

EAST AFRICAN ASIANS VERSUS THE UNITED KINGDOM: THE INSIDE STORY

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It is a privilege to have been invited to give this lecture and it is a great personal pleasure to do so under the auspices of Vijay Sharma's law firm and with the bonus of having Baroness Prashar of Runnymede in the chair. I have known Usha ever since she worked for the Race Relations Board – the predecessor of the Commission for Racial Equality. She became my star witness in favour of legislation to combat racial discrimination, in a television programme called "Your Witness", and persuaded the television jury to vote for our side. And she has since performed great and wise public service, including being an outstandingly effective Director of the Runnymede Trust, Chair of the Parole Board, and a robustly independent and wise First Civil Service Commissioner. As a member of the House of Lords Usha is a source of enlightenment, compassion and common sense on issues of public importance and concern.

Thirty three years ago I was co-counsel for the applicants before the European Commission of Human Rights in what is known as the *East African Asians' case*. The case led to a dramatic improvement in the position of the 200,000 British Asian nationals who were being made refugees by the racist policies of the rulers in East Africa. But although the case was of such public importance, most notably to British Asians from East Africa, it is barely known among them and their families who have made such a great contribution to the life of all of us in this country. I hope that this lecture will spread knowledge of the importance of what happened and how the European Commission of Human Rights came to the rescue.

It was a test case involving a challenge to the compatibility of section 1 of the Commonwealth Immigrants Act 1968 with the European Convention on Human Rights. It was especially significant because it involved European judicial review of legislation recently enacted by the Westminster Parliament, and an attack upon the motives of the British Government in introducing, and of Parliament in passing, a measure that discriminated against British Asians from East Africa

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who were citizens of the United Kingdom and Colonies² with full British passports, by depriving them of the right to enter and remain in their only country of citizenship. It was the enactment of that law in 1968 that prompted me to call, later that year, for the enactment of a British Bill of Rights (such as the Human Rights Act 1998, enacted thirty years later) to protect the constitutional rights of the individual and of minorities against what John Stuart Mill described as “the tyranny of the majority”³. It was the most unfair measure enacted by Parliament in my lifetime, racially motivated and in breach of a pledge made by Britain to the East African Asian community. A group of British citizens became citizens without status, stateless in fact, if not on abstract theory.

Some background is needed⁴ to explain the extraordinary circumstances of the case. Under the Commonwealth Immigrants Act 1962, immigration control was applied for the first time to Commonwealth citizens. In broad terms, the only persons to whom the 1962 Act did not apply were those born in the UK, or citizens of the UK and Colonies holding a British passport issued by the British Government, as distinct from the Government of a British dependency⁵. In other words, after 1962, not only citizens of independent Commonwealth countries, but also citizens of British dependencies became subject to immigration control. The reason why colonial UK citizens were subject to the 1962 Act was because they were issued with passports by the colonial Government, rather than by the UK Government.

The citizens of the UK and Colonies of Asian descent who were living in East Africa in 1962, in common with other colonial UK citizens, lost their right of entry to the UK by this means. That was because they were UK citizens by virtue of their colonial connection, and were entitled only to colonial UK passports, rather than to passports issued here. However, they still had the right to live in East Africa.

At precisely this time, the British Government was engaged in constitutional talks about the coming independence of the East African dependencies. Tanganyika had become independent in 1961, whilst the Commonwealth Immigrants Bill was pending, and now the future of both

² To use the archaic and confusing portmanteau concept of citizenship contained in the British Nationality Act 1948, later to be replaced by the separate concepts of ‘British citizen’, ‘British Overseas Citizen’, and ‘British Dependent Territories Citizen’, by the British Nationality Act 1981

³ Anthony Lester, *Democracy and Individual Rights*, Fabian Tract 390, November 1968, 3-4, and 13-15.

⁴ See e.g., David Steel MP, *No Entry: The Background and Implications of the Commonwealth Immigrants Act 1968* (1969) for the wider background.

⁵ Commonwealth Immigrants Act 1962, section 1(2).

Uganda and Kenya was being considered. One of the problems that concerned the British Government was the future well-being of the European and Asian minorities, especially in Kenya in the aftermath of the Mau Mau uprising.

The British Government was faced with an unusual situation. Previously where a dependent territory had attained independence, the residents of the territory automatically became citizens of the newly independent State, and could often also retain their UK citizenship. That had been the normal situation, but it did not happen in Uganda and Kenya. The Uganda Independence Act 1962 and the Kenya Independence Act 1963 provided that, upon the attainment of independence, citizens of the UK and Colonies would not automatically lose their UK citizenship; instead, under the laws of Uganda and Kenya, the European and Asian minorities could only become citizens of those countries if they applied to do so within two years and at the same time renounced their citizenship of the UK and Colonies.

By permitting the Asian minority in East Africa to retain their UK citizenship, the British Government restored a precious benefit to them – the right once more to enter the UK free from immigration control; for, there being no longer any colonial Government in Uganda and Kenya, the British Asians became entitled for the first time to be issued with passports by the British Government, and therefore to be exempt from the Commonwealth Immigrants Act 1962.

