Church of Scientology of California v Miller & Another

Chancery Division

The Independent 10 October 1987, The Times 15 October 1987,
(Transcript:Nunnery)

HEARING-DATES: 9 October 1987

9 October 1987

COUNSEL:

A Newman and J Algazy for the Plaintiff; G Lightman QC, M Briggs and P Jong for the Defendants

PANEL: Vinelott J

JUDGMENTBY-1: VINELOTT J

JUDGMENT-1:

VINELOTT J. In this action the Church of Scientology seek an interim injunction pending the trial of an action against a Mr Russell Miller and Penguin Books Limited. The Church of Scientology, California, is registered under Californian law as a religious organisation. It has, of course, subsidiary or associated organisations with similar objects elsewhere, including the United Kingdom. The subsidiary or associated organisation in the United Kingdom is a company. It has not been registered as a charity. It should not therefore be assumed that the plaintiff or its subsidiary or associated organisations will be recognised in England as established for the advancement of religion. I shall, nonetheless, for convenience refer to this group of organisations as "the Church"; I shall, were appropriate, refer to the plaintiffs alone as "the plaintiffs".

The founder of the Church was the late Mr Ron Hubbard. Mr Russell Miller is a well known author with a reputation for investigative journalism. He has written a biography of Mr Hubbard. Penguin Books Limited are, of course, the intended publishers. Proof copies of the book were available to a limited circle on 5th August last. The plaintiffs obtained a copy of it. It is not clear from the evidence precisely how or, more importantly, when they did so. The intended date for publication is 26th October. The publication date has been arranged to coincide with the serialisation of excerpts from the book in successive editions of the Sunday Times. The publishers planned to send the first print run to booksellers and wholesalers early this week. Distribution to them cannot be delayed much longer if the intended publication date is to be adhered to. In turn, much of the impact of the publication of excerpts in the Sunday Times which is likely to go ahead, albeit if necessary with some editing whatever the outcome of this application, will be lost if publication date is delayed beyond 26th October.

The plaintiffs seek an injunction, pending trial, to restrain the author and the publisher from distributing the book in its present form. The writ was issued and notice of an application for an interim injunction was given on 29th September. The hearing commenced on Tuesday of this week and concluded at 10.45 this morning. In these circumstances and having regard to the planned publication date and the need for urgent distribution of the first print run, I have thought it right not only to give judgment without delay but also to make my judgement as brief as possible in the hope that if my decision is challenged in the Court of Appeal a transcript can be made available to it.

Injunctions are sought on three grounds. First, it is said that the plaintiffs own the copyright in two photographs, one of which appears on the dustsheet and, indeed, appeared in earlier publicity material put out by Penguin Books, and the other as an insert in the body of the book. They say that the publishers would be in breach of this copyright. Secondly, it is said that the book contains quotations from and information derived from diaries and journals and letters of a confidential character which were communicated in confidence to one Gerald Armstrong while an employee of the plaintiffs, and that the plaintiffs are entitled to protect those documents and information from publication by a defendant who, whether or not he acquired them innocently, now knows of the confidence attaching to them. Thirdly, it is said

that the documents in question were obtained by Mr Miller directly or indirectly in breach of a sealing order made by the courts of California in litigation to recover the documents from Mr Armstrong.

The Photographs

I can deal with the photographs very briefly. Mr Miller says that he obtained the dust cover photograph from a library which supplies newspapers and publishers with, inter alia, photographs. An executive of that company says that he attended a photographic session at the Church's college in East Grinstead when he was handed the publicity brochure which included this photograph. The plaintiffs say that the photograph he was given was a different photograph and they have produced a copy of the photograph they say he was given. It is admitted by the plaintiffs, though the admission was made at a late stage, that the library is entitled to supply copies of the photograph it was given in the ordinary course of its business. There are some, but only minor, differences between the photographs. The one on the dust jacket is not an exact reproduction of the one in which the plaintiffs claim copyright; it has been reproduced in a way which increases its dramatic impact. The photograph admittedly supplied to the library, similarly reproduced, would be virtually indistinguishable.

The claim that the plaintiffs would be injured by infringement of its copyright, assuming that it has copyright in the photograph actually supplied to Mr Miller by the library, and that the library had no authority to supply that photograph, is simply incredible.

The other photograph is, on its face, a snapshot of a number of people, including Mr Hubbard, taken on the beach at Curacao. Unlike other photographs on the same page, it is not a "posed" or official photograph. The plaintiffs say that it was taken by an official photographer employed by them. The defendants say that it was taken by another employee, who was not employed as a photographer, and was a shapshot taken for his own purposes. They say that it later came into the possession of a lady resident in California, who supplied ti to Mr Miller. I do not think that it matters which of these accounts is ultimately found to be correct, if this action is tried. Even if the plaintiffs have copyright in the photograph, it is no more than a snapshot, and the use of it in breach of copyright cannot, in my judgment, possibly harm them. It could, by contrast, gravely impair the defendant's plans for launching the book if it now has to remove that inserted photograph.

This is not a case where a defendant has deliberately made use of copyright material for profit or otherwise, and used it in deliberate disregard of the owner's rights. In my judgment, the plaintiff is not entitled to any interlocutory relief in respect of the photographs.

The Documents

The background is shortly this. Mr Armstrong, then a senior employee of the plaintiffs, was employed to compile, protect and preserve Mr Hubbard's personal papers and other biographical material. Mr Hubbard was then alive and it is said that Mr Armstrong was allowed to carry out this task on the footing that he would hold confidential all documents and information obtained by him in pursuance of his duties, which documents were to form part of the archives of the Church. Much of the material collected by Mr Armstrong was given to him, it is said, after he had promised that it would be kept confidential. Later, a Mr Garrison was employed to write an official biography. Mr Armstrong was assigned to be his researcher. Then Mr Armstrong left the Church. Mr Garrison's engagement was also terminated, though that was later. Mr Armstrong took with him a substantial amount of what I shall call "the archival material".

The plaintiff took proceedings in the courts of California to secure the return of this material and to prevent disclosure of any of the contents. A temporary restraining order was made on 25th August 1982 requiring Mr Armstrong to surrender all the archival material to the court. The action then came before Judge Breckenridge in the Californian Superior Court in May 1984. On 20th June he gave a memorandum of intended decision. Shortly stated, one defence advanced by Mr Armstrong was that he was entitled to remove the material and to lodge it with his attorney for his own protection. He reasonably believed, he said, that possession of this material would afford him some protection against unlawful harassment (or worse) by the Church, under practices, in particular the fair game doctrine, which have been sufficiently diescribed in other decisions of the English courts, to which I shall later refer.

Judge Breckenridge, while holding that Mr Armstrong had been guilty of conversion, found on the facts that this defence was amply made out. The documents he said, were to remain with the court pending a further hearing of the action. I should at this point cite the decision of the learned judge as to what was to be done with the documents, in full. He said:

"As to the equitable actions [that is, breach of confidence and constructive trust], the court finds that neither plaintiff" --

I interpose to say that Mr Hubbard's wife, Mary Sue, was joined as a party --

"has clean hands and at least as at this time is not entitled to the immediate return of any document or object presently retained by the court clerk. All exhibits received in evidence or marked for identification, unless specifically ordered sealed, are matters of public record and should be available for public inspection or use to the same extent that any such exhibit would be available in any other law suit; in other words, they are to be treated as henceforth no differently than similar exhibits in any other case in Superior Court. Furthermore, the 'inventory list and description' of materials turned over by Armstrongs's attorney to the court shall not be considered or deemed to be confidential, private or under seal.

