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Deportation in the United States, Great Britain and International Law[†]

Introduction

Migrations on a mass scale have been commonplace during the twentieth century and they have led to the presence of large numbers of aliens in many countries of the world. The migration may be the consequence of domestic upheavals, as in the case of the refugees from East Pakistan (Bangladesh) to India, or of a systematic governmental policy of expelling a minority, as happened to those Asians in Kenya and Uganda who had failed to opt for Kenyan or Ugandan citizenship at the time those countries gained their independence. One aspect of the problems created by the presence of refugees and immigrants within a country concerns the undesirable aliens whom a host state finds on its territory and wishes to deport. Recent *New York Times*' articles show in a convincing fashion that deportations occur world-wide, as stories appeared involving Iraq,¹ Greece,² Israel,³ United States,⁴ Zaire,⁵ Mexico,⁶ Communist China,⁷ and Uganda.⁸

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[†]This article may be treated as a follow-up to the excellent articles by Miss Alona E. Evans and Mr. Jack Wassermann, on the immigration laws of the United States which appeared in Volume 3 Number 2 of the January 1969 *International Lawyer*, at pages 205 and 254.

¹Kathleen Teltsch, *Iran Complains in U.N. That Iraq Has Ousted 60,000*, New York Times, Jan. 5, 1972, at 3.

²"Lady Fleming Is Deported from Greece to England," New York Times, Nov. 15, 1971, at 4.

³"Israel Orders Deportation of Eight American Blacks," New York Times, Dec. 20, 1971, at 4. "Israel Refuses Citizenship to Lansky, but Offers Him Special Travel Papers," New York Times, Sept. 12, 1972, at 2.

⁴Paul L. Montgomery, *22 Cubans Lose Bid to Stay in U.S.—Immigration Official Rules They are Deportable*, New York Times, Nov. 3, 1971, at 16. "Xaveria Hollander Faces Deportation," New York Times, Nov. 19, 1971, at 21. "18 Seized at West Point Given Date to Leave U.S.," New York Times, Oct. 16, 1971, at 14. Edward C. Burks, *Immigration Aides Raid a Catskill Farm at Dawn*, New York Times, Sept. 27, 1972, at 35. David Bird, *Lindsay Deplores Action to Deport Lennons as a Grave Injustice*, New York Times, April 29, 1972, at 33; Grace Lichtenstein, *John and Yoko—"If There's Mercy, I'd Like It, Please,"* New York Times, May 21, 1972, at 11 § 4.

⁵"Nigerians Expelled from Zaire Say that Some Were Tortured," New York Times, Aug. 24, 1972, at 3.

⁶"St. Louis Professor, Deported by Mexico, Denies Spy Charge," New York Times, Aug. 27, 1972, at 12.

⁷"Z British Nationals Held 5 Years by the Chinese Are Deported," New York Times, Oct. 14, 1972, at 13.

⁸Joseph Lelyveld, *Britain to Resist Ugandan Demand—Hints Retaliation if African*

This study will consider the formal deportation procedures adopted by the United States and Great Britain, and will then ask whether any international agreements to which either of these countries is a party or the general principles of customary international law have established an enforceable international minimum standard which governs deportation procedures. Procedural and substantive rules controlling the entry of visitors or prospective immigrants, the extradition of criminal suspects, and the substantive grounds that permit or require deportation of aliens under the laws of the United States and Great Britain will not be discussed. Emphasis throughout shall be placed on the procedural safeguards accorded to aliens against whom deportation proceedings have been instituted.

I. Deportation Procedures in the United States

A. *The Legislative and Constitutional Background*

The Plymouth colonists required as early as 1639 the return of foreign indigents to their countries of origin.⁹ The first United States law authorizing the deportation of aliens was the Alien Act of 1798 which "gave the President power to order to leave the country any alien whom he deemed dangerous to the United States."¹⁰ The Alien Act proved to be highly unpopular and no alien had been expelled under its provisions when it expired in 1800.¹¹ It was not until 1888 that Congress adopted another statute dealing with the expulsion of aliens who had already entered the United States. The 1888 Act "authorized and directed the Secretary to return within a year after their entry any immigrants landing contrary to the contract labor laws."¹² In 1891 the power to expel was extended to all

Nation Expels Asians, (Expulsion Order covered Asians entitled to British Passports), New York Times, Aug. 8, 1972, at 6.; "Uganda Will Let Some Asians Remain," (Exception for non-citizen classes of professionals), New York Times, Aug. 10, 1972, at 4.; Bernard Weinraub, *Uganda's Unwanted Asians—Uncertainty and Fear Grow as the Days Dwindle*, (Elimination also of the non-citizen professional exemptions), New York Times, Aug. 20, 1972, at 2.; "Uganda Says That All Asians, Even Citizens, Must Leave Country," New York Times, Aug. 20, 1972, at 13 § 1.; Bernard Weinraub, *Uganda Now Says Asians Who Are Citizens May Stay*, New York Times, Aug. 23, 1972, at 3.; "Uganda Threatens to Intern Banned Asians After November 8," New York Times, Sept. 14, 1972, at 3.; "Uganda Broadens Category of Asians Due for Expulsion," New York Times, Oct. 20, 1972, at 7. (By November 8, 1972, all Asians with Kenyan, Tanzanian or Zambian citizenship were also ordered expelled.)

⁹Jane P. Clark, *Deportation of Aliens from the United States to Europe*, Columbia Univ. Press, New York, 1931, at 35.

¹⁰William C. Van Vleck, *The Administrative Control of Aliens*, The Commonwealth Fund, (New York), 1932, at 3.

¹¹Milton R. Konvitz, *Civil Rights in Immigration*, Cornell Univ. Press, Ithaca, (1953) at 95-96.

¹²Van Vleck, *supra* note 10, at 7.

aliens who had entered illegally, but this power had to be exercised by the Secretary within a year from entry.¹³ The Chinese Exclusion Act of 1892 required Chinese laborers who were legally in the United States to obtain a certificate of deportation, and placed the burden of proving the lawfulness of his residence on the Chinese alien.¹⁴ In *Fong Yue Ting v. United States*¹⁵ the United States Supreme Court upheld the constitutionality of this statute. Mr. Justice Gray's opinion for the court, which gave Congress almost unfettered discretion over the deportation of aliens, has been summarized as follows:

(1) The right to deport aliens is "absolute" and "unqualified." The admission of an alien creates no obligation on the part of the government; the alien's presence here is a matter of pure permission or simple tolerance. (2) The action of Congress respecting deportation is conclusive on the courts; for Congress has the inalienable and inherent right to expel all aliens or any class of aliens, "absolutely or upon certain conditions, in war or in peace." (3) In the exercise of this power Congress may decide to use only executive or administrative agencies; if the use of the courts is not provided for in the legislation, the courts cannot be used. The reason for this is that deportation is not punishment for crime. Due process of law requires judicial process only when a person is charged with the commission of a crime.¹⁶

The Act of 1903 extended the time limit for moving against illegal entrants to three years and called for the arrest of the aliens while their deportation was pending.¹⁷ Under the Act of 1917 the usual time limit was five years after entry, but for some categories of aliens such as anarchists, prostitutes, and people advocating "force and violence" against the government, the time limit was eliminated completely. The 1917 Act also provided for appeal from decisions of immigration officers to a board of special inquiry and then to the Secretary of Labor; "[i]n expulsion cases the decision of the Secretary to deport was expressly made final in an effort to reduce court action in immigration cases to a minimum."¹⁸

In 1920, the Secretary of Labor was authorized to deport aliens convicted of violating any war emergency legislation, "if he found them to be undesirable residents."¹⁹ Nineteen twenty-one saw the introduction of a quota to govern and limit immigration into the United States, and in 1924 all time limits for deporting illegal entrants were abolished while in deportation proceedings the alien now had the burden of proving his lawful entry.²⁰

¹³*Id.*, at 8.

¹⁴*Id.*, at 15.

¹⁵149 U.S. 698 (1893).

¹⁶Konvitz, *supra* note 11, at 97-98.

¹⁷Van Vleck, *supra* note 10, at 9-10.

¹⁸*Id.*, at 13.

¹⁹*Id.*, at 16.

²⁰*Id.*, at 17-18.

In the 1920s the number of deportations grew gradually from 4,517 in 1921 to 10,904 in 1926 and 16,631 in fiscal year 1930.²¹ At the same time aliens enjoyed no procedural protection by statute, except "that there must be a warrant of arrest issued by the Secretary of Labor at the time the alien is taken into custody, and that pending the decision on his case the alien so arrested may be released on bond."²²

In two 1952 decisions, the Supreme Court reaffirmed the wide congressional prerogative in the field of deportation. *Carlson v. Landon*²³ held that aliens arrested pending deportation proceedings were not entitled to release on bail. The salient points of the court's opinion were the following:

When aliens have come here legally admitted, they have come at the nation's invitation, but . . . "they remain subject to the plenary power of Congress to expel them under the sovereign right to determine what non-citizens shall be permitted to remain within our borders. . . ." The power to expel aliens belongs to the political branches of the government—the legislative and the executive; and this power may be exercised entirely through the administrative process, without affording the alien judicial review unless Congress authorizes or permits such review. There is no constitutional right to judicial proceedings or review because "Deportation is not a criminal proceeding and has never been held to be punishment. . . ." The Attorney General has been authorized by Congress in his discretion to "hold arrested aliens in custody. . . ." The court concluded that there was no showing in this case of a "clear abuse" of discretion.²⁴

The other 1952 Supreme Court decision, *Harisiades v. Shaughnessy*,²⁵ upheld the *ex post facto* application of the Alien Registration Act of 1940, in order to deport alien Communist Party members whose party membership had terminated prior to the passage of the Act. The court reasoned that the power to expel aliens was inherent in state sovereignty and the constitutional prohibition of *ex post facto* legislation was inapplicable since deportation is not a criminal proceeding.