These Asian UK citizens were given a difficult choice. Either they could apply within two years for local African citizenship and renounce their British citizenship, or else they could retain their British citizenship and thereby their right of entry into the UK. They were treated less favourably in this respect than the British European minority, who were permitted to re-acquire their UK citizenship and their right of entry in the event that they renounced those rights in order to become citizens of other Commonwealth countries⁶. But at least they were given the option to remain as British citizens with British passports that entitled them to enter and settle in this country.

Many East African Asians realised that their position might become precarious in East Africa, whatever their citizenship⁷. In reliance upon their rights as UK passport holders, the vast majority of those in Kenya and Uganda

⁶ By the British Nationality Act (No.1) 1964 .

⁷ Indeed, the Asians who opted for Uganda citizenship were not protected by that status against racial persecution and expulsion from Uganda, in 1972, at the hands of Idi Amin: see Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States* (1978), 212-26.

decided to retain their British citizenship during the two years in which they could have applied for local African citizenship. They thereby lost their right to live in East Africa. But they had a new positive attribute of citizenship – the right to a British passport issued by the UK Government, and with it the right of entry into the UK.

In the aftermath of attaining independence, Kenya, Uganda, and Tanzania introduced racially-motivated policies of ‘Africanisation’, giving preference to their citizens in trade and employment and in due course requiring the departure of people who were not local citizens and whose right to work or trade there had, been withdrawn. The British Asians were the victims of this racist policy. And they began to exercise their right to come to the United Kingdom. Between 1965 and 1967, the annual number of entrants increased from 6,150 to 13,600. In the first two months of 1968, the number of people exercising the right was 12,800. They came in greater and greater numbers because they were rightly fearful that the UK might deprive them of their rights of entry and of residence.

After a highly effective populist campaign led by Enoch Powell MP and Duncan Sandys MP to deprive the British Asians of their right to enter the UK, the Wilson Government introduced emergency legislation – the Commonwealth Immigrants Act 1968 – and drove it through all its parliamentary stages in three tumultuous days and nights⁸. The device used was to insert a familiar provision, well-known in nationality law into the immigration code. Henceforth, a UK passport holder could enter the UK free of immigration control only if he, or at least one of his parents or grandparents, was born, naturalised, adopted or registered as a UK citizen *in the United Kingdom itself*.

Upon its face, the 1968 Act was merely applying a familiar set of qualifications for the acquisition of UK citizenship to UK immigration law; but, as members of all political parties, the press and the general public recognised at the time, the real purpose of this provision was to deprive the British Asians of their right of entry on racial grounds. A group of British citizens, temporary in public office, successfully used their legislative majority to abridge the basic rights and freedoms of another group of British citizens, because of their colour and ethnic origins. And because the Westminster Parliament was all-powerful under the British constitution with unbridled legislative powers, British courts could not strike down this obnoxious and unsightly measure.

⁸ Within a few weeks of the enactment of the 1968 Act, Enoch Powell MP made his river-of-blood speech. Within months, he renewed his demands for the “repatriation” of Britain’s coloured minority and a ban on the future entry of the families of black and Asian resident workers, declaring that “The West Indian or Asian does not, by being born in England, become an Englishman.: *The Times*, 18th November 1968.

The extent of the suffering which ensued for Asian UK citizens from East Africa was considerable: stripped of their livelihood and possessions in East Africa; divided from members of their families in the UK; detained for weeks or months in prison if they sought to enter the UK without Home Office vouchers; or shuttled here and there, across Europe, Africa and Asia, desperately seeking a new world; some stranded in Europe en route for the UK, others in India. Nominally, they remained citizens of the UK and Colonies, but they became citizens without status, lacking status in fact if not in law. In all these respects, the British Asians were treated less favourably than their fellow British citizens of European ethnic origin.

In the absence of effective British judicial remedies, the only recourse open to these dispossessed British Asians was to complain to the European Commission of Human Rights that the UK Government and Parliament had violated their rights in breach of the European Convention on Human Rights, and this they did in 1970. I had been counsel a couple of years earlier in the first British cases to go to Strasbourg, brought on behalf of a Pakistani Muslim and an Indian Sikh whose children had been refused entry to the UK. That is what led to my being asked to act as counsel for some of the applicants in the *East African Asian Case*.

The Commission adopted its Report in the case almost thirty years ago, on 14th December 1973. It concluded that publicly to single out a group for differential treatment on racial grounds constitutes a special affront to human dignity and that each of the applicants, as British citizens, had been subjected to such degrading treatment in breach of Article 3 of the Convention. It also concluded that the refusal of admission to Britain of the husbands of Commonwealth citizens already resident in the United Kingdom, in circumstances in which their wives would have been admitted, had been in breach of Article 8 in preventing the reunion in the UK of the members of the applicants' families, and of Article 14 read with Article 8 in discriminating against male immigrants on the ground of their sex⁹. It was a momentous decision unprecedented in the jurisprudence of the European Convention on Human Rights, and it was a heavy blow to the reputation of the UK for fair play.