All other documents or objects presently in the possession of the clerk not marked herein as court exhibits shall be retained by the clerk, subject to the same orders as presently in effect as to sealing and inspection until such time as trial court proceedings are concluded as to the severed cross-complaint."

And then goes on to say when the conclusion of the case is to be taken as occurring.

I shall return to the outline history of the litigation in a moment. First, I should say something about the documents, publication of which or of information derived from which is sought to be prevented in this action. The particulars in the application cover eight categories of documents; four were abandoned in the course of the hearing when it became plain that the Church itself had brought them into a public domain. The remainder can be categorised under two heads.

Category A

This category comprises documents which became exhibits during the hearing before Judge Breckenridge. There are two subcategories. The first comprises diaries kept by Mr Hubbard during the years 1927 to 1929. In 1929 he was 18 years old. The second is a letter written to Mr Hubbard by his mother, also in 1929. The case for the defendants is that they obtained copies of these documents from a Mr Atack who in turn obtained them from a photocopying agency employed by Mr Flynn who was Mr Armstrong's attorney, and that they were supplied to Mr Armstrong at a time when the order made by Judge Breckenridge that exhibits should be available to the public was in force. The plaintiffs say that this is impossible because the order did not remain in force for a sufficient period for that to be done.

The tangled history of the Californian litigation is shortly this. The memorandum of intended decision became a decision and an order on 20th July 1984. Until then it was, as its title suggests, an intended decision; the intention being announced to enable the parties to seek other relief in a higher court before the order was made. In fact the plaintiff obtained a temporary stay order from the Court of Appeal on June 25th which was vacated on 18th July but reinstated on 20th July 1984 by the Supreme Court of California. That was the very day on which Judge Breckenridge made his order. No disclosure, it is said, could properly have been made up to or after 20th July. Then, on the 23rd August, the temporary stay order made by the Supreme Court was vacated. It was re-entered on 28th August. That gap of five days has been referred to in argument, as "the first window". Then, on 15th November the temporary stay order was again vacated by the Supreme Court, but on 21st November an injunction was entered by the Nineth Circuit Federal Court of Appeals. That is the second window. Then, on 19th December the trial exhibits, which had been ordered to be unsealed by Judge Breckenridge, were made available to the public for viewing. However, a temporary restraining order stopping that was made on 20th December. That is the third window.

The plaintiffs say that the documents could not properly have escaped through these windows because no order vacating a stay order by the Court of Appeal or the Supreme Court would release the documents from the stay order unless and until the order vacating that stay order had been made an order of the Superior Court of California -- that is, Judge Breckenridge's court -- a process which they say, with the support of expert evidence from Californian attorneys,

would take some five to six days. So the window was never open except for the very short period on 19th or 20th December.

The answer given by the defendants is that although the Supreme Court would not act on an order vacating a stay order by releasing documents in its custody until that order had been made an order of the Superior Court, there was nothing to prevent Mr Flynn, who was the attorney for a party in the appeal, from releasing copies of exhibits which he had in his possession in accordance with Judge Breckenridge's original order as soon as the order vacating the stay order had been made and perfected by the Court of Appeal or the Supreme Court; a process which clearly would take less time than the communication of that order to the Superior Court and its entry in the Superior Court. On that footing the windows were open for a significant period.

Reliance is placed by the defendants on what is alleged to have been said by Mr Flynn to the plaintiffs' Californian Attorney in relation to documents which he had. I do not propose to deal with this evidence in detail; it is hearsay evidence and, more importantly, too vague to found any conclusion.

I accept that there is an issue whether there was a period during which Mr Armstrong and Mr Flynn were entitled to release to others copies of exhibits in the possession of Mr Flynn or, for that matter, in the possession of Mr Armstrong (if there were any). But the claim that there was never the faintest chink in the window seems to me flimsy.

Category B

This comprises documents, which were never exhibited, and which, it is said, were throughout sealed. There are two subcategories. The first is a letter written by Mr Hubbard to his first wife, Polly. The second comprises three letters written by Mr Hubbard to one Helen O'Brien in 1953. The defendants founded an argument on Judge Breckenridge's order. The argument, as I understand it, is this. It is said that the first part of the order related to exhibits -- snd there were of course exhibits other than those derived form archival material -- and declared them to be available for inspection, save only for certain specified exhibits put in evidence and sealed by specific orders made in the course of the proceedings. Then it is said that the next sentence: "The inventory list and description shall not be considered or deemed to be confidential,' relates to all the archival material. On that view the remainder of the decision, "all other documents or objects shall be retained by the clerk, subject to the same order as are presently in force," apply to other documents put in evidence in the proceedings, and not the archival material.

That seems to me a strained construction. I would construe the first paragraph as dealing with exhibits, and the last sentence of that part as referring to the list of the archival material and not to the archival material itself.

The next paragraph, "All other documents . . ." then catches the archival material other than that put in evidence. Any other construction seems to me to give rise to wholly capricious results.

However, that is not the end of the story. Mr Miller says that he did not in any event obtain these documents from Mr Armstrong or his attorney, or anyone connected with them. His evidence is that he obtained the letter to Polly from a source which he is reluctant to disclose and that he obtained the documents in the second subcategory from a Mr Ronald Newman. That is all I need to say about the factual background.

The conclusion I reach is that as regards the first category, the plaintiffs claim that the defendants could not properly have obtained the documents under an order which specifically released them into the public domain is flimsy. There is a triable issue whether the defendants obtained the second category of documents directly or indirectly from Mr Artmstrong or Mr Flynn or, as Mr Miller claims, from another source unaffected by any duty of confidence to the plaintiff. The decision of the judge who hears that issue may well turn on the view he takes of the credibility of Mr Miller's evidence.

With that in mind, I turn to the two grounds advanced to restrain publication or use of these documents and the information contained in them.

Confidentiality

The plaintiffs' case is that Mr Armstrong owed it a duty to keep the archival material confidential and that the plaintiffs' correlative right to prevent disclosure by Mr Armstrong is binding on any person who comes into possession of the archival material directly or indirectly through a breach of that duty by Mr Armstrong. The first difficulty which confronts the plaintiffs is that it is well settled that the only person who can complain of a breach of confidence is the person to whom the duty of confidence is owed (see Fraser v Evans [1969] 1 QB 349 [1969] 1 All ER 8). The plaintiffs cannot rely on the duty of confidence, if any, in respect of the diaries which was owed to Mr Hubbard. Similarly, the plaintiffs cannot rely on the duty of confidence, if any, owed to the writers or recipients of the letters (the letter to Mr Hubbard from his mother, or the letters written by Mr Hubbard in category B). Prima facie the writer or the recipient of each of the letters is the only person who could assert confidentiality.

Mr Newman had two answers to this difficulty. The first was that the material in respect of which a duty of confidence was owed by Mr Hubbard was entrusted at his direction or with his consent to a Church of which he was the founder and which is in substance the living embodiment of his beliefs and teaching. In the unusual circumstances of this case, it is said, the Church can claim to enforce the duty of confidence owed to Mr Hubbard in his place. The second was that apart from any duty of confidence owed to Mr Hubbard, Mr Armstrong owed a duty to the Church as his employer on whose behalf he collected material to be stored in the archives. In considering these submissions it is, I think, important to bear in mind that the duty of confidentiality owed to Mr Hubbard and the duty of confidentiality owed by Mr Armstrong to the plaintiffs as his employer are separate and distinct. Prima facie the maker of a diary intends the contents to be kept confidential, and if he entrusts it to another a duty of confidentiality arises.

