[COURT OF APPEAL] A

* REGINA *v.* SECRETARY OF STATE FOR HOME AFFAIRS, *Ex parte* HOSENBALL

1977 March 16, 17 — Lord Widgery C.J., Eveleigh and Wien JJ. B

March 25, 28, 29 — Lord Denning M.R., Geoffrey Lane and Cumming-Bruce L.JJ.

Alien—Deportation order—Validity—United States citizen required to leave — Journalist alleged to have obtained information harmful to security and prejudicial to safety of Crown servants — Secretary of State's refusal to give further particulars — Whether deportation procedure contrary to natural justice— Immigration Act 1971 (*c.* 77), *ss.* 3 (2) (5) (*b*), 15 (3)—*Statement of Immigration Rules for Control after Entry: EEC and Other Non-Commonwealth Nationals* (1973) (*H.C.* 82), *r.* 42—*Convention for the Protection of Human Rights and Fundamental Freedoms* (1953) (*Cmd.* 8969, *art.* 6 (1) C

Natural Justice—National security—Deportation—Applicability of rules of natural justice—Alleged non-compliance with minister's statement in Parliament D

The applicant, H, a United States citizen, had worked as a journalist in England for nearly three years on a paper featuring investigative journalism. In July 1976 he started work as a reporter for a London evening newspaper. By a letter of November 15, 1976, the Home Office informed him that the Secretary of State had decided in the interests of national security to make a deportation order against him under section 3 (5) (*b*) of the Immigration Act 1971.[1] The letter stated that, by virtue of section 15 (3) of the Act, H was not entitled to appeal against the decision to make a deportation order, but that if he wished he could make representations to an independent advisory panel. A Home Office statement accompanying the letter said that the Secretary of State had considered information that H, while resident in the United Kingdom, had sought and obtained for publication information harmful to the security of the United Kingdom including information prejudicial to the safety of servants of the Crown. On December 14, H's solicitors requested particulars of what was alleged against him. The Secretary of State declined to add anything to the statement in the letter of November 15. Following a hearing before an advisory panel in January at which H made representations and called witnesses, the Secretary of State made a deportation order against him on February 16, 1977. E F G

H applied for an order of certiorari to quash the deportation order on the ground that there was a breach of the rules of natural justice in the refusal to supply him with particulars of the allegations which he had to meet. Reliance was put on rule 42 of the Statement of Immigration Rules for Control after Entry: EEC and Other Non-Commonwealth Nationals[2] and a statement by the Home Secretary in the House of Commons during the passage of the Immigration Act 1971. An affidavit on behalf of the Secretary of State said that he had H

[1] Immigration Act 1971, s. 3 (5): "A person who is not a patrial shall be liable to deportation from the United Kingdom— . . . (*b*) if the Secretary of State deems his deportation to be conducive to the public good; . . ."
S. 15 (3): see post, p. 779F–G.

[2] Statement of Immigration Rules for Control after Entry: EEC and Other Non-Commonwealth Nationals, r. 42: see post, p. 781C–D.

made the deportation order on the ground that it would be conducive to the public good after considering the advice of the panel of advisers and the representations made on H's behalf; and that the Secretary of State had personally considered H's request for further information of the allegations against him but considered that it was not in the interests of national security to add anything to the statement in the letter of November 15, 1969. The Divisional Court dismissed the application.

On appeal by H:—

Held, dismissing the appeal, (1) that where national security was involved the ordinary principles of natural justice were modified for the protection of the realm (post, pp. 778F, 779C, 783H—784A, 786H, 787G–H).

Dicta of Lord Reid in *Reg.* v. *Lewes Justices, Ex parte Secretary of State for Home Department* [1973] A.C. 388, 402 and Lord Hailsham of St. Marylebone L.C. in *Pearlberg* v. *Varty* [1972] 1 W.L.R. 534, 540 applied.

(2) That public policy required the preservation of confidentiality for security information, and, since the Secretary of State, who was answerable to Parliament, had given the matter his personal consideration and there was nothing to suggest that he had acted unfairly, the application for an order of certiorari to quash the deportation order must be dismissed (post, pp. 782F–H, 786E–F, H).

Dicta of Lord Simon of Glaisdale in *Reg.* v. *Lewes Justices, Ex parte Secretary of State for Home Department* [1973] A.C. 388, 407, H.L.(E.) and Lord Denning M.R. in *D.* v. *National Society for the Prevention of Cruelty to Children* [1976] 3 W.L.R. 124, 132–134, C.A. applied.

Per curiam. Although the Statement of Immigration Rules for Control after Entry: EEC and Other Non-Commonwealth Nationals (H.C.82) can be used as a touchstone to see whether the Secretary of State has acted fairly, they are rules of practice and not delegated legislation amounting to strict rules of law, and a departure from rule 42, or from the procedure outlined in the statement by the Home Secretary in the House of Commons during the passage of the Immigration Act 1971, does not in itself constitute unfairness or the breach of any right (post, pp. 780H—781B, G–H, 784H—785A, D, 786C, 788A–B, F).

Dicta of Roskill L.J. in *Reg.* v. *Chief Immigration Officer, Heathrow Airport, Ex parte Salamat Bibi* [1976] 1 W.L.R. 979, 985, C.A. not followed.

Decision of Divisional Court, post, pp. 775H—776A, affirmed.

The following cases are referred to in the judgments in the Court of Appeal:

Agee (Philip Burnett Franklin) v. *United Kingdom, Application No. 7729/76*, European Commission of Human Rights, December 17, 1976.

Board of Education v. *Rice* [1911] A.C. 179, H.L.(E.).

D. v. *National Society for the Prevention of Cruelty to Children* [1976] 3 W.L.R. 124; [1976] 2 All E.R. 993, C.A.

H. K. (An Infant), In re [1967] 2 Q.B. 617; [1967] 2 W.L.R. 962; [1967] 1 All E.R. 226, D.C.

Kanda v. *Government of Malaya* [1962] A.C. 322; [1962] 2 W.L.R. 1153, P.C.

Liversidge v. *Anderson* [1942] A.C. 206; [1941] 3 All E.R. 338, H.L.(E.).

Pearlberg v. *Varty* [1972] 1 W.L.R. 534; [1972] 2 All E.R. 6, H.L.(E.).

Reg. v. *Chief Immigration Officer, Heathrow Airport, Ex parte Salamat Bibi* [1976] 1 W.L.R. 979; [1976] 3 All E.R. 843, C.A.

Reg. v. *Criminal Injuries Compensation Board, Ex parte Lain* [1967] 2 Q.B. 864; [1967] 3 W.L.R. 348; [1967] 2 All E.R. 770, D.C.

Reg. v. *Governor of Brixton Prison, Ex parte Soblen* [1963] 2 Q.B. 243; [1962] 3 W.L.R. 1154; [1962] 3 All E.R. 641, C.A.

Reg. v. *Lewes Justices, Ex parte Secretary of State for Home Department* [1973] A.C. 388; [1972] 3 W.L.R. 279; [1972] 2 All E.R. 1057, H.L.(E.).

Reg. v. *Secretary of State for Home Affairs, Ex parte Birdi* (unreported), February 11, 1975; Bar Library Transcript No. 67B of 1975, C.A.

Rex v. *Halliday* [1917] A.C. 260, H.L.(E.).

Rex v. *Hardy* (1794) 24 State Tr. 199.

Schmidt v. *Secretary of State for Home Affairs* [1969] 2 Ch. 149; [1969] 2 W.L.R. 337; [1969] 1 All E.R. 904, C.A.

Van Duyn v. *Home Office* [1975] Ch. 358; [1975] 2 W.L.R. 760; [1975] 3 All E.R. 190, E.C.J.

The following additional cases were cited in argument in the Court of Appeal:

Reg. v. *Gaming Board for Great Britain, Ex parte Benaim and Khaida* [1970] 2 Q.B. 417; [1970] 2 W.L.R. 1009; [1970] 2 All E.R. 528 C.A.