However, it has been well established since the 1950 case of *Wong Yang Sung v. McGrath*,²⁶ that aliens are entitled by the Constitution to a fair administrative hearing, where they can present their case against deportation and to judicial review to the limited extent of assuring the observance of the fair hearing requirement. In *Wong Yang Sung* the Supreme Court had also held that Congress intended the Administrative Procedure Act of 1946 to apply to deportation proceedings, but "after this decision was announced, Congress passed an act which expressly withdrew appli-

²¹*Id.*, at 19.

²²*Id.*, at 83.

²³342 U.S. 524 (1952).

²⁴Konvitz, *supra* note 11, at 99–100.

²⁵342 U.S. 580 (1952).

²⁶339 U.S. 33 (1950).

cation of the Administrative Procedure Act from deportation proceedings,"²⁷ and this provision was retained in the McCarran-Walter Act of 1952.

Thus a fair administrative hearing is the sole constitutionally required procedural safeguard which must be honored when the United States establishes an administrative system to effect the deportation of undesirable aliens. The scope of the constitutional procedural protection is the same whether the alien had originally entered the United States legally or illegally, since it is derived from the due process clause which applies to "all persons." The scope of any constitutionally-required judicial review is limited to ascertaining whether there was "reasonable notice, a fair hearing, and an order supported by some evidence."²⁸ Concerning the substantive grounds for deportation, there are no constitutional safeguards nor any judicial review; aliens here enjoy only those substantive rights that are specifically granted to them by statutes and administrative regulations.²⁹

B. United States Practice in Deportation Proceedings

There are currently between one and two million illegal aliens in the United States and they continue to enter at the rate of 2,000 per day.³⁰ According to Senator Brooke of Massachusetts, illegal aliens take away a large number of jobs that would otherwise be filled by American workers and they earn about \$5 billion in the United States annually.³¹ California recently adopted a law that imposes fines on employers who knowingly hire illegal aliens.³² Illegal aliens were found working at West Point,³³ for President Nixon,³⁴ and for the current Treasurer of the United States.³⁵

Clearly, illegal aliens present a serious problem in the United States and it is not surprising that a large-scale administrative machinery has been

²⁷Konvitz, *supra* note 11, at 107.

²⁸*Id.*

²⁹The constitutional right to an administrative hearing in deportation was codified by the Immigration and Naturalization Act of 1952, in 8 U.S.C. 1252(b).

³⁰Paul L. Montgomery, *Illegal Aliens Pose Ever-Deepening Crisis*, New York Times, Oct. 17, 1971, at 7.

³¹"Aliens' Wages Scored," New York Times, Dec. 7, 1971, at 34.

³²Everett R. Holles, *California Law Seeks to Curtail a Heavy Influx of Illegal Aliens*, New York Times, Nov. 21, 1971, at 51. Similarly, groups representing migrant farm workers have urged that the Immigration and Naturalization Service adopt regulations directed against the employers of illegal aliens. See, Donald Janson, *Prosecution of Employers Urged to Halt the Flow of Illegal Aliens*, New York Times, May 19, 1972, at 34.

³³"18 Seized at West Point Given Date to Leave U.S.," New York Times, Oct. 16, 1971, at 14.

³⁴"Illegal Alien Reported as Gardener for Nixon," New York Times, Oct. 8, 1971, at 23.

³⁵"Treasurer Nominee Denies She Knew of Illegal Aliens," New York Times, Nov. 30, 1971, at 48.

developed to catch and deport illegal aliens. In fiscal year 1971, 420,126 illegal immigrants were captured by the Immigration and Naturalization Service and about 320,000 of them were Mexicans.³⁶ These figures for 1971 show that the magnitude of the problem has increased in recent years, as a 1967 account estimated that deportation proceedings were instituted against about 90,000 people annually,³⁷ and in 1966, 132,851 aliens were deported.³⁸

The United States statute governing immigration and deportation is the Immigration and Nationality Act of 1952,³⁹ better known as the McCarran-Walter Act. Although amended twenty-seven times by 1969,⁴⁰ this statute has remained the basis for all deportations from the United States. It provides about 700 substantive grounds for deportation without a statute of limitations,⁴¹ and deportation may be ordered for activity either prior or subsequent to the alien's entry.⁴²

The ensuing description of the procedure in deportation cases is largely derived from an interview with Mr. Harold Grace, the Assistant District Director for Deportation in the New York district,⁴³ that took place on October 26, 1971. When an alien is suspected of being deportable he will normally be called for questioning by an immigration inspector.⁴⁴ Although the courts have held that aliens have no right to counsel at such a preliminary hearing,⁴⁵ Immigration and Naturalization Service policy calls for the

³⁶Montgomery, *supra* note 30, at 1, 58.

³⁷Note: *Judicial Review of Final Orders of Deportation*, 42 N.Y.U. L. REV. 1155 (1967).

³⁸Alona E. Evans, *The Political Refugee in U.S. Immigration Law and Practice*, 3 INT'L. L., 205. See also; Jack Wasserman, *The Undemocratic, Illogical and Arbitrary Immigration Laws of the United States*, 3 INT'L. L., 254.

³⁹8 U.S.C. 1101.

⁴⁰Wasserman, *supra* note 38, at 254.

⁴¹8 U.S.C. 1252.

⁴²Wasserman, *supra* note 38, note 49 at 260.

⁴³The New York district office of the Immigration and Naturalization Service is located at 20 West Broadway in Manhattan. During my interview there I was given a set of the forms used by the Service and I will, on occasion, refer to these forms.

⁴⁴To arrest a suspected illegal alien without a warrant the immigration officer needs the equivalent of probable cause. However, for detaining a suspected illegal alien for questioning, the immigration officer is only required to meet the "reasonable suspicion" test established to cover police conduct in *Terry v. Ohio*, 392 U.S. 1 (1968). *Au Yi Lau v. Immigration and Naturalization Service*, 445 F.2d 173 (7th Cir. 1971). The Seventh Circuit recently held that a suspected illegal alien must be given the full Miranda warning before he can be asked for his alien registration card. *U.S. v. Campos-Serrano*, 430 F.2d 173 (7th Cir. 1971). However, the United States Supreme Court affirmed the reversal of the conviction for possession of a counterfeit alien registration card while sidestepping the issue of the Miranda warnings; the Supreme Court held that an alien registration card was not "visa, permit, or other document required for entry into the United States" and hence its counterfeiting was not made punishable by 18 U.S.C. 1546. *U.S. v. Campos-Serrano*, Sup. Ct. No. 70-46 (1971), 40 U.S. L. WEEK 4084.

⁴⁵*Nason v. Immigration and Naturalization Service*, 370 F.2d 865 (2d Cir. 1967).

use of their Form I-214 at these interviews. Form I-214 involves the giving of all *Miranda*⁴⁶ warnings, including "if you cannot afford a lawyer, one will be appointed for you before any questioning if you wish," and requires a signed waiver at the beginning of the questioning. Based on the interview, if further proceedings seem warranted, the investigating officer prepares the Record of Deportable Alien (Form I-213) and an Application for Order to Show Cause and Processing Sheet (Form I-265). On receipt of the investigator's recommendation in the Form I-265, the Deputy District Director administratively decides whether to issue an Order to Show Cause and Notice of Hearing (Form I-221). The show cause order states the alleged ground for deportability and requires the alien to appear for a formal hearing before a Special Inquiry Officer.⁴⁷

Pending the hearing, the alien may be detained under a Warrant for Arrest of Alien (Form I-200) issued by the District Director, or released either on bond or on his own recognizance. Detained alien women are kept at the civil jail; men are normally kept at district headquarters, twenty West Broadway, but those with criminal records are sent to the Bergen County jail. The alien may immediately ask for a redetermination by a Special Inquiry Officer of the decision for his detention or he can ask that the amount of his bond be reduced. The alien may be detained during the deportation proceedings and for up to 6 months from the date of the final deportation order.⁴⁸ Any detained alien:

must be advised of his right to communicate with a diplomatic or consular representative of his country; and the U.S. is bound by treaty to notify the representatives of certain countries whenever any of their nationals are detained for exclusion or expulsion proceedings whether the alien so detained requests it or not.⁴⁹

An alien may agree to depart voluntarily, provided he is not considered politically subversive, has not been convicted for certain listed crimes, and is not "otherwise undesirable."⁵⁰

According to Mr. Grace, very few aliens are actually detained and the bond set usually does not exceed \$500. The main concern in arriving at the amount required as bond is to assure that the alien will be present for the deportation proceedings. Mr. Grace also stated that there were no professional bondsmen actively dealing with the immigration authorities and consequently the full amount of the bond must be furnished by the alien. If the alien was detained the hearing before the Special Inquiry

⁴⁶*Miranda v. Arizona*, 384 U.S. 436 (1966).

⁴⁷8 C.F.R. 242.1(a).

⁴⁸8 U.S.C. 1252; 8 C.F.R. 242.2.

⁴⁹Evans, *supra* note 38, at 226.

⁵⁰*Id.*, n. 115 at 226; 8 U.S.C. 1251(a)(4)(5), 1254(e); 8 C.F.R. 242.5.

Officer will take place on the first subsequent working day; otherwise the hearing will be held in 7-10 days. When the alien contests the deportation or is asking for discretionary relief, the District Director will assign a trial attorney to represent the Government at the hearing and then the Special Inquiry Officer acts as judge.⁵¹ At the hearing the alien enjoys some procedural protection under administrative regulations:

[T]he alien must be informed of his right to counsel "at no expense to the Government," his right to present evidence and witnesses on his own behalf, to examine evidence presented by the immigration authorities, and to cross-examine their witnesses.⁵² He must also be advised of the possibility of applying for temporary withholding of deportation pursuant to the terms of Section 243(h).⁵³

Section 243(h)⁵⁴ gives the Attorney General discretion not to deport an alien who would be persecuted because of his race, religion or political opinion and this authority is delegated to the Special Inquiry Officers; under this section the alien has the difficult burden of proof.⁵⁵ In addition, after an alien is found deportable, the Special Inquiry Officer may suspend temporarily or indefinitely the actual deportation at his own discretion.⁵⁶

Thus at the hearing the Special Inquiry Officer can decide that the alien is not deportable; that he should not be deported based on discretionary authority such as Section 243(h); that his actual deportation be temporarily suspended; that the alien be permitted to depart voluntarily at his own expense; or that a Warrant of Deportation (Form I-205) should be issued.

