Court recalls that, in any event, it is not bound by the rules of domestic practice in this area (see the Silver and Others judgment of 24 October 1983, Series A no. 67, p. 10, para. 20). It finds, having regard to the circumstances and complexity of the case, that the fees in question are reasonable as to quantum.

(b) The Government contended that, unless the person who consulted Messrs. Sycip, Salazar, Feliciano & Hernandez had been acting as agent for Messrs. Bindman & Partners, there should be an appropriate deduction as regards the former firm's fees. Mrs. Cabales replied that that person had been so acting and that the latter firm had paid the fees. The Court notes that the account in question was, in fact, addressed to Messrs. Bindman & Partners.

100. The costs and expenses accepted by the Court total U.S.\$ 120.75 and, after subtracting the donation of £342.83, £28,768.78. From the latter amount has to be deducted the sum of 9,650 FF received by the applicants from the Commission and the Court by way of legal aid; the resulting figure is to be increased by any value added tax that may be due.

## FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that Article 8 (art. 8) was applicable in the present case but that, taken alone, it has not been violated;



2. Holds that Article 14 (art. 14) was applicable in the present case;
3. Holds that Article 14 taken together with Article 8 (art. 14+8) has been violated by reason of discrimination against each of the applicants on the ground of sex;
4. Holds that there has been no other violation of Article 14 taken together with Article 8 (art. 14+8);
5. Holds that there has been no breach of Article 3 (art. 3);
6. Holds that there has been a violation of Article 13 (art. 13) in regard to the complaint of discrimination on the ground of sex;
7. Holds that the United Kingdom is to pay to the applicants jointly, for costs and expenses, the sums resulting from the calculations to be made in accordance with paragraph 100 of the judgment.

Done in English and in French, and delivered at a public hearing at the Human Rights Building, Strasbourg, on 28 May 1985.

Gérard WIARDA  
President

Marc-André EISSEN  
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 52 para. 2 of the Rules of Court, the separate concurring opinions of Mr. Thór Vilhjálmsson, Mr. Bernhardt, Mr. Pettiti and Mr. Gersing are annexed to the present judgment.

G.W.  
M.-A.E.

CONCURRING OPINION OF JUDGE THÓR VILHJÁLMSOON  
CONCURRING OPINION OF JUDGE THÓR  
VILHJÁLMSOON

I have voted with the other members of the Court. My reasons with regard to the conclusion that there was no violation of Article 8 (art. 8) taken alone (point 1 of the operative provisions) differ from those set out in the judgment. I find that that Article (art. 8) was not violated although there was in my opinion lack of respect for the family life of the applicants. I find the interference justified under paragraph 2 of Article 8 (art. 8-2) because it was in accordance with the law and necessary in a democratic society in the interests of the economic well-being of the respondent State.

CONCURRING OPINION OF JUDGE BERNHARDT

I have voted with the other members of the Court, but my reasoning with respect to Article 8 (art. 8) and Article 13 (art. 13) of the Convention differs to a certain extent from the views expressed in the judgment.

1. According to the present judgment, Article 8 para. 1 (art. 8-1) is applicable but, if taken alone, is not violated because there is no "lack of respect" for family life. This reasoning excludes the application of Article 8 para. 2 (art. 8-2), and it in fact places inherent limitations upon the rights guaranteed in paragraph 1 of Article 8 (art. 8-1). In my opinion, the measures in question can only be, and indeed are, justified by the application of Article 8 para. 2 (art. 8-2).

2. Concerning Article 13 (art. 13), the present judgment maintains the jurisprudence established by the Court since its *Silver and Others* judgment of 25 March 1983. In my view, this jurisprudence should be modified since it does not conform to the object and purpose of Article 13 (art. 13) - a provision whose phrasing admittedly gives rise to doubts.

According to the present judgment, Article 13 (art. 13) is always and automatically violated if the following conditions are met: (1) the Convention does not form part of the internal law of a given State; and (2) the internal law of the State violates - according to the findings of our Court - other rights guaranteed by the Convention (in the present case Article 8 taken together with Article 14 (art. 14+8)). The result of this reasoning is that the interpretation of the substantive provisions by this Court is decisive also for the violation or non-violation of Article 13 (art. 13). Whenever this Court finds a violation of one of the Articles 2 to 5 (art. 2, art. 3, art. 4, art. 5) or 8 to 12 (art. 8, art. 9, art. 10, art. 11, art. 12) of the Convention as a result of the existence and application of a national legal norm in a State where the Convention does not form part of internal law, Article 13 (art. 13) also is automatically violated. This interpretation is doubtful for at least two reasons.

Unequal standards are being applied to States according to the position of the Convention in internal law. A State where the Convention is not directly applicable may have a most comprehensive human rights catalogue in its internal law and/or a sophisticated system of legal protection, but it will nevertheless always violate Article 13 (art. 13) if any internal legal provision is incompatible with the Convention. This is hardly comprehensible.

Article 13 (art. 13) must, in my view, be given a meaning which is independent of the question whether any other provision of the Convention is in fact violated. Whenever a person complains that one of the provisions of the Convention itself or any similar guarantee or principle contained in the national legal system is violated by a national (administrative or

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executive) authority, Article 13 (art. 13) is in my view applicable and some remedy must be available.

In spite of these considerations, I have voted with the majority since I feel to a certain extent bound by the former jurisprudence of the Court; in addition, United Kingdom law did not afford in the present cases, as far as I can see, the remedies necessary under Article 13 (art. 13) even if this provision is interpreted according to the view explained in this opinion.

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*(Translation)*

I agree with the views concerning Article 13 (art. 13) of the Convention which Judge Bernhardt has expressed in his concurring opinion.

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CONCURRING OPINION OF JUDGE GERSING

I agree with the views concerning Article 13 (art. 13) of the Convention which Judge Bernhardt has expressed in his concurring opinion.