Reg. v. *Knuller (Publishing, Printing and Promotions) Ltd.* [1973] A.C. 435; [1972] 3 W.L.R. 143; [1972] 2 All E.R. 898, H.L.(E.).

Rex v. *Inspector of Leman Street Police Station, Ex parte Venicoff* [1920] 3 K.B. 72, D.C.

No cases are referred to in the judgments in the Divisional Court.

The following cases were cited in argument in the Divisional Court:

Collymore v. *Attorney-General* [1970] A.C. 538; [1970] 2 W.L.R. 233; [1969] 2 All E.R. 1207, P.C.

Kanda v. *Government of Malaya* [1962] A.C. 322; [1962] 2 W.L.R. 1153, P.C.

Pearlberg v. *Varty* [1972] 1 W.L.R. 534; [1972] 2 All E.R. 6, H.L.(E.).

Reg. v. *Chief Immigration Officer, Heathrow Airport, Ex parte Salamat Bibi* [1976] 1 W.L.R. 979; [1976] 3 All E.R. 843, C.A.

Reg. v. *Gaming Board for Great Britain, Ex parte Benaim and Khaida* [1970] 2 Q.B. 417; [1970] 2 W.L.R. 1009; [1970] 2 All E.R. 528, C.A.

Reg. v. *Governor of Brixton Prison, Ex parte Soblen* [1963] 2 Q.B. 243; [1962] 3 W.L.R. 1154; [1962] 3 All E.R. 641, C.A.

Reg. v. *Mackey* (unreported) [1971] No. 126, Northern Ireland.

Schmidt v. *Secretary of State for Home Affairs* [1969] 2 Ch. 149; [1969] 2 W.L.R. 337; [1969] 1 All E.R. 904, C.A.

APPLICATION for order of certiorari.

On March 1, 1977, the applicant, Mark Jeffrey Hosenball, applied for an order of certiorari to remove into the High Court for the purpose of its being quashed an order of deportation made by the Secretary of State for Home Affairs on February 16, 1977, that he should be deported from the United Kingdom in pursuance of the powers conferred by section 5 (1) of the Immigration Act 1971.

The grounds on which the relief was sought were (a) that the order was wrong in law; (b) that, in refusing to supply the applicant with the nature of the allegations he had to meet when appearing on January 19 and 20, 1977, before the advisory panel set up by the Secretary of State for Home Affairs to advise him on whether it would be conducive to the public good to deport him, there was a failure to comply with the basic requirement of the principle audi alteram partem, namely, to be informed of the matters on which the party was to be heard; (c) that in the exercise of his powers under section 3 (5) (*b*) of the Immigration Act 1971, the

A Secretary of State for Home Affairs misdirected himself in law by considering the applicant's past conduct to the exclusion of his recent and present circumstances which indicated that his removal from the United Kingdom would not be conducive to the public good.

The facts are stated in the judgments of Lord Widgery C.J. and Lord Denning M.R.

B

Louis Blom-Cooper Q.C. and *Jonathan Caplan* for the applicant.
Harry Woolf for the Secretary of State.

LORD WIDGERY C.J. In these proceedings Mr. Blom-Cooper moves on behalf of the applicant, Mark Jeffrey Hosenball, for an order of certiorari to remove into this court with a view to its being quashed an order C made by the Secretary of State for Home Affairs on February 16, 1977, to the effect that the said Mark Jeffrey Hosenball should be deported from the United Kingdom in pursuance of the powers conferred by section 5 (1) of the Immigration Act 1971.

It is important to observe the principal ground upon which that order is challenged, and the principal ground is that, in refusing to supply the D said Hosenball with the nature of the allegations he had to meet when appearing on January 19 and 20, 1977, before the advisory panel set up by the Secretary of State for Home Affairs to advise him on whether it would be conducive to the public good to deport the said Mark Hosenball, there was a failure to comply with the basic requirement of the principle audi alteram partem, namely, to be informed of the matters on which the party is to be heard.

E That is a formidably long sentence, I fear, but the gist of it simply is that it is complained that when the Secretary of State was considering this matter with a view to deciding whether to make a deportation order or not, it is alleged that he failed to supply the applicant with sufficient information as to the matters on which the application was to be heard.

It is also, I think, perhaps convenient, in view of the fact that F this is a case which has attracted a certain amount of public interest, to notice what our function is. We are in no sense a court of appeal over the Home Secretary. We are in no sense in a position in which we can set aside his views and substitute our own. All that is being said is that in reaching this conclusion the Secretary of State was guilty of a procedural error of the kind referred to. What we are asked to do is to recognise that procedural error, set aside the deportation order and G then events will have to take their course. Our concern is whether the allegations are sound that there was a substantial procedural error in making the order.

The applicant is a United States citizen. He is therefore of course through our eyes an alien. He has been in this country a great deal in recent years. He first came on September 11, 1969, initially, I think, H as a student, but the time came when he sought to remain on as a working journalist and he was given permission by the Home Office to remain on more than one occasion. He was given permission to engage in trade as a working journalist and was so employed up to the time when these events occurred in the latter part of 1976.

At that time (that is to say the latter part of 1976) the Secretary of State took offence at certain activities of the applicant. We do not know precisely what they were, but the reaction of the Secretary of State was

to decide to make a deportation order against the applicant, and the Secretary of State sent details of his proposal to that end.

We have a letter of November 15, 1976, written by Mr. Taylor on behalf of the Home Office to the applicant, and it says:

> "Sir I am to inform you that the Secretary of State has decided that your departure from the United Kingdom would be conducive to the public good as being in the interests of national security and that he has decided to make a deportation order against you by virtue of section 3 (5) (*b*) of the Immigration Act 1971 requiring you to leave the United Kingdom and prohibiting you from returning while the order remains in force."

If one looks at that section it becomes apparent at once that it does contain authority for a conclusion of this kind. The section says:

> "A person who is not patrial shall be liable to deportation from the United Kingdom . . . (*b*) if the Secretary of State deems his deportation to be conducive to the public good."

Thus, we have the applicant who is not a patrial, and we have the Secretary of State reaching the conclusion that his removal from the country would be conducive to the public good in the interests of national security. That letter goes on: "By virtue of section 15 (3) of the Act you are not entitled to appeal against the decision to make the deportation order." That is correct. The right of appeal is specifically excluded in this Act when the matter is one in which there is to be a deportation order on the basis of public good. The letter continues:

> ". . . but, if you wish, you may make representations to an independent advisory panel. You will be allowed to appear before the panel if you wish to do so but may not be represented. To such extent as the advisers may sanction you may be assisted by a friend and arrange for third parties to testify on your behalf. If you decide not to avail yourself of the opportunity to submit your case to the panel you may nevertheless make any representations you wish to the Secretary of State."

Then it goes on to deal with other matters which I need not mention in detail at this stage.

With that letter or shortly afterwards—I am not quite clear which—the applicant received what is called a Home Office statement setting out the only statement of the Secretary of State's case which has been delivered to him at all in the course of these proceedings. The Home Office statement is in these terms, and I should read it, I think, in full:

> "Mr. Hosenball completed his secondary education at Leighton Park School, Reading, during the scholastic year 1969–1970 and subsequently entered Trinity College, Dublin, as an undergraduate finishing there in 1973; in vacations during the period 1970–1975, he undertook approved vacational employment in the United Kingdom. He subsequently remained in the United Kingdom in approved journalistic employment, most recently with the London 'Evening Standard' and his present leave to remain expires on December 11, 1976."

So far, we do not seem to have heard very much about the justification for the deportation order, but paragraph 2 continues:

> "The Secretary of State has considered information that Mr. Hosenball has, while resident in the United Kingdom, in consort with others

A sought to obtain and has obtained for publication information harmful to the security of the United Kingdom and that this information has included information prejudicial to the safety of servants of the Crown.

