GOING ABROAD

A REPORT ON PASSPORTS

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CHAIRMAN OF COMMITTEE

CEDRIC THORNBERRY

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1 GENERAL

After its first meeting, Committee members prepared and circulated papers on aspects of the law and practice on passports for discussion at subsequent meetings. The Committee also had access to a recent study on passports prepared by one of its members, Guy Goodwin-Gill. Near the conclusion of its work some delegated members had an informal discussion with representatives of the Foreign and Commonwealth and Home Offices at the Passport Office.

1 *Terms of Reference and Modus Operandi.*

The Committee was given wide terms of reference and felt able to examine and make recommendations relating to all aspects of United Kingdom passport law and practice. It held eleven meetings between January 1973 and December 1973. Stephen Kramer and Anthony Boyd-Williams acted from time to time as secretaries to the Committee.

2 *Functional Approach.*

In assessing the present position regarding passport law and practice, the Committee attempted to identify the functions fulfilled by the modern passport:— from the standpoint of the issuing State; from that of the State of intended entry; from that of the individual. We then sought to apply a "rule of law" standard to what emerged. Present British practice is in some areas hard to disentangle from questions of entry controls and from the intricate web of post-Imperial nationality problems, and is surrounded by misconceptions and myths on the role and significance of the passport. These latter are often fed by the media and, we have concluded, by at least one major judicial decision. We believe that matters of immigration, nationality and allegiance fall, in the main, within distinct and separate areas of law. As to passports, we have concerned ourselves largely with the position of United Kingdom citizens seeking exit from (and re-entry to) this country; and with problems that may attend their entry sojourn and reception in foreign States. Thus, other matters, often associated with passport questions — such as the entry of categories of persons to the United Kingdom, and entitlement to diplomatic protection abroad — have seemed to us to lie outside our terms of reference. In such regions largely beyond our present concern the nature of the passport is essentially secondary. It is merely evidentiary of a pre-existing status.

3 *The Varying Functions of Passports in Constitutional History*

The term "passport" has historically been used in a variety of different senses to indicate various forms of executive control over the movement

of citizens and aliens.[1] The word is a combination of the French words "passer" and "porte" or "port". It was, in ancient times, necessary for a visitor to obtain permission to pass through the door or gate of a walled city. The passport has been used to indicate an authorization to pass from a port or leave the country; to enter or pass through a foreign country; as a sea-letter to authorize the passage of ships; as a permit for soldiers to depart from their service; as a document issued in time of war to protect persons from the general operation of hostilities. In these contexts, it was often used interchangeably with the phrases "sauf-conduit" and "laissez-passer". In one form or another, the passport has been known to British legal history for at least six hundred years.[2] By 1906, however, leading commentators were able to remark on the "desuetude into which the passport system is falling".[3] Yet just a few years later the passport in its modern sense came generally into being. The present system dates from the First World War. The passport now means an administratively-issued document of identity authoritatively indicating the bearer's nationality.

4 The idea of "identity" should be stressed; for other superficial aspects of the passport, and its association with ideas of protection (what may be called its scrolls and flourishes), seem relics of a time when the passport fulfilled different functions from those of today. These relics may be a reason for some of the confusion surrounding the present legal significance of the passport.

5 The Aliens Order, 1920, required an alien seeking entry to produce a passport containing a photograph of himself, or some other document establishing his identity and nationality, to the satisfaction of an Immigration Officer. Similar measures were adopted by other States. The passport thus became in practice the *sine qua non* of international travel.

6 *Passports and the Right to Leave the Country*

Under the 1920 Aliens Order every person was required to provide an immigration officer with such information as he might require, whether on entering or leaving the country. The parent Act, that of 1914, cast the onus on every person, including British subjects, to show that they were not aliens. By treating the traveller as a potential alien, the authorities could put him to proof of his nationality. Comparable provisions are now contained in the Immigration Act 1971. Immigration officers are given the power to examine any person who is embarking or seeking to embark in the United Kingdom for the purpose of determining whether he is patrial,

1 Turack: *The Passport in International Law* (1972) p.15

2 The idea of the passport seems implicit in Magna Carta as a device granted by the King to enable the subject to go beyond the realm. See also *Register of Brieves* (ed. Lord Cooper), Vol. 10, the Stair Society, pp 9, 45-6, 55, for examples of Royal Passports c.1300.

3 Sibley and Elias: *The Aliens Act* 1905 (1906) p. 44

and, if he is not, for the purpose of establishing his identity. A person not carrying his passport may, it seems, establish his identity and citizenship by other means.

7 Under analogous provisions of the Aliens Order, 1953, the journalist Ian Colvin, a citizen of the United Kingdom and Colonies, was in 1968 refused permission to leave the country at London Airport, by an immigration officer. Colvin did not have his passport with him. On May 23, 1968 the Home Secretary answered a Parliamentary Question on the subject:—

> Mr. Colvin informed the immigration officer that he was travelling without a passport as a test case, and the immigration officer thereupon applied a strict test of proof under the Aliens Order 1953. Mr. Colvin is of course well-known as a journalist, but none of the documents of identity he produced satisfied the immigration officer that he was a British subject or a person to whom leave to embark under the Aliens Order 1953 should be granted, and in the spirit of a test case, leave was refused.[4]

Upon this a leading constitutional authority observed that

> the law requires statutory powers to be exercised reasonably and in good faith, and the Aliens Restriction Act ought not to be invoked unless there are genuine grounds for suspecting alien nationality. To turn the law for the control of aliens into a law for the control of British subjects, by applying an arbitrarily strict standard of proof, would be an abuse of power for which a British subject would have the usual legal remedies.[5]

But no court action was taken as a result of the Colvin case. In April, 1973, the chairman of the present committee, on embarking at London Airport, was informed by an immigration officer that the latter would place no obstacle in his way should he seek to leave without a passport; but that he "wouldn't get far." The potentially critical role of the passport, as an evidentiary aid, to the citizen in his desire to leave the United Kingdom is clear.

8 *The writ* ne exeat regno

Interesting comparisons may be made between the situation described above, established by administrative interpretation of statutory provisions, and the common law technique for restraining the citizen from leaving the country. The subject's duty to defend the realm might be enforced by writ, the writ, *ne exeat regno*, being put on a statutory basis by Richard II in 1381. This Act was repealed in 1606, and it seems that the writ became an equitable restraint on absconding debtors. In *Felton* v. *Callis* [1969] 1 Q.B. 200 it was held that the writ is extant, but that it should issue under only the most stringent conditions. Its issue is discretionary; the action in respect of which it is sought must be the equitable equivalent of one in which the defendant would formerly have been liable to arrest at law; a good cause of action for at least £50 must be established; there

4 765 H. C. Deb. *WA* 119 (May 23, 1968)

5 H. W. R. Wade: 'Passports and the Individual's Right to Travel,' *The Times*, August 7, 1968

must be probable cause for believing that the defendant is about to leave England unless he is arrested; the absence of the defendant from England must be such as materially to prejudice the plaintiff in the prosecution of his action; and the standard of proof of all these elements is high — it must be such as to convince the court.

9 From the above, it would appear that only in the very limited circumstances in which *ne exeat regno* may issue is there any substantive power to prevent the citizen of undisputed nationality from leaving the country. Procedural obstacles may legally be placed in his way if he has no passport but, it is believed, any attempt except through *ne exeat regno* or other legal warrant to arrest him could be dealt with by proceedings for habeas corpus and damages.