The Commission's Report was transmitted to the Committee of Ministers on in March 1974, at the very time when I left the Bar for some two years to work

⁹ This principle was affirmed by the European Court of Human Rights in the later case of *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471.

as Special Adviser to Roy Jenkins MP at the Home Office, developing policy on what became the Sex Discrimination Act 1975 and the Race Relations Act 1976. Because of the potential conflict of interest between my role as advocate and my role as Special Adviser, it was specifically agreed that I should take no part in advising the Home Secretary on what should be done in relation to the East African Asians case. I was greatly relieved, however, when Roy Jenkins decided, against official advice, not to refer the case to the European Court of Human Rights to challenge the Commission's opinion. It was far from certain that the Court would have been as robust as the Commission in finding the British Government and Parliament guilty of bad faith and racism.

Roy Jenkins decided to increase the annual quota of those who could enter and settle in the UK¹⁰. The applicants and the other British Asians were not restored to full citizenship rights, but their rate of entry into the UK was greatly accelerated. In the absence of a reference to the Court, the matter rested with the Committee of Ministers, a political rather than independent judicial body. And after Roy Jenkins and I had left the Home Office in 1976, British Ministers and officials, worked within the Committee of Ministers to limit the effect of the Commission's landmark decision.

In this they were depressingly successful. Eventually, some seven years after all of the applicants had been admitted to the UK, the Committee of Ministers agreed with those of the Commission's findings that were favourable to the Government but could not muster the necessary two-thirds majority to decide whether the Committee also agreed with the findings of breaches of the applicants' Convention rights. The Committee simply decided that "no further action was called for"¹¹. That highly political and non-judicial approach by the Committee of Ministers shows how courageous and controversial had been the Commission's decision, and how inadequate were the Governments of Western Europe in countering the spread of racism in response to the growth of immigration from the Third World.

¹⁰ The Government submitted a memorandum on 6th May 1975 to the Committee of Ministers stating that in its view there had been no violation of the Convention in the matters covered by the Commission's Report: see Resolution DH (77) 2, adopted by the Committee of Ministers on 21st October 1977, 77(20) Yb 642

¹¹ It noted with satisfaction that all 31 applicants were settled in the UK, and that the annual quota had been increased from 1500 to 5000 heads of household, and that the Immigration Rules had permitted husbands to join wives settled in the UK *Ibid.* See e.g., DJ Harris, M O'Boyle and C Warbrick, *Law of the European Convention on Human Rights* (1995), 695, for criticism of such politically motivated 'non-decisions'.

The unprincipled conduct of Harold Wilson's first administration in introducing the 1968 legislation was in marked contrast to the much more generous approach of Edward Heath's government when Idi Amin expelled some 71,000 Uganda Asians in the early 1970's.

The Cabinet papers relating to the Wilson government's decision to introduce the Commonwealth Immigrants Bill, were made public five years ago under the Thirty Year Rule. The official records reveal the Wilson government's motivation in introducing the Bill, and the nature of the disagreement within a divided Cabinet about this unsightly measure.

Before considering what the Cabinet papers reveal, I should explain the main issues in the Strasbourg proceedings.

The Fourth Protocol to the Convention¹² provides¹³ that "No one shall be deprived of the right to enter the territory of the State of which he is a national", but, most regrettably, the Fourth Protocol had not and has still not been ratified by the UK. The Government relied heavily by way of defence upon its failure to ratify the Fourth Protocol, claiming that the applicants were seeking a right to enter the territory of the State of which they were nationals, a right to which they were not entitled under the Convention because Protocol No. 4 had not been ratified on behalf of the UK. For their part, the applicants argued that the Government could not rely upon its failure to ratify Protocol 4 to limit the scope of the rights protected by the Convention itself. The fact that the Government had chosen not to ratify the Fourth Protocol did not mean that the Government and Parliament were entitled to treat their citizens in any way they pleased as far as entry and exit were concerned.

We had to overcome a legal obstacle because the non-discrimination guarantee in Article 14 of the Convention¹⁴ is not a general guarantee of equal

¹² The Fourth Protocol was signed on 20th March 1952 by Anthony Eden MP, on behalf of the UK Government. It entered into force on 2nd May 1963, and has been ratified by 37 Member States of the Council of Europe. It has not been ratified by Andorra, Greece, Liechtenstein, Spain, Switzerland, Turkey, and the United Kingdom. Successive British Governments have refused to ratify the Protocol. The current explanation for this refusal was explained by Baroness Chalker of Wallesey in a Written Answer on 12th November 1996; 'Her Majesty's Government believes that Article 3(2) of the Protocol could conflict with the UK immigration and nationality legislation by giving British Dependent Territories Citizens, British Overseas Citizens, British Subjects and British Nationals Overseas a right of entry to the UK that they no longer possess.'

¹³ Article 3 (2).

¹⁴ Article 14 of the Convention states; 'The enjoyment of the rights and freedoms set forth in this Convention on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'. The European Court

treatment without discrimination¹⁵. It applies only to discrimination in the enjoyment of some other Convention right. But, given that there was no right in the Convention itself to enter and live in the territory of the applicants' nationality, upon what other Convention right could they rely as the springboard for their complaint of racial discrimination?

One obvious Convention right was the right to respect for family life, guaranteed by Article 8. This was successfully relied upon in relation to those cases where the effect of a refusal of entry was to separate close members of a family, but it was of no avail in other cases, and would not benefit the 200, 000 British Asians as a group of victims.