"(3) In the light of the foregoing, the Secretary of State has decided that Mr. Hosenball's departure from the United Kingdom would be conducive to the public good as being in the interests of B national security and he has accordingly decided to make a deportation order against him by virtue of section 3 (5) (*b*) of the Immigration Act 1971 requiring him to leave the United Kingdom. . . ."

That is the only statement of what one might describe as the Home Office case which has been supplied to the applicant at any stage during these proceedings, and, perhaps not altogether unnaturally, the first reaction of the applicant's solicitors who were then consulted was to write a letter of November 26 in which they include this phrase:

"the Secretary of State has provided quite inadequate particulars of the information on which he has made his decision. It will therefore take some time to prepare my client's case properly."

Whilst the solicitors are left preparing the applicant's case, one should look briefly at the circumstances in which the panel referred to in the Home Office letter of November 15 was set up. It was as a result of a statement made in the House of Commons on June 15, 1971, when the Immigration Act 1971 was going through the Commons. Reading between the lines, because we have not studied Hansard in detail, it is fairly clear that a certain element amongst the members of Parliament did not like the idea of there being no right of appeal in this particular situation, and there was some contention as to whether there should or should not be a right of appeal. In the sort of Parliamentary compromise which I believe to be not altogether uncommon this understanding was reached, and I will read it:

"The details of this procedure [that is to say the procedure for setting up a panel of advisers to assist the Secretary of State] were announced some while ago in the House by my right hon. friend the member for Wolverhampton, South-West (Mr. Powell) who was then Financial Secretary to the Treasury. . . . The person concerned is notified of the decision and he will be given by the Home Office such particulars of allegations as will not entail disclosure of sources of evidence. At the same time the person will be notified that he can make representations to the three advisers and will be given time to decide whether or not to do so. The advisers will then take account of any representations made by the person concerned. They will allow him to appear before them, if he wishes. He will not be entitled to legal representation, but he may be assisted by a friend to such extent as the advisers sanction. As well as speaking for himself, he may arrange for a third party to testify on his behalf. Neither the sources of evidence nor evidence that might lead to disclosure of sources can be revealed to the person concerned, but the advisers will ensure that the person is able to make his points effectively and the procedure will give him the best possible opportunity to make the points he wishes to bring to their notice."

[His Lordship referred to the applicant's solicitors' letter of December 14, 1976, to the secretary of the advisory panel requesting six specific

particulars, to the secretary of the panel's reply of December 16, 1976, setting out the statement made in the House of Commons on June 15, and continued:] Over the page (of the letter of December 16), and liable to be missed in consequence, is another quite important phrase bearing in mind this letter is written on behalf of the Home Office to the applicant's solicitors, and the phrase is:

> "On your request for further particulars the Secretary of State is not prepared to add to the statement of the grounds for his action contained in the enclosure to the Home Office's letter to your client of November 15, last."

There is a refusal to add any particulars of complaint to those which I have already read.

Pausing there for a moment to review the situation, what has happened, it will be apparent, is this. The Secretary of State has notified his intention to make a deportation order, but has told the applicant that he can have his case heard before the panel of advisers to which I have just referred. It will have been noticed that the panel of advisers are contemplated as listening to the applicant's case, hearing what he has to say positively on his own behalf, but are to be somewhat limited in their dealing with the Home Office case because of the necessity for protecting sources and the like.

That panel of advisers was set up. The applicant appeared before them. He called some evidence to speak to the fact that he was a highly qualified and responsible journalist, but nevertheless on the date in question the deportation order was duly made. It is against that order, and on the basis that there was irregularity in the making of that order, that the applicant comes today to this court.

There is a statutory instrument which may have some bearing on this kind of problem. It is the Immigration Appeals (Notices) Regulations 1972, S.I. 1972 No. 1683. It provides for the receipt of notice by a person against whom a deportation order is to be made, and also for him to have facilities for presenting his case against the order.

No argument has been addressed to us by Mr. Blom-Cooper on behalf of the applicant based on this order, and in those circumstances it seems to me the right thing to do is to ignore it. I am satisfied it does not make any difference to this case, but in another case it may be relevant to remember that the terms of this order may perhaps extend the obligation of the Secretary of State to supply opportunities to the person threatened with deportation. Having said that, I say no more about it.

I turn to consider what are the various bases upon which it can be said that the Secretary of State erred in law in not allowing the applicant a wider opportunity to examine the case against him.

First and foremost, the argument is based on natural justice. Mr. Blom-Cooper contends that the rules of natural justice applied, at all events to some extent, to the situation which was presented here, and he says that there was a breach of the rules of natural justice when the applicant was not given an adequate opportunity to study and be advised of the case which was going to be made against him.

It is of course well known that the principles of natural justice are those fundamental rules, the breach of which will prevent justice from being seen to be done. It is well enough known that one of the rules generally accepted in the bundle of the rules making up natural justice is the rule which requires that a person accused should have a fair and full

A disclosure to him of the case which is made against him. Perhaps the two most important rules of natural justice are, first, that a person accused must be given a fair statement of the case against him, and, secondly, that he must be given a fair hearing for the case which he proposes to put up himself.

No particular complaint is made here about the absence of a fair hearing. Nothing seems to have gone wrong before the panel which was B worthy of comment, but, as we see, the argument here is directed to the contention that there was no sufficient disclosure of the case for the Home Secretary.

It is fully established that the rules of natural justice do not always apply in their fullest rigour. To formal courts, courts which have all the qualities of a court, they do apply in that way. But in other tribunals C one finds they apply in part only. In other words, they may have to be adapted or adjusted to suit the particular type of issue which is to be tried.

That is well put in the most recent edition of *Halsbury's Laws of England*, 4th ed., vol. 1 (1973), para. 66 where, under the heading "Duty to act fairly," the editors say:

D "The content of the rules of natural justice is not stereotyped, and a duty to act judicially does not necessarily connote an obligation to observe the procedural and evidential rules of a court of law. In some situations, where it has been said that a deciding body is under a duty to act fairly, a distinction appears to have been drawn between such a duty and a more rigorous duty to act judicially in accordance with natural justice; but, given the flexibility of the rules of natural E justice, the meaning of this distinction is not always clear, and a duty to act fairly can generally be interpreted as meaning a duty to observe certain aspects of the rules of natural justice, though in some situations the expression is used without reference to procedural duties."

Thus, the rules are flexible and must be adjusted to a particular case. That at once draws attention to the fact that this is a case in which F issues of national security are raised, and one can go through the authorities and find almost literally dozens of cases in which it has been recognised over the years that where matters affecting public security are in issue, and where the responsible minister has certified that in his opinion the matters should not be disclosed, then they will not be disclosed.

It seems to me that this case with which we are now dealing represents a good example of that principle. We know that questions of national G safety were raised by the Secretary of State. We must bear in mind, because in this court we must respect the sworn statement of ministers, that in the affidavit filed on behalf of the Secretary of State there are two extremely important paragraphs, paragraphs 9 and 10:

"9. As appears from the letter of February 15, 1977, the deportation order, which was made personally by the Secretary of State, was only H made after consideration had been given by him to the advice of the panel of advisers and to the substantial number of representations which had been made on the applicant's behalf. As in the case of any deportation order made on the grounds that the departure of the person concerned would be conducive to the public good, the Secretary of State has taken into account the applicant's present, as well as his past, conduct in reaching his decision.

"10. The Secretary of State personally considered the request for

further information to be supplied concerning the case against the applicant but he was of the view that it was not in the interests of national security to add anything to the matters set out in the statement attached to his letter of November 15, 1976, to the applicant."

In my judgment, there being no allegation that the Secretary of State acted in bad faith, we are bound to accept that he is the person who must decide whether particular matters are fit for disclosure or not when national security is involved. We do not know what the basis of his objection was in any sort of detail, and we are bound, having no alternative, to accept what he says when, through his representatives, he swears that he has formed the opinion that no matter can safely be disclosed beyond those already included.