An alien may select the destination listed on his deportation order unless the Attorney General finds that the chosen destination "would be prejudicial to the interests of the United States."⁵⁷ If the country selected by the deportee will not accept him, he will be sent to the country of his nationality. According to Mr. Grace the normal practice is to release aliens on bond even after the issuance of deportation orders.

Any decision of a Special Inquiry Officer may be appealed within ten days to the Board of Immigration Appeals in Washington, D.C., and the

⁵¹ Evans, *supra* note 38, at 226; 8 C.F.R. 242.9.

⁵² 8 C.F.R. 242.10, 242.16(a); It is noteworthy that while Mr. Grace, the Assistant District Director for Deportation, was very proud and emphatic about the Miranda warnings at preliminary interrogations, he admitted that at hearings aliens had legal representation only if they hired an attorney or were furnished one through legal aid or a charitable organization.

⁵³ Evans, *supra* note 38, at 227.

⁵⁴ 8 U.S.C. 1253(h).

⁵⁵ Evans, *supra* note 38, at 227; 8 C.F.R. 242.17(c). *See*, Khalil v. District Director of Immigration and Naturalization Service, 457 F.2d 1276 (9th Cir. 1972), where a U.A.R. citizen failed to carry the burden of showing that on return she would be persecuted for her political beliefs.

⁵⁶ 8 U.S.C. 1254; 8 C.F.R. 244.17(a).

⁵⁷ 8 U.S.C. 1253(a).

Attorney General may review decisions made by the Board.⁵⁸ Following the formal hearing, an alien may collaterally move to reopen the deportation proceedings based on newly discovered evidence,⁵⁹ and the Special Inquiry Officer's denial of the motion to reopen may also be appealed to the Board of Immigration Appeals.⁶⁰ The scope of judicial review, provided by statute, has been summarized as follows:

The Courts of Appeals have exclusive jurisdiction to review final orders of deportation including the Attorney General's denial of discretionary relief rendered during the course of a deportation hearing.⁶¹ Such review is available only if the alien is still in the country, but a stay of deportation is automatic when a petition for review is filed in a Court of Appeals.⁶² The legality of an alien's detention or a question of authorization of bond may be reviewed by a District Court in a habeas corpus proceeding.⁶³ An action in a District Court for a declaratory judgment is also available as a means of review of immigration orders which are not final . . .⁶⁴ As there is substantial administrative discretion involved in these proceedings, the courts are reluctant to interfere with the Attorney General's exercise of such discretion unless the alien, who has the burden of proof, can show that the decision was arbitrary, abusive, or otherwise violative of the law. . . . In reviewing administrative denials of discretionary relief under Section 243(h), the courts generally see their role as limited to determining whether there are procedural grounds for complaint. The courts will consider whether an abuse of discretion by the Attorney General has been shown, or due process of law, patently denied in the administrative proceeding.⁶⁵

In *Giova v. Rosenberg*⁶⁶ the Supreme Court held that the refusal by the Board of Immigration Appeals to reopen a case was directly appealable to the appropriate Court of Appeals as a final deportation order. Coupled with the decision of the Supreme Court in *Foti*,⁶⁷ which permits a direct challenge in a Court of Appeals of both determinations of deportability and denials of discretionary relief, the result is that Courts of Appeals have exclusive appellate jurisdiction over a variety of classes of "final orders of deportations."⁶⁸

C. Some Criticisms of United States Deportation Procedures

By administrative regulation any "determination of deportability shall

⁵⁸8 C.F.R. 242.21; 8 C.F.R. 3.1(h).

⁵⁹8 C.F.R. 242.22.

⁶⁰8 C.F.R. 242.21; 8 C.F.R. 3.1.

⁶¹8 U.S.C. 1105(a)(2). This section was judicially interpreted to cover denials of discretionary relief in *Foti v. Immigration and Naturalization Service*, 375 U.S. 217 (1963).

⁶²8 U.S.C. 1105(a)(c).

⁶³8 U.S.C. 1252(a).

⁶⁴8 U.S.C. 1105(a)(c).

⁶⁵Evans, *supra* note 38, at 228-30.

⁶⁶379 U.S. 18 (1964).

⁶⁷375 U.S. 217 (1963).

⁶⁸Note in 42 N.Y.U. L. REV. 1163-64.

not be valid unless it is found by clear, unequivocal and convincing evidence that the facts alleged as grounds for deportation are true."⁶⁹ Since deportation proceedings are considered non-criminal, neither the legal rules of evidence nor the federal rules of criminal procedure apply.⁷⁰ For the same reason the constitutional protection of the fifth and sixth amendments concerning criminal proceedings does not cover deportations,⁷¹ and "[i]n terms of constitutional guarantees the alien is forced to rely upon the vague fifth amendment requirement of due process."⁷² The Government's burden in deportation proceedings is the civil "preponderance of the evidence" and not the higher criminal standard of "beyond a reasonable doubt."⁷³

Unauthenticated foreign documents and depositions taken abroad are freely admissible as evidence at deportation hearings since the rules of evidence are not observed.⁷⁴ The vacation or suspension of prior proceedings does not bar subsequent governmental action to deport.⁷⁵ The Special Inquiry Officer cannot force the Immigration Service to produce records from its files which the alien claims would exonerate him, but the Inquiry Officer can ask courts to subpoena witnesses on request by the alien.⁷⁶ Where the statute calls for the exercise of administrative discretion, the rule requiring "clear, unequivocal and convincing evidence" does not apply,⁷⁷ and the evidence need not be contained in the record of the hearing "if, in the opinion of the Special Inquiry Officer or the Board, the disclosure of such information would be prejudicial to the interests of the United States."⁷⁸

Since any judicial review is limited to the record, in effect the exercise of administrative discretion based on evidence not disclosed in the record is totally unreviewable.⁷⁹ As it was already shown, judicial review of discretionary rulings is in any event possible only to the limited extent of seeing that the discretion is exercised in a procedurally fair manner. On

⁶⁹8 C.F.R. 242.14(a).

⁷⁰Evans, *supra* note 38, at 239; MacLeod v. Immigration and Naturalization Service, 327 F.2d 453 (9th Cir. 1964).

⁷¹Woodby v. Immigration and Naturalization Service, 385 U.S. 276 (1966).

⁷²William Haney, *Deportation and the Right to Counsel*, 11 HARV. INT'L. L.J. 177-79 (1970).

⁷³For an argument that at least for long-time resident aliens the government's burden of proof should be "beyond a reasonable doubt," see, Note, *Standard of Proof in Deportation Proceedings*, 18 STAN. L. REV. 1237 (1966).

⁷⁴According to 8 C.F.R. 242.14(c), a Special Inquiry Officer may, e.g., admit an oral or written statement "which is material and relevant to any issue in the case previously made by the respondent or any other person during any investigation, examination, hearing or trial."

⁷⁵Note: *The Special Inquiry Officer in Deportation Proceedings*, 42 V.L. REV. 803, 810 (1965).

⁷⁶*Id.*, at 811.

⁷⁷*Supra*, note 71.

⁷⁸8 C.F.R. 242.17(c).

⁷⁹Case Note on Vardjan v. Esperdy (2d Cir. 1962), in 50 CALIF. L. REV. 880, (1962).

issues of fact deportation orders are statutorily made conclusive on the reviewing courts "if supported by reasonable, substantial, and probative evidence on the record considered as a whole."⁸⁰

Stringent criticism has been directed against the non-applicability of the Administrative Procedure Act to deportation proceedings, and against the role of the Special Inquiry Officer as an employee of the Immigration and Naturalization Service who serves as both prosecutor and judge.⁸¹ Immigration officers are frequently guided by unpublished instructions emanating from the higher authorities, and these guideposts are not disclosed to either the alien or his attorney.⁸² The Board of Immigration Appeals publishes only those of its decisions which it wants to be regarded as precedents, but can buttress any decision by citing its unpublished opinions which are kept on file. The Immigration Service has a representative in attendance at all hearings of the Board and maintains its own list of unpublished opinions; only the alien and his attorney lack knowledge of the unreported decisions.⁸³ The 1966 Freedom of Information Act applies to the rules, regulations and instructions of the Immigration and Naturalization Service, but the Service has continued its tradition of secrecy in violation of the Act.⁸⁴ Thus most of the policies governing the exercise of discretion by immigration officers contained in the Operations Instructions of the Service remain secret although they have important substantive effects on aliens.⁸⁵ The Attorney General exercises supervisory control over the Board of Immigration Appeals, and when the Attorney General reviews a decision of the Board the alien has no right to argue his case orally or to present a brief.⁸⁶

The Administrative Conference of the United States, at its sixth plenary session, recommended that more decisions wherein discretionary relief had been granted be published, that the handbooks and administrative manuals of the Immigration and Naturalization Service be published, and that the regulations of the Service receive periodical review.⁸⁷ The Administrative Conference also recognized that an alien receiving congressional assistance or merely some evidence of congressional interest was immediately placed in a much more favorable position. As long as a private bill is pending in

⁸⁰8 U.S.C. 1105(a)(4).

⁸¹*See, e.g.,* Konvitz, *supra* note 11, at 107-9, and, *supra* note 79, at 881-82.

⁸²Elmer Fried, *Immigration and Nationality Law*, 35 N.Y.U. L. REV. 188-93 (1960).

⁸³*Id.*, at 195-96.

⁸⁴Note: *The Secret Law of the Immigration and Naturalization Service*, 56 IOWA L. REV. 147-48 (1970).

