

EUROPEAN COURT OF JUSTICE

4 JULY 2000

IN THE MATTER OF MANJIT KAUR

SPEECH FOR THE INTERVENING PARTY JUSTICE

My Lords, like all those who make submissions today, JUSTICE considers this case to one of great importance to the Community. It is a case that poses the question whether it is serious about its proclamation that human rights stand at the centre of the law of the Union, and that Community law sets standards that member states are obliged to maintain in its field of application.

Mr. President there is no debate about whether as a matter of domestic law the United Kingdom has granted its nationality or citizenship to Ms. Kaur. The issue is whether the United Kingdom was entitled when first joining the Community to empty the notion of citizenship of all meaningful content when making a statement about who were UK nationals for Community purposes.

It is the submission of JUSTICE that in 1968 with the Commonwealth immigrants Act and again in 1971 with the Immigration Act the government of the United Kingdom amended its immigration laws in a way that violated fundamental human rights. It deprived a certain class of its own nationals of the right to enter the only country of which they were a national and it relied on that arbitrary and discriminatory denial of a fundamental right to a section of its nationals when making the 1972 declaration on accession to the community. Its subsequent unilateral declaration was merely a further entrenchment of that deprivation of rights.

Put briefly, such a deprivation is unacceptable to the values and principles of the community and is incompatible with community law requirements in this field.

There can be no escaping one of two equally unattractive conclusions from the human rights perspective. Either, by depriving this class of the right to enter their own country the United Kingdom was depriving it of a citizenship status they had previously enjoyed and made them stateless in an arbitrary fashion. That would follow if one equates the right to enter one's own country with citizenship. Alternatively, the citizenship and nationality was retained but it was not an effective nationality because its holder was arbitrarily deprived of one of the most fundamental rights attaching to nationality.

Either way such a course violates fundamental norms of human rights in the field of nationality. As the Inter American court on Human rights has decided in its advisory opinion in the Costa Rica case cited in our written observations (para 6.13) "international law does impose certain limits on the broad powers enjoyed by states in t(this) area and that the manner in which states regulate matters bearing on nationality cannot be deemed to be within their sole jurisdiction".

Justice proposes to address in these oral submissions three issues relating to the determination of the first question posed by the national court.

1. Does community law have a role in regulating the meaning of nationality for the purpose of the application of free movement rights in the EC treaty as amended?
2. If so, what are the relevant principles of international and human rights law that come into play?
3. Does the fact that the United Kingdom has hitherto not ratified the Fourth Protocol to the European Convention on Human Rights preclude it informing the minimum standards set by Community law?

Before addressing these submissions there are three preliminary observations on the facts on this case in so far as they bear on the legal issues.

First, it is misleading to state, as the commission implied in its written observations that the United Kingdom has been unduly generous in extending nationality to Mrs. Kaur. In

1962 as the colonial power the UK might have ensured that Mrs. Kaur obtained Kenyan citizenship and had no claim to United Kingdom citizenship. It did not do so, because in a many white and Asian British nationals of Kenya were not seen to belong to that country, but retained a sense of identity of belonging to the “mother” country whose administration had brought the Asian community to Africa in the first place. She did not acquire Kenyan citizenship on de-colonisation. That meant that international rules reflected in the UN Convention on the Reduction of Statelessness adopted just the year before in 1961 required that she retain British nationality to avoid becoming stateless on an act of state succession. Thereafter the only territory or community with which her continued British nationality was connected was the United Kingdom. The retention of British nationality and citizenship was thus not an act of generosity but application of the appropriate international law rules. It is not the case as the UK government has stated that her connections with the UK are purely historical and that the UK was “her country” for the purpose of the UNCHR Art 13. She has present links by way of passport and protection from the UK government, if this is not her country she has none.

We have noted in our written observations the applicable practice in France, the Netherlands and Portugal. Whoever retained the nationality of the former dependent territory on decolonisation retained an effective and full nationality for all purposes, not subject to retroactive deprivation of rights.