10 The matter has been dwelt on because of the uncertainty created by the Colvin affair; and because that uncertainty illustrates one of the areas of confusion surrounding the legal role and significance of the passport. What seems important to emphasize is that in this region, as in others into which we have inquired, the passport is an administrative device of evidentiary persuasiveness. Its absence is not conclusive proof of status (or lack of it). Rights of entry attach to an individual because of national status, not by virtue of his passport. The strict manner in which in *Felton* v. *Callis* Megarry J., representing the modern common law tradition, construed the sole common law power to prevent the citizen from leaving the country should also be noted. The court, reviewing the authorities, was unable to find an instance of the writ's issue since 1893.

11 We append, however, to this report a copy of the report of a more recent but little-known authority, *Parsons* v. *Burk and Others* [1971] N.Z.L.R. 244. The applicant sought, on behalf of the Crown, that *ne exeat regno* should run to prevent the All Blacks rugby touring team from going to South Africa, Southern Rhodesia and Namibia, on the ground that the tour would bring "Her Majesty and Her Government and people here into hatred and contempt in the eyes of the majority of members of the United Nations and of the Commonwealth" and thereby be detrimental to the wellbeing of the State. Hardie Boys, J., dismissed the application after an examination of the authorities, on the facts; holding that "the Court would . . . be usurping the functions of the Queen's Ministers in New Zealand if on the application of a private citizen the Court in the name of the Queen in a matter of this kind permitted its writ to issue" (at 248). This is a pregnant passage. We feel that, should the Crown desire to restrain a United Kingdom citizen from leaving the country, its advisers should consider the availability of this process. In any application made to the High Court full and proper consideration could be given to the legitimacy and appropriateness of the writ's issue in a full hearing of the facts and the parties by the judiciary.

12 *Passports and the Right of Entry*

Confusion also attaches, with perhaps better reason, to the inter-relationship of passport-holding and the right of the citizen to enter the country. Again, it is to be stressed as a general point that the passport itself is a mere administrative device, providing evidence of status. But the situation has been vastly complicated by our post-imperial heritage reflected in an abstruse and, some feel, somewhat artificial, British nationality law. It has been announced in Parliament that a review of citizenship law has begun.[6]

13 In paragraph 7 we noted how the passport, as evidence of British nationality or of alienage, came to be associated with entry to the United Kingdom under the former Aliens Act and Orders. This adjectival role of the passport became more important, verging almost onto the substantive law, with the passage of the Commonwealth Immigrants Act, 1962. This Act attached entry controls to all Commonwealth citizens, Irish citizens, and British protected persons, who were not either born in the United Kingdom, or in possession of United Kingdom passports. By a United Kingdom passport was meant one issued by the United Kingdom Government (through, e.g., the Passport Office in London or a High Commission in some independent Commonwealth country) but not one issued by the Government of a Colony. Thus an individual's possession of a United Kingdom passport could critically affect his right of entry to the United Kingdom. Yet the decision, as we shall see, whether or not the applicant should have such passport was and remains a matter of unreviewable executive discretion.

14 In 1968 legislation imposed immigration controls for the first time on the holders of United Kingdom passports when Asian holders of such passports began to emigrate from East Africa to the United Kingdom. The Act extended immigration controls to the holders of United Kingdom passports issued outside the British Isles unless they or one of their parents or grandparents had been born, naturalised, or adopted in the United Kingdom itself, or had been registered in the United Kingdom or a Commonwealth country already independent or self-governing in 1948.

15 The present legislation — the Immigration Act, 1971 — repealed the 1968 Act, and much of the 1962 and Aliens Acts. It came fully into force on January 1, 1973, together with statutory instruments made in pursuance of it. It was supported by immigration rules, two sets for Commonwealth citizens and two for EEC and non-Commonwealth nationals. The primary distinction drawn by the new law is between "patrials" and non-patrials". The chief significance of the holding of a United Kingdom passport is, that a citizen holding such a passport not endorsed to the effect that the

6 869 H. C. Deb. 653-4 (January 25, 1973); 865 H. C. Deb. 1437 (December 6, 1973)

holder is subject to immigration control will be admitted without proof of nationality; and should be admitted (even though his passport is so endorsed) if he holds a special voucher or entry certificate. Patrials are those having a "right of abode", and some categories of patrial may be required to prove patriality by producing a certificate of patriality to establish a right of entry.

16 The close supportive link between passport and right of entry in existence from 1962 until the end of 1972 no longer, therefore, exists in that form. Rules under the present Act nevertheless require all passengers, whether Commonwealth citizens, EEC or other nationals, to produce to the immigration officer on request either a valid passport or other document which indicates the holder's nationality and identity. The evidentiary role of the passport thus remains. But the free right of entry turns on patriality rather than on passport-holding as such (or even on nationality). Section 1 of the Immigration Act 1971 declares that those with the right of abode in the United Kingdom shall be "free to live in, and to come and go into and from the United Kingdom without let or hindrance". On the other hand, whether an individual has the right of abode will *prima facie* turn on the nature of his passport and what is entered thereon. This evidentiary factor, in turn, is determinable by the executive.

17 *Need for Re-definition of Citizenship*

It will be seen from the above that misconceptions may easily arise concerning the role of the passport as regards both entry to and departure from the United Kingdom. In these matters, the substantive issue, on which other things depend, is nationality defined in terms of patriality. It is unnecessary for us to express any view on the issues raised by the position of United Kingdom citizens of Asian descent resident, or formerly resident, in East Africa; on the merits of the applications made by some such citizens to the European Commission of Human Rights in Strasbourg; or on the restriction of their entry to Britain. Such issues are often referred to as matters concerning "United Kingdom passport-holders"; and it is sometimes alleged that legislation affecting their position has in some form "devalued" their rights as "passport-holders". Any such rights as they may have, however, whether under national or international law, seem to us to attach to them as United Kingdom citizens. But it has been repeatedly borne in on us that the present enormous complexity of current immigration and nationality laws urgently requires rationalization and clarification. A leading constitutional authority states that "there can be no doubt that within a few years [the Immigration Act of 1971] will be followed by a new definition of 'United Kingdom citizenship', accompanied by a less artificial body of immigration law".[7]

7 de Smith: *Constitutional and Administrative Law* (2nd ed., 1973) p. 426

18 *Passports amd Diplomatic Protection*

A further area of confusion and misconception surrounds the association between the passport and diplomatic protection. Yet successive Foreign Office Ministers, speaking of the modern pasport, have reiterated its subsidiary role. "The passport is a request to foreign governments to give certain facilities to the holder";[8] "a passport is simply a facility";[9] "a United Kingdom passport does not in itself confer a citizenship or other status on the holder. It recognizes the status which he already has and is accepted internationally for travel purposes".[10]

19 *Allegiance*

An incident of nationality is allegiance. Such allegiance is enforceable by the Crown in the sense that its violation, by levying war against the Crown within the realm, or adhering to her enemies, is high treason (an offence still attracting the death penalty). A supposedly correlative "right" is the right to protection by the Crown. But even if the right of the citizen to diplomatic protection by the Crown is a right in the legal sense at all, it is not legally enforceable. It seems to us much closer to a moral or political claim to which the Crown may or may not accede as it sees fit and in such manner as it sees fit. For even if the Crown wishes to protect its subject abroad the manner and forcefulness of such protection are clearly discretionary. Even Lord Palmerston, as Foreign Secretary the instigator of the resounding "Civis Britannicus sum" doctrine, was discriminating in his sending of gunboats. It is beyond our terms of reference to express any opinion on this state of affairs; to moot whether the citizen should have an enforceable right to protection abroad. We are, once more, in a different field of law — that surrounding the legal incidents of citizenship.