An employee may also in the course of his employment come into possession of material (for instance a list of customers and their requirements) which the employer has a legitimate interest in keeping confidential. It does not follow from the fact that Mr Hubbard had or may have had an interest in keeping confidential the contents of his diary that Mr Armstrong owed a similar duty to the plaintiffs. The plaintiffs must be able to show that there is something in the nature of the material gathered together by Mr Armstrong or in the terms of his employment which give rise to a duty not to divulge that material to anyone outside the Church. It can hardly be said that that duty extended to every part of the vast mass of material collected by Mr Armstrong form a wide variety of sources -- in part, at least, for the purpose of preserving it for Mr Hubbard's biographer.

Mr Newman's answer to this difficulty was that in the circumstances of this case the Church can be regarded as standing in Mr Hubbard's shoes and can avail itself of the same rights of confidentiality which he had. Alternatively, it is said, the material gathered together by Mr Armstrong dealing, as it does, with the development of Mr Hubbard's personality and with the discoveries or revelation which lead to the foundation of the Church is part of the arcanum of the Church and should not be divulged to those outside the Church. These are novel arguments and seem to me to invite an extension of law which the court should be cautious of making in interlocutory proceedings. Moreover the argument leads Mr Newman into a further difficulty.

Public interest

The affairs, the doctrines and activities of the Church are a matter of legitimate public interest and concern. An official investigation into these matters was carried out by the late Sir John Foster many years ago and following his report entry by alien scientologists into the United Kingdom was barred. I should add that this bar was lifted in 1980. The doctrines and activities of the Church have been considered by the courts in a number of cases, in particular Re B & G Minors [1985] FLR 134 where Latey J deprived a father and stepmother of the custody of infants which he would otherwise have given them on the grounds that they were members of the English branch of the Church. That decision was affirmed by the Court of Appeal. Of course the Church was not a party to those proceedings, but that point was not overlooked and indeed was dealt with specifically by Dunn LJ, who said at p 502:

"In this case it was in the interests of the children that the judge should not only hear evidence about scientology but should make definitive findings upon it, otherwise he could not assess the risk to the children if they continued to be brought into contact with the father. In any event, no application was made to the judge for the Church to be joined as a party and there has been no appeal against the refusal of the Registrar to allow an application for the Church to be joined in this court."

In the Court of Appeal the decision of the trial judge was attacked on the ground that he had made observations critical of Mr Hubbard and that these were matters which ought not to have been taken into account. As to that Dunn LJ said, also on p 502:

It seems to me, with respect, that it was unnecessary for the judge to have gone into the detail in which he did but when one is considering a set of beliefs it is, I should have thought, relevant to know the sort of person who is the original proponent of those beliefs."

Purchas LJ similarly observed on p 508:

"The behaviour of Mr Hubbard was an integral part of the whole context of mainline scientology, an examination of which the judge had a duty to make and which he was entitled to announce as part of the background justification for his findings."

As I have said, the doctrines and activities of the Church are matters of legitimate public concern. Mr Hubbard is, as Mr Newman himself forcefully expressed it, the revered founder of the Church. He is believed by members of the Church to be someone whose appearance on this earth was an event of cosmic significance. Mr Hubbard'd life history and the story of the psychological discoveries made by him and of his revelations are matters in respect of which large claims are made in Mr Hubbard's writings and by the Church. In these circumstances the life of Mr Hubbard, his relationship to the Church and the circumstances in which the Church was founded are also matters in which the public has a legitimate interest. Of course that does not mean that everyone has carte blanche to disregard every bond of confidence affecting any matter communicated to them and concerning Mr Hubbard. The public interest in maintaining the bonds of confidentiality must be weighed against the legitimate public interest in the affairs of the Church and its history and the history of its founder.

However, I have read Mr Miller's biography, or the larger part of it, and it is to my mind clear that the public interest in the affairs of the Church and in the life of its fuonder far outweigh any duty of confidence that could possibly be owed to Mr Hubbard or the Church. The diaries covering the years when Mr Hubbard was between 16 and 18 years old contain direct contemporaneous evidence of his activities and thoughts at the time. They are essential if his early development and achievements for which, as I have said, large claims are made by the Church, are to be properly evaluated. The letter to his mother is a letter of the kind that an affectionate and responsible parent would write to a son starting at a new school. It is of importance in understanding his relationship to his parents. It is evident from reading the letter to his wife that it was written at a time which was critical in the development of ideas and beliefs that later became the doctrines of the Church. The letters to Helen O'Brien similarly relate to Mr Hubbard's relationship to someone who had given financial backing to an earlier movement called Dianetics founded by Mr Hubbard, which later evolved or was subsumed into the Church. Mr Miller interviewed Helen O'Brien or had telephone conversations with her and the letters form a natural part of the narrative of his account.

It is in my judgment plain beyond question that the legitimate public interest in Mr Hubbard as the founder of the Church in the circumstances in which it was founded and in motives which led to its foundation far outweigh any duty of confidence that could conceivably attach to any of the documents in issue, even assuming -- contrary to my view -- that Mr Armstrong owed the same duty of confidence to the Chruch which he owed or would have owed to Mr Hubbard if living.

Shortly stated, the Church is an active proselytising church and in its efforts to obtain converts the personality, qualifications, history and intellectual and moral development of its founder are matters on which the Church itself relies. The public equally has an interest in evaluating the image of Mr Hubbard so projected. The Church having collected this material cannot claim a monopoly in it and release to the public only that information which it chooses to make available.

The order of the Californian court

I can deal with this point shortly. Mr Newman referred me to Dicey and Morris and the well-settled principle that the judgment of a foreign court may be enforced if and to the extent to which it creates an obligation and is recognised by English courts as made by a court having jurisdiction and is not tainted by fraud and if the enforcement is not contrary to English public policy or in breach of the rules of natural justice.

I do not find it necessary to examine the foundations or limits of this doctrine or the circumstances in which the English courts will grant injunctive relief. As I understand the postion, while the Superior Court has decided that the archival material was the property of the plaintiffs and that Mr Armstrong was guilty of conversion, it has not finally decided that in respect of all its archival material Mr Armstrong owes a duty to the plaintiffs to keep the archival material and all information derived from it confidential which is enforceable against him and all other persons who have come into possession of copies of any of this archival material and of information derived from it. The sealing orders and all the orders of the Superior Court were interlocutory and cannot be relied on as founding such a duty. Moreover, in so far as considerations of comity have to be considered, they must be weighed against -- and in my judgment are plainly outweighed by -- the public interest to which I have already referred.

Delay

The plaintiffs became aware of Penguin Book's intention to publish a biography of Mr Hubbard written by Mr Miller at latest in May of this year. They had been aware that Mr Miller was writing a biography and that he had been in contact with Mr Armstrong for some time. They were told by Mr Armstrong in the Summer of 1986 that Mr Miller might well have some archival material. Nothing was done to obtain any undertaking by Mr Miller that this material would not be used. The proof copies were available and were circulated in confidence to persons concerned by Penguin Books on August 5th. The plaintiff obtained a copy of the proofs and exhibited it -- wrongly described as a manuscript -- to the affidavit in support of the application. No explanation has been given as to how or more importantly when they obtained a copy of the proofs. This application was made on 29th September, by which time the plaintiffs must have known that the printing of the first run was complete and that the book was ready for distribution to wholesalers and retailers. The application was thus made at a time, whether calculated or not, when it would give rise to the greatest possible damage and inconvenience to Penguin Books.