Having legislated so that she retained the common citizenship of the United Kingdom and colonies, the die was cast, the election made, and assurances given. By 1968 the option to voluntarily acquire citizenship had gone. The deprivation of the right to enter the United Kingdom six years later was not a measure adopted on withdrawal from a former territory. It was not a response to Mrs. Kaur acquiring some new and additional rights in exchange for the acquisition of a new citizenship. It occurred after her opportunity to acquire citizenship of Kenya had expired. She has never held such a citizenship or indeed the nationality of any other state than the United Kingdom. This was a unilateral act of removing that which they had granted some years previously. It was removing a right that members of the class were assured that they would enjoy. It was a

removal of a right on grounds of race, to deter coloured immigration into the UK. It was in the words of the ICCPR an arbitrary deprivation of the right to enter her country.

Second, it is important to note that JUSTICE's submissions to this court do not seek to suggest that Community law supervision of the question would lead to free movement rights for the entire potential class of British nationals at common law. There are two reasons for that. Our written observations make plain that British nationals whose only connection was with a overseas country or territory, who resided and had a right to reside in a dependent territory of a member state would be outside the territorial scope of the EC Treaty. The Treaty and case law suggests that special arrangements would need to be made for these people. There was no need of a declaration. This would apply even more so to those who were nationals of independent commonwealth states with rights of residence there although still entitled to some residuary benefits in UK domestic law. Secondly, those who have an effective other nationality entitled them to remain as a matter of national and international law in another state, could not be said to be rendered stateless or have been arbitrarily deprived of nationality if an additional and subordinate nationality status did not afford rights of admission. Very different human rights concerns arose in respect of dual nationals.

The class we are considering today are those who are British nationals and have no other nationality. The UK Government has estimated that there are 1.5 million British Overseas Citizens. That was an estimate given to Parliament in 1983 when the class was created. Of this 1.5 million however only about 200,000 were British Overseas citizens with no other citizenship. This is the maximum number potentially affected by this case. In fact the number is bound to be less than this as in the intervening 17 years many will have died, acquired full British citizenship or the citizenship of another territory. Children of British Overseas citizen will not acquire this status automatically. The membership of the class is closed and diminishing. This is the lost tribe of British nationality, and it is time that ancestral rights were restored to it before it disappears altogether in the deserts of exile.

The UK government has published proposals to extend full British citizenship to British nationals from the remaining Caribbean dependencies. It does not intend to restore this to BOCs on the grounds that most are dual nationals and others will be able to enter the UK on the special voucher system. This case gives the lie to both those propositions. It is those who have no other nationality and cannot secure entry who are being arbitrarily deprived of the protection of their state.

Thirdly, the United Kingdom and other states have suggested that this case does not raise Community rights of free movement at all, but is a matter of purely internal effect. JUSTICE suggests that this is simply not so. Let us examine the true picture. Ms. Kaur has been resident in the United Kingdom for some years although now is being required to leave. The order for reference tells us that she wants to visit other member states of the Community whether to seek services and perhaps to obtain employment. Even apart from question 2 and old Article 8A EC, therefore, it is a case of someone who wants to travel to exercise the economic free movement rights provided under the Treaty. In such a case of her own state of nationality is under an obligation under the Directives to issue her with a travel document in order to enable her to exercise those rights. The issue of such a document to one who wants to travel to exercise Community in the Community rights is not a matter of purely internal effect. It is a central Community law obligation to enable effective trans-national activity to take place. If Community law recognises her or requires the UK to recognise her as within the personal scope of the treaty then this is not a case of purely internal effect at all.

With those preliminary observations I now return to the first of the three questions I would wish to develop:

Issue 1: Does Community law have a role in determining who are nationals for the purposes of the EC Treaty”.

The general principles are set out in Micheletti: the Community will look to the members state to see whether domestic law of that state has conferred nationality on the *propositus* and to examine whether there is anything contrary to community law in any measure conferring or depriving the *propositus* of effective nationality. That approach is to be found generally in international law: the initiative belongs to the sovereign rights of the state, but it is not a sovereignty entirely unaffected by international law principles. This approach is reflected in the European Convention on Nationality of 1997 where state decisions on nationality should be accepted “in so far as consistent with applicable international conventions, customary international law and the principles of law generally recognised with regard to nationality”.

For reasons that we have touched on this is not a debate about conferral, but about the legitimacy of deprivation of a key right attaching to what has been conferred. May I here address the question posed by the Advocate General. The fact that the deprivation of the right to enter occurred before UK accession does not alter the fact that community law rules are engaged in the approach to the 1972 Declaration. That purports to be a statement about nationality. At that time Mrs. Kaur and I shared the same nationality and citizenship status. Our passports looked the same though I was born in London and she in Kenya. The 1972 declaration added a deprivation of nationality to deprivation of migration rights, and it is that act inconsistent with international law principles that engages the competence of the Community.