20 *The Anomalous Case of William Joyce*

Yet, because of the decision in a notorious case, that of *William Joyce* v. *Director of Public Prosecutions*,[11] whose shadow has come to fall across the whole region of passport law, we are obliged to look at the interrelationship of passport-holding and protection. Joyce was a U.S. citizen. He had, by misrepresentation, obtained a British passport in 1939. He went to Germany and, as "Lord Haw-Haw", broadcast Nazi propaganda. At the end of the war he was arrested by the British military authorities, sent to England, tried for treason, convicted and hanged. By a majority, the House of Lords held that he owed allegiance by virtue of the passport which he held, and that his breach of the duty imposed by such allegiance amounted to high treason. The judgement has been widely criticized and

8 489 H. C. Deb. 3-4 (June 18, 1951)
9 491 H. C. Deb. 451-3 (July 25, 1951)
10 843 H. C. Deb. *WA* 172 (October 23, 1972)
11 [1946] A. C. 347

it is our view that the case was wrongly decided. We would strongly hope that the decision will not be followed. Its illogicality bars the way to any clear understanding of the law relating to passports. It is evident that the Crown owed the alien, Joyce, no duty of protection by virtue of his having a passport. (It would have owed him no legal duty of protection even had he been a citizen). Why, then, should Joyce have owed allegiance while in Germany? A leading authority comments on this case that "It is impossible to believe that the Crown has any legal duty to afford diplomatic protection to an alien outside H.M. dominions, even if he has obtained a United Kingdom passport by misrepresenting his citizenship".[12]

21 *Scrolls and Flourishes*

Nor is clarity in this region assisted by the passport's copperplate introductory inscription:—

> Her Britannic Majesty's Principal Secretary of State for Foreign and Commonwealth Affairs Requests and requires in the Name of Her Majesty all those whom it may concern to allow the bearer to pass freely without let or hindrance, and to afford the bearer such assistance and protection as may be necessary.

No magic attaches to either the form or the content of this imperious imprecation. Foreign States admit passport-holders not out of deference to Mr James Callaghan, but because the passports issued in his name identify their holders by description and photograph and certify their nationality. The passport is by no means all that it appears to be; much less, what it is generally believed to be.

22 *The Underlying Fundamental Human Right*

Despite the gap between appearance and reality explored in the preceding paragraphs, we have no doubt that the grant and withdrawal of passports is a process intimately related to a fundamental civil liberty and human right:— that of the citizen to travel abroad, relying upon authoritative evidence of his identity and nationality.

23 *Prerogative and Executive Discretion*

The final note on the inside back cover of the passport states (this time in more mundane lettering) that

> This passport remains the property of Her Majesty's Government in the United Kingdom and may be withdrawn at any time.

This administrative document, without which the citizen may find it in practice extremely difficult to leave the country, return to it, or enter or travel in a foreign country, is provided by and within the discretion of the Crown.

24 No statute regulates the issue or withdrawal of passports. They are afforded under Crown prerogative upon which most aspects of the conduct of foreign relations are legally grounded. The prerogative itself is a relic of earlier constitutional absolutism, in other regions wrested from the

12 de Smith, *op. cit.*, p. 438

executive by Parliament in the seventeenth century English revolutions. Many of the Crown's powers in the area of foreign relations give rise to little controversy. The Crown may make war and peace, conclude treaties, send and receive ambassadors, without Parliamentary consent (though without such consent the Crown's acts may in practice be domestically without legal consequence). Where, however, the power to conduct foreign affairs impinges on areas of basic civil liberty, such as the effective right to travel outside the United Kingdom, and, to a lesser extent, to leave and re-enter the State, other considerations arise.

25 Where statute confers, as it often does, wide discretionary powers upon the executive, it may yet be possible to review the exercise of such powers in the courts; though such possibility diminishes as the extent of power afforded the executive widens. In the area of prerogative, however, the Courts have been unwilling to apply rudimentary standards of natural justice in order to review allegedly arbitrary decisions apparently arbitrarily taken. A refusal to issue, or the withdrawal of, a passport by the executive may thus not be challenged in any court proceedings. (A different situation exists where a passport is taken by the police or other body; see para. 33 below).

26 *Parliamentary Commissioner*

Nor may an executive decision affecting the issue of a passport, or its withdrawal, form the subject of an inquiry by the Parliamentary Commissioner for Administration.[13]

27 *Advisory Committee*

However, in 1968, resulting from the withdrawal of the passport of a United Kingdom citizen, Sir Frederick Crawford, and policy in respect of Rhodesia in this field, the Government established a committee to scrutinize and report on cases where passports had been withdrawn.[14] The Committee, which has an advisory role only, still Its exists.powers relate only to the Rhodesian situation.

28 *Defeating the Government as a Means of Redress*

The activities of the Passport Office, a department of the Foreign and Commonwealth Office, engage the ministerial responsibility to Parliament of the Foreign and Commonwealth Secretary. On this, the then Joint Parliamentary Under Secretary of State for Foreign Affairs, the Earl of Gosford, told the House of Lords in 1958, that

> If Parliament decided that the Foreign Secretary had overstepped his prerogative I imagine . . . the Foreign Secretary would re-exercise his prerogative on the ground that he had made a personal misjudgment.[15]

13 Parliamentary Commissioner Act 1967
14 766 H. C. Deb. 723-7 (June 17, 1968)
15 209 H. L. Deb. 862 (June 16, 1958)

Upon this Lord Wilmot pertinently observed that the "only action open to one aggrieved would be in fact to defeat the Government"[16] and to provoke a General Election. The problems of making political responsibility to Parliament effective in individual cases of administration are well-known; they were one of the reasons for the creation of the Ombudsman (though, as has been noted, he is precluded from overseeing this region of government). Furthermore, they provide no adequate redress where time is important and Parliament is not sitting ("nothing succeeds like recess"). There can be few, if any, other areas of basic civil liberties in which the citizen's sole redress consists in bringing down the Government.

16 *Ibid*

II CURRENT UNITED KINGDOM PRACTICE CONCERNING PASSPORTS

29 *Issue*

Passports are granted upon payment of a fee by the Passport Office of the Foreign and Commonwealth Office to applicants providing adequate evidence of their national status. We gather that refusal to issue or renew, and withdrawal, are rare events. It was stated in Parliament in 1968 that only 20 passports had been denied on political grounds since 1945;[17] we gather that this figure has now risen to 27 (including Rhodesian cases). Four categories of refusal are said to be identifiable, and were set out by a Foreign Office Minister in 1958:—

> First, in the case of minors suspected of being taken illegally out of the jurisdiction;
> Secondly, persons believed on good evidence to be fleeing the country to avoid prosecution for a criminal offence;
> Thirdly, persons whose activities are so notoriously undesirable or dangerous that Parliament would be expected to support the action of the Foreign Secretary in refusing them a passport or withdrawing a passport already issued in order to prevent their leaving the United Kingdom; and
> Fourthly, persons who have been repatriated to the United Kingdom at public expense and have not repaid the expenditure incurred on their behalf.[18]

30 It has been noted above, para. 27, that an advisory committee still exists to review proposed withdrawals of passports from United Kingdom citizens believed to be actively sympathetic to the Smith regime.