However, that is not an end of the matter because Mr. Blom-Cooper has another string to his bow. Under section 3 (2) of the Immigration Act 1971 there is power for the Secretary of State to make rules. I read the relevant part of the paragraph:

"The Secretary of State shall from time to time . . . lay before Parliament statements of the rules, or of any changes in the rules, laid down by him as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons required by this Act to have leave to enter . . ."

I pause there because that is a sufficient introduction to the topic for present purposes. Anyone who is familiar with this Act will realise that it is of a somewhat unusual structure. It is obviously intended to deal with many thousands of different situations which cannot all be governed precisely by any form of legislation, and so the idea has been adopted of having the Act in almost framework form and giving the Secretary of State power to issue rules and policy directions and the like which are to be taken into account in the administration of the Act.

Some question has arisen as to the status of these rules. There is dicta in the Court of Appeal to the effect that they are delegated legislation. But in my opinion it is not possible to dispose of their status as briefly and as readily as that. An examination of these various rules will show that some of them are policy documents which immigration officers are required to observe in the carrying out of their function. Those may be said to approximate at all events to a delegated legislation, although I would not at this stage express the opinion that they are properly so described.

But the rules under section 3 (2) on which reliance is placed in this particular case are not rules laying down matters of policy. They are very largely descriptive of the statutory rights of various parties and are a layman's guide to the somewhat complex subject of immigration legislation.

The rule upon which Mr. Blom-Cooper primarily relies is rule 42 of the document entitled Statement of Immigration Rules for Control after Entry, H.C. 82, and this rule provides:

"Against the making of a deportation order on the recommendation of a court there is no appeal within the immigration appeal system; but there is a right of appeal to a higher court against the recommendation itself. An order may not be made while it is still open to the person to appeal against the relevant conviction, sentence or recommendation, or while an appeal is pending. Nor is there a right of

A appeal (except as to the country of destination . . .) where a deportation order is made on the ground that the Secretary of State deems the person's deportation to be conducive to the public good as being in the interests of national security or of the relations between the United Kingdom and any other country or for other reasons of a political nature. But such cases are subject to a non-statutory advisory procedure and the person proposed to be deported on that ground
B will be informed, so far as possible, of the nature of the allegations against him and will be given the opportunity to appear before the advisers, and to make representations to them, before they tender advice to the Secretary of State."

I think that this rule has to be considered together with the statement
C in Parliament in 1971 which I read a few minutes ago. It is not, as I understand it, contended by Mr. Blom-Cooper that the statement in Parliament created any rights in favour of the applicant. I am of the opinion that it did not create any such rights. The whole device of using a statement rather than putting the subject matter into the Act is to my mind eloquent of the fact that the parties did not intend to ask Parliament to enact a binding piece of legislation. On the contrary, the use of
D the Parliamentary statement and the creating, as I see it, of no legal right is a clear indication that Parliament did not intend to give those in the position of the applicant the right which he claims today.

Taking that view of the statement in Parliament, I carry it through to rule 42 of the document which I am presently looking at. It seems to me that rule 42, which I have read, is not creating rights and is not laying down standards. It is merely repeating in very simple straightforward
E and layman's English the provisions of two or three sections of the Immigration Act 1971 and whilst doing so (the purpose being to set out in the simplest form the rights and appeals which exist) the rule has referred to the advisory panel and the non-statutory activities which it carries on.

There again I think all that the rule is doing is informing the reader that this is happening, that there is a non-statutory tribunal, and the
F functions which fall to it. It seems to me that it would be very extraordinary if Parliament, when not prepared to put this type of provision into this Bill, had intended it to take effect by a side wind by including the terms of rule 42, which I have already read.

It seems to me as a matter of common sense and logic that, if one accepts that the statement in Parliament did not create any rights, then
G one should regard the statement of rule 42 as being no more than a factual statement of the existing rights of appeal, and not construe it as creating any new rights which did not formerly exist.

If that be the case, there is nothing, I fear, to assist the applicant in regard to the argument that the rules of natural justice had not been observed and nothing to assist the applicant in his contention that a right to disclosure of information is created and conferred upon him by rule
H 42 of the document H.C.82.

In the result, therefore, as it seems to me, the procedure was correctly followed by the Secretary of State, and as that is all we are concerned with I feel that we have no alternative but to dismiss this application.

EVELEIGH J. I agree, and in so far as it is said that rule 42 creates rights or lays down a set of legal rules in the sense of being a statutory rule or equivalent to an order, I do not regard section 3 (2) of the Act

as giving the minister power to engage in such delegated legislation. He has an obligation there to the extent that he must lay before Parliament statements of such rules as he will lay down. That is quite a different thing.

I agree with the judgment of Lord Widgery C.J.

WIEN J. I agree with both judgments and have nothing to add.

Application dismissed.

Solicitors: *Simons, Muirhead & Allan; Treasury Solicitor.*

APPEAL from the Divisional Court.

The applicant appealed from the decision of the Divisional Court on the grounds that the Divisional Court was wrong in holding that (1) the rules of natural justice did not apply in the instant circumstances so as, at least, to require the Secretary of State to distinguish between those particulars of the allegations which could be disclosed without revealing the sources of information and those which he thought could not properly be disclosed, and to disclose the former; (2) a general statement by, or on behalf of, the Secretary of State that it was not " in the interests of national security " to give any particulars was sufficient and the court was " bound to accept what he (the Secretary of State) says," since the applicant had adequately raised a prima facie case to show that it would not be impossible for the Secretary of State to disclose at least some of the particulars of allegations requested by the applicant's solicitors in their letter of December 14, 1976; (3) the Statement of Immigration Rules for Control after Entry; EEC and other Non-Commonwealth Nationals: (H.C.82) and the undertaking given to Parliament on June 15, 1971, by the then Secretary of State did not require the Secretary of State to disclose so far as possible, all particulars of the allegations against the applicant, or at least the nature of the allegations save for those particulars which would entail disclosure of sources of evidence; (4) the Secretary of State had not misdirected himself in law in making the order of deportation against the applicant.

Louis Blom-Cooper Q.C. and *Jonathan Caplan* for the applicant.
Harry Woolf for the Secretary of State.

LORD DENNING M.R. Mark Hosenball is now only 25. He came here from the United States when he was not quite 18. He came on a scholarship awarded to him by the English Speaking Union. He went for a year to the Leighton Park School at Reading. Then for three years to Trinity College, Dublin. Whilst there, he came to England for his vacations, getting work here. On finishing in Dublin, he came over to England and worked here as a journalist. At first he worked for the weekly journal, " Time Out." We have been told very little about that journal. Only that it makes a feature of investigative journalism; that it is not a party to the D Notice system; and that the Special Branch has visited " Time Out " on one or two occasions. Mr. Hosenball tells us that, whilst he was with " Time Out," he did take part in an article called " The Eavesdroppers,"

which was about communication monitoring by the government. It was published on May 21, 1976, and has been published elsewhere since. Mr. Hosenball tells us that the "Eavesdroppers" was the last article with which he had been concerned involving any matter which could be said to touch on national security. He left "Time Out" in July 1976, and was employed by the "Evening Standard" as a general news reporter, having nothing to do with security matters at all.

During all that time, he had permission from the Home Office to be here. His latest permit was due to expire on December 11, 1976. Then four weeks ahead of it, on November 15, 1976, he received a letter from the Home Office. It told him that he could no longer stay because the Secretary of State had decided to deport him. The reason was because it was in the interests of national security. I will read the statement which was enclosed with the letter. It said:

> ". . . The Secretary of State has considered information that Mr. Hosenball has, while resident in the United Kingdom, in consort with others sought to obtain and has obtained for publication information harmful to the security of the United Kingdom and that this information has included information prejudicial to the safety of the servants of the Crown. In the light of the foregoing, the Secretary of State has decided that Mr. Hosenball's departure from the United Kingdom would be conducive to the public good as being in the interests of national security and he has accordingly decided to make a deportation order against him. . . ."