⁸⁵*Id.*, at 144-45.

⁸⁶Fried, *supra* note 82, at 198.

⁸⁷Administrative Conference, 40 L. WEEK 2354 (Dec. 14, 1971).

Congress in his behalf, an alien is permitted to remain in the United States in a "voluntary departure status."⁸⁸

The Immigration and Nationality Act grants aliens the right to be represented by counsel at their own expense at all formal hearings, but precludes the furnishing of attorneys to indigent aliens.⁸⁹ Although studies have shown clearly that aliens with legal representation have a much greater chance of success, about 50 percent of the aliens have no attorneys in deportation proceedings.⁹⁰ The case of Carlo Gambino, the reputed underworld boss whom the United States unsuccessfully tried to deport to Italy for fourteen years, is striking illustration of the value of legal counsel.⁹¹ Based on the argument that deportation is not a criminal proceeding, the absolute right of indigents to counsel appointed free of charge has not been extended to deportation.⁹² Haney forcefully argues that under the rationale of *Gideon v. Wainwright*⁹³ and *Miranda v. Arizona*,⁹⁴ indigent aliens should have a right to free, appointed counsel at least at all formal hearings.⁹⁵

Another major area of dissatisfaction concerns the question of bail or bond, which in deportation cases is settled solely by administrative discretion. Of course any argument that suspected illegal aliens are treated worse than citizens indicted for serious crimes, would be defeated if the Supreme Court adopted the view of Attorney General Mitchell that there is no constitutional right to bail in criminal cases.⁹⁶ Mitchell's reasoning is supported somewhat by *Carlson v. Landon*,⁹⁷ in which the Supreme Court upheld the denial of bail to aliens in a deportation proceeding, because the Court stated as dictum that the eighth amendment guaranteed only that when bail is granted it will not be excessive.⁹⁸

Since the suspected illegal alien is only accused of violating the immigra-

⁸⁸The three-year delay gained by the deportable alien in *Togukawa v. Rosenberg*, 454 F.2d 423 (9th Cir. 1971), through the introduction of a succession of private bills is by no means unusual. In the 90th Congress 7,293 private immigration bills were introduced of which 218 passed; in the 91st Congress of 6,266 such bills 113 became law; and in the 92nd Congress of about 4,000 bills only 56 passed. Richard L. Madden, *Private Immigration Bills Found to Drop Sharply*, New York Times, Oct. 25, 1972, at 14.

⁸⁹8 U.S.C. 1252(b); 8 U.S.C. 1362.

⁹⁰Haney, *supra* note 72, at 181.

⁹¹"Gambino Is Given Indefinite Stay," New York Times, Nov. 6, 1971, at 32.

⁹²*Murgia-Melendez v. Immigration and Naturalization Service*, 407 F.2d 207 (9th Cir. 1969).

⁹³372 U.S. 335 (1963).

⁹⁴384 U.S. 436 (1966).

⁹⁵Haney, *supra* note 90, at 177-90.

⁹⁶John N. Mitchell, *Bail Reform and the Constitutionality of Pre-trial Detention*, V.L. REV. 1223, at 1230-31 (1969).

⁹⁷342 U.S. 524 (1952).

⁹⁸*Id.*, at 544-46.

tion laws and poses no danger to the community, he should be released on bond unless there is good reason to believe that he would try to flee. However, bond is often denied to achieve aims other than assuring the continued presence of the alien, *e.g.* to prevent alien seamen from marrying American citizens.⁹⁹

Formal deportation procedures have occasionally been relied on to attain other ends. Thus there have been repeated attempts to use the technique of deportation, to avoid constitutional or treaty restrictions on extradition.¹⁰⁰ "In the early years of this century it became the regular practice for British authorities to utilize the United States immigration laws to secure the return to the United Kingdom of wanted criminals."¹⁰¹

Stays of deportation and grants of indefinite time for departure under the provision for voluntary departure, were awarded on a large scale in order to permit Cuban refugees to remain in the United States.¹⁰² A special problem is posed in attempts to deport United Nations personnel who enjoy a right of access under the 1947 U.N. Headquarters Agreement. The Agreement permits deportation for abuse of the right of access and residence in the United States, and at least twenty-three people connected with the United Nations have been ordered expelled.¹⁰³

It has been argued recently that resident aliens should receive the benefits of the "equal protection clause" as a constitutional requirement, since their fundamental interest in remaining in the United States is analogous to the position of criminal defendants.¹⁰⁴ Others maintain that in deportation proceedings aliens are entitled to full due process under the fifth and fourteenth amendments, and to the fourth amendment protection against arrests without a warrant or probable cause.¹⁰⁵ Any such extension of the constitutional protection of aliens in deportation proceedings would be welcome, but even at present aliens are afforded sufficient procedural safeguards by statute, regulations and practice, to present their case to the immigration authorities and to appeal to the courts. However, the adminis-

⁹⁹Fried, *supra* note 86, n. 33 at 192-93.

¹⁰⁰Note, *Executive Discretion in Extradition*, 62 COLUM. L. REV. 1313-28 (1962).

¹⁰¹Paul O'Higgins, *Disguised Extradition—The Soblen Case*, 27 MODERN L. REV. 521-23 (London, 1964).

¹⁰²Note, *Immigration—The Status of Cuban Refugees in the U.S.*, 21 U. FLA. L. REV., 73 (1968).

¹⁰³Leif Kr. Tobiassen, *The Reluctant Door—The Right of Access to the United Nations*, 397-98, Public Affairs Press, Washington, D.C., (1969).

¹⁰⁴Note, *Constitutional Limitation on the Naturalization Power*, 80 YALE L.J. 769-97 (1971).

¹⁰⁵Note, *Immigration and Naturalization "Dragnet"—Warrantless "Seizures" of Aliens—Due Process or Discrimination?*, 4 SUFFOLK L. REV. 805 (1970).

tration should be improved by furnishing free appointed counsel to indigent aliens, and by reducing both the secrecy and the scope of pure administrative discretion.

II. Deportation Procedures in Great Britain

A. British Legislation on Deportation

Britain has been proud of the rights accorded by its laws to aliens permitting them to gain access to its civil courts and of the special protection given to aliens charged with crimes. Already the "Magna Charta permitted friendly alien merchants to come and go freely, at the same time assuring them of protection."¹⁰⁶ Under a statute dating from the reign of George IV, aliens accused of criminal offenses were entitled to a jury composed of half foreigners excepting only trials for treason,¹⁰⁷ and this law was still in effect as of 1867.¹⁰⁸ All persons, regardless of their nationality and place of residence, may appear as plaintiffs before British courts in civil matters, provided the court otherwise has jurisdiction; the only exception concerns enemy aliens in time of war.¹⁰⁹ However, a look at the history of British legislation dealing with the deportation of aliens reveals a lack of regard for the procedural rights of the aliens.

Following the 1789 French Revolution England adopted Alien Acts which provided for the exclusion and expulsion of aliens on mere suspicion of disloyalty.¹¹⁰ The Alien Act of 1826 and the Registration of Aliens Act of 1836 both simply called for the registration of aliens, but a law passed in 1848 authorized the expulsion of aliens while giving the aliens a right to appeal to the Privy Council.¹¹¹ The Act of 1848 expired after only one year without ever having been utilized. "During the eighty years from 1825 until 1905 no alien was expelled from the United Kingdom, nor, from 1826, were any prevented from entering."¹¹² In 1906 the Privy Council

¹⁰⁶C. F. Fraser, *Control of Aliens in the British Commonwealth of Nations*, The Hogarth Press, London, (1940), 37.

¹⁰⁷William Blackstone, *Commentaries on the Laws of England*, vol. IV of *Public Wrongs*, 413, Beacon Press, Boston (1962).

¹⁰⁸Warren, born in Ireland but then naturalized as citizen of the United States, was unsuccessful in invoking the statute in 1867 as it was held that he had remained a British subject despite his American naturalization, and hence was no alien. Sir Alexander Cockburn, *Nationality*, 90 William Ridgway, London, (1869).

¹⁰⁹Ivan L. Head, *International Standards of Civil Procedure—The Alien in the Courts of Ghana*, 12 ST. LOUIS U.L.J. 392-95 (1968).

¹¹⁰Cedric Thornberry, *Dr. Soblen and the Alien Law of the United Kingdom*, 12 INT'L. & COMP. L.Q., 414-17, London (1963).

¹¹¹*Id.*, at 417.

¹¹²*Id.*, at 417-18.

held that expulsion was a Crown prerogative which could therefore be exercised in the absence of any statutory authorization,¹¹³ but there has been no need to resort to this Crown prerogative in practice as Alien Acts authorizing deportation have been in force constantly since 1905.

The Alien Act of 1905 empowered the Secretary of State for Home Affairs to order the expulsion of aliens on court recommendation, following a criminal conviction, or on court certification that the alien received charity, lacked means of support or lived in overcrowded, unsanitary conditions.¹¹⁴

Nineteen fourteen saw the passage of the statute that has remained to this day the most important British legislation on the subject of the deportation of aliens:

The Aliens Restriction Act, 1914, which went through all its stages and received the royal assent on August 5, 1914, conferred on the Crown the widest possible powers with regard to the admission, treatment and deportation of aliens, exercisable by Order in Council.¹¹⁵

The "emergency powers" contained in the 1914 Act, and continued by that of 1919, have been prolonged year by year by the Expiring Laws Continuance Acts. The consolidating Order in Council at present regulating the admission and expulsion of aliens is that of 1953. . . .

The deportation provisions of the enabling Acts are at present exercised in articles 20 and 21 of the 1953 Order. The Home Secretary is empowered to make a deportation order in two cases; where an alien has been convicted of an offence punishable with imprisonment and the court has seen fit to recommend the alien for deportation; and where he "deems it to be conducive to the public good."¹¹⁶

Although somewhat modified by the Immigration Appeals Act of 1969, the 1914 Aliens Restriction Act, and the 1953 Order in Council adopted under its authorization, are still in effect. Consequently the Home Secretary still enjoys tremendous discretion in issuing deportation orders and thus expelling aliens.