31 British visitors' passports, available for one year, are available for travel to certain countries upon payment of a fee of £1.50. They are obtainable through Employment Exchanges. The normal passport, which is valid for 10 years, costs £5. A passport with 94 pages, intended for those who travel a great deal, costs £10.

32 Power exists under s.21 of the Criminal Justice Act 1969 for a court in England to require the surrender of a passport as a condition of bail. An accused person may appeal against the imposition of such condition.

33 *Passports and Police Powers*

In *Ghani* v. *Jones* [1970] 1 Q.B. 693 it was held that the police were not entitled to retain a passport against the wishes of its holder merely because they thought it to have some evidential value, or because they believed that there was a serious risk that its holder might leave the country on its

17 764 H. C. Deb. 1107 (May 14, 1968)
18 209 H. L. Deb. 860 (June 16, 1958)

return to him; unless the passport could be the fruit of the alleged crime, its instrument, or material evidence to prove its commission. Thus, Pakistanis, under investigation by the police in connexion with the possible murder of a relative, were entitled to recover passports which they had initially handed over to the police voluntarily. A different result would, presumably ensue were the Passport Office rather than the police to attempt to withdraw UK passports. It may however again be noted, as in the earlier discussion of *ne exeat regno*, that the courts appear to view such attempts to limit the citizen's movement with disfavour.

34 *Sexual Discrimination and Family Passports*

In July, 1973, Lord Balniel, on behalf of the Foreign and Commonwealth Office, announced a change in the rules governing the issue and use of family passports. Formerly, a wife and children could be entered upon a man's passport. The Minister stated that "to remove any element of discrimination in the system . . . a wife may be issued with a family passport in her own name on the same basis as a husband".[19] We understand that there has been no rush of applicants under the new rules. By November only one such passport had been issued. As a further concession the Passport Office will now accept the style "Ms" in place of "Mrs" or "Miss".

35 *Children's Passports and Disputing Parents*

Passport difficulties can often occur in the case of the children of separated or divorced parents. If a child is made a ward of court it cannot in any event be taken out of the jurisdiction. But in other cases, it was formerly the rule that the consent of the legal guardian of the child had to be obtained before passport facilities could be afforded. In some such cases, the notional legal guardian might not be traceable. In others, he or she might object to the child being given a passport without, perhaps, being in the best of good faith or entirely reasonable. A new regime was instituted in 1966 and its details were set out in Hansard for January 27 of that year.

> The prior and explicit consent of the child's legal guardian will no longer be required. It will, however, still be open to the legal guardian or to any person awarded the custody or the care and control of a minor to register, by means of a caveat, objection to the grant of passport facilities. The decision whether or not to give effect to a caveat will be taken in the light of the information supplied by the person lodging it and of any other available information.[20]

This regime requires the Passport Office to rule on the force and value of a caveat. Its decision is not challengeable in the courts.

36 *Patrial and Non-Patrial Passports*

New United Kingdom passports set out whether or not the holder has a "right of abode", in implementation of the Immigration Act's distinction between patrials and non-patrials. It is understood that problems can arise

19 860 H. C. Deb. 1595 (July 25, 1973)
20 723 H. C. Deb. *WA* 137-8 (January 27, 1966)

at foreign ports for non-patrial United Kingdom passport-holders. It may be assumed that a foreign State will be more reluctant to admit such a person when it is not clear to what, if any, country he may be sent back should need arise, when his "returnability" is clearly indicated.

37 *Counter-Signature on Applications*

The applicant for a passport must have his application counter-signed, together with one of the two photographs with which his application must be accompanied. It is understood that this procedure is intended to lessen the possibility of fraudulent applications. The counter-signature must be that of a "British subject who has known you *personally* for at least two years and who is a Member of Parliament, Justice of the Peace, Minister of Religion, Lawyer, Bank Officer, Police Officer, Doctor or a person of similar standing". This somewhat imprecise requirement may not greatly inconvenience the majority of applicants; but the manner of its formulation may seem to some to be either archaic or even demeaning and may cause practical difficulties.

III INTERNATIONAL PERSPECTIVES

38 *United Nations' Standards*

We have had little difficulty in concluding (above, para. 22), that the possession of a valid passport may be a vital prerequisite to the citizen's exercise of any freedom of movement beyond the limits of his State. Certain, as yet imperfect, United Nations' standards are emerging, and will bind this country. Given that in many countries (which have had a hand in their drafting) the mere application for a passport may cause the citizen officially-imposed discomfort, if not worse, it is not surprising that international standards are unexacting. The Universal Declaration of Human Rights, 1948, is not in itself creative of legal obligations. It has, however, come to enjoy an important law-creating role. It provides in art. 13 (2) that "Everyone has the right to leave any country, including his own, and to return to his country". Conventions on Refugees (1951) and on Stateless Persons (1954) impose legal duties on States parties to "issue identity papers to any refugee (or stateless person) in their territory who does not possess a valid travel document" (art. 27 of each Convention). The International Covenant on Civil and Political Rights (1966), which has not been ratified by the United Kingdom and which is not yet in force provides in art. 12(2) that "Everyone shall be free to leave any country, including his own". It mordantly adds, however, in para. 3, that this right may be subjected to restrictions, as provided by law, which are necessary to protect national security, public order, public health or morals, or the rights and freedoms of others, and are consistent with other rights recognised in the Covenant. Article 12(4) provides that "No one shall be arbitrarily deprived of the right to enter his own country". We do not think that the Covenant's provisions are likely to add dramatically to the sum of human freedom of movement.

39 *Standards of the European Convention on Human Rights*

The Convention, which creates legal rights and duties binding upon Her Majesty's Government, does not specifically mention passports. The Commission, in applying the Convention, has in early cases indicated that a complaint about the refusal of authorities to issue a passport is outside its jurisdiction.[21] However, these decisions were rendered before the coming into force of the Fourth Protocol to the Convention. This Protocol, to which the United Kingdom has not acceded, provides that "Everyone shall

21 Fawcett: *Application of the European Convention* (1969) p. 64

be free to leave any country, including his own", and that "No restrictions shall be placed on the exercise of (such right) other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety for the maintenance of "ordre public", for the prevention of crime, or for the protection of the rights and freedoms of others" (art. 2, paras. 2 and 3). Article 3(2) provides that "No one shall be deprived of the right to enter the territory of the state of which he is a national". While it would seem that an arbitrary refusal by a contracting State to grant a passport, or its arbitrary withdrawal, would provide a good ground for claim under the Protocol, we are unaware of any case-law having as yet been established in support of such proposition.

40 *East African Asians' Cases*

At the time at which this Report was written the European Human Rights Commission was about to adopt its Report on the claims by East African Asians brought against the United Kingdom in respect of their treatment under previous immigration laws. We are therefore unable to deduce from the Commission's Report (which may lead to further proceedings in the European Court, or may require the consideration and determination of the Committee of Ministers) whether the Convention's standards in the area of passports will have been clarified in any manner. We tend to believe, however, that these proceedings are unlikely to lead to any further elucidation of the area of law under our review.