That statement is couched in official language: but translated into plain English it means that the Secretary of State believes that Mr. Hosenball is a danger to this country. So much so that his presence here is unwelcome and he can no longer be permitted to stay. This belief is founded on confidential information which has been placed before the Home Secretary. It is to the effect that Mr. Hosenball is one of a group of people who are trying to obtain information of a very sensitive character about our security arrangements. Their intention is to publish it, or some of it, in a way which will imperil the lives of the men in our secret service. The crucial charge against him is that he has "information prejudicial to the safety of the servants of the Crown" and is proposing to publish it. If that charge be true, he should certainly be deported. We cannot allow our men's lives to be endangered by foreigners.

On receiving the letter and its enclosure, Mr. Hosenball at once consulted his lawyers. They asked for further particulars of what was alleged against him. But they did not get any. The Secretary of State himself personally considered the request for further information, but he was of the view that it was not in the interests of national security to add anything to what he had already said. In order to see that he was fairly treated, Mr. Hosenball was given a hearing before a special panel of "three advisers." No doubt that panel had before them a good deal of information, and, I expect, evidence from the security service about the activities of Mr. Hosenball. That information and evidence was not made available to Mr. Hosenball or his lawyer; but at the hearing he was allowed to make representations. His solicitor did so on various matters which seemed to require explanation. The chairman told the solicitor: "I think you should concentrate on those areas. It would help us a lot and if we think there is anything else we can tell you." They told him nothing else. He called several witnesses of high standing in journalism, who spoke

of his good character. After the hearing the panel made a report to the Home Secretary, but it was not made available to Mr. Hosenball. The Home Secretary, gave it all his personal consideration. Then on February 16, 1977, he made a deportation order against Mr. Hosenball in these words:

> "Whereas I deem it to be conducive to the public good to deport from the United Kingdom Mark Jeffrey Hosenball . . . Now, therefore . . . I by this order require the said Mark Jeffrey Hosenball to leave and prohibit him from entering the United Kingdom so long as this order is in force.
>
> Merlyn Rees
> One of Her Majesty's Principal Secretaries of State."

A few days later, on February 23, 1977, Mr. Hosenball by his solicitors applied to the High Court for an order of certiorari to quash the deportation order on the ground that it was wrong in law; and that there was a failure to comply with the principles of natural justice in that he was not informed of the matters on which he was to be heard; and that the Home Secretary had misdirected himself. On March 17, 1977, Lord Widgery C.J., Eveleigh and Wien JJ. in the Divisional Court, ante, pp. 775H—776A, dismissed his application. He now appeals to this court.

Now I would like to say at once that if this were a case in which the ordinary rules of natural justice were to be observed, some criticism could be directed upon it. For one thing, the Home Secretary himself, and I expect the advisory panel also, had a good deal of confidential information before them of which Mr. Hosenball knew nothing and was told nothing: and which he had no opportunity of correcting or contradicting; or of testing by cross-examination. In addition, he was not given sufficient information of the charges against him so as to be able effectively to deal with them or answer them. All this could be urged as a ground for upsetting any ordinary decision of a court of law or of any tribunal, statutory or domestic: see *Kanda* v. *Government of Malaya* [1962] A.C. 322, 337.

But this is no ordinary case. It is a case in which national security is involved: and our history shows that, when the state itself is endangered, our cherished freedoms may have to take second place. Even natural justice itself may suffer a set-back. Time after time Parliament has so enacted and the courts have loyally followed. In the first world war in *Rex* v. *Halliday* [1917] A.C. 260, 270 Lord Finlay L.C. said: "The danger of espionage and of damage by secret agents . . . had to be guarded against." In the second world war in *Liversidge* v. *Sir John Anderson* [1942] A.C. 206, 219 Lord Maugham said:

> ". . . there may be certain persons against whom no offence is proved nor any charge formulated, but as regards whom it may be expedient to authorise the Secretary of State to make an order for detention."

That was said in time of war. But times of peace hold their dangers too. Spies, subverters and saboteurs may be mingling amongst us, putting on a most innocent exterior. They may be endangering the lives of the men in our secret service, as Mr. Hosenball is said to do.

If they are British subjects, we must deal with them here. If they are foreigners, they can be deported. The rules of natural justice have to be modified in regard to foreigners here who prove themselves unwelcome and ought to be deported.

If confirmation is needed, it is to be found in the very recent ruling of the European Commission of Human Rights made in the case of Mr. Agee (Application No. 7729/76 by Philip Burnett Franklin Agee against the United Kingdom), who is running parallel with Mr. Hosenball in these matters. Mr. Agee invoked article 6 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, which provides:

> "In the determination of his civil rights and obligations . . . everyone is entitled to a fair and public hearing . . . by an independent and impartial tribunal established by law."

The European Commission held:

> "where the public authorities of a state decide to deport an alien on grounds of security, this constitutes an act of state falling within the public sphere and that it does not constitute a determination of civil rights or obligations within the meaning of article 6. Accordingly . . . the state is not required in such cases to grant a hearing. . . ."

So it seems to me that when the national security is at stake even the rules of natural justice may have to be modified to meet the position. I would refer in this regard to the speech of Lord Reid in *Reg.* v. *Lewes Justices, Ex parte Secretary of State for Home Department* [1973] A.C. 388, 402.

The ground for deportation here

The most important words used by the Home Secretary were that he was deporting Mr. Hosenball "in the interests of national security." Deportation on this ground has always been treated separately from other grounds of deportation. At one time there was a statutory right of appeal when a decision to deport was taken on security grounds. It was so recommended in 1967 by Sir Roy Wilson's committee, Report of the Committee on Immigration Appeals, Cmnd. 3387, para. 144; and it was implemented to some extent by the Immigration Appeals Act 1969, section 9. But experience showed that it was unsatisfactory that there should be a statutory right of appeal in such cases. So in the Immigration Act 1971 that statutory right of appeal was abolished. Section 15 (3) says:

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

During the passage of that Bill there were some members in the House who wanted there to be some sort of statutory inquiry, but that too was rejected. Instead the Home Secretary in the House of Commons agreed to introduce a procedure of a non-statutory character. It was modelled on a procedure with which we were familiar in the old days, the 18B cases [Defence (General) Regulations 1939, reg. 18B]. It has since been applied in regard to British servants who are alleged to be security risks.

The special procedure

I will set out the procedure as described in the assurance given by the then Home Secretary, Mr. Maudling, to the House of Commons on June 15, 1971:

> " All these proceedings start with a personal decision by the Home Secretary on national security grounds. The person concerned is notified of the decision and he will be given by the Home Office such particulars of allegations as will not entail disclosure of sources of evidence. At the same time the person will be notified that he can make representations to the three advisers and will be given time to decide whether or not to do so. The advisers will then take account of any representations made by the person concerned. They will allow him to appear before them, if he wishes. He will not be entitled to legal representation, but he may be assisted by a friend to such extent as the advisers sanction. As well as speaking for himself, he may arrange for a third party to testify on his behalf. Neither the sources of evidence nor evidence that might lead to disclosure of sources can be revealed to the person concerned, but the advisers will ensure that the person is able to make his points effectively and the procedure will give him the best possible opportunity to make the points he wishes to bring to their notice."

Then, a little later, he went on to say:

> " Since the evidence against a person necessarily has to be received in his absence, the advisers in assessing the case will bear in mind that it has not been tested by cross-examination and that the person has not had the opportunity to rebut it . . . On receiving the advice of advisers the Secretary of State will reconsider his original decision, but the advice given to him will not be revealed."

The Home Secretary went on to give the procedure his blessing:

> " I recommend it to the House as the best possible system we can adopt in what is inevitably a difficult case. We have to reconcile the needs of national security with the proper rights of the individual to protect himself . . . I am not sure that it is wise to put this in statutory form. In effect, it means importing once again into this matter a justiciable issue, whereas the whole basis of my philosophy is that these are decisions of a political and executive character which should be subject to Parliament and not subject to courts arbitrators, and so on . . . Whether an individual's presence in this country is a danger to this country is not a legal decision. It is not a justiciable issue or a matter of law; it is a matter of judgment. Judgment should be exercised by the government, subject to the House of Commons, and not by a tribunal which is not under the control of the House."