Until 1962, there was no statutory power to deport Commonwealth citizens from Britain under any circumstances. Under the Commonwealth Immigrants Act of 1962, if a Commonwealth citizen who is above 17 and has not resided in England for the preceding five years is convicted of a crime which is punishable with imprisonment, the court which convicted

¹¹³Attorney General for Canada v. Cain, A.C. 542 (1906).

¹¹⁴Thornberry, *supra* note 110, at 429.

¹¹⁵Under British constitutional practice Crown refers to the executive branch and Order in Council to regulations adopted by the executive branch, usually under some statutory authorization.

¹¹⁶Thornberry, *supra* note 110, at 430-32. *Rex v. Leman Street Police Station Inspector, ex parte Vinicoff*, (1920), 3 K. B. 72, held that when the Home Secretary acted under an authorization from the Aliens Order, he was not a judicial officer and hence he did not have to hold a hearing prior to the issuance of a deportation order.

him or any appellate court seized of the case may recommend his deportation; however, the Commonwealth citizen will then be deported only if the Secretary of State "thinks fit" to make a deportation order.¹¹⁷ Without such a court recommendation, and unless the Commonwealth citizen falls into a class made deportable by the 1962 Act, the Home Secretary still cannot order the deportation of the citizen of a country within the British Commonwealth.¹¹⁸

The most recurrent criticism of the procedural aspects of British deportation of both aliens and Commonwealth citizens after 1962, focused on the non-appealability of deportation decisions. There was also no way to appeal determinations to exclude prospective immigrants, even if they came from a Commonwealth country. In 1967 the government-appointed Wilson Committee proposed the establishment of a two-tier system of administrative appeals from recommendations of deportation, and from the refusal to revoke a deportation order; the appeal procedure was to be available to both aliens and Commonwealth immigrants.¹¹⁹

The Wilson Committee's recommendation led to the Immigration Appeals Act of 1969. Since this Act contains almost the whole of British legislation concerning deportation procedures, a fairly extensive quotation from the excellent accounts by Hepple¹²⁰ and Yeats¹²¹ seems to be warranted:

Adjudicators (appointed by the Home Secretary) and an Immigration Appeal Tribunal (appointed by the Lord Chancellor) will hear appeals, in terms of the Immigration Appeals Act, from those Commonwealth citizens who are subject to immigration control, and, in terms of corresponding provisions established by Order-in-Council, from aliens. It is proposed to appoint some twenty full-time and thirty part-time adjudicators to deal with the anticipated annual total of 15,000 to 20,000 appeals. . . . Appeal will lie in the first instance to an adjudicator (save in security cases) and then to the Tribunal. Rules of procedure will provide when leave to appeal is required. The Home Secretary may dispense with the need for leave by certifying that a decision by the Tribunal is "desirable in the public interest. . . ." There will be no

¹¹⁷Part II of the Commonwealth Immigrants Act of 1962 governing deportations is reproduced in Ian A. MacDonald, *Race Relations and Immigration Law*, 128-32, Butterworths, London (1969).

¹¹⁸Walter Greenwood, *Deportation Under the Commonwealth Immigrants Act*, 1962, 1963 CRIM. L. REV., at 92-93 (London). The Commonwealth Immigrants Act also provides a number of grounds for refusing admission to Commonwealth citizens; the excluded Commonwealth citizens may then be detained for a reasonable period pending their removal from Britain at the Government's expense as long as the Home Office issues valid directions for removal within two months of the commencement of the detention. See, R. v. Governor of Richmond Remand Centre, *ex parte* Ashgar and Ali, 1 W.L.R. 129, D.C. (1971); reported also in 1971 CRIM. L. REV. 91, and 1971 PUBLIC LAW 65, 142.

¹¹⁹B.A. Hepple, *Report of the Committee on Immigration Appeals*, 31 MODERN L. REV. 310-18, London (1968).

¹²⁰B.A. Hepple *Immigration Appeals Act 1969*, 32 MODERN L. REV. 668, London, (1969).

¹²¹Ian Yeats, *Immigration Appeals Act 1969*, 113 SOL. J. 534 (July 11, 1969).

further appeal from the Tribunal to the courts, although the adjudicators and the Tribunal will be kept within their powers by the ordinary forms of judicial review. . . . The right of appeal is not general but lies only in respect of certain defined decisions and actions . . . (including) refusal to revoke a deportation order, the giving of directions for the removal of a person and a direction that he be removed to a particular country.¹²²

It is intended to provide in the regulations that whenever any relevant decision or action is taken, the person affected shall be informed of the reasons and of his right to challenge it. . . . Home Secretary now acquires for the first time power to deport Commonwealth citizens without a court recommendation though only for failure to comply with conditions of admission. . . . Again § 9 provides special machinery where the decision appears to the Home Secretary to involve issues of national security. The appeal will then be heard by a special panel of the tribunal and not the adjudicator, and § 9(2) ensures in a circuitous fashion that the panel's functions are advisory and final responsibility rests with the Home Secretary.¹²³

[T]he Act allows an appeal against a refusal to revoke an order made following a court recommendation. This right may not be exercised until the deportee has complied with the requirement in the order in question that he should leave the United Kingdom. . . .

In the case of an alien whom the Home Secretary has decided to deport because he "deems it to be conducive to the public good" there is a right of appeal only to the Tribunal, but an appeal may also lie to an adjudicator where the Home Secretary refuses to revoke such an order. The apparent liberality of these provisions for appeal must be measured against the difficulties which will face the adjudicators and Tribunal in deciding to interfere with the exercise of discretion.¹²⁴

Immigration rules are now to be drawn up by the Home Secretary within the statutory framework, and they will be published as well as presented to Parliament for possible disapproval; all the appellate bodies are bound by these rules,¹²⁵ as well as the immigration authorities themselves. Under Section 8 of the Act of 1969, on appeal both findings of fact and conclusions of law may be reviewed, but not a refusal to depart from the usual immigration rules; an appeal will be successful if the appellate organ finds either that the decision "was not in accordance with the law or with any immigration rules," or that the discretionary authority of the Home Secretary or of an immigration officer should have been exercised differently.¹²⁶ During the time for filing an appeal, and while an appeal is pending, deportation orders may be issued only against seamen and stowaways not seeking political asylum, and appellants may be released on bail.¹²⁷

¹²²Hepple, *supra* note 120, at 668-69.

¹²³Yeats, *supra* note 121, at 534-35.

¹²⁴Hepple, *supra* note 120, at 670.

¹²⁵Yeats, *supra* note 121 at 536.

¹²⁶Hepple, *supra* note 120, at 671.

¹²⁷*Id.*

B. British Practice in Deportation Proceedings

Until 1962 only true aliens, but not Commonwealth citizens, could be formally deported from Britain, and about 100 aliens were deported annually.¹²⁸ In the five-year period ending with 1961 exactly 483 aliens were deported.¹²⁹ The number of aliens deported unaccountably dropped after 1962, and between May 1962 and August 1966 only 232 were actually deported.¹³⁰ Since, under Article 20 of the 1953 Aliens Order, the Home Secretary may order the deportation of aliens if he "deems it to be conducive to the public good" a British author has concluded "that an alien may be quite arbitrarily deported under this procedure."¹³¹

The Court of Appeals has repeatedly held that since aliens had no right to land or remain in Britain, in immigration matters there was no duty of procedural fairness toward them.¹³² However, only the Home Secretary can order the deportation of an alien; British courts can neither grant aliens a period of time for leaving voluntarily during which they would be immune from deportation orders by the Home Secretary,¹³³ nor can courts themselves order the deportation of an alien.¹³⁴

The Aliens Order of 1953 permits courts to recommend the deportation of convicted aliens, and if the sentence includes imprisonment, the court may not release the alien on bail pending appeal against the sentence and recommendation, until the Secretary orders either his deportation or his release.¹³⁵ In 1956 the Home Secretary established a procedure whereby aliens who were ordered deported as "conducive to the public good," could appeal the deportation decision to the Chief Magistrate at Bow Street, but only aliens who had entered legally and then resided in England for at least two years could avail themselves of this appeal procedure.¹³⁶

The Chief Magistrate made a non-binding recommendation to the Home Secretary whether or not the deportation order should be carried out, with the recommendation not being disclosed to the alien.¹³⁷ Between 1956 and 1962 fifty aliens appealed to the Chief Magistrate who in eighteen cases did

¹²⁸Cedric Thornberry, *Law, Opinion and the Immigrant*, 25 MODERN L. REV. 654-69, London (1962).

¹²⁹Thornberry, *supra* note 114, n. 88 at 432.

¹³⁰Sheila Patterson, *Immigration and Race Relations in Britain 1960-67*, 73 Oxford Univ. Press, London (1969).

¹³¹MacDonald, *supra* note 117, at 74.

¹³²Hepple, *supra* note 120, at 668. A recent such case was *Schmidt v. Secretary of State for Home Affairs*, 1 ALL E.R. 904 (1969).

¹³³*R. v. Governor of Brixton Prison, ex parte Havlidge*, Queen's Bench (1968); reported in 1969 CRIM. L. REV. 26, and 33 J. CRIM. L. 19 (1969).

¹³⁴*R. v. East Grinstead Justices, ex parte Doene*, Queen's Bench, 3 W.L.R. 920 (1968); reported in 1968 CRIM. L. REV. 671, and 31 J. CRIM. L. 17 (1969).

¹³⁵*Deportation Orders and Bail Pending Appeal*, 30 J. CRIM. L. 76-77 London (1966).

¹³⁶Thornberry, *supra* note 110, at 432.