41 *EEC*

A British member of the European Parliament recently enquired there whether the Commission was yet able to make proposals for abolishing passports for travelling within the Community. For the Commission, it was stated that controls had been eased appreciably over the years. It was intended to go further and arrive at the abolition of all controls, but no attempts should be made to conceal the difficulties. The Commission regarded none of the difficulties as insuperable, and attached importance to Community citizens being able to travel freely within E.E.C. frontiers. The Commission envisaged producing proposals as soon as possible, but time was needed to study the experience of the new member States.[22] Though the form of the question related to passports, the substantial matter raised was freedom of movement. The Treaty of Rome, in arts. 48-57, proposed the freedom of movement of workers and the right of establishment in the territories of member States for the purposes of employment, or involvement in the production or distribution of goods, or the provision of services. Such Treaty objectives are to be realized by regulations and directives of the Commission. Regulations have been issued (*e.g.* 1612/68) on the individual's right to take up and carry on employment in the territory of another member State. The right to leave one's own State is implicit in this

22 *The Times*, December 13, 1973

provision. It is made explicit in directives 68/360 and 73/148, which require member States to grant to nationals and to their dependants who wish to establish themselves in another member State in order to work the right to leave the country. "Such right shall be exercised simply on production of a valid identity card or passport". Member States shall, in accordance with their own legislation, issue to their nationals, or renew, an identity card or passport which shows in particular their nationality.Regulations of the Commission are immediately binding on member States and give enforceable rights to individuals. Directives are "binding as to the end to be achieved" but leave the method by which such end is to be achieved to the choice of national authorities. But it seems clear that legally enforceable rights are envisaged. Without arriving at firm conclusions we have examined the legal situation in which this state of law, read in conjunction with the European Communities Act, 1972, places the United Kingdom in respect of the issue of passports. It seems to us arguable that Her Majesty's Government may now be under an international legal obligation to enact a statutory regime affording passport rights to beneficiaries of the Rome Treaty's freedom of movement articles as promulgated by the Commission. Should this view of law be well-founded, then the Parliamentary opportunity to review the legal basis for the whole machinery of passport practice, should, we feel, be taken.

42 *Other Common Law Jurisdictions*

In India, in *Sawhney* v. *Assistant Passport Officer* [1967] AIR (SC) 1836, the Supreme Court inferred from the constitutional guarantees to personal liberty and equality before the law a right to travel abroad, and the right to a passport as an ancillary element in such right. Analogous reasoning by the United States Supreme Court has led that body to conclude, in a series of cases from 1952 onwards, that the right to travel, and thus the right to a passport, is a right guaranteed by the Constitution. It can be thus restricted only in accordance with the due process requirements of the Fifth Amendment. The most significant of these cases is *Kent* v. *Dulles* 357 US 116 (1958).

VI RECOMMENDATIONS

43 *The Functions of the Modern Passport*

In para. 3, we stated that, having identified the functions of the modern passport, we should proceed to apply a "rule of law" standard in making our evaluation of British practice. From the standpoint of the issuing State, the United Kingdom, the chief function of the passport appears to be that of providing clear evidence that a traveller seeking exit or entry is one of its nationals. From time to time, United Kingdom authorities also seek to use the passport as a means of social or political control:— in the case of absconding suspected criminals, political undesirables, disputing spouses seeking to remove or prevent the removal of children from the jurisdiction, and those indebted to the State because of a previous officially-financed repatriation. From the standpoint of the State of intended entry, the U.K. passport has other functions. It provides authoritative evidence of identity and nationality. The latter may be important for various reasons — political, social, economic, legal. Fundamentally, however, the passport provides, or should provide, clear evidence of the place to which the would-be entrant may be returned by the receiving State, should his presence there become undesirable for whatever reason.This is inelegantly described as the "returnability principle" and is of great importance. From the standpoint of the individual possessed of or seeking one, a passport is an almost indispensable aid to travel, because of its authoritative indications of identity, nationality and returnability. An incident of the proof of his identity and nationality is the ability to seek and receive official British assistance abroad. But, essentially, the passport enables the holder to meet the requirements, previously set out, exacted by the United Kingdom and the foreign State of intended entry.

44 *One Functional Deficiency*

On the basis of the previous analysis, present British practice seems deficient at one point. A non-patrial U.K. passport-holder, who does not have a right of abode in the United Kingdom, which fact is evident to a foreign immigration officer, is at a disadvantage in regard to returnability. The foreign immigration officer, though he perceives the fact of United Kingdom citizenship, is not able, before allowing the holder to enter the country, to determine to what place, if any, the entrant may be returned. Although we appreciate that no adequate solution to this problem may, perhaps, be found until there is a full-scale overhaul of the British Nationality Act, 1948, we believe that some interim reform should be instituted. We therefore *recommend* that all United Kingdom passports, including

those issued on behalf of colonial Governments, should clearly indicate the territory to which the holder may if necessary be returned. We believe that, apart from the uncertain limbo into which some classes of U.K. passport-holders are cast by the present arrangements, there may be an element, from the viewpoint of foreign states, of irresponsibility on the part of the United Kingdom authorities in failing to meet this obligation. Our recommendation, therefore, relates not only to a present structural deficiency in the present passport regime from the standpoint of the applicant, but also to the improvement of our international relations.

45 *The Rule of Law and Passports*

JUSTICE, as the British section of the International Commission of Jurists, is committed to the defence and extension of the rule of law. In this context, we interpret that standard to mean the following:—

(a) that, in principle, executive actions should be reviewable by judicial process;
(b) that certain kinds of decision affecting fundamental rights and interests of the citizen should not in principle lie within the domain of the executive at all, but should be determined by the ordinary courts (or, in special circumstances, tribunals) applying the ordinary law of the land;
(c) that there is a basic human right or civil liberty, namely, freedom of movement, with which the passport is intimately associated.

46 *Present Manner of Exercise of Executive Discretion*

We have drawn attention to the fact that the issue and withdrawal of United Kingdom passports is, at present, a matter wholly within the prerogative discretion of the Crown, a discretion administered by the Passport Office on behalf of the Foreign and Commonwealth Secretary. We believe this situation to be undesirable and potentially dangerous and we are in no doubt whatever that it should end. However, we also wish to make clear that we have been impressed by the apparent efficiency and enlightened operation of the present system. It cannot be pretended that its present functioning gives rise to any major difficulties or to any serious abuse of power. In this respect, we seem in Britain to have been very fortunate. The administrative practice of other States with supposedly more effective means of individual redress against the executive is littered with instances of abuse by such executives of powers over their citizens' right to travel abroad. Considering the many millions of passport transactions effected in the past decade, we find it not far from astonishing that so few instances of complaint have reached public attention.

47 *Grave Rule of Law Defect*

We are, nevertheless, satisfied that the present regime is gravely defective from the standpoint of the rule of law, as set out above in para. 46. It has been administered, we are convinced, benignly. But this should not justify

complacency. For, as the law stands, there is no legal safeguard against any future descent into arbitrary absolutism by the executive, even were such arbitrariness to exceed anything known in present European society, whether west or east.

48 *A Statutory Right to a Passport*

We therefore *recommend*, as a basic constitutional necessity, the early enactment of a brief statute conferring upon all citizens the legal right to a passport. The issue, refusal and withdrawal of passports would thus cease to be a prerogative matter, and one of unreviewable executive discretion. The categories of persons entitled by citizenship to a passport would be statutorily established.

49 The passport should clearly state the holder's nationality, his identity, and the place to which he may if necessary be returned by the foreign State into which he seeks entry. Some members of the present Committee find the introductory words of the current passport evocative, pretty or inoffensive (or one or more of these things). Others feel that they may confuse the holder by suggesting promises of official aid and protection which are misleading. There is, indeed, a view that the precarious position of the bearer in respect of diplomatic aid should be made known to him.