Those statements, made in the House of Commons, are reflected in the rules which the Home Secretary afterwards made. To these I will now turn.

The immigration rules

Under section 3 (2) of the Immigration Act 1971 the Secretary of State has power to make rules as to the practice to be followed in the administration of the Act. Those rules were said by Roskill L.J. to be delegated legislation. He said it in *Reg.* v. *Chief Immigration Officer, Heathrow Airport, Ex parte Salamat Bibi* [1976] 1 W.L.R. 979, 985. But that, I think, goes too far. They are not rules of law. They are rules of practice laid down for the guidance of immigration officers and tribunals who are entrusted with the administration of the Act. They can be, and often are,

A prayed in aid by applicants before the courts in immigration cases. To some extent the courts must have regard to them because there are provisions in the Act itself, particularly in section 19, which show that in appeals to an adjudicator, if the immigration rules have not been complied with, then the appeal is to be allowed. In addition, the courts always have regard to those rules, not only in matters where there is a right of appeal; but also in cases under prerogative writs where there is a question B whether the officers have acted fairly. But they are not rules in the nature of delegated legislation so as to amount to strict rules of law.

There is one of these rules which is particularly prayed in aid here. It is rule 42 in Statement of Immigration Rules for Control after Entry: EEC and Other Non-Commonwealth Nationals, H.C. 82. It says:

C

> ". . . Nor is there a right of appeal (except as to the country of destination . . .) where a deportation order is made on the ground that the Secretary of State deems the person's deportation to be conducive to the public good as being in the interests of national security . . . But such cases are subject to a non-statutory advisory procedure and the person proposed to be deported on that ground will be informed, so far as possible, of the nature of the allegations D against him and will be given the opportunity to appear before the advisers, and to make representations to them, before they tender advice to the Secretary of State."

That rule seems to me simply to reproduce in a shortened form the statement which the Home Secretary made to the House of Commons. It adds nothing. It subtracts nothing. At any rate, nothing of substance.

E

The remedy in case of breach

The question was much discussed before us whether the prerogative writs, such as certiorari, apply in respect of this special procedure which was introduced by the statement in the House of Commons and by the immigration rules. Mr. Blom-Cooper referred us to *Reg.* v. *Criminal* F *Injuries Compensation Board, Ex parte Lain* [1967] 2 Q.B. 864 where it was held that that board (which deals with the amount of compensation to be paid to victims of crimes of violence) is subject to the writ of certiorari if it has gone wrong in point of law, much in the same way as a statutory tribunal. But the special procedure here is very different. It is not to be enforced by means of a writ of mandamus or certiorari simply G because there has been a departure from it. But nevertheless it is subject to the supervision of the court in this way: if the body concerned, whether it be a minister or advisers, has acted unfairly, then the courts can review their proceedings so as to ensure, as far as may be, that justice is done. But a departure from the procedure or from the rules does not constitute unfairness. An example was given by Mr. Woolf of a deportation order H being made against an alien who had gone to ground and disappeared. In such a case this special procedure could not be implemented, but nevertheless a deportation order would be perfectly valid. But if the man was present and the advisers said, " We are not going to hear any representations " and thus acted unfairly, that would be a ground on which the court might interfere. I need not go into the cases on fairness. They start with *In re H. K. (An Infant)* [1967] 2 Q.B. 617, approved by this court in *Schmidt* v. *Secretary of State for Home Affairs* [1969] 2 Ch. 149, 170, and

in *Reg.* v. *Secretary of State for Home Affairs, Ex parte Birdi*, February 11, 1975; Bar Library Transcript No. 67B of 1975.

The Security Service

Although the Secretary of State did not say so explicitly, it would seem likely that, in coming to his decision whether Mr. Hosenball's presence is a danger or not, he would have before him information that had been supplied to him by the Security Service: and that the officers of that service gave evidence before the special panel of three advisers. Mr. Blom-Cooper guessed as much himself in the course of his observations before us. Little has been written and little is known about the work of this service. I had to consider it in the report which I made in 1963 in relation to the former Secretary of State for War, Mr. Profumo: see Lord Denning's Report, Cmnd. 2152, paras. 235—242. As I there said, para. 239:

> "(3) The function of the Security Service is to defend the realm as a whole from dangers which threaten it as a whole, such as espionage on behalf of foreign powers, or internal organisations subversive of the state. For this purpose it must collect information about individuals and give it to those concerned. But it must not, even at the behest of a minister or a government department, take part in investigating the private lives of individuals except in a matter bearing on the defence of the realm as a whole."

I went on to say, para. 240:

> "if the Director-General of the Security Service gets information about a minister or senior public servant"—or, I would now add, a journalist —"indicating that he may be a security risk—he should consult the Home Secretary. The Home Secretary then will have to take the responsibility for further action, that is to say, whether to take steps to eliminate the security risk or to put up with it. If a mistake is made, it is the Home Secretary who will be responsible to Parliament."

Confidential information

The information supplied to the Home Secretary by the Security Service is, and must be, highly confidential. The public interest in the security of the realm is so great that the sources of the information must not be disclosed—nor should the nature of the information itself be disclosed—if there is any risk that it would lead to the sources being discovered. The reason is because, in this very secretive field, our enemies might try to eliminate the sources of information. So the sources must not be disclosed. Not even to the House of Commons. Nor to any tribunal or court of inquiry or body of advisers, statutory or non-statutory. Save to the extent that the Home Secretary thinks safe. Great as is the public interest in the freedom of the individual and the doing of justice to him, nevertheless in the last resort it must take second place to the security of the country itself. So much so that arrests have not been made, nor proceedings instituted, for fear that it may give away information which must be kept secret. This is in keeping with all our recent cases about confidential information. When the public interest requires that information be kept confidential, it may outweigh even the public interest in the administration of justice. I gave the instances in *D.* v. *National Society for the Prevention of Cruelty to Children* [1976] 3 W.L.R. 124, 132–134.

The present case

Much of what I have said was not disputed by Mr. Blom-Cooper. In his most helpful submission, he recognised that national security must take first place. But he suggested that the Home Secretary had pressed it too far when he refused to give the further particulars of the allegations against Mr. Hosenball. In a letter from Mr. Hosenball's solicitors of December 14, 1976, they made these requests for further particulars:

> "(a) State what information the Secretary of State has considered and the source of such information. (b) State the persons with whom my client is alleged to have been in consort and the occasions on which it is alleged he made such contacts. (c) State the dates and the places where such contacts occurred. (d) State what information harmful to the security of the United Kingdom my client has sought to obtain and has obtained for publication. (e) State which of the information has been published and when and where it has been published. (f) State which of the information is alleged to be prejudicial to the safety of servants of the Crown."

The Secretary of State, as I have said, declined to give those particulars. He declined to add anything to the short statement enclosed in the first letter. It seems to me, if you go through those requests one by one—even including (e) on which Mr. Blom-Cooper so much relies—it is apparent that, if the Secretary of State complied with that request, it would be quite possible for a clever person, who was in the know, to track down the source from which the Home Secretary got the information. That might put the source of the information himself in peril. Even if not in peril, that source of information might dry up. Rather than risk anything of the kind, the Home Secretary was quite entitled to say: "I am sorry but I cannot give you any further information."

Conclusion

There is a conflict here between the interests of national security on the one hand and the freedom of the individual on the other. The balance between these two is not for a court of law. It is for the Home Secretary. He is the person entrusted by Parliament with the task. In some parts of the world national security has on occasions been used as an excuse for all sorts of infringements of individual liberty. But not in England. Both during the wars and after them, successive ministers have discharged their duties to the complete satisfaction of the people at large. They have set up advisory committees to help them, usually with a chairman who has done everything he can to ensure that justice is done. They have never interfered with the liberty or the freedom of movement of any individual except where it is absolutely necessary for the safety of the state. In this case we are assured that the Home Secretary himself gave it his personal consideration, and I have no reason whatever to doubt the care with which he considered the whole matter. He is answerable to Parliament as to the way in which he did it and not to the courts here.