I the absence of any evidence as to when the plaintiffs obtained a copy of the proofs and of the reasons for delaying thereafter in instituting proceedings, if there was delay, the apparent delay is, in my judgment, in itself sufficient to bar any claim for interlocutor relief.

Mr Newman submitted that the plaintiffs could not be critised for delay, which could not on any view exceed the two months since 5th August, bearing in mind the huge task of relating the material in the book to the thousands of documents in the archival material. The short answer to that submission is that it is plain on a cursory reading of the book that substantial use is made of Mr Hubbard's diaries which they must have known were part of the archival material.

Clean hands

Mr Lightman submitted that the plaintiffs do not come to this court with clean hands. He relied upon the fact that the plaintiffs obtained a copy of the proof, siad to have been circulated within a narrow circle and which was plainly the subject of confidence, in circumstances which ae unexplained. He also relied upon the doctrines of the Church which have been frequently commented on, in particular in Hubbard v Vosper [1972] 2 QB 84, [1972] 1 All ER 1023.

On this last point Mr Newman submitted that unlike the Vosper case no link exists between the doctrines and conduct complained of and the matters in issue in this action. He reminded me of the often cited passage in the judgment of Lord Chief Baron Eyre in Derry v Winchelsea 1 Cox 318 that:

"The priciple that a litigant must come to court with clean hands does not mean a general depravity, it must have an immediate and necessary relation to the equity sued for. It must be a depravity in a legal as well as moral sense."

I do not propose to go into this aspect of the cse, save only to observe that one statement of policy to be found in the writings of the Chruch is in substance that litigation may be resorted to in order to stifle criticism. This litigation to my mind precisely answers the description of oppressive litigation, that is, litigation (which the authors equally clearly had in mind) which is not bona fide lauched to protect any legitimate interest of the church in preserving confidentiality in information contained in Mr Miller's biography.

For these reasons I have reached the conclusion that this application is both mischievous and misconceived and must be dismissed and in my judgment dismissed with costs to be taxed and paid forthwith.

DISPOSITION:

Judgment Accordingly

SOLICITORS:

Hamida Jafferji; Peter Carter-Ruck & Partners

R v IMMIGRATION APPEAL TRIBUNAL
Ex parte L RON HUBBARD

5 July 1985

Queen's Bench Division: Woolf J

Letter of consent—refusal—power of appellate authorities to determine appeals adversely to appellants on basis of matters not relied on by the Secretary of State—distinctions between grounds and reasons—refusal of applicant to attend any interview with immigration officer—whether a factor to be taken into account. Immigration Act 1971 *s.* 13, 14, 18 *et seq*: *Immigration Rules HC* 169, *paragraphs* 10, 17

The applicant sought judicial review, which was refused, of the determination of the Tribunal upholding the dismissal by an adjudicator of the applicant's appeal against the refusal of the Secretary of State to give him a letter of consent to allow him to visit the United Kingdom. The applicant was the founder of the Church of Scientology. In 1968, following policy decisions in relation to that church the applicant was advised he would not be given leave to enter the United Kingdom. The ban against Scientology was lifted in 1980. In 1982 the applicant's solicitors sought an informal meeting with the Home Office with a view to the issue of a letter of consent. The Home Office refused to act through intermediaries. Reference was made to a conviction in France for fraud which could lead to a refusal of entry. The applicant's solicitors continued to attempt to resolve the issues but the Home Office refused to consider various matters until a formal application was made. In the fullness of time such an application was made. The Home Office indicated that they wished to interview the applicant so that the immigration officer might be satisfied as to the matters on which, under the rules, he had to be satisfied. Assurances in those regards by the applicant's solicitors were not alone sufficient. The applicant declined to be interviewed and the application was refused. Appeal was made to an adjudicator who found as a fact that the applicant was alive (that itself earlier having been in some doubt) but dismissed the appeal. He concluded that he could not be satisfied on the evidence before him that only a short visit to the United Kingdom, as claimed by the applicant, was intended. There was an appeal to the Tribunal which was also dismissed. When judicial review was sought, it was argued that the adjudicator and the Tribunal were restricted to reviewing the facts and issues on which the Secretary of State had come to his decision. It was also submitted that the Immigration Appeal Tribunal had erred in taking into account the exceptional history and reputation of the applicant, on which there was no—or no sufficient—evidence before it, and of which matter the applicant had had no notice.

Held: 1) That the appellate authorities were not confined to considering the matters on which the Secretary of State based his decision. Section 18(2) of the Immigration Act 1971's purpose is to avoid any dispute as to basis of the Secretary of State's decision. It does not affect the scope of appeals from that decision.

2) That where new matters were raised in the course of a hearing, it was necessary to give the parties an opportunity fully to prepare their case in relation to those matters.

3) On the facts the Tribunal had not erred in noting the exceptional position of the applicant, it being clear that the *ratio* of its decision were matters already known to the parties.

Obiter it was doubted whether the clear distinction between grounds and reasons accepted in *ex parte Mehra* was right or sensible.

It was conceded by counsel for the respondent and not argued that an appellate authority should not seek to go behind a finding of fact of the Secretary of State which is favourable to an appellant.

M Beloff QC and *D Pannick* for the applicant.
A Collins QC and *R Jay* for the respondent.

The following cases were referred to in the judgment:

R v *Immigration Appeal Tribunal ex parte Mehmet* [1978] Imm AR 46.
R v *Immigration Appeal Tribunal ex parte Kwok on Tong* [1981] Imm AR 214.
R v *Immigration Appeal Tribunal ex parte Malik* [QBD 16 November 1981], unreported.
R v *Newham West Magistrates' Court ex parte Mohammed Akhtar* [QBD 25 June 1982], unreported.
R v *Immigration Appeal Tribunal ex parte Kotecha* [1982] Imm AR 88.
R v *Immigration Appeal Tribunal ex parte Mehra* [1983] Imm AR 156.

WOOLF J: This is an application for judicial review brought by Mr L Ron Hubbard in relation to a decision of the Immigration Appeal Tribunal who heard the matter on 12 July 1984. In that decision, the Tribunal upheld a decision of an adjudicator who, in turn, had upheld the Secretary of State's decision to refuse to the applicant a letter of consent to enable him to visit this country for the period of one month.

In support of his application to this court, Mr Beloff relies on three grounds. One of those grounds raised a general issue as to the extent of appellate bodies' powers under the Immigration Act 1971 to determine an appeal adversely to an appellant on the basis of reasons or matters not relied upon by the Secretary of State or an immigration officer at the time of the original decision. The second and third grounds depend upon the facts of this particular case, the first of those two grounds being a natural justice point. The second of the two grounds involved a no evidence point.

In order to understand the issues which are involved, it is necessary to make reference to the long history leading to the decision of the Tribunal. That history is largely to be derived from correspondence between the Home Office and those who are acting on behalf of the applicant. The precise terms of that correspondence can be significant, but the adjudicator, in his decision, admira-

bly set out the facts and therefore, although I have well in mind the precise terms of the correspondence, like the Tribunal, I propose to set out that history by adopting the adjudicator's summary which I regard as excellent.