50 *Role of the Court Under a Statutory Passport Regime*

Upon application in the Divisional Court for *mandamus*,[23] any dispute between the issuing authority and the applicant as to issue; or as to any statutorily-authorized distinction between patrial and non-patrial citizens; or, in the case of non-patrial citizens, as to the territory to which they "belong"; would be determinable as the result of ordinary common law proceedings in court, with the usual rights of appeal.

51 *Ground for Refusal*

We have examined the list of grounds (above, para. 29) on which passports are now from time to time refused or withdrawn. We conclude, that the right of movement is of such cardinal libertarian importance, and that the danger of unreviewable maladministration in the application of the four imprecise criteria for refusal is so great, that the right to a passport should be absolute. (While current administration may have given rise to no, or few, substantial complaints, we conceive that one of the functions of law must be to guard against possible future abuse).

52 We do not think that mere suspicion of criminality should be a ground for interfering with the citizen's ability to travel, and note the jealousy with which this matter was regarded in the case of *Ghani* v. *Jones* (above, para. 33). If an individual is charged with a crime, then he may, as at present, be required to surrender his passport as a condition of bail. If he does not have a passport the Passport Office should be notified that any

23 or for specific performance from the Court of Session in Scotland

passport later issued to him should not be handed to him without leave of the Court. It should not, we feel, be the business of the executive arm of Government, without reference to the Courts, to make any pre-judgment of criminality.

53 While we would sympathize with any executive impatience over the possibility that a United Kingdom citizen might have to be repatriated more than once at public expense before he had repaid the cost of a previous repatriation, we see no compelling reason why the executive should not in this area be placed in the same position as any other creditor. Nor do we see any reason why any obligation to repatriate a defaulter should be assumed. The executive may commence proceedings against the debtor in the English courts on the same footing as anyone else to whom the defendant owes money and does not seem to us to need the additional and possibly drastic remedy of taking away the citizen's right to travel. Indeed, we are of the opinion that such action may be contrary to art. 2(3) of the Fourth Protocol to the European Human Rights Convention.

54 So far as the children of disputing parents are concerned, we feel that the practice instituted in 1966 (above, para. 35) would in principle seem to provide proper safeguards. However, if a statutory right to a passport were established, questions relating to consent, and to the force and validity of objections, would be removeable to the Courts. We are of opinion that this may be a more suitable forum for such decisions than the Foreign and Commonwealth Office. Indeed, we would imagine that the Department might well concur.

55 The fourth present ground for refusal or withdrawal is that relating to those engaged in "notoriously undesirable or dangerous activities". The power is, we have been informed, used sparingly (above, para. 29). For the reasons set out above in para. 51 we find it in principle highly objectionable, and open to grave abuse. Should the executive, for whatever reason, desire to prevent a citizen from leaving the country, then, we believe, it should attempt to do so by open and judicially-acknowledged means, rather than by administrative action. For the citizen to be ignorant of the reasons for decisions affecting him, and of how they are arrived at, in a primary area of liberty, seems to us insupportable. Either the writ *ne exeat regno* may be obtained by the executive in a proper case; or else the courts will decide, after hearing arguments on both sides, that the power contended for does not exist, or should not be resorted to in the particular case.

56 While our principal recommendations are those set out in paras. 44, 48, 49 and 50, other matters have also concerned us.

57 *Cost of Passports*

We have been informed that the economic cost, in April 1973, of a standard passport containing 30 pages was £2.41; and that of the 94-page

variety, £2.81. The charges made are, respectively, £5 and £10. We have been told that the balance of the charge is paid over for the "general administration of the foreign service". Some members feel that the charge levied must be found onerous by some applicants. Any tendency to impose anything in the nature of a tax upon the right to move outside one's country would require close examination.

58 *Young Persons aged* 16-18

At present, a young person aged between 16 and 18 must have parental consent to obtain a passport. We feel that where such consent is not forthcoming a young applicant should be entitled to make application in the Family Division of the High Court[24] for its authority in lieu of parental consent directed to the Passport Office.

59 *Counter-Signature*

The Committee has examined the requirement that an application (together with its accompanying photograph) requires the counter-signature of a member of a designated class of persons, who must be British subjects, and must have known the applicant "personally" for at least two years. We understand that this requirement is intended to minimise the chance of fraudulent application. The Committee doubts whether the provision can be absolutely effective in this regard. Moreover, some members feel that the category of persons qualified to counter-sign is conceived in such a way as to cause practical problems for many applicants. Some feel, additionally, that the category of qualified countersignatories is expressed in a way strangely reminiscent of early twentieth-century middle class attitudes, omitting as it does teachers, trade union officials, university lecturers etc. A committee member has had an application made on behalf of a member of his family returned to him because of the deemed impropriety of the counter-signature; it having been attached by his secretary — a person, it is said, of a rectitude and responsibility comparable (at least) to that of "qualified" legal colleagues. Should the provision for counter-signature be retained, therefore, the list of qualified persons should be extended to include all persons readily identifiable to the Passport Office (which will have access to reference books and registers) who can authoritatively identify the applicant. Special provision may be needed for applicants resident abroad.

60 *Refugees, Stateless Persons, and Others of Uncertain Status*

We have noted, in para. 38, the international legal obligations imposed upon the United Kingdom by the 1951 Refugees Convention and the 1954 Stateless Persons Convention. Articles 27 and 28 are common to the Conventions, and they provide (1) for the issue of identity papers to any refugee or stateless person in the territory of contracting States who does not possess a valid travel document; and (2) for the issue to resident re-

24 or to the Court of Session in Scotland.

fugees or stateless persons of travel documents for the purposes of foreign travel. We have had an opportunity of inspecting such documents as issued by Her Majesty's Government. They are at present granted, like other passports, by executive discretion. Yet the U.K. is under international legal duty to grant them. We believe that the position of refugees and stateless persons in respect of passports and travel documents should be placed on a statutory footing; such legislation giving effect to our Convention duties and at the same time removing one of the unnecessary elements of precariousness from the lives of such persons. We have considered, as a present aspect of this problem, the uncertain and unregularized position of many Asians, formerly resident in Uganda, whose national status is unclear. Such persons should be entitled to a determination in their favour by the U.K. authorities:— either, that they are U.K. citizens and as such entitled to passports; or, that they are not, in which event they may be eligible for consideration as Convention beneficiaries. If, as we strongly recommend, legislation be introduced to alter the present foundation of passport law, we also recommend that these matters be dealt with in the same Act.

61 *Apparent Lack of Departmental Liaison Affecting Certain Applicants.* Although, as stated above in para. 46, we believe that the present manner of administration of the passport regime is efficient and seems to create little inconvenience, we have noted one exceptional area. This affects those applicants who are U.K. citizens but who require certain certificates of patriality so that their status may be entered upon their passports by the Passport Office. These are at present two administrative functions and they require two separate applications, one in London and the other in Croydon. The consequence is delay and, often, considerable personal inconvenience sometimes amounting to clear hardship. We would suggest and recommend inter-departmental re-appraisal of this situation with a view to rationalization in the applicant's interests.