I would dismiss the appeal.

GEOFFREY LANE L.J. There are occasions, though they are rare, when what are more generally the rights of an individual must be subordinated to the protection of the realm. When an alien visitor to this country is

believed to have used the hospitality extended to him so as to present a danger to security, the Secretary of State has the right and, in many cases, has the duty of ensuring that the alien no longer remains here to threaten our security. It may be that the alien has been in the country for many years. It may be that he has built a career here in this country, and that consequently a deportation order made against him may result in great hardship to him. It may be that he protests that he has done nothing wrong so far as this country's security is concerned. It may be that he protests that he cannot understand why any action of this sort is being taken against him. In ordinary circumstances common fairness—you can call it natural justice if you wish—would demand that he be given particulars of the charges made against him; that he be given the names of the witnesses who are prepared to testify against him and, indeed, probably the nature of the evidence which those witnesses are prepared to give should also be delivered to him. But there are counter-balancing factors.

Detection, whether in the realms of ordinary crime or in the realms of national security, is seldom carried out by cold analysis or brilliant deduction. Much more frequently it is done by means of information received. Courts of criminal jurisdiction have for very many years indeed, if not for centuries, given protection from disclosure to sources of information. One can see that in *Rex* v. *Hardy* (1794) 24 State Tr. 199, 808, which was cited by Lord Simon of Glaisdale in *Reg.* v. *Lewes Justices, Ex parte Secretary of State for Home Department* [1973] A.C. 388, 407.

The reasons for this protection are plain. Once a source of information is disclosed, it will cease thereafter to be a source of information. Once a potential informant thinks that his identity is going to be disclosed if he provides information, he will cease to be an informant. The life of a known informant may be made, to say the least, very unpleasant by those who, for reasons of their own, wish to remain in obscurity. Thus, take away the protection, and you remove the means of detection; and, when the security of the country is involved, there may be added difficulties. It may well be that if an alien is told with particularity what it is said he has done it will become quite obvious to him from whence that information has been received. The only person who can judge whether such a result is likely is the person who has in his possession all the information available. That, in this case, is the Secretary of State himself. If he comes to the conclusion that for reasons such as those which I have just endeavoured to outline he cannot afford to give the alien more than the general charge against him, there one has the dilemma. The alien certainly has inadequate information upon which to prepare or direct his defence to the various charges which are made against him, and the only way that could be remedied would be to disclose information to him which might probably have an adverse effect on the national security. The choice is regrettably clear: the alien must suffer, if suffering there be, and this is so on whichever basis of argument one chooses.

Mr. Blom-Cooper lays at least two separate forms of foundation for his argument. First of all, the undertaking given by then Secretary of State, Mr. Maudling, on June 15, 1971, to the House on the passage of the Immigration Bill, to which Lord Denning M.R. has already made reference. A pronouncement such as that does not, of course, have any statutory effect. It does not bind the person who made it—the Secretary of State at that time—nor does it bind his successor, but of course no one would expect

A that the then Secretary of State or his successor would lightly disregard such a pronouncement.

The second possible foundation are the rules made by virtue of the Immigration Act 1971 itself, and particularly rule 42 of the Statement of Immigration Rules for Control after Entry, H.C.82, which, in so far as it is material, reads in its last sentence as follows:

B

> "But such cases are subject to a non-statutory advisory procedure and the person proposed to be deported on that ground will be informed, so far as possible, of the nature of the allegations against him and will be given the opportunity to appear before the advisers, and to make representations to them, before they tender advice to the Secretary of State."

C There have been dicta to the effect that these rules have the force of statute. In particular the judgment of Roskill L.J. in *Reg.* v. *Chief Immigration Officer, Heathrow Airport, Ex parte Bibi* [1976] 1 W.L.R. 979, 985, where he said:

> "These rules are just as much delegated legislation as any other form of rule-making activity or delegated legislation which is empowered
D by Act of Parliament."

I entertain a respectful doubt as to whether that is the case. These rules are very difficult to categorise or classify. They are in a class of their own. They are certainly a practical guide for the immigration officers at the various ports and airports of the country, who have the everyday task of trying to administer the Immigration Act 1971 of Parliament. Indeed
E they are, as to large parts, if one reads them, little more than explanatory notes of the Act itself. Some clue is to be found in section 3 (2), in the last part thereof, which deals with what is to happen to these regulations after the Secretary of State has laid them before Parliament, and that section reads as follows:

> "If a statement laid before either House of Parliament under this
F subsection is disapproved by a resolution of that House passed within the period of forty days beginning with the date of laying . . . then the Secretary of State shall as soon as may be make such changes or further changes in the rules as appear to him to be required in these circumstances, so that the statement of those changes be laid before Parliament at latest by the end of the period of forty days beginning with the date of the resolution . . ."

G That means, as I read it, that if Parliament disapproves of the rules they are not thereby abrogated: it merely becomes necessary for the Secretary of State to devise such fresh rules as appear to him to be required in the circumstances.

Then, on the other hand, section 19 (1) of the Act reads:

H

> "Subject to sections 13 (4) and 16 (4) above, and to any restrictions on the grounds of appeal, an adjudicator on an appeal to him under this Part of this Act—(*a*) shall allow the appeal if he considers—(i) that the decision or action against which the appeal is brought was not in accordance with the law or with any immigration rules applicable to the case; . . ."

So, so far as an adjudicator is concerned at least, the rules have the force of law. Then, when one turns to subsection (2) of section 19, it seems

that the rules may be departed from with the consent of the appellant himself.

We have also been referred by Mr. Blom-Cooper to *Van Duyn* v. *Home Office* [1975] Ch. 358. That was a reference by Sir John Pennycuick V.-C. to the European Court of Justice for a preliminary ruling; and, in the statement of facts on the matter which no doubt will be prepared or approved by the court in this country, the following phrase occurs, at p. 369:

> "Leave to enter was refused by the immigration officer acting in accordance with the policy of the government and with rule 65 of the relevant Immigration Rules for Control of Entry which Rules have legislative force."

One thing can be said with certainty with regard to the rules, and that is that they certainly can be used as a touchstone in order to aid the discovery as to whether the Secretary of State has in all the circumstances acted fairly.

Whether the argument in this case is based upon Mr. Maudling's pronouncement or on rule 42 of the Immigration Rules, H.C.82, or on the ground of fair play, the answer remains the same. As Lord Reid said in the *Lewes Justices* case [1973] A.C. 388, 402:

> "Natural justice requires that the board should act in good faith and that they should so far as possible tell him the gist of any grounds on which they propose to refuse his application so that he may show such grounds to be unfounded in fact. But the board must be trusted to do that; we have been referred to their practice in this matter and I see nothing wrong in it."

Different principles and strict principles apply where matters of the safety of the realm are at stake. What is fair cannot be decided in a vacuum: it has to be determined against the whole background of any particular case. The advisory panel system is an effort to ensure fairness as far as possible in these difficult circumstances, but in the end it is the Secretary of State who must in those circumstances be trusted to speak the last word.

Mr. Blom-Cooper contends that there is in these circumstances an obligation upon the Secretary of State to say specifically, "The reason why I cannot give you any further particulars is because I must not disclose my sources; and, if I do give further particulars, I am certain to make such disclosure." That is a narrow ground on which to base his argument, but base it he did on that. In my judgment, the Secretary of State, by his letter of December 16, although he did not say it in terms, has in fact just said that and no less. That is far from saying that the actions of the Secretary of State can never be examined by the court. One has only to look at *Reg.* v. *Governor of Brixton Prison, Ex parte Soblen* [1963] 2 Q.B. 243, to see that the court is entitled, for example, to inquire whether the Secretary of State is not in reality extraditing an alien under the guise of a deportation. No such question arises here.