What was said by Mr Healy, the adjudicator, is as follows:

"The appellant is a public figure known internationally as the founder of the Church of Scientology. In later years he has severed his official connection with the church and has lived the life of a recluse concentrating on his writing and leaving his extensive business affairs to be managed by others.

"For the purposes of this determination it is only necessary to record that in 1968 the appellant was informed by the British Government that having regard to its policy towards Scientology he would not be given leave to land in the United Kingdom. However on 16 July 1980 the so-called ban on Scientology was lifted and it was made clear that 'individuals associated with Scientology whose presence was not conducive to the public good will continue to be liable to refusal under ordinary immigration policy'. The appellant himself was told that if he presented himself at a port he would be likely to be refused admission and it was pointed out that it was open to him to apply for entry clearance from abroad which would enable all the relevant circumstances to be considered.

"On 9 June 1982 the appellant's solicitors wrote to the Home Office referring to this previous history and informing them that the appellant was minded to seek to visit the United Kingdom later that year although he had taken no final decision in this regard. They felt it would be desirable, in the light of the somewhat exceptional history of the appellant's case, to have an informal discussion as to the kinds of matters on which the Home Office might require satisfaction before issuing a letter of consent. They said it was the appellant's wish that he should be represented by his legal advisers including legal counsel as well as members of the church who look after his affairs. The delegation would consist of no more than four people.

"The Home Office did not agree to this course. By letter of 30 June 1982 they confirmed that the solicitors' understanding of the lifting of the ban on Scientology, in so far as it affected the appellant, was broadly correct and that if the appellant applied for entry clearance, he would have to fulfil the normal requirements of the immigration rules to qualify for entry. They explained that the reason the appellant would be refused entry if he presented himself at a port at that time was because he had been convicted of fraud in France in 1978 and the immigration rules provided that such a person be refused entry unless justified for strong compassionate reasons. They concluded that it would obviously be better for all concerned if consideration of these later matters took place other than at a port of entry.

"The solicitors made representations about the legal effect of the conviction which the Home Office agreed to take into account when the appellant applied for entry clearance.

"By letter dated 17 September 1982 the solicitors made efforts to ascertain from the Home Office what decision they would make if the appellant made an application for entry clearance and how they would justify any refusal of the application if made.

"By letter of 22 October 1982 the Home Office declined to consider the issues in advance of an application. By letter of 18 November 1982 the solicitors protested against the Home Office attitude and again put forward a series of questions regarding possible reasons for refusal which they required the Home Office to answer. By letter of 20 December 1982 the Home Office again declined to pre-judge the issues.

"Meanwhile by letter of 13 December 1982 the solicitors applied for a letter of consent to enable the appellant to enter the United Kingdom as a visitor for one month. They said the appellant would come as soon as possible and the purpose of the visit would be to see some friends, to do some writing and to attend to some personal matters. The visit would be private.

"They referred to a telephone call they had made to the Home Office on 9 December 1982 when they had said the appellant would on a visit, meet and possibly give privately, unpaid lectures to members of the Church of Scientology. They had also said they would seek confirmatory instructions in regard to this purpose.

"Their letter now went on to say they were specifically instructed that the appellant did not propose to give any private lectures. The visit was to be strictly private and one in which the appellant sought no publicity whatsoever.

"The solicitors gave an assurance on behalf of the appellant that he would leave the United Kingdom at the conclusion of his visit and they referred to the fact that the appellant had always observed his conditions of stay.

"There was some delay in dealing with the application and on 15 March 1983 the solicitors wrote to the Home Office pressing for a decision. They took the opportunity to submit evidence that the appellant was alive as an allegation had been made in court proceedings in America that he was dead.

"On 27 April 1983 the Home Office wrote to the solicitors to say they were considering the implications of the French judgment in the case in which the appellant had been convicted of fraud and wished to interview him before making a decision on his applicaion. They asked which consular post would be most convenient for the appellant.

"By letter of the 6 May 1983 the solicitors stated that before they could properly advise their client in relation to the proposal that he should attend for interview, it would be useful to know the purpose of the proposed interview. They asked for an indication as to what matters the interview would be directed. Once again they attempted to ascertain the grounds upon which the application might be refused. They asked whether, if the appellant declined an interview, the Home Office would make a decision forthwith.

The Home Office replied on 26 May 1983 again pointing out the requirement of the immigration rules that a visitor must satisfy an immigration officer, *inter alia*, that he is genuinely seeking entry for the period of the visit as stated by him. They referred to the fact that there had been concern recently about the state of the appellant's health and the fact that he had not made a public appearance for some years. They said they wished to satisfy themselves that the appellant was genuinely intending to visit the United Kingdom and that he would leave at the end of the period for which he sought admission. They did not regard the evidence submitted, which was a copy of a letter allegedly written by the appellant to the judge trying a case in which he was involved in an American court, as satisfactory evidence that he was alive.

"The Home Office referred to the assurance made through the solicitors, that the appellant wished to come for a strictly limited and private visit but they considered, in all the circumstances, it was reasonable that the appellant should make a personal appearance before a British representative so that they could be satisfied the requirements of the immigration rules would be met. They indicated that no specific documentary evidence would be requested at the interview although the appellant might be asked for evidence of his identity. They said the interviewing officer might also wish to ask him one or two questions about his proposed visit. They said that once the interview had taken place they would be able to consider all the circumstances of the application including the French conviction and a decision would then be made.

"On 8 September 1983 the solicitors replied to this letter. They dealt with what they regarded as the three fresh matters now raised by the Home Office; that the appellant might not be alive, that the appellant might not genuinely intend to visit the United Kingdom and that he might not leave at the end of his visit. They supplied better evidence that the appellant was alive and they asked that their letter be regarded as formal application for a letter of consent and if the application was refused, sufficient grounds for refusal. They pressed for a reply to this letter on 25 October 1983 and on 3 November the Home Office replied refusing the application on the grounds that the respondent was not satisfied that the appellant was genuinely seeking entry for the period of the visit as stated by him. It was confirmed that this decision was made after taking into account all the previous correspondence in the case and all the circumstances including the fact that the appellant was not inclined to present himself for interview as requested."

I interpose there to say that the last sentence to which I have referred was contained not in the notice itself, but in a letter accompanying the notice.

"An explanatory statement was prepared in due course summarising the main features of these facts and stating"—this was for the purpose of the appeal to the adjudicator—"'The Secretary of State needed to be satisfied as to the genuineness of the appellant's intentions as a visitor and the motives behind his application; including whether he would actually come to the United Kingdom. The appellant however was disinclined to present himself for interview as requested. The Secretary of State was not satisfied therefore that the appellant was genuinely seeking entry for the period of the visit as stated and on 3 November 1983 he refused the application.'"

When the appeal came before the adjudicator, an affidavit was produced sworn by a Mr Lenske, who described himself as the appellant's "personal legal counsel". The affidavit referred to the fact that because of the secluded life that the appellant led, his contacts with the appellant were sporadic and unscheduled, but the appellant had no wish to remain in the United Kingdom after the expiry of any permitted period of stay.

The adjudicator dismissed the appeal. He did so in these terms;

"So at the end of the day I am satisfied that the respondent had reasonable grounds at the various material times for not being satisfied that the appellant intended only a short private visit. It was reasonable therefore for him to ask the appellant to appear in person rather than to accept at face value the various statements and assurances made on the appellant's behalf.