¹³⁷MacDonald, *supra* note 117, at 74.

not concur with the deportation order.¹³⁸ In each case, the Home Secretary followed the recommendation of the Chief Magistrate.¹³⁹ Under the Aliens Order implementing the 1969 Immigration Appeals Act, aliens have a clear right to appeal deportations ordered by the Home Secretary "conducive to the public good."¹⁴⁰

Since 1962 Commonwealth immigrants may be deported from Britain, if they fall within a category specifically made deportable by the 1962 Commonwealth Immigrants Act, the 1968 Commonwealth Immigrants Act modifying the 1962 Act, and the 1969 Immigration Appeals Act. These statutes authorize the Home Secretary to issue deportation orders against Commonwealth immigrants only for violations of the conditions on admission or on court recommendation following criminal convictions.

For purposes of judicial appeal a court recommendation of deportation is part of the criminal sentence and is appealable to the Court of Appeal if the sentence itself could be so appealed under the Criminal Appeal Act of 1907;¹⁴¹ the immigrant may elect to appeal against the recommendation alone without also appealing his conviction and sentence.¹⁴² The courts have full discretion in deciding whether to recommend deportation and their discretion may not be construed as having been circumscribed by Home Office circulars or a speech of the Lord Chief Justice.¹⁴³

As long as a Commonwealth immigrant has the possibility of a judicial appeal, no order of deportation may be issued against him.¹⁴⁴ The execution of a sentence of imprisonment will not be postponed while the Home Secretary is deciding whether to follow through on a recommendation for deportation, but the sentencing court may release Commonwealth citizens on bail during the judicial appeal process and while waiting for the action of the Home Secretary.¹⁴⁵

The framers of the 1962 Commonwealth Immigrants Act envisioned that recommendations for deportation and deportation orders based on them would be relatively rare. The professed aim was to guard the British community from confirmed criminals by permitting their prompt deportation. In their practice the courts and the Home Secretary have not been so

¹³⁸Thornberry, *supra* note 110, n. 87, at 432.

¹³⁹*Id.*, at 432.

¹⁴⁰MacDonald, *supra* note 117, at 74.

¹⁴¹An analysis of appellate court decisions on lower court recommendations for deportation may be found in, F. O. Shyllon, *Immigration and the Criminal Courts*; 34 MODERN L. REV. 135, 142-46 London (1971).

¹⁴²MacDonald, *supra* note 117, at 72. R. v. Lynch, 1 W.L.R. 92 (1966); *discussed in*, 30 J. CRIM. L. 107, London (1966).

¹⁴³Khan v. Shea, Queen's Bench (1968); *reported in*, 1969 CRIM. L. REV. 84 (London).

¹⁴⁴Thornberry, *supra* note 128, at 669.

¹⁴⁵Greenwood, *supra* note 118, at 97-98.

selective, and during the first six months after the Act became effective there were 256 such recommendations and 58 actual deportation orders.¹⁴⁶ By August 1966, 999 Commonwealth citizens had been deported, with above 60 percent being sent to Ireland.¹⁴⁷

The Immigration Appeals Act of 1969 went into effect on July 1, 1970, and the Home Secretary appointed twenty full-time and sixty-seven part-time adjudicators to handle the first stage of appeals.¹⁴⁸ An independent, albeit government-supported, Joint Council for the Welfare of Immigrants was established to aid all immigrants in their disputes with the immigration authorities.¹⁴⁹ The appellate machinery created under the 1969 Act was quickly engulfed in controversy through the well-publicized "national security" case of Rudi Dutschke. The immigration authorities concluded that Dutschke, a German national, had violated the terms of his admission as a student by engaging in political activities. The Home Secretary held that "national security" was involved and, pursuant to Section 9 of the Act, directed that Dutschke's appeal be heard by a special panel of the Immigration Appeals Tribunal in an advisory capacity with the final decision left to the discretion of the Home Secretary. Use was also made of the statutory provision "that matters relevant to the case are not to be disclosed to the appellant if the Home Secretary certifies that to do so 'would be contrary to the interests of national security.'"¹⁵⁰ There was an outcry against the withholding from the prospective deportee the evidence relied on against him.¹⁵¹ At the same time, a few people claimed that the mistake lay in unnecessarily providing a right of appeal in the first place.¹⁵²

In 1971 Parliament passed a new Immigration Bill which became law on October 28, 1971.¹⁵³ The 1971 Immigration Bill abolishes the special appeal procedure involved in the Dutschke case, places aliens and Commonwealth citizens procedurally on the same footing, and will eventually

¹⁴⁶Thornberry, *supra* note 128, at 669.

¹⁴⁷Patterson, *supra* note 130, at 73-74.

¹⁴⁸Comment of Mr. Merlyn Kees, joint Under-Secretary in the House of Commons on May 28, 1970; *reported in*, 114 SOL. J. 439 (June 5, 1970).

¹⁴⁹Hepple, *supra* note 119, at 321. The United Kingdom Immigrants' Advisory Service was set up by a group of organizations "to advise Commonwealth citizens and aliens on exercising their right of appeal and to deal with any welfare problems arising from such cases. If an appellant including anyone who has unsuccessfully applied for an entry certificate or visa overseas, seeks the help of the service in presenting his appeal, it will represent the appellant . . ." Note, Immigration Appeals, 1970 PUBLIC LAW 301-2 (London, 1970).

¹⁵⁰Hepple, *supra* note 120, at 669-70. A more detailed, factual account of the Dutschke affair is in B.A. Hepple, *Aliens and Administrative Justice—The Dutschke Case*, 34 MODERN L. REV. 501 (London (1971)).

¹⁵¹Letter to the editor of F. H. Amphlett Micklewright, 115 SOL. J. 38 (Jan. 8, 1971); and William Forbes, 115 SOL. J. 49 (Jan. 15, 1971).

¹⁵²Letter to the editor of Joseph Yahuda, 115 SOL. J. 49 (Jan. 15, 1971).

¹⁵³SOL. J. (Nov. 5, 1971).

supersede all previous legislation dealing with aliens and Commonwealth immigrants.¹⁵⁴ The immigration rules proposed in implementation of the 1971 Immigration Bill, were recently rejected by Parliament mainly as a protest against the regulations concerning immigration from Commonwealth countries.¹⁵⁵ In the sphere of deportation the draft immigration rules would end all distinctions between aliens and Commonwealth citizens as to rights in the course of deportation proceedings, and would make numerous other changes as well:

Deportation may be ordered (1) if a person has failed to comply with a condition attached to his leave to enter the country, or remains beyond the authorized time, (2) if the Secretary of State deems the person's deportation is conducive to the public good, (3) if the person is the wife or child under 18 of a person ordered to be deported, (4) if the person, after reaching the age of 17, is convicted of an offense for which he is punishable with imprisonment and the court recommends deportation. Even where the court has not recommended deportation of an offender, the Secretary of State has the right to make a deportation order. . . . Under the new rules there is no right of appeal for anyone who is deported on the personal decision of the Secretary of State except to question the country to which he is to be deported. . . . Others against whom deportation orders are served will have a right of appeal under existing legislation. . . . The new rules bring Commonwealth citizens within the same legal framework as aliens.¹⁵⁶

Adoption of the new Immigration Bill and immigration rules would end the undesirable differentiation as to the procedural rights of aliens and Commonwealth immigrants in deportation proceedings. However, this desirable end would be reached by sharply reducing the rights of Commonwealth citizens to the minimal level of protection enjoyed by aliens, and exposing all non-British citizens to the almost unfettered discretion of the Home Secretary to act "conducive to the public good."¹⁵⁷ Since the new Immigration Bill would deny a right of appeal against deportation orders based solely on the Home Secretary's discretion, the persons affected may turn for help to the Parliamentary Commissioner, the British ombudsman, through the intercession of a Member of Parliament.¹⁵⁸

By British policy established in the Home Office, political asylum is granted only if the alien in his own country faces serious danger to his life and liberty, or if he would be subjected there to economic persecution "of

¹⁵⁴*Current Topics: Immigration Bill*, 115 SOL. J. 161 (Mar. 15, 1971).

¹⁵⁵Richard Eder, *Heath's Party Loses Vote in Commons on Migration*, New York Times, Nov. 23, 1972, at 1, 7.

¹⁵⁶*Draft Immigration Rules*, 115 SOL. J. 192 (Mar. 12, 1971).

¹⁵⁷While the 1971 Immigration Bill became law on October 28, 1971, (SOL. J., Nov. 5, 1971) rules establishing the new deportation procedures must still be adopted.

¹⁵⁸See Bernard Schwartz, *The Parliamentary Commission and His Office: The British Ombudsman in Operation*, 45 N.Y.U. L. REV. 963 (1970).

such a nature as to render life unsupportable." The grant of asylum is wholly discretionary and the alien has the burden of proof.¹⁵⁹ Like their American counterparts, British immigration authorities have occasionally utilized formal deportation proceedings to accomplish the disguised extradition of aliens, as in the 1962 case of Dr. Soblen.¹⁶⁰ Conversely, deportation has frequently been brought about by informal proceedings resulting in "voluntary" departure by aliens, generally by giving convicted aliens the option of leaving in lieu of serving their prison sentence.¹⁶¹

When available, the two-tier British administrative appeals system adequately assures to prospective deportees a fair hearing and an opportunity to argue against deportation, at least in theory. Of course the effectiveness of the system as a procedural protecting device in practice will depend on the attitude and degree of independence from the Government of the adjudicators and of the Immigration Appeals Tribunal.¹⁶² The proposed Immigration Bill and rules would reduce the scope of the right to appeal and would increase the discretion reserved to the Home Secretary; therefore its adoption would lessen the procedural protection in deportation cases.

III. Deportation under International Law and Agreements

A. Traditional International Law

Classical international law, based primarily on the actual practice of sovereign states, placed almost no limitations on the freedom of a state to admit or expel aliens. Lord Chief Justice Cockburn of England, writing in 1869, considered it proper under the comity of nations that "by the law of many countries a power is vested in the Government either for cause, or at discretion, to direct the removal of the alien."¹⁶³ Writing in 1937, the Canadian law professor MacKenzie accepted that deportation "is a right on which all states insist and in which all states concur . . . (and) if one state permits the citizens of another state to enter its territories, it should have the right to eject these individuals if they prove undesirable."¹⁶⁴

¹⁵⁹Thornberry, *supra* note 100, at 436-37.