The other relevant Convention right was the right not to be subjected to inhuman or degrading treatment or punishment, guaranteed by Article 3. The applicants alleged that they had been subjected to degrading treatment by being refused admission to the UK as British citizens, even though, as the British authorities were aware, they would not be allowed to return to the country they had left, and there was no other country which they were entitled to enter. The difficulty with this argument was that it was fact-sensitive; in other words, it could succeed only if on the particular facts of individual cases the treatment meted out amounted to degrading treatment.

The breakthrough came in the Commission's acceptance of our argument that, in and of itself, the subjection of the citizens of the State to racial discrimination was capable of amounting to degrading treatment in breach of Article 3. In the Commission's memorable words:

"a special importance should be attached to discrimination based on race...publicly to single out a group of persons for differential treatment on the basis of race might, in certain circumstances, constitute a special form of affront to human dignity; and ... differential treatment ... on the basis of race might therefore be capable of constituting degrading treatment."

The applicants also needed to establish as a matter of fact that, even though the legislation was neutral on its face it was racially discriminatory in its

of Human Rights gave its first judgment interpreting Article 14 in the *Belgian Linguistic Case (No.2)* (1968) 1 EHRR 252, on 23rd July 1968, a few months after the enactment of the Commonwealth Immigrants Act 1968. The applicants relied upon this landmark judgment in the *East African Asians' case*.

¹⁵ That is why it is so important for the UK and other Contracting States to sign and ratify Protocol 12.

aims and effect¹⁶. In other words, we had to convince the Commission that the British Government and Parliament had legislated in bad faith to conceal the racial aims and effects of the law. The Government strongly denied that the 1968 Act was racially motivated, and claimed that it was based upon geography. We relied upon the Parliamentary debates, together with evidence given by Dipak Nandy, the Director of the Runnymede Trust, about demography and immigration statistics, and Nicholas Deakin¹⁷ about the political history. The Commission found it

“established that the 1968 Act had racial motives and that it covered a racial group. When it was introduced into Parliament as a Bill, it was made clear that it was directed against the Asian citizens of the United Kingdom and Colonies in East Africa and especially those in Kenya.”

It concluded that it had “discriminated against this group of people on grounds of their colour or race.”¹⁸ That was a damning verdict on the Government and Parliament of this country, and an ugly stain on the international reputation of the United Kingdom

What light do the now publicly available Cabinet Papers and other official records shine upon the issues? Lack of time prevents me from explaining what they reveal during the period between 1965 and 1967, when Sir Frank Soskice and Roy Jenkins were successive Home Secretaries. But in late November 1967, Jenkins swapped Ministerial office with James Callaghan MP, moving from the

¹⁶ A legal expert, writing in 1970, observed that “if it could be shown that the real object of section 1 [of the 1968 Act] was to penalize some citizens of the United Kingdom and Colonies on account of their race, it would not be difficult to show that the section (or action taken under it) contravened international law; *but as a matter of fact it may be doubted (and it might be very difficult to show) that the object of section 1 was improper: international tribunals will not easily impute bad faith to states.*” Richard Plender, “The Exodus of Asians from East and Central Africa: Some Comparative and International Law Aspects”, Vol XIX, *American Journal of Comparative Law* (1971) 287, at 316 (emphasis added). Plender also doubted the competence of the European Commission and Court of Human Rights to pronounce on the question whether the UK owed a duty to grant admission to those in whom it had conferred UK citizenship, since the UK had not ratified the Fourth Protocol: *ibid.*, at 322-33. Plender suggested that there might be a stronger argument under customary international law.

¹⁷ Jim Rose’s associate in the authoritative report on British race relations: E.J.B.Rose and associates, *Colour and Citizenship* (1969).

¹⁸ The Commission also took into account the fact that the British Nationality Act 1964 facilitated the resumption of citizenship of the UK and Colonies by persons who had chosen to become citizens of Uganda or Kenya, provided that they had a qualifying connection “which would normally be fulfilled by the so-called ‘white settlers’, but not by members of the Asian communities in East Africa.” It also noted that the concept of “patriality” introduced by the Immigration Act 1971 in the course of the proceedings “would normally operate in favour of white people.”

Home Office to the Treasury. Callaghan¹⁹ swiftly decided that the time had come to legislate. On 8th February 1968, he circulated a memorandum²⁰ to the Commonwealth Immigration Committee proposing that, in the light of the steep rise in numbers arriving from East Africa, immigration control should be extended to citizens of the UK and Colonies who “do not belong to the United Kingdom.” The Committee considered the proposal on 13th February 1968²¹. Strong opposition came from the Minister of State for Commonwealth Affairs, George Thomas MP who said that

“it had been a calculated decision of the British Government of the time to offer these people the security of a British passport and it would be wrong to disregard this now. Previous Commonwealth immigration legislation had covered white immigrants also, but legislation of the sort proposed would in effect discriminate against the Asians from East Africa because of their colour. This would contradict all we had previously said on the subject. This was all the more to be regretted because the people concerned were mostly English-speakers, better educated than most other immigrants and with means of their own. They should therefore be more easily assimilated. The legislation proposed might turn these people into stateless persons.... We should find ourselves accused in the United Nations and elsewhere of a breach of human rights....²²