"When a person has been asked to present himself for interview and is not prepared to do so it is natural to wonder why. It can be a suspicious circumstance in itself but when an explanation is given, that may be the end of the matter. I have only the faintest of residual reservations on that aspect myself and there is no reason to believe much weight was given to this factor by the respondent.

"I consider the respondent's decision was in accordance with the law and the immigration rules. The evidence the respondent had has only been supplemented by the affidavit of Mr Lenske but in view of his lack of real contact with the appellant, while I do not doubt his personal bona fides, I cannot accept that he is in a position fully to speak for the appellant or that an affidavit can in a case such as this carry the same weight as the appellant's own statements.

"I am satisfied the appellant was alive at the date of the respondent's decision but without knowing how the appellant would answer such questions as the respondent would wish to put to him and what general impression he made, I am not satisfied on the balance of probability, even

taking into account his previous record that the appellant intends only a short private visit of one month to the United Kingdom on this occasion."

Pausing there and without going on to the reasons which the Tribunal gave for dismissing the appeal, it will be observed that the history has three stages. First of all, there is the preliminary enquiry stage. Secondly, there is the stage during which the applicant had made an application for an entry certificate which ended with the letter of refusal. Thirdly, there is the stage which covered the statement of reasons relied upon by the Secretary of State before the adjudicator and the appeal hearing before the adjudicator, culminating with his decision.

So far as the first and second stages are concerned, there is no doubt that there was a considerable degree of delay. That is unfortunate and a matter which, in some cases, can cause hardship. It is fair to say, so far as those periods are concerned in this case, that the matter was being presented on behalf of the applicant as being an unusual one. There were clearly difficult decisions to be made and, furthermore, on one occasion, the delay was due to the absence of the applicant's own legal adviser who had no doubt been advising him throughout.

Secondly, it can be observed, when those three stages are considered, that the matters which the Home Office were raising differed as the time progressed. At an early stage, it was clearly being accepted by the Home Office that the applicant's connection with the Church of Scientology would not be relied upon in itself as a ground for refusing the application. In addition, it was also accepted as time went on that the French conviction would not be relied upon in itself as a ground for refusal of the application. Furthermore, the question of the applicant's health was clearly resolved by the decision of the adjudicator who found, as a fact, that the appellant was alive at the date of the respondent's decision.

I turn now to consider the point of law of general application which has been argued before me. In considering that point, it is important to bear in mind that the Immigration Act contains a complex set of interlinked appeal procedures, each of which is directly connected with a power of the Secretary of State or in his immigration officers acting on his behalf, to control the entry into and visitors in this country. First of all, there is the right of appeal under section 13 of the Act in relation to a refusal of leave. Secondly, there is the right of appeal under section 14 in respect of a refusal to vary a leave already granted. There is the appeal under section 15 in respect of a decisison of the Secretary of State to make a deportation order or his refusal to revoke an order. Finally, under sections 16 and 17, there are the appeal procedures in respect of directions for removal and objections to removal to a specified destination respectively. For each of those appeal procedures there is the power of the Secretary of State to make regulations as to the notice which potential appellants are to receive as to their rights.

Section 18(1) provides that the Secretary of State may make regulations providing for written notice to be given to a person of any decision or action

taken in respect of him as is appealable under the relevant part of the Act and for that notice to contain reasons for the decision or action. Subsection (2) of that section is important since it provides: "For the purpose of any proceedings under this Part of this Act"—that is the part dealing with appeals—"a statement included in a notice in pursuance of regulations under this section shall be conclusive of the person by whom and of the ground on which any decision or action is taken."

The regulations that have been made under section 18 are the Immigration Appeals (Notices) Regulations 1972. Regulation 4(1) of those regulations provides that the notice which must be given has to include a statement of the reasons for the decision or action to which it relates.

Section 19 sets out the jurisdiction of adjudicators which, having regard to section 20, also affects the jurisdiction of the Appeal Tribunal. Subsection (1) of section 19 provides:

> "Subject to sections 13(4) and 16(4) above, and to any restriction 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; (ii) where the decision or action involved the exercise of a discretion by the Secretary of State or an officer, that the discretion should have been exercised differently; and (b) in any other case, shall dismiss the appeal.
>
> "(2) For the purposes of subsection 1(a) above the adjudicator may review any determination of a question of fact on which the decision or action was based; and for the purposes of subsection (1)(a)(ii) no decision or action which is in accordance with the immigration rules shall be treated as having involved the exercise of a discretion by the Secretary of State by reason only of the fact that he has been requested by or on behalf of the appellant to depart, or to authorise an officer to depart, from the rules and has refused to do so.
>
> "(3) Where an appeal is allowed, the adjudicator shall give such directions for giving effect to the determination as the adjudicator thinks requisite, and may also make recommendations with respect to any other action which the adjudicator considers should be taken in the case under this Act; and, subject to section 20(2) below, it shall be the duty of the Secretary of State and of any officer to whom directions are given under this subsection to comply with them."

It will be appreciated that if there was no power to review questions of fact provided by subsection (2) of section 19, the scope of the appeal under section 19(1)(a) would be limited. However, as there is such a power to review questions of fact, the role of the adjudicator is an extensive one and in the normal case, although it is right to regard the adjudicator as reviewing the decision of the Secretary of State, the review will be one which will require the adjudicator to consider the facts *de novo*. Clearly, situations will arise where

the view of the adjudicator on the facts will be wholly different to that of the Secretary of State and indeed the evidence which will be before the adjudicator will be different from that which is before the Secretary of State. However, because the function of the adjudicator is to review the determination of the Secretary of State, the matter has to be considered having regard to the circumstances existing at the date of the Secretary of State's decision. That this is the correct approach to the role of the adjudicator is made clear by the decision of the Court of Appeal in the case of *R* v *Immigration Appeal Tribunal, Ex parte Kotecha* [1982] Imm AR 88.

In support of his contention that the adjudicator is further restricted to considering the matters relied upon by the Secretary of State for his decision, Mr Beloff relies strongly on section 18(2), considered in the context of section 19, and the statutory instruments relating to the right of appeal provided by this part of the Immigration Act. He submits that although the provisions do not expressly spell out the result for which he contends it is the effect of what is laid down by the Act; this is the clear implication from the provisions as a whole. He submits that the whole object of giving notice of the reasons for the Secretary of State's decision would be defeated if those reasons could subsequently be changed. He submits that the statement that section 18(2) contains, that the notice shall be conclusive of the person by whom and of the ground on which any decision or action was taken, shall be binding upon the Secretary of State, both in relation to the actual decision and to the appeal which flows from that decision.

The difficulty I find with Mr Beloff's submission is that it could lead to results quite contrary to the manner in which the control of immigration is intended to be exercised by the immigration authorities under the Act. The Act requires that the Secretary of State shall from time to time lay down rules as to the practice to be followed in the administering of the Act: see section 3(2). The rules which the Secretary of State has laid before the Houses of Parliament in accordance with the requirements of the Act set out circumstances in which leave to enter this country is to be refused, circumstances where leave may be refused and circumstances where leave is to be granted.