¹⁶⁰The Soblen case is described in two excellent articles; O'Higgins, *supra* note 101, at 521 and Thornberry, *supra* note 110, at 414.

¹⁶¹MacDonald, *supra* note 131, at 77-79.

¹⁶²In February 1972 the initial issue of Immigration Appeals Reports was published "to report decisions of the immigration appeal tribunal and immigration appeal adjudicators which contain points of legal principle and interest relevant to immigration legislation." 116 SOL. J. 163 (Feb. 25, 1972).

¹⁶³Cockburn, *supra* note 108, at 138.

¹⁶⁴Norman MacKenzie, *The Legal Status of Aliens in Pacific Countries*, 10 Oxford Univ. Press, London (1937).

Perusal of a recent textbook on international law reveals that this classical view has endured to this day:

Under ordinary circumstances and in the absence of international agreement to the contrary, a state is under no duty to admit nationals of another state into its territory and incurs no international responsibility if it deports them. If aliens are admitted, they may be subjected to restrictions on the duration of their stay, where they may travel and what activities they may engage in.¹⁶⁵

According to the opinion of the governments of the United States and Great Britain, but not of Latin American, Communist and numerous developing countries, "a state is responsible under international law for injury to an alien caused by conduct subject to its jurisdiction, that is attributable to the state and wrongful under international law."¹⁶⁶ Under this view the conduct of a state violates international law if it "departs from the international standard of justice" established by "international custom, judicial and arbitral decisions, and other recognized sources" or by "analogous principles of justice generally recognized by states that have reasonably developed legal systems."¹⁶⁷

Even if one accepts that state responsibility for the observance of certain international minimum standards toward aliens is a valid tenet of international law, it may still be maintained that these international minimum standards do not apply to deportation procedures. It seems unlikely that the formal or informal procedure used in the exercise of a state's acknowledged right to deport aliens could by itself cause sufficient injury to the aliens affected so as to give rise to a claim under international law. Further, the actual practice of states has not revealed general acceptance of any international minimum standards governing deportation procedures that a deporting state could be accused of having violated; thus newspaper reports indicate that Greece,¹⁶⁸ Iraq,¹⁶⁹ and Uganda¹⁷⁰ have recently deported people without having first relied on any formal procedure. Uganda's arbitrary expulsion, within a 90-day deadline, of 50,000 long-time residents holding British passports was not universally condemned by all countries.¹⁷¹

¹⁶⁵Wolfgang Friedmann, Oliver L. Lissitzyn, Richard C. Pugh, *International Law—Cases and Materials*, 747 West Publishing Co., St. Paul, Minn. (1969).

¹⁶⁶ALI, Restatement (Second) *Foreign Relations Law of the United States*, § 164(1) at 499.

¹⁶⁷*Id.*, § 165 at 501.

¹⁶⁸*Supra* note 2.

¹⁶⁹Teltsch, *supra* note 1.

¹⁷⁰See note 8, *supra*.

¹⁷¹"One African foreign minister insisted today that all African nations shared Uganda's position that the issue of the Asians was an 'internal' matter that should not be brought before the General Assembly. Many Arab states are said to hold this view—that Uganda is being

In the author's view traditional international law provides no protection to aliens against deportation procedures adopted by host countries and aliens have no such procedural rights that their own countries could and would enforce on their behalf.

B. The Universal Declaration of Human Rights

The Universal Declaration of Human Rights¹⁷² was adopted by the U.N. General Assembly on December 10, 1948, with both Great Britain and the United States voting in favor. The Universal Declaration was not intended as a binding statement of international law but rather as a list of aspired rights, and the Declaration gave recognition to both the traditional civil and political rights, as well as the more recently developed economic, social and cultural rights.¹⁷³

Its main aim was "to explain the contents of the Human Rights provisions of the Charter, and thus to be a preliminary formulation of the fundamental freedoms which needed recognition internationally by a series of binding covenants."¹⁷⁴ According to a large number of authors, the Universal Declaration has since its adoption acquired compulsory character as it became part of customary international law,¹⁷⁵ or because it has been constantly re-cited by other U.N. resolutions (seventy-five times in nineteen years).¹⁷⁶

The provisions in the Universal Declaration that may be relevant to deportation procedures include Article 9: "No one shall be subjected to arbitrary arrest, detention or exile"; Article 10: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations . . ."; and Article 14(1): "Everyone has the right to seek and to enjoy in other countries asylum from persecution." Since both the United States and Britain had

bullied by a former imperial power"; M.A. Farber, *Britain, Citing an "African Initiative," Suspend U.N. Bid for Uganda Debate*, New York Times, Sept. 30, 1972, at 3.

"The African nations also split on the question of Uganda's expulsion of her Asian community and on whether a discussion of the expulsion would be an interference in Uganda's internal affairs"; Robert Alden, *U.N. Debate Seen as Defining Where Things Stand*, New York Times, Oct. 13, 1972, at 2.

¹⁷²Resolution 265 III, U.N. GAOR III.2, Resol. A/810 at 71-77. The text of the Universal Declaration is reproduced in, Alessandra Luini del Russo, *International Protection of Human Rights*, 265-69, Lerner Law Book Co., Washington, D.C., (1971).

¹⁷³John Humphrey, *Human Rights and Authority*, 200, Toronto L.J. 412-15 (1970).

¹⁷⁴del Russo, *supra* note 172, at 36.

¹⁷⁵See, e.g., the views cited, *id.*, at 38-39.

¹⁷⁶Samuel A. Bleicher, *The Legal Significance of Re-Citation of General Assembly Resolutions*, 63 AM. J. INT. L. 444 (1969).

voted for the Universal Declaration, they are bound by it if it has become a part of customary international law.

However, the United Nations has no machinery for enforcing the observance of human rights by its member states,¹⁷⁷ and the organization must rely mainly on the techniques of investigation, negotiation and publicity.¹⁷⁸ Although individuals have no right to present petitions to the United Nations or to its Commission on Human Rights (only states have this right), the U.N. Secretariat developed the routine of forwarding individual complaints to the Commission for publication and possible action.¹⁷⁹

This practice was ended after twenty years in October 1969, when U Thant ordered U.N. Information Centers throughout the world to stop receiving and forwarding such individual petitions.¹⁸⁰ However, the normal enforcement problem does not arise in connection with a human-rights violation based on arbitrary, unfair deportation procedures, since the alleged violation concerning each individual affected is not a continuous one; each alien was presumably deported quickly by the offending country. Hence, only reparations and damages are sought, and not the stopping of an ongoing human-rights violation as *e.g.* in the case of South African apartheid.

As there is no United Nations enforcement mechanism in the field of human rights, and traditional international law recognizes only claims raised by states, redress for a violation of customary international law embodied by the Universal Declaration of Human Rights can be achieved only if the alien's state espouses his claim. The alien's own state may then negotiate with the offending state, and can possibly refer the matter to the International Court of Justice.

C. The U.N. Covenant on Civil and Political Rights

On December 16, 1966, the U.N. General Assembly adopted a Cov-

¹⁷⁷See, *e.g.*, Richard B. Lillich, *Intervention to Protect Human Rights*, 15 MCGILL L.J. 205 (1969).

¹⁷⁸John Carey, *Procedures for International Protection of Human Rights*, 53 IOWA L. REV. 291-324 (1967). See generally, John Carey, *U.N. Protection of Civil and Political Rights*, Syracuse Univ. Press, Syracuse (1970).

¹⁷⁹Donald P. Parson, *The Individual Right to Petition*, 13 WAYNE L. REV. 678-692 (1967).

¹⁸⁰Richard B. Lillich, *The U.N. and Human Rights Complaints—U Thant as Strict Constructionist*, 64 AM. J. INT'L L. 610-11 (1970). The lack of concern shown by the United Nations for appeals by private individuals was severely criticized by the Soviet author Solzhenitsyn: "As a result of an obedient vote, (the United Nations) declines to undertake the investigation of private appeals—the groans, screams and beseechings of humble individual plain people—not large enough a catch for such a great organization. The U.N. made no effort to make the Declaration of Human Rights, its best document in 25 years, into an obligatory condition of membership confronting the governments." *Excerpts from Nobel, Lecture by Solzhenitsyn*, New York Times, Aug. 25, 1972, at 2.

enant on Civil and Political Rights, together with an Optional Protocol.¹⁸¹ The Covenant will enter into force when ratified by thirty-five countries and as of October 30, 1969, there have been only five ratifications;¹⁸² the Optional Protocol requires ten ratifications or accessions by states that had also ratified the Convention.¹⁸³ Article 13 of the Convention deals directly with deportation procedures:

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.¹⁸⁴

The Covenant creates a binding obligation on each ratifying state to honor the individual rights protected by the Covenant, and to take the steps needed for their implementation as domestic law, including the availability of effective domestic remedies when those rights are infringed.¹⁸⁵ The Covenant created a Committee on Human Rights, which is to receive periodic state reports describing the implementation of the Covenant. Any ratifying state may recognize the competence of the Committee to receive complaints of breaches of the Covenant with a view toward conciliation; but this power of the Committee can be invoked only if both states involved have so recognized its competence.¹⁸⁶

Under the Optional Protocol individuals are given the right to make written complaints to the Human Rights Committee leading to an investigation and a public report; but the individual right to petition is not absolute:

individuals may petition only (1) when they claim to be victims of a violation of a right set forth in the Covenant, (2) when they are subject to the jurisdiction of the government that they allege has violated that right, and (3) when that government has ratified both the Protocol and the Covenant.¹⁸⁷

Britain signed the Convention on September 16, 1968, but has not ratified either the Convention or the Optional Protocol.¹⁸⁸ It is fair to

¹⁸¹U.N.G.A. Res. 2200, 21 U.N. GAOR Supp. 16.