The Attorney-General, Sir Elwyn Jones QC, MP, said that the memorandum “did not spell out the difficulties which legislation of the kind proposed would entail for us in the context of a number of international instruments dealing with human rights and racial discrimination”. In view of “the serious embarrassment in which legislation of the kind proposed was likely to involve us, he thought that when the question was considered by the Cabinet, Ministers should have before them a paper setting out the legal aspects of the problem.” In discussion

“it was recognised that legislation along the lines proposed by the Home Secretary would appear to run counter to our international obligations, particularly the European Convention on Human Rights, would be going back on the undertaking given by the British Government when Kenya was given

¹⁹ Callaghan’s biographer observes that “Callaghan was vehemently denounced as a reactionary pandering to racism. He felt angry that he had to carry the can when Jenkins and Soskice before him had ducked the issue. A clear policy was needed and he felt no embarrassment in enforcing one.” Kenneth O. Morgan, *Callaghan, A Life* (1997), at 311. For Callaghan’s version of the events see James Callaghan, *Time and Change* (1987), at 264 – 269.

²⁰ CI (68) 3, CAB 134/2637.

²¹ CI (68) 2nd Meeting, CAB 134/2637.

²² The official brief for the Minister of State, dated 12th February 1968, stated that “The legislation proposed would not be consistent with our adherence to various International Agreements and Convention, and might place us in breach of customary international law”, FCO 31/251.

independence in 1963; and might be presented as the Government giving way to racial prejudice." The majority of the Committee considered, however, that there was no alternative but to legislate in order to prevent "a large influx from the Asian Community in East Africa to this country." The Committee invited the Attorney-General to circulate a memorandum to the Cabinet dealing with the international obligations relating to the proposed legislation."

Richard Crossman recorded his impressions of the meeting in his Diary²³ with characteristic bluntness as follows:

"Our first Cabinet Committee meeting was that on Commonwealth Immigration with our friend Jim Callaghan in the Chair. Here's an interesting point about Prime Ministerial government. In normal circumstances the line we should take on Commonwealth immigration would be considered by the Home Affairs Committee but this Kenya Asian problem had been sent to a special committee appointed for the purpose with Jim Callaghan - not Michael Stewart - in the chair, As a matter of fact if it had been considered under the chairmanship of Michael Stewart, things would have been much better. Jim arrived with the air of a man whose mind was made up. He wasn't going to tolerate this bloody liberalism. He was going to stop this nonsense as the public was demanding and as the Party was demanding. He would do it come what may and anybody who opposed him was a sentimental jackass. This was the tone in which he conducted this Cabinet Committee and it was extremely interesting to see the attitude of the members round the table. Whitehall had lined up the E.E.A., the Ministry of Labour, the Ministry of Education, all the Departments concerned, including even the Foreign Office, behind the Home Office demand that the law must be changed. Only the Commonwealth Department stood out against this pressure and George Thomas, the Minister of State, made a most passionate objection to the Bill in strictly rational form, saying this was being railroaded through and Jim was getting backing from all of the Departments. A few years ago everyone there would have regarded the denial of entry to British nationals with British passports as the most appalling violation of our deepest principles. Now they were quite happily reading aloud their departmental briefs in favour of doing just that. Mainly because I'm an M.P. for a constituency in the Midlands, where racialism is a powerful force, I was on the side of Jim and said that we had a sharp choice. We had to decide whether to take the risk of announcing in advance that there would be no ban on immigration in the hope that this would stem a panic rush, or we had to announce the Bill. The one thing not to do was to hesitate and be indecisive. Between these two courses I felt that a country such as

²³ Richard Crossman, *The Crossman Diaries*, at 678-79.

France might possibly choose in favour of the first but the British people wouldn't. There was virtually no opposition to this view except from George Thomas and Elwyn Jones."

On the day before this meeting, Callaghan had circulated a memorandum²⁴ to the Cabinet giving notice of his view that a Bill was needed as a matter of urgency to extend immigration control to citizens of the UK and Colonies "who do not belong to the United Kingdom", to restrict the right of entry of dependent children, and to deal with clandestine immigration. He explained that

"Our best hope of developing in these Islands a multi-racial society free of strife lies in striking the right balance between the number of Commonwealth citizens we can allow in and our ability to ensure them, once here, a fair deal not only in tangible matters like jobs, housing and other social services but, more intangibly, against racial prejudice. If we have to restrict immigration now for good reasons ... the imminent Race Relations Bill²⁵ will be a timely factor in helping us to show that we are aiming at a fair balance all round..... The effect of the legislative amendment proposed will be that Asians in East Africa and others will be treated exactly as all other Commonwealth citizens; and it is proposed to allow them a special quota of employment vouchers....I believe that this equality of treatment and our general policy of a fair deal all round ... should be sufficient to show that we are not dishonouring any of the international obligations"

The Attorney-General's brief memorandum²⁶ made no reference to the prohibition of discrimination in the enjoyment of Convention rights, such as the right to family life, under Article 14 of the Convention; nor to the prohibition against degrading treatment in Article 3; nor to customary international law protecting the individual's right to enter the territory of the state of his or her nationality; nor the UN Convention on the Reduction of Statelessness 1961²⁷.