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[The Court will be considering in question 1 what relevance to the interpretation of the treaty the UK's 1972 declaration may have and its subsequent unilateral replacement by the 1982 declaration. For the purpose of these submissions, and without prejudice to any arguments advanced on behalf of Ms. Kaur, Justice will assume that the declaration annexed to the instrument of accession is something to which the Court may have regard in determining Community Law and is not bound to ignore.

But what does the 1972 Declaration amount to? It is not a source of law either domestic or international. The executive cannot take away or change the nationality of an

individual citizen by a statement made in the exercise of the prerogative power of engaging in international treaties. Neither is the declaration part of the Treaty of Rome or a reservation from it. It is in truth a piece of information that may be helpful in deciding who are nationals of a member state and within the personal scope of the Treaty for Community law purposes. ]

The 1972 declaration was in fact a statement of immigration law not nationality law. It was a statement whereby the United Kingdom is unilaterally telling the Community yes Ms. Kaur is a British national and a citizenship of the United Kingdom and Colonies, yes though born in Kenya she holds the same citizenship status as anyone born in London, but she can't exercise the rights that other British nationals are afforded under the Treaty of Rome. Is Community law powerless or indifferent to that state of affairs? We submit not.

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[Suppose my Lords, that a Member State of the Community was to lodge a declaration to be placed alongside its instrument of accession stating that that from such a day none of its nationals who were black were to be regarded as its citizens for Community law purposes. We suggest along with the commentator Hall that the Community would not be indifferent to such a declaration but judge such an act of deprivation as the most transparent act of racially motivated deprivation of citizenship.

The UK implicitly acknowledges that once granted Community law rights cannot be unilaterally be removed such a declaration but stresses that Ms. Kaur was never brought within the ambit of free movement rights in the first place. Such a submission misses the point. If it is inconsistent with international law principles to deprive one's own national of free movement rights, it is inconsistent whether the deprivation takes place in 1968 when the citizen lost the rights to enter her own state, or 1972 when the deprivation was purportedly extended to the international free movement rights provided by the EC treaty.]

[The United Kingdom suggests that a sovereign state can agree a particular definition of nationality for particular purposes. There are two answers to that: the Treaty itself did not state that the benefit of the free movement rights is restricted to those persons identified by a contracting party in a declaration annexed to it. So there was no multilateral agreement to restrict the personal scope to whoever the Member State wanted. Second, any such an agreement would itself be subject to the principles of international law and the restraints on the deprivation of rights.]

The 1972 declaration should have said that UK national includes all those who by domestic law or the principles of international law cannot be excluded from the United Kingdom. That would have left the precise elaboration of the class benefited by the treaty to be determined by judicial inquiry into the text of the treaty, its territorial scope and the international law principles engaged.

That we submit is precisely the function of the court in the present case, to give guidance to the national court as to the principles of Community law to be applied. This is to ensure that community law develops in a consistent principled way.

As the Court has said in ERT

“from the moment when national regulations enter the field of application of Community law the Court on a preliminary reference must provide all the elements of interpretation necessary for the national jurisdiction to assess the conformity of those regulations with the fundamental rights that the Court protects and in particular those contained in the European Convention on Human Rights”

Issue 2: What are the principles of Community law that govern?

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[Once the it is accepted that the subject matter of the free movement rights and if and in so far as it is permissible to do so, the compatibility with Community law of any declaration made by a member state, is a matter for interpretation by the Courts, the question arises of how the court goes about its task.

JUSTICE has submitted that the first set is whether the domestic law of the state has conferred nationality or citizenship on the propositus. Here is clear that it has. Thus the applicant is within the potential scope of old Article 48 and 8A of the EC Treaty unless excluded from it by some other provision.

She is not excluded from it by territorial scope or the principle of reciprocity on which the commentator Hartley has relied. She is not seeking to enter another member state as a national of an independent common wealth country or a national of a dependent territory outside the scope of the EC treaty.