¹⁸²del Russo, *supra* note 172, at 41.

¹⁸³*Id.*, n. 44 at 44.

¹⁸⁴The text of the U.N. Convention on Civil and Political Rights is reproduced, *id.*, at 311-326.

¹⁸⁵*Id.*, at 43.

¹⁸⁶*Id.*, at 43-44.

¹⁸⁷Frank C. Newman, *Ombudsmen and Human Rights—The New U.N. Treaty Proposals*, 34 U. CHI. L. REV. 951-955 (1967).

¹⁸⁸Egon Schwelb, *The U.K. Signs the Covenant on Human Rights*, 18 INT'L. & COMP. L.Q. 457-58 London (1969).

assume that eventually Britain will at least ratify the Convention, and that a sufficient number of states will ratify so that the Convention will come into force. Ratification by the United States is much more unlikely, as it has ratified only two international conventions in the sphere of human rights: the Slavery Convention of 1926 and the Supplementary Slavery Convention of 1967.¹⁸⁹ Although the various human rights conventions are not objectionable either in their substantive contents¹⁹⁰ or because of any fancied conflict with the constitutional limits on the U.S. treaty-making power,¹⁹¹ the Senate has not seen fit to ratify them.

D. The European Convention on Human Rights

The European Convention on Human Rights was signed on November 4, 1950, and became effective on September 3, 1953, when it was ratified by ten states.¹⁹² Article 1 of the Convention obligates the ratifying states to assure the guaranteed rights "to everyone within their jurisdiction" regardless of nationality, except permissible restrictions on political activity by aliens and under emergency legislation.¹⁹³

The extraordinary nature of this obligation is stressed by the term "everyone" which embraces nationals, aliens, stateless and even nationals of States not parties to the Convention, over and above any traditional concept of nationality ties in international law. It creates in each member State an international duty to restrict the free exercise of its sovereign rights in order to assure that all legislative, judiciary and executive authorities are complying with its obligations under the Convention.¹⁹⁴

Each member state is a guardian of the rights guaranteed by the Convention against any infringement by the other states, and may refer alleged breaches to the Commission set up under the Convention.¹⁹⁵ The following provisions in the Convention may be held to apply to deportation proceedings: Article 5:

No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: . . . (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the

¹⁸⁹James C. Tuttle, *Are the Human Rights Conventions Really Objectionable?* 3 INT'L. L. 385-86 (1969).

¹⁹⁰*Id.*

¹⁹¹Louis Henkin, *The Constitution, Treaties and International Human Rights*, 116 U. PENN. L. REV. 1012 (1968).

¹⁹²Parson, *supra* note 179, at 702-3.

¹⁹³Thomas Buergenthal, *Comparative Study of Certain Due Process Requirements of the European Human Rights Convention*, 16 BUFFALO L. REV. 18, 78 (1966).

¹⁹⁴del Russo, *supra* note 172, at 78.

¹⁹⁵Alessandra Luini del Russo, *The Human Person and Fundamental Freedoms in Europe*, 11 HOW. L.J. 420-28 (1965).

country or of a person against whom action is being taken with a view to deportation or extradition.

Article 6(1):

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent tribunal established by law.

and Protocol No.4, Article 4:

Collective expulsion of aliens is prohibited.¹⁹⁶

Article 25 of the Convention permits a contracting state to declare that it recognizes the competence of the European Commission on Human Rights established by the Convention to receive petitions from private complainants. Article 46 makes it optional for a state to accept the compulsory jurisdiction of the European Court of Human Rights which was also set up according to the Convention.

To date states have filed only nine claims under the Convention, including one which led to finding the current military régime in Greece guilty of various human rights violations, and the most recent one filed by Ireland against Britain concerning the internment of suspected terrorists in Northern Ireland.¹⁹⁷ On the other hand, 5,180 petitions have been filed with the Commission by individuals under Article 25, with only 88 having been ruled admissible.¹⁹⁸ The Commission screens out most petitions under Article 27(2) by considering them "manifestly ill-founded." When a complaint is filed by a state or an individual petition is held admissible:

the Commission holds a complete trial on the merits; elaborate briefs and written pleadings are presented to the Commission; oral hearings are held in either Strasbourg or Paris; . . . and a finding of fact results. In short, a final pronouncement is given which often includes dissenting opinions; moreover the Commission attempts to reach a friendly settlement with disputing parties . . .¹⁹⁹

The Commission's decision to dismiss a claim as "manifestly ill-founded," or as failing to exhaust the available local remedies, or as not alleging a violation of the Convention that injured the petitioner personally, is final and unappealable.²⁰⁰

¹⁹⁶The text of the European Convention and its Protocols are reproduced in, del Russo, *supra* note 172, at 271-87.

¹⁹⁷John L. Hess, *European Rights Agency Is Building a Body of Law*, New York Times, Dec. 31, 1971, at 4.

¹⁹⁸*Id.*

¹⁹⁹W. Paul Gormley, *The Development of International Law Through Cases from the European Court of Human Rights—Linguistic and Detention Disputes*, 2 OTTAWA L. REV. 382, 384 (1968).

²⁰⁰Buerghenthal, *supra* note 193, at 20.

If no settlement can be reached on a claim that the Commission determined to be admissible and well-founded, the case is sent to a Committee of Ministers together with the Commission's report on the facts and merits; then within three months a state or the Commission, but not an individual claimant, can send the controversy to the European Court of Human Rights.²⁰¹

Throughout its existence the Commission has referred a total of ten cases to the Court and has won three judgments.²⁰² The 1962 decision of the Court in the *Lawless* case, established that the Commission had the right to refer to the Court, cases that had originated as petitions by individuals to the Commission; thus in an indirect fashion individuals gained access to the European Court of Human Rights.²⁰³

Great Britain is party to the European Convention on Human Rights; on January 14, 1966, it declared its acceptance of the compulsory jurisdiction of the Court of Human Rights and of the individual right of petition under Article 25.²⁰⁴ Commonwealth immigrants appealed to the Commission as soon as Britain had recognized its competence to receive individual petitions.

In *Khan v. United Kingdom* a thirteen-year old son, and in *Singh v. United Kingdom* an elderly widowed father, were trying to rejoin their families in Britain, but were refused entry by British immigration authorities. It was claimed that Articles 8(1) (guaranteeing respect for family life) and 6(1) (guaranteeing a fair, public hearing by an independent tribunal in the determination of civil rights and obligations) had been violated.

The Commission decided that the *Khan* case, involving the thirteen-year old son, was admissible since there may have been a violation of Article 8(1). More importantly, the Commission ruled:

The facts did raise the possibility of a breach of Article 8(1) so that there was a "civil right" in the sense of Article 6(1) being determined when the decision was being taken to exclude . . . and Article 6 applied. Since, furthermore, the claim that there was a breach of the right to a "fair and public hearing" guaranteed by Article 6(1) raised complex questions which could only be resolved by a further consideration of the case, the claim under Article 6(1) was admissible also.²⁰⁵

²⁰¹Martin H. Redish, *British Immigration and International Protection of Human Rights*, 10 HARV. INT'L. L.J. 150-66 (1969).

²⁰²Hess, *supra* note 197.

²⁰³Górmley, *supra* note 199, at 391.

²⁰⁴The letters containing these British declarations are reproduced in, 15 INT'L. & COMP. L.Q. 539-41 London (1966).

²⁰⁵D. J. Harris, *Immigration and the European Convention on Human Rights*, 32 MODERN L. REV. 102-4 London (1969).

While the Commission was investigating the *Khan* case on its merits, the matter was settled when Britain announced that the Home Secretary would permit the son to enter as an immigrant "on the basis of new evidence about his relationship to his father."²⁰⁶

In *Khan* the Commission has established, at least until the European Court passes on the legal issue, that the "civil rights" protected by Article 6(1) include the rights directly guaranteed by the Convention. Furthermore, if immigration entry procedures can violate the Convention then, logically, the same should hold true for deportation procedures. The Commission has ruled admissible petitions by Indians and Pakistanis from Kenya, against their exclusion from England although they hold British passports, and there is currently an investigation on the merits of the claim.²⁰⁷

Conclusion

Both the United States and Great Britain have established elaborate administrative machinery, derived from statutes and regulations, to govern deportation proceedings. In both countries, the administering authorities have retained a great deal of discretion, and even though appeal procedures are generally available to the aliens, a reviewing body will normally not interfere with the exercise of administrative discretion in the absence of blatant misconduct. While the procedures are far from ideal in protecting prospective deportees, in most instances deportees are assured a fair hearing to present their cases and to argue against deportation.

While neither international law, nor U.N. "law" places any effective control on a state's adoption and administration of deportation procedures, the European Convention on Human Rights probably will be held to limit British discretion in this sphere. Any valid challenge of deportation procedures must be directed against the inherent unfairness of the administrative system adopted or against the method of its implementation, but may not challenge the basic fact that the proceedings are administrative rather than judicial.

Under all concepts of international law, in the absence of contrary

²⁰⁶MacDonald, *supra* note 117, at 81.

²⁰⁷"Immigration and Human Rights," 114 SOL. J. 774-75 (Oct. 23, 1970). For the current status of claims pending against Great Britain before the European Commission of Human Rights, see: Current Survey, 1972 PUBLIC LAW 67, 150 (London, 1972).

treaties, states have wide discretion in deporting aliens,²⁰⁸ and administrative bodies are better equipped to exercise discretionary power, often subject to rules and instructions from higher administrative authorities, than are courts.

²⁰⁸However, the Indians and Pakistanis from Kenya who hold British passports may have a valid claim for treatment as British nationals rather than as aliens. Article 3 of Protocol No. 4 of the European Convention (which Britain has not ratified) would guarantee to all nationals free access to the state of their nationality.