V SUMMARY OF RECOMMENDATIONS

1 All United Kingdom passports should state the territory to which the holder may be returned by a foreign State;

2 There should be a statutory right to a passport;

3 The passport should make it clear to the holder what his entitlement is in respect of British authorities abroad;

4 Any dispute between applicant and issuing authority would, under a statutory regime, be removeable to the Courts for determination;

5 The present grounds for administrative refusal of a passport should be removed, the right to a passport being unqualified;

6 However, in respect of the children of disputing spouses, decisions might have to be taken on issue, initially, by the Passport Office; but such decisions would be reviewable by the courts;

7 Any tendency to impose a "travel-tax" through the passport fee would be undesirable;

8 Young persons aged 16-18 should be entitled to passports, without parental consent, but by the authority of the Family Division of the High Court;

9 The list of qualified counter-signatories should be extended;

10 Refugees and stateless persons, in respect of whom HMG has incurred the international legal duty to provide identity papers and travel documents in lieu of passports, should have statutory rights to such papers and documents;

11 Departmental liaison between Home and Foreign and Commonwealth Offices over the issue of certificates of patriality and patrial passports should be re-appraised with a view to expediting and improving the process;

12 Though not a recommendation, we have taken the view that the decision in *Joyce* v. *D.P.P.* is unsound in law, being inconsistent with constitutional practice and hypotheses, before and since, and that it is apt to confuse the lawyer wishing to comprehend the legal significance of passports.

APPENDIX A

A Selection of the Chief Recent Parliamentary References to the Modern British Practice on Passports.

As to the nature of the passport; and on the limitation of its validity to certain countries:

489 H. C. Deb. 3-4 (June 18, 1951)
491 H. C. Deb. 451-3 (July 25 1951)

As to the evidentiary character of the passport:

843 H. C. Deb. *WA* 172 (October 23, 1972)

As to the circumstances of refusal to issue and revocation:

209 H. L. Deb. 860-3 (June 16, 1958)

— (and, in connexion with Rhodesia and the *Crawford Case*) —

764 H. C. Deb. 623-633 (May 9, 1968)
764 H. C. Deb. 1041-1116 (May 14, 1968)
766 H. C. Deb. 723-7 (June 17, 1968)

As to the issue of passports to minors:

723 H. C. Deb. *WA* 137-8 (January 27, 1966)

As to the issue of family passports to women:

860 H. C. Deb. 1595-6 (July 25, 1973)

APPENDIX B

PARSONS v. BURK AND OTHERS [1971] NZLR 244-8
SUPREME COURT, WELLINGTON
JUNE 8, 9, 1970
HARDIE BOYS, J.

Constitutional law — Prerogative writs — Writ of ne exeat regno — Right of private citizen to claim writ on matter of State.

The applicant, a private person, applied to the Supreme Court for the issue of the prerogative writ *ne exeat regno* to prevent officials and members of the "All Blacks" rugby football team from departing from New Zealand to travel to South Africa, Southern Rhodesia and the former mandated territory of South-West Africa, on the ground that the proposed tour would be prejudicial to the interests of New Zealand.

Held. On a matter of State the prerogative writ *ne exeat regno* did not issue on the application of a private citizen (see p.248 line 10).

Dictum of Eldon, L.C., in *Flack v Holm* (1820) 1 Jac. & W. 406; 37 E.R. 430, applied.

Application refused.

Application

This was an application by a private citizen for the issue by the Supreme Court of the Queen's writ *ne exeat regno*.

Barton and *Matthews* for the applicant.

Cooke, Q.C. and *Neville* for the respondents.

HARDIE BOYS J. (orally) By these proceedings the applicant as a private citizen applied to the Court for an order "that Her Majesty's writ of *ne exeat regno* may issue" out of this Court restraining the respondents who are respectively the manager, assistant manager, captain and a local member of the New Zealand Rugby Football Union's team (universally known as the All Blacks) from departing from New Zealand for the purpose of travelling to South Africa, Southern Rhodesia and the former mandated territory of South-West Africa. The alternative forms attached to the motion contain the ancient words of such a writ charging in the name of the Queen that those to whom it is addressed "intend to prosecute there many things prejudicial to Us and to Our Crown in contempt and prejudice of Us", to oppose which contempt and prejudice they are strictly forbidden "under peril that may fall thereon that in any wise you go not into such foreign parts without our special licence" and so on.

To support the claim for the issue of such a writ counsel for the applicant first read his affidavit, the sincerity of which no one can doubt. It stems

from his conviction that the forthcoming All Black tour of South Africa will bring Her Majesty and her Government and people here into hatred and contempt in the eyes of the majority of members of the United Nations and of the Commonwealth, will stand in the way of the 1974 Commonwealth games being held here and will induce African and Asian athletes (the Afro-Asians being a majority of the members of United Nations) to refrain from touring this country or competing with or playing against New Zealand athletes and teams. It should be said here that the affidavits supporting the application were served on the respondents' legal advisers only late on Friday, for the hearing yesterday: no answering affidavits have therefore been filed; but even the application does not contend that there are not two points of view and some parts of the opposing viewpoint emerge in the affidavits from official sources sworn pursuant to an order of this Court made on Friday last.

Counsel then went directly to sources of great antiquity to trace the origin, application and later disuse of this writ of ne exeat regno now sought.

Sources such as *Fitzherbert's New Natura Brevium*, *Coke's Institutes*, *Viner's Abridgement of Law and Equity*, *Blackstone's Commentaries*, *Holdsworth's History of English Law and Jones's Elizabethan Court of Chancery* have all been quoted in the course of argument: but with this matter urgent for decision by reason of the fact that this team is due to leave the country this week unless restrained by order of the Court I have felt it better to confine my citations to two or three which contain all that is of importance and in particular the passage strongly relied on by Mr Barton for the applicant.

I choose first *Chitty's Prerogative of the Crown* (the 1820 edition) and quote at p.21:

"The King's right to restrain his subjects from leaving his dominions, and to compel them to return from foreign countries, is also grounded on the interest which his Majesty has in his subjects; but the King has in general no legal power to force any of his subjects out of his dominions, even to carry on a necessary war.

By the common law, every one, generally speaking, is at liberty to go out of the kingdom without the leave of the King though some particular classes of persons were it seems always forbidden to do so, without a licence previously obtained.

The King's right to keep his subjects within the realm, which exists at common law and is expressly recognized in the great charter of King John may be exercised either by laying on an embargo which, however, can it seems be legally done only in time of enmity, and in case of necessity etc; or by the common law writ of *ne exeat regno;* or if *Fitzherbert* be correct, by proclamation, because the King may not know where to find his subject so as to direct a writ to him.

The writ of *ne exeat regno*, or *de securitate invenienda* appears from the words used in it "*quam plurima nobis et coronae nostrae prejudicialia ibidem prosequi intendis*", to be a State writ and clearly it was originally used merely as such, principally in cases of attempts, or suspected attempts, prejudicial to the King and nations in which case the Lord Chancellor granted it on application from any of the principal secretaries, without shewing cause, or upon such information as his Lordship thought of weight. The writ may still be used on similar occasions and may be obtained in the same manner, and, when it is not issued out of Chancery in aid of the debt or demand of a private individual, and in order to prevent the party from evading justice, the King is not restricted to any particular cases; so that the causes of its issuing, and the grounds and motives on which it is granted, are not traversable: and of course, therefore, the King may issue it at pleasure, without any reasons applicable to the party restrained. And it is laid down, that any one upon surmise to the Chancery, may cause this writ to be sued out for the King."
It is upon this last sentence, the authority for which in *Chitty* is shown to be *Fitzherbert's Natura Brevium* and which is to be found in *Viner* 200 years later, that Mr Barton urges the right of the lay citizen to claim this writ from the Court in the Sovereign's name. *Viner* p.539 heading (c) says:

> "Everyone upon a surmise made unto the Chancellor may sue forth this writ for the King and then the party against whom it issued may come into the Chancery and obtain Licence by letters patent or by letters under the Privy Seal or Privy Signet and the licenses are good although they be not under the great Seal because those Letters will excuse his contempt and such licences are called Passports."