In the course of an appeal, in reviewing the facts on evidence wholly different from that which was before the Secretary of State, the adjudicator can be faced with a situation where the effect of the facts as found by him is clear and unequivocal: leave should be refused. This is not a situation where the applicant is entitled to enter this country. However, because on the facts which were before him, the Secretary of State based his decision upon a different part of a rule, he could have come to a decision which was the right decision, for the wrong reasons having regard to the facts found by the adjudicator. If the adjudicator was then to be circumscribed by the reasons for the decision given by the Secretary of State, because the case did not, on his findings of fact, fall within the grounds relied upon by the Secretary of State, he would have no option but to come to a decision which was contrary to the rules when viewed as a whole, although it would accord with a particular rule or part of a rule relied upon by the Secretary of State. This would clearly be a result quite contrary to the intent of the Act. Furthermore, I regard it as one which would be contrary

to the wording of section 19(1)(a)(i) which refers to any immigration rules applicable to the case. A preferable interpretation of the Act is one which leads to the result that the adjudicator, having found the facts, is entitled to apply the immigration rules as applicable to the case, having regard to the facts that he has found, subject to important provisos.

The first proviso is this. It is necessary, of course, to make sure that the appellant before the adjudicator has a proper opportunity of fairly stating his case. He must be given proper notice of the case which he has to meet. If, at the outset of the hearing, it is not apparent that a particular point is going to arise for consideration, then it may be necessary for the matter to be adjourned to enable the applicant to deal with the matter properly. The construction of the provisions which I would adopt does not need to involve any risk of injustice to the appellant, if the adjudicator bears in mind, as he is bound to in my view, that the procedure must be one which is fair to the appellant.

The second proviso is one which Mr Collins made as a concession at the close of the argument before me, namely, that the adjudicator should not seek to go behind a finding of fact of the Secretary of State which is favourable to the appellant. Mr Collins made this concession having regard to his interpretation of the provisions and I express no personal view as to whether he was obliged to make that concession or not. I am content to deal with it in the way in which he dealt with it, namely, as a concession. Section 18(2) is not intended to have the effect Mr Beloff submits. Its purpose is to avoid any dispute as to the basis of the Secretary of State's decision. It does not affect the scope of appeals from the decision.

I turn to the previous decisions of this court dealing with this question to see whether they throw any light upon the matter. I turn to the latest of those decisions first of all because it is the decision which at least in part is in support of the arguments which Mr Beloff has advanced although it does not go as far as he submits that it should go in his favour. It is the decision of *R* v *Immigration Appeal Tribunal, Ex parte Mehra* [1983] Imm AR 156. In that case, a notice of refusal was given in respect of an application for an entry certificate which indicated that the entry clearance officer was not satisfied that the applicant had any close connection with the United Kingdom or that his admission would be in the general interest of the United Kingdom. There was an appeal against that decision and the Home Office, in support of their decision sought to rely upon an entirely new matter, namely, an expressed lack of satisfaction as to the applicant's means. It was on the basis of the lack of means—a matter not originally relied upon—that the adjudicator and the Immigration Appeal Tribunal dismissed the appeal.

On the matter coming before Mann J on an application for judicial review, he came to the conclusion that the tribunal could take into account reasons not given in a notice of refusal, but not grounds other than those stated in the notice. He also dealt with the allegation that the tribunal applied the wrong standard of proof. Mr Beloff, who appeared for the applicant in that case as well as in this case, argued that it was not permissible to do what the adjudicator and the tribunal had done. Counsel appearing on behalf of the Immigration

Appeal Tribunal, Mr Simon Brown, argued the contrary. The way that the learned judge dealt with the matter is as follows:

> "Mr Brown, for the Immigration Appeal Tribunal, argues that Mr Beloff's argument is based upon a false premise. He says that Section 18(2) provides that a 'ground' is conclusive, but is silent upon 'reasons'. 'Reasons' may therefore be added to or subtracted from. Mr Brown suggests a statutory structure which recognises decision, ground, reasons. Of course, as Mr Beloff has pointed out, linguistically the word 'ground' and the word 'reason' may be interchangeable. However, it does appear that the draftsman of the Act has distinguished between 'ground' and 'reason'. I do not pick up all the references to 'ground' in Part II of the Act (that is the part dealing with appeals). There are seven of them anterior to Section 18(2). I take as an example Section 13(5)." The learned judge then referred to that subsection. He went on to say: "The word 'reasons' appears in Section 18(1)(b) which I have already read. It does not appear elsewhere in Part II, but it does appear in the subordinate legislation to which I have referred. The statutory structure, says Mr Brown, is one where there is a decision for which there is a ground for which there are reasons. The ground, he says, is conclusive and I can readily perceive why a ground should be conclusive in that it would prevent an unappealable ground being added so as to shut out an appellant or so as to avoid difficulty in relation to the forum for an appeal. Although Mr Brown suggests a ground is conclusive, a reason for that ground is not, in the sense that the reason may be added to in order to support the conclusive ground. It seems to me that the draftsman of the subordinate legislation, in particular the draftsman of the Procedural Rules and, most specifically, Rules 8(1) and 8(4), took the view that reasons could not be added to. I have already made a comment on the two sub-paragraphs. It may be that on a future occasion a question will arise as to the propriety of a particular explanatory memorandum. That is not a question before me today."

For the purposes of that case, it was sufficient to mount an argument of the sort that was mounted by counsel on behalf of the Immigration Appeal Tribunal. The wider argument which was advanced before me by Mr Collins was apparently not advanced before the Immigration Appeal Tribunal. With the greatest respect to the way in which the matter was dealt with in those circumstances, I would disagree that it is right or sensible to draw a distinction between grounds and reasons. The argument against limiting the powers of the appellate body appears to me to be equally strong whether one applies it to grounds or reasons. I do not myself find there is room for a halfway house. Indeed, I would question whether it is right to say that the fact that the grounds are conclusive would prevent an unappealable ground being added or avoid difficulty in relation to forum. First of all, so far as grounds are concerned, there is specific provision in section 13(5) which removes a right of appeal if the Secretary of State certifies that he has given directions for the appellant not to be given entry into the United Kingdom on the ground that his exclusion is conducive to the public good. Such a direction can be given quite independently of any application for leave to enter and its operation would be quite independent of

any ground relied upon for refusing leave to enter apart from that specific ground. Therefore, the fact that the Secretary of State had not relied, in considering an application for leave to enter or for entry clearance on the public good ground, would not stop him from preventing an appeal by relying on section 13(5).

So far as forum is concerned, again if the provisions of the Act are examined, I do not consider that the result would be achieved that it was anticipated would be achieved if the grounds could be changed. The provisions of the Act clearly deal specifically and separately with the situation with regard to a ground such as exclusion for the public good. It is clearly provided tht the appellate machinery should not interfere with the Secretary of State's power to give directions in that regard.

Mann J referred to an earlier decision of *Ex parte Tong* [1981] Imm AR 214. In that case, Glidewell J as he then was, as I understand his judgment, was taking a similar view to that which I would adopt. Reading from the headnote in that case, it states:

> "When hearing appeals under the Immigration Act 1971 the immigration appellate authorities are required under s 19(1) (the adjudicators) and s 20(1) (the Tribunal) to consider whether the decision of the immigration authority which is appealed was 'not in accordance with . . . any immigration rules applicable to the case.'
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> "Thus, the adjudicator and the tribunal were entitled to take into account a reason which might have justified refusal of an application . . . though that reason had not figured in the statutory notice of refusal which had specified a number of other reasons for refusal contained in that relevant rule."