²⁴ C(68)34, CAB 129/35, 12th February 1968..

²⁵ That is the Bill which became the Race Relations Act 1968.

²⁶ C (68) 36, CAB 129/135, 14th February 1968. A minute by a Foreign Office Legal Adviser, Henry Steel, of 16th February 1968, minuted a colleague that "We were asked by the Law Officers Department late yesterday evening to let the Attorney General have a note on the rights, if any, of the persons we are concerned with to acquire local citizenship in each of the three East African countries. I attach for your information and for your own file a copy of the letter I have just sent to the Law Officers Department together with a copy of each of the notes in case you wish to send them to the Home Office." FCO 31/252 Neither the letter nor the notes are in the official papers in the Public Records Office.

²⁷ The UK signed the Convention on 30th August 1961 but has not yet ratified it. This was an especially curious omission, since the Minister of State at the Home Office referred to the Statelessness Convention in the Lords the day after the Attorney-General had signed his memorandum.

The Home Secretary's memorandum did not mention either the more favourable treatment given to UK citizens of British descent who had acquired local African citizenship, or the question of a pledge or undertaking, and the reliance placed by East African Asians on their right of entry to the UK in deciding not to acquire local African citizenship. It argued that the effect of the legislation proposed would be that

"Asians in East Africa and others similarly placed will be treated exactly as all other Commonwealth citizens.... I believe that this equality of treatment and our policy of a fair deal all round, as evidenced by the forthcoming Race Relations Bill, should be sufficient to show that we are not dishonouring any of the international obligations ..."

The Secretary of State for Commonwealth Affairs, George Thomson MP (now my Liberal Democrat colleague, Lord Thomson of Monifieth) recorded his dissent from the Home Secretary's proposal²⁸. He believed that the legislation proposed would "(i) be widely condemned as an act of racial discrimination; (ii) be construed as a breach of faith towards those Asian residents in Kenya who were accorded as recently as 1963 by a British Government full United Kingdom Citizenship without reserve or condition; (iii) be contrary to international principle and practice; (iv) be unworkable in practice...." He continued:

"The proposal is undesirable because it creates a second-class category of citizens of this country ... who have no right of entry into any part of it. Since United Kingdom citizenship is the only one that most of them possess, they would be left with no legal right of entry into any country at all. We would in practice, if not in law, be rendering them stateless. The proposal leaves us open to the charge of breaking faith with many Kenyan Asians who, because of actions by past British Governments for their own purposes, now find themselves possessing citizenship of the United Kingdom and Colonies. There is a moral issue of fundamental importance here. The proposal raises difficulties in relation to the international agreements by which we are bound, and to customary international law. It would undoubtedly come under challenge internationally.... There would be strong criticism by certain Governments on the score that Her Majesty's Government, motivated by racial prejudice, were openly discriminating against coloured citizens."

²⁸ Memorandum of 12th February 1968, C(68) 35, CAB 129/135

The Cabinet met on 15th February 1968, this time presided over by the Prime Minister, Harold Wilson MP²⁹. Curiously, on the same day, Lord Stoneham, Minister of State at the Home Office assured the House of Lords³⁰, that legislation to control the entry of Asian UK citizens from Kenya was unlikely because

“It would remove from them their right to United Kingdom citizenship and make them Stateless; and under the United Nations Convention of 1961 the United Kingdom Government are pledged to avoid any increase in future Statelessness.”

The Home Secretary referred, in the course of his argument in Cabinet, to

“The obligations which we have undertaken when Kenya and other colonial territories had achieved independence that their citizens who did not opt for local nationality would retain the rights of citizens of the United Kingdom and Colonies. There are also the various international conventions which we have signed or ratified which make it difficult for us to deny entry to these people, although such conventions had not in his view been intended to deal with the kind of problem which we now faced.”

In the course of discussion, the Attorney-General said that, if the proposed legislation were passed,

“Our position in relation to the relevant international agreements and declarations would be difficult but not impossible. In the case of the Universal Declaration of Human Rights, the United Nations Convention on Racial Discrimination and the International Covenant on Civil and Political Rights, we might justify our action on the grounds, amongst others, that the people concerned did not in any real sense belong to this country.”

²⁹ CC (68), CAB 128/43. The other members of the Cabinet present were the Foreign Secretary, George Brown MP, the Home Secretary, James Callaghan MP, the Chancellor of the Exchequer, Roy Jenkins MP, the Lord Chancellor, Lord Gardiner, the First Secretary, Michael Stewart MP, the Lord President of the Council, Richard Crossman MP, the Secretary of State for Defence, Denis Healey, the Secretary of State for Education and Science, Patrick Gordon Walker MP, the Secretary of State for Scotland, William Ross MP, the President of the Board of Trade, Anthony Crosland MP, the Secretary of State for Commonwealth Affairs, George Thomson MP, the Secretary of State for Economic Affairs, Peter Shore MP, the Minister of Housing and Local Government, Anthony Greenwood MP, the Minister of Labour, Ray Gunter MP, the Minister of Agriculture, Fisheries and Food, Fred Peart MP, the Lord Privy Seal, Lord Shackleton, the Secretary of State for Wales, Cledwyn Hughes MP, and the Minister of Power, Richard Marsh MP. The Attorney-General, Sir Elwyn-Jones QC, MP was also present. The Minister of Transport, Barbara Castle MP, who was opposed to the Bill, was absent because she was busy: *The Crossman Diaries*, at 684:

³⁰ Hansard (HL), 15th February, Cols 201-207, at 203.