Chitty goes on to say:

> "But though the writ of ne exeat regno is certainly in its nature and origin a State writ, yet it has been gradually introduced into the Court of Chancery, and is now become a common process therein, in order to prevent individuals from going abroad to avoid the payment of their debts."

And it is in this latter connotation that all references to the writ ne exeat regno are to be found since Elizabeth times, causing Lord Chancellor Eldon to say in *Flack v Holm* (1820) 1 Jacob & Walker 406 "This writ was originally issued in attempts against the safety of the State and may be applied *subject to responsibility in those who give the advice*, to prevent any subject from quitting the country. How it happened that this great prerogative writ intended by the laws for great political purposes and the safety of the country came to be applied between subject and subject I cannot conjecture."

Lord Eldon's query of over 100 years ago is the more pertinent today when this high prerogative writ is sought to be applied to its original

purpose not to achieve security for an equitable debt but for what must therefore be great political objects and purposes of State and the benefit of the realm (to quote *Storey on Equity* 3rd edn. 621). That, according to *Fitzherbert's Natura Brevium* was because every man is bound to defend the King and his realm; the King may therefore at his pleasure command a man by the writ not to go beyond the seas or out of the realm without a licence.

How far away from this conception of the great purposes of the State have we come as we consider the position of a Rugby football team!

I turn next to *Halsbury*, to which most lawyers look for at least a guide to what principles of law are applicable to a given matter, and one finds in 7 *Halsbury's Laws of England* 3rd edn., 291 para. 618 this simple statement:

In time of war . . . where the public welfare requires it both subjects and aliens may be restrained from . . . leaving the realm in various ways. Thus, the common law writ of *ne exeat regno*, now obsolescent and confined in time of peace to cases of absconding debtors or persons evading justice might possibly still be used *as a State writ* to prevent persons leaving the *realm in time of war.*

A footnote claims justification for this statement from authorities which include *Blackstone's Commentaries* and I noted from Mr Barton's citations that in the 1809 edition which he was using, at pp 265/6 editor Christian gives his own note reading "The exercise of this prerogative writ *has been long disused* and it is probable that it *will never be resumed.*"

Mr Barton very properly (because it was to his disadvantage) drew the Court's attention to the fact that in 10 *Holdsworth's History of English Law* at p.230 the learned author quotes the extract already given from *Fitzherbert's Natura Brevium* 85A but omitting the sentence so vital to the applicant's argument namely that "anyone upon surmise to the Chancery, may cause this writ to be sued out for the King". Nor does *Holdsworth* refer to *Viner* (who repeated the sentence) a fact which counsel says is surprising having regard to the fact that Holdsworth's inaugural address on assuming his chair at Oxford where he was of course Vinerian Professor was on Viner himself. I do not attach particular significance to this omission: rather do I note Holdsworth's own comment at p.230 that follows his quotation from Fitzherbert; for he went on to say: "It was issued by the Chancellor *for reasons of State* on the application in the 16th and 17th centuries of a Secretary of State."
Again in 10 *Holdsworth's History of English Law* 362. He has this to say:

"'At present' says *Blackstone* (Comm i 266) 'everyone has or at least assumes, the liberty of going abroad when he pleases', and the practice of issuing writs to command a subject to return had long been disused. The best proof of the disuse of these prerogative powers is the fact that,

if it was wished to restrain a subject from going abroad or to recall him from abroad, recourse was had to an act of Parliament." (and he cites examples) "But these powers had never been abolished. In 1788 Sir Archibald McDonald the Attorney-General was of opinion that they still existed. He thought that *in time of national danger* the Crown could still prohibit all its subjects from going abroad: and he pointed out that it was the constant practice to prohibit 'marines' from going abroad 'for the purpose of entering foreign service at times when the State of Europe would *render it dangerous to weaken the strength of the nation*'. But though possibly the prerogative might still be used in a *national emergency* it is probably true to say that with the exception of the particular case of marines, it had, when Blackstone wrote, ceased to be used to prevent subjects from going abroad. In practice the writ ne exeat regno was only used as part of the process of the Court of Chancery to prevent a defendant from withdrawing his person and property from the jurisdiction of the Court."

That ends the quotation from *Holdsworth* and I act upon it as a modern statement of the fate of the use of the original writ ne exeat regno for State purposes.

It is proper to say that even in its latter usage as a restraint on debtors about to leave the country Judge after Judge has spoken of the caution, jealousy and hesitation with which they approached its use even in that context. Against this background Mr Parsons as a civilian seeks Her Majesty's writ of ne exeat regno against other citizens. Mr Barton with proper candour acknowledges the obstacle that confronts him in that in New Zealand there is no precedent whatever for this procedure or remedy, no case precedent in England in all the books—(and of course there were in early days no law reports) and there is no authority in English writings save only this single sentence to be found in *Fitzherbert* and repeated 200 years later by *Viner* on that authority.

One can only speculate as to the circumstances in which the private citizen on *surmise* i.e. on cause being shown—to the Chancellor could take out the writ but it is clear that he took it out *for the King* that at least it must have been for the same purposes—the great political objects and purposes of State, for the safety and benefit of the realm. This application lacks either qualification and must fail accordingly.

Her Majesty in this democratic country acts on the advice of her Ministers in matters of State of this order and the affidavit of the Secretary of Foreign Affairs shows, in its terminal exhibits, that the Prime Minister as Minister of Foreign Affairs has given consideration to representations of the kind which the applicant here makes and has declined to act on them. The legal officers of the Crown, in the knowledge of these proceedings, have not even sought to come in and be heard in them and yesterday I declined Mr Cooke's suggestion that I should part hear the application

and then if necessary adjourn and invite the Crown to make its own representations. For me it suffices that the Crown has not applied to be heard and appears content to trust to the Court the decision inter partes which is vital as a preliminary step, namely as to whether it lies in the right of the private citizen today to claim this ancient writ against another private citizen on the basis put forward yesterday.

I am clearly of the view that it does not so lie and I am not concerned whether in ancient times this was an administrative rather than a judicial act on the part of the Chancellor to whom application had to be made (as Mr Cooke contends): rather do I rely on what Lord Eldon said in a passage already quoted—that the responsibility is on those who give the advice and in the present context those persons are Her Majesty's Ministers. That it is a responsibility is emphasised by the fact that if this writ were to issue and were disobeyed, the consequences could lead to imprisonment.

It is true that by the Supreme Court Act of 1860 s.5 this Court became clothed with all the former common law jurisdiction of the Lord Chancellor in England so that it is strictly correct for New Zealand purposes to read "Supreme Court" in place of "Chancellor" as one examines the ancient authorities.

But even so, on matters of State, this Court would in my view be usurping the functions of the Queen's Ministers in New Zealand if on the application of a private citizen the Court in the name of the Queen in a matter of this kind permitted its writ to issue. In the absence of clear authority of precedent I decline to do so.

It is accordingly refused.

Application refused.

Solicitors for the applicant: *Tripe, Matthews and Feist* (Wellington).
Solicitors for the respondents: *Perry, Wylie, Pope and Page* (Wellington).

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