She is purportedly excluded only by a statement of the domestic immigration law that denies certain classes of national the right of admission to their only country of nationality. ]

There are at least three binding principles of international and human rights law that apply to judge the compatibility of such a state of affairs with the community legal order:

- i) Everyone has a right to a nationality. This is stated in the Universal declaration, the Inter American Convention and its omission from the European Convention has been rectified by the 1997 European Convention on Nationality.
- ii) The nationality that everyone has a right to must be an effective nationality. This emerges from the case law and practice of member states to avoid statelessness
- iii) There can be no discriminatory or arbitrary deprivation of the rights attached to nationality. The 1968 Act has been held by the European Commission to amount to degrading treatment in violation of Article 3 European Convention on Human Rights. How much more humiliating one might add would the expulsion of an own national from the territory of the state of nationality be, where residence has been engaged in for some years passed and where there exist all the relevant close family connections. The principle is reflected in ICCPR Art 12 and Article 5 of the European Convention on Nationality 1997 recently in force.

There can be no question of the UK not accepting these principles of international law at least. They underpin the true meaning that JUSTICE submits is to be assigned to 4<sup>th</sup> Protocol ECHR.

### Issue 3: Protocol 4 European Convention on Human Rights

The Commission have concluded in para 68 of its written observations that the right to enter the country of one's own nationality is a fundamental right which the Court is called upon to protect as being part of the general principles of Community law. But would hesitate to apply or oppose it to the United Kingdom because it has not ratified this Convention. Such a result would be a curious limitation to the role of supervising compatibility with Community law principles and the protection of fundamental rights.

Where the United Kingdom have participated in the drafting of the 4<sup>th</sup> Protocol and signed it, the Nolde case suggests that there have been sufficient recognition of the principles therein set out to form relevant guidelines to be applied by community law. The fact that there has been no ratification does mean that individuals like Ms. Kaur cannot lodge proceedings in Strasbourg complaining of a violation of this obligation. It does not mean that the separate use made of the principles of the Convention by the Court in deciding Community law has to be constrained by the act of a single state.

The UK points that that Spain and Greece states have not ratified the 4<sup>th</sup> Protocol, but the Commission's helpful constitutional survey shows that these two countries have specific constitutional guarantees to the same effect and have clearly recognised and applied the principle. The other countries have ratified and apply the obligation in domestic law through direct effect given to international human rights. Our written observations have shown how recognition of the international right has influenced French and Dutch practice within respect to its nationality and immigration laws.

Moreover every member state including the UK has ratified Article 12 .3 of the International Covenant on Civil and Political Rights the right not to be arbitrarily deprived of entry to one's country of nationality. The UK's reservation of its own

immigration laws is not necessarily inconsistent with its obligation provided its laws were not applied in a manner that rendered people effectively stateless or discriminated against. If it did then the reservation is inconsistent with the obligation and cannot be accepted as a proper reservation under international law.

The Court, in full recognisance of the UK's lack of ratification, has referred to the right as a principle of international law in Van Duyn. Of particular interest are the references to the right in the case of Singh and Roque, because here it was the United Kingdom itself who was relying on the principle for an explanation of what certain persons have to be admitted to the UK and the Channel islands. So one can say, not merely have the UK participated in the drafting of this instrument and signed it (sufficient criteria for the court to use it) but has also prayed it aid as a principle of international law in submissions before the Court, that have been accepted. It is extraordinary now for the UK to state that the discussion of the question in those cases was superficial, and having taken forensic advantage of the benefit of the principle now seek to disown it and invite the Court to dis-apply it.

The United Kingdom and the Commission have also raised the question of the difficulty of deciding who are the nationals to whom Article 3.2 applies. If this has been a factor inhibiting ratification it is surely a misconceived one. Article 5.6 makes it plain that a state can apply the protocol to dependent territories if it chooses and at the same time can identify each territory as a separate one to which the right of entry applies. That is to say British nationals from Hong Kong could enter Hong Kong, those from the Turks and Caicos can enter those territories etc. From this it is easy to arrive the conclusion that the right refers to all those who are nationals as a matter of domestic law, save that those who are nationals of a dependent or overseas territory may be limited to a right to enter that overseas territory.

On its true meaning Protocol 4 supports the approach we derive from the other instruments and together form principles of international law to be applied by the Community

## CONCLUSIONS:

For these reason JUSTICE invites this Court to answer the questions in the way set out in our written observations. The principle of international law must be that you must have an effective nationality, you must have the right to at least enter one territory on the basis of that nationality. That is the right that Ms. Kaur seeks to exercise and JUSTICE submits should form the principle of international law to be applied in this case.