The Attorney General referred to the problem that “it would be difficult to argue that refusal of an Asian immigrant from East Africa would not be in breach of Article 3 of the Fourth Protocol; but pointed out that the Protocol had not been ratified. He also referred to the right to respect for family life protected by Article 8 of the Convention, and to two pending cases before the European Commission alleging breaches of the Convention³¹.

The Cabinet was divided and not prepared to take a decision³². It deferred the matter pending consultation with the Governments of Kenya, India and Pakistan, and examination by Home Office officials of the number of Asian immigrants from Kenya who could be admitted if it were decided to legislate. When the Official Committee met on 19th February 1968, they considered³³ a draft report to the Cabinet from the Home Office and the Ministry of Labour. One of the points made was that

It would be undesirable in the report to speak in terms of coloured immigration; instead the report should refer to Asian immigration.

This was duly done in the Home Secretary’s memorandum³⁴ which avoided any reference to colour, but referred to “citizens of the United Kingdom and Colonies who have no substantial connection with this country.”

The Cabinet met again on 22nd February 1968³⁵. The balance of opinion was strongly in favour of the legislation³⁶. The minutes record that

³¹ The two cases, in which I represented the applicants, were *Mohamed Alam and Mohamed Khan, and Harbhajan Singh v United Kingdom*. The applications were declared admissible on 15th July 1967: 24 CD 116. The report of the Sub-Commission on a friendly settlement was adopted on 17th December 1968. The admissibility decision was relied upon in the course of argument in the *East African Asians’ case*.

³² According to Crossman, the opponents of the proposal included the Lord Chancellor, Lord Gardiner, the Chancellor of the Exchequer, Roy Jenkins MP, and the absent Minister of Transport, Barbara Castle MP, while the Foreign Secretary, Michael Stewart MP and Jenkins argued (against the Prime Minister, Harold Wilson MP) for a week’s delay so that efforts could be made to obtain an agreement with Kenya: *The Crossman Diaries*, at 684-85.

³³ CI (O) 68, CAB 134/2640.

³⁴ C(68)29, CAB 129/136.

³⁵ CC (62), CAB 123/43. Those present now included the Minister of Transport, Barbara Castle MP. Her published diaries contain only a bare mention of the subject: Barbara Castle, *The Castle Diaries 1964-76* (1990), at 191. Callaghan’s biographer observes that “Barbara Castle, who would ... have been strongly opposed to the bill, failed to resist in Cabinet on 21st February because she fell asleep. Crossman, her neighbour, failed to wake her perhaps out of compassion for a tired colleague, perhaps because he supported Callaghan’s bill.” Kenneth O’Morgan, *Callaghan, A Life* (1997), at 310, citing Castle, *Castle Diaries*, at 378-8. Morgan also notes (at 310) that Shirley Williams MP, was a fierce critic of the Bill.

Although the moral and legal objections to this course, and the problems it would raise for us internationally and administratively, were recognised, these were thought to be outweighed by the consequences for the social services, in terms of additional expenditure, and for our race relations policy, if the flow of immigrants from Kenya was allowed to continue unchecked.

Summing up the discussion, the Prime Minister said that “the Cabinet were, on balance, agreed that legislation should be introduced immediately.... The necessary Bill should be tabled that afternoon”.

The Bill was, as I have said, rushed through all stages in three days and nights as an emergency measure. There were powerful critics of the Bill from all parties in both the Commons and the Lords, emphasising its racially discriminatory nature, and the breach of faith or pledge which it involved. However, from a legal perspective, the debates are conspicuous for the lack of effective scrutiny of the Bill’s international legal implications. Neither the Minister in charge of the Bill in the Lords, Lord Shackleton, nor the Lord Chancellor, sought to explain the Government’s understanding of the position in international human rights law. Parliamentary scrutiny of the compatibility of Section 1 of the Bill with the European Convention and other relevant international instruments was cursory and rudimentary.

If such a measure were to be introduced by a future Government which decided that it was more expedient to defer to than to resist popular prejudice and intolerance, scrutiny within Whitehall, by Parliament, and by the Courts of its compatibility with international human rights law would be much better informed and much more rigorous, within the framework of the Human Rights Act.

In the first place, there is now a well-developed body of jurisprudence under the European Convention, which was lacking in 1968, and British judges and lawyers are well trained in using this case law. Secondly, the obligation imposed by Section 19³⁷ upon the Minister in charge of a Bill to make a statement

³⁶ According to Crossman, Roy Jenkins had by this time softened his opposition to the Bill, but felt that there would be a major crisis in the Labour Party unless the problem was handled carefully by Callaghan: *The Crossman Diaries*, at 686.