I would dismiss the appeal.

CUMMING-BRUCE L.J. I agree with all that has fallen from Lord Denning M.R. and Geoffrey Lane L.J. The first ground of appeal to this court was that the Divisional Court was wrong in holding that the rules of natural justice did not apply so as to require the Secretary of State to

A distinguish between those particulars of the allegations which could be disclosed without revealing the sources of information and those which he thought could not for that reason be disclosed, and require him to disclose the former. The second ground relied upon was also a ground founded on a failure to confirm with the rules of natural justice.

I listened with mounting admiration to the pyramid of natural justice built by Mr. Blom-Cooper with a brick taken here from a case dealing B with the right of a taxi driver to have a licence, here with the right of a person injured by a criminal to have the appropriate amount of money allocated by the Criminal Compensation Board, and here to a case in which the courts were scrutinising the operations of the Gaming Board who are charged with the responsibility of preventing gaming houses in England from falling under the control of the Mafia, and so on. And I C recalled the classic case of *Board of Education* v. *Rice* [1911] A.C. 179 where the courts have in many different contexts of domestic circumstances insisted that certain simple rules of fairness are to be complied with by statutory bodies charged with a responsibility which may infringe upon the rights of the subject. But at the end of the day I was reminded of the words of Lord Hailsham of St. Marylebone L.C. in *Pearlberg* v. *Varty* D [1972] 1 W.L.R. 534, 540, where he said:

> "Despite the majestic conception of natural justice on which it was argued, I do not believe that this case involves any important legal principle at all. On the contrary, it is only another example of the general proposition that decisions of the court on particular statutes should be based in the first instance on a careful, even meticulous, construction of what that statute actually means in the context in E which it was passed. It is true, of course, that the courts will lean heavily against any construction of a statute which would be manifestly unfair. But they have no power to amend or supplement the language of a statute merely because on one view of the matter a subject feels himself entitled to a larger degree of say in the making of a decision than the statute accords him. Still less is it the function- F ing of the courts to form first a judgment on the fairness of an Act of Parliament and then to amend or supplement it with new provisions so as to make it conform to that judgment. The doctrine of natural justice has come in for increasing consideration in recent years, and the courts generally, and your Lordships' House in particular, have, I think rightly, advanced its frontiers considerably. But at the same time they have taken an increasingly sophisticated view of what it G requires in individual cases."

In my view, the field of judicial scrutiny by reference to the enforcement of the rules of common fairness, is an extremely restricted field in the sphere of the operations necessary to protect the security of the state. There is a certain range of such operations which depend for their efficacy H entirely on secrecy, and they are none the less important for that reason.

I can see no authority pointing to the correctness of the submission made by Mr. Blom-Cooper that the principles of ordinary fairness which have been insisted upon by the courts in the field of domestic institutions have any significant bearing on the field of security with which this case is concerned.

There are two other grounds relied upon by the appellant. One is founded upon a statement made by the Secretary of State for Home Affairs

on the floor of the House of Commons to which we have been referred. It was suggested, as I understand it, that such rights as Mr. Hosenball might have having regard to the scrutiny of the Act might be enlarged by the statement of the Secretary of State in the House of Commons. I cannot accept as a matter of constitutional law and principle that where the rights of the subject or of a resident have been dealt with in an Act of Parliament a statement made by a minister in Parliament can have the effect of enlarging those statutory rights. The danger of assenting to such a doctrine is obvious. If a minister can enlarge the rights of a subject as laid down in an Act of Parliament by a statement on the floor of the House, it is but a short step to say that it is constitutional for a minister to restrict the rights of a subject by making a statement on the floor of the House. By our constitution, it is Acts of Parliament and not the acts of ministers, save when authorised by Act of Parliament or under the prerogative, that define the rights of subjects or of residents.

Then Mr. Blom-Cooper submitted, fortified by an observation of Roskill L.J. in *Reg.* v. *Chief Immigration Officer, Heathrow Airport, Ex parte Bibi* [1976] 1 W.L.R. 979, 985, that the rules made under the title " Statement of Immigration Rules for Control after Entry " were delegated legislation and operated with legislative force.

The statement of rules came into being pursuant to the obligation of the Secretary of State laid down in the Immigration Act 1971, section 3 (2), which imposed upon the Secretary of State the statutory duty from time to time to lay before Parliament statements of the rules or of any changes in the rules laid down by him as to the practice to be followed in the administration of this Act regulating entry and stay in the United Kingdom. In the last paragraph of that section it is enacted:

> " If a statement laid before either House of Parliament . . . is disproved by a resolution of that House . . . then the Secretary of State shall as soon as may be make such changes or further changes in the rules as appear to him to be required in these circumstances."

Therefore, although they are entitled " A Statement of Immigration Rules," they are a totally different kind of publication from the rules that usually come into being under the authority delegated to ministers under Acts of Parliament; and, for my part, having scrutinised them, and observed that curious amalgam of information and description of executive procedures, they are not in my view in any sense of themselves of legislative force. It is true that by section 19 (2) of the Immigration Act 1971 the rules are given legal effect in the field of the appellate process to the adjudicator or the tribunal, which does not arise of course in connection with Mr. Hosenball's case. But the legal effect that the rules have in that limited field flows not from the fact that they have been published by the minister and laid before both Houses of Parliament, but because by section 19 (2) the rules are given an effect which is in a certain field clearly legally enforceable, and that is a quite different matter.

So much for the principles of the law that affect the appeal. On the facts I need only say this, that I agree with all that Lord Denning M.R. and Geoffrey Lane L.J. have already stated. The narrow ground on which Mr. Hosenball moves this Court of Appeal comes down on analysis to the fact that in the affidavit of Mr. Woodfield, a Deputy Under Secretary of State in the Home Office, sworn on behalf of the Secretary of State, it was stated:

A "The Secretary of State personally considered the request for further information to be supplied concerning the case against the applicant but he was of the view that it was not in the interests of national security to add anything to the matters set out in the statement attached to his letter of November 15, 1976, to the applicant."

It was conceded, as I understood it, that if Mr. Woodfield, speaking on B behalf of the Secretary of State, had used the words that he was of the view that it was not in the interests of national security to add anything to the matters set out lest the information should disclose the sources of the Secretary of State's information, then Mr. Hosenball's anxieties, or at any rate his objections to the lawfulness of the Secretary of State's proceedings, would have been set at rest. But in the context of the facts, starting from the statement that the Secretary of State appended to his C original deportation order, I am satisfied that the distinction drawn by Mr. Blom-Cooper, though it has an attractive logical foundation, is really a distinction without a difference. The Secretary of State, who, under our constitution, is responsible for seeking information about those who visit and stay in our shores and who is responsible for the decision to exclude those who are in his view a danger to the security of the state, D has sufficiently explained the reasons for refusing to give further information, and the fact that he has not used exactly the language which appears in rule 42 to which I have referred does not, in my view, found a ground for any legal objection in the way in which he has carried out his duties.

For those reasons I agree that the appeal should be dismissed.

E *Appeal dismissed.*
Leave to appeal refused.

Solicitors: *Simons, Muirhead & Allan; Treasury Solicitor.*

A. H. B.

F April 28, 1977. The Appeal Committee of the House of Lords (Lord Wilberforce, Viscount Dilhorne and Lord Fraser of Tullybelton) dismissed a petition by the applicant for leave to appeal.

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[CENTRAL CRIMINAL COURT]

* REGINA *v.* NUGENT

1976 Oct. 22 **Park J.**

H *Crime—Evidence—Witness—Statements tendered by prosecution in committal proceedings supporting alibi defence—Prosecution's discretion not to call witness*

A milkman was stabbed to death in Ashford and the money he had collected from customers was stolen. On the same day, two brothers were arrested and charged with his murder and robbery. A few days later, the defendant told the police first that he had been at Feltham at the time of the murder and then that he had been with the two brothers but had taken no part