³⁷ Section 19 provides that

“(1) A Minister of the Crown in charge of a Bill in either House of Parliament must, before Second Reading of the Bill –

“(a) make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights (‘a statement of compatibility’); or

“(b) make a statement to the effect that although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill.

of compatibility with the Convention rights has greatly intensified scrutiny in Whitehall. Thirdly, the existence of the Joint Parliamentary Committee on Human Rights, with a broad mandate and expert Legal Adviser, means that there is a public watchdog to scrutinise Ministerial statements of compatibility and their reasons. The Parliamentary Committee (of which Usha and I are members) focuses not only on the European Convention, but also upon the other international human rights instruments by which the UK is bound, such as the International Covenant and the Convention on Racial Discrimination, even though the rights and freedoms they protect have not been made directly effective in UK law. Fourthly, the fact that British courts are empowered to make declarations of incompatibility³⁸ in their judicial scrutiny of legislation which cannot possibly be read and given effect in a way which is compatible with Convention rights³⁹, means that the alleged victims of a similar measure today would have direct access to our courts to obtain a declaration that would either induce the Government to take remedial action⁴⁰ or provide vital support in a claim to the European Court of Human Rights. British courts would be well placed to establish the relevant facts about the aims and effects of the measure⁴¹.

The institutional and legal safeguards against the misuse of executive and legislative powers in this country are much stronger now than they were in 1968. They would not in themselves be sufficient to guarantee that a future Government, Parliament and Judiciary would protect unpopular or vulnerable groups against what Justice Robert Jackson described⁴² as “the great currents of intolerance, passion, usurpation, and tyranny which have threatened liberty and free institutions.” However, they provide an essential bulwark, and they promote a culture of respect for fundamental rights and freedoms which are, or ought to be, our constitutional birthright.

It also gives me pleasure to conclude by noting that the grievous wrongs done by Government and Parliament in 1968 have at last been rectified by the present Government and Parliament, thanks to the efforts of my colleague Lord Dholakia, who is also President of the Liberal Democrats. During the passage of the Nationality, Immigration and Asylum Act 2002. Navnit Dholakia introduced an amendment to give British overseas citizens, British subjects and British

“(2) The statement must be in writing and be published in such manner as the Minister making it considers appropriate.”

³⁸ Under Section 4 of the Human Rights Act 1998.

³⁹ *Ibid.*, Section 3.

⁴⁰ *Ibid.*, Section 10 and Schedule 2.

⁴¹ *Cf.*, *R v Secretary of State for Employment, ex parte Equal Opportunities Commission* [1995] 1 AC 1 (HL) (indirectly discriminatory effect of statutory provision).

⁴² Robert Jackson, *The Supreme Court in the American System of Government* (1955), at 80.

protected persons having no other nationality an entitlement to acquire British citizenship, and automatically to acquire a right of abode. In other words, they would no longer be subject to UK immigration control, and, as EU citizens, they would acquire the rights of free movement and establishment conferred by the Treaty of Rome. The Government agreed to consider the matter, and in due course introduced a similar amendment in the Commons which duly passed into law.

In the introduction to a book on *Race and Law*, written in collaboration with Geoffrey Bindman and published thirty years ago, I asked optimistically⁴³ whether the *East African Asians Case*, then pending before the European Human Rights Commission, might “eventually prompt our legislators to bring the whole of the law into harmony not only with the spirit of the Race Relations Act but also with the growing body of International Conventions and Covenants on human rights”. It was the plight of the British Asians and my experience in arguing their case that convinced me of the need for effective constitutional protection of fundamental civil and political rights. That continued to inspire me during my thirty year campaign for what became the Human Rights Act 1998. It is a cautionary tale for all who care about equal citizenship and the equal protection of the law.

Much remains to be achieved. The Government has shilly-shallied for the past six years about whether they will ratify the additional Protocols to the European Convention, and the right to complain to the UN Human Rights Committee and the UN Committee Against Racial Discrimination of breaches by the UK of the International Covenant on Civil and Political Rights and the Convention on the Elimination of All Forms of Racial Discrimination. They have legislated to amend the Race Relations Acts in a way that gives less protection to the victims of racial discrimination based on colour than to the victims of other forms of racial discrimination. They have refused to reform the tangled and incoherent web of discrimination legislation. And they have threatened to introduce legislation to cut down legal protection for the human rights of asylum-seekers. I hope that this audience and the wider community will campaign for these much needed reforms, including a coherent and effective Equality Act, and, in the longer term, a written constitution and a British Bill of Rights to bridle the powers of an Executive-dominated Parliament.

What was done to British citizens of Asian descent in 1968 is not a remote chapter of history. In times of populist hysteria, racism and xenophobia, it could

⁴³ Lester and Bindman, *Race and Law* (1972), pp.14-15.

happen again if a future Government decided to deprive some other vulnerable minority of their common humanity and their basic rights and freedoms. We would do well always to remember the terrible lesson given to future generations by the German anti-Nazi activist, Pastor Martin Niemöller:

“When Hitler attacked the Jews I was not a Jew, therefore I was not concerned. And when Hitler attacked the Catholics, I was not a Catholic, and therefore, I was not concerned. And when Hitler attacked the unions and the industrialists, I was not a member of the unions and I was not concerned. Then Hitler attacked me and the Protestant church — and there was nobody left to be concerned. “