So far as the Immigration Appeals (Procedure) Rules are concerned, Mann J referred to the fact that rule 8 anticipates that at the commencement of a hearing the authority shall give to the respondent an opportunity to amplify the written statement and he regarded that as drawing a distinction between amplifying and amending the statement.

For my part, I would not regard it as being significant as to whether there was express power to amend that statement or merely to amplify it. In my view, the procedure rules cannot, in themselves, affect the proper interpretation of the Act. In so far as it is relevant to have regard to those procedure rules in construing the Act, the position is correctly indicated in Halsbury's Laws of England, Volume 44, 4th Edn., paragraph 884 and, in particular, by the notes referred to in that paragraph.

The issue here is not as to whether the statement or reasons can be amended, but as to whether or not the Secretary of State is confined to the reasons and grounds which he gave or had at the time of his refusal. A number of other authorities were referred to in the course of argument. I do not propose to do more than to refer to them shortly. First of all, there was the case of *R* v

Immigration Appeal Tribunal, Ex parte Mehmet [1978] Imm AR 46. I do not regard that decision as being helpful because in that case, the applicants sought to change horses midway through the deportation process and the Divisional Court said that that was not permissible. That was a wholly different situation to that under consideration here.

I was referred to the case of *Akhtar*. This was a decision of McNeill J. This case is unreported, but I was provided with a copy of the transcript. The case was concerned with the position of the appellate authority in relation to possible illegal entrants. The conclusion was reached by the learned judge that if the Secretary of State was not treating an immigrant as an illegal entrant, it was not open to the immigration appellate body to do so. I do not quarrel with that conclusion at all. It is clearly right, but in the course of giving judgment, the learned judge said this: "There are two aspects of this reading of the rules. The first is that the appellate authorities' powers—jurisdiction, if that be the appropriate word—are wholly restricted to deciding that which is referred to them for decision by the notice and grounds of appeal, varied or amended as they may be by Rule 6(3) and the respondent's written statement."

So far as that deals with the situation at the outset of the tribunal's investigations, again I do not dissent. However, if in the course of properly carrying out the jurisdiction referred to by the learned judge, facts are found which make it appropriate to consider a different part of a rule, or a different rule, or a different circumstance, then in my view, the passage in the judgment should not be taken as suggesting such a consideration is not possible. It is to be noted that the reference which the learned judge makes to the respondent's written statement includes a possible expansion or amendment of that statement.

Both McNeill J in that case and Glidewell J in the case of *Tong* stressed the importance of safeguarding the appellant against unfairness. As I have already indicated, I fully endorse their views—in particular the views of Glidewell J in the case of *Tong*.

The final case to which I should make reference is the judgment of Forbes J in the case of *Malik*. That was a case which went to the Court of Appeal but the Court of Appeal did not deal with the point which is relevant to this case. However, as I read the approach indicated by Forbes J in that case, he was taking the view that an adjudicator could act under the provisions of a different rule if he came to the conclusion that that rule was applicable rather than the rule relied upon by the Secretary of State, but he was concerned with the question as to how the adjudicator's conclusion was then to be put into effect. Should the matter be determined by the adjudicator or should the matter be remitted by the Secretary of State if the question of discretion was involved? This is not the problem here and I therefore come to the conclusion that the argument advanced by Mr. Beloff in support of this general point is incorrect and not decided in his favour by the previous decisions.

Next, it is necessary to consider the two matters on which he relies arising out of the facts of this case. Having regard to the length of this judgment already, I do not intend to set out in full the reasoning of the Tribunal for their con-

clusion. It is sufficient if I draw attention to the fact that the relevant part of their decision starts at page 119 and continues to the end of their decision. In that passage, the Tribunal refer to the fact that the applicant is hardly an ordinary citizen. They say: "He is the founder of an organisation (a so-called Church) which caused a public outcry and whose members were denied entry to this country from 1968 to 1980. He is also the author of two 'bestsellers'. An immigration officer or entry clearance officer is entitled to take into account the sort of person with whom he is dealing and in our view it would have been unreasonable to have regarded the appellant as any run-of-the-mill applicant."

In particular, having regard to that passage which I have just read, Mr Beloff submits that no evidence was before the Tribunal which supported the adverse conclusion which he says is implicit in those remarks. Furthermore, no warning had been given to the applicant that these matters were going to be relied upon against him. With the greatest of respect to the forceful argument—and on this matter, it was an extremely forceful argument—advanced by Mr Beloff, I consider that the whole of his attack against the Tribunal's decision misunderstands the basis upon which the Tribunal came to their decision that the appeal should be dismissed. When read as a whole, it is quite clear that what was motivating the Tribunal was the fact that the applicant had declined the invitation to be interviewed. The Tribunal were saying that having regard to his history and the sort of person he appeared to be, in their view it was not unreasonable for the officer to consider that he could not be satisfied without interviewing the applicant himself. That was the basis of the decision. That was something which I find reflected in the letter which accompanied the original notice of refusal, in the statement of reasons for the refusal, in the adjudicator's decision (although he deals with it in two different ways; one more favourable to the applicant than the other) and in the Tribunal's decision.

The reference to the immigration officer not being satisfied arises because, in an ordinary case where entry clearance is being sought under rule 17 of HC 169, it says that a visitor is to be admitted if he satisfies the immigration officer that he is genuinely seeking entry for the period of the visit as stated by him. The obligation is upon him to satisfy the immigration officer of that. He can, if he wishes, take the course which is encouraged by rule 10 of applying for entry clearance, including seeking a letter of clearance as was sought here. If he obtains entry clearance, then he is in an advantageous position as rule 13 provides that a passenger who holds an entry clearance, which was duly issued to him and is still current, is not to be refused leave to enter unless the immigration officer is satisfied of the three specified matters referred to in that rule. Once he has entry clearance, there are only very limited grounds on which he can be refused leave to enter.

Where a person seeks to enter this country without entry clearance, in the normal way, he will be interviewed. The Act specifically provides in schedule 2 that an immigration officer may examine any person who has arrived in the United Kingdom. In the light of that background, the Home Office were entitled to invite the applicant to come to an interview. It seems to me as was the case here, that when such an invitation was declined, that was a matter which, in itself, could cause the Home Office to have reservations about

whether or not this was an applicant who wished, in accordance with the rules, to undertake a visit of the type there specified. I understand the Immigration Appeal Tribunal's decision as doing no more than indicating that the proper inference to be drawn from that matter had to be considered in the light of the person who was the appellant before them. In making reference to his background, they were doing no more than referring to undisputed facts which had been placed in evidence before them and which had been previously found to be correct by the adjudicator in the decision which I have set out.

That there was an intention to rely upon the failure of the appellant to attend the interview was apparent because at page 117 in the bundle, Mr Beloff, before the Tribunal, had submitted that the demand for the appellant to attend the interview was unreasonable, as was the refusal of his application. The Tribunal came to the conclusion that the requirement to attend the interview was not unreasonable. In my view, that was a decision to which they were entitled to come. I do not regard them, in doing that, as attaching some adverse significance to the Church of Scientology which went beyond what were the agreed facts, namely, that between 1968 and 1980, members were denied entry to this country.

I would therefore take the view that properly understood, there was nothing inferred by the Tribunal which involved them having to give any specific notice to Mr Beloff of the basis on which they were going to decide the matter. They were not going into any new areas of fact which were outside the consideration of the questions which it could reasonably be anticipated were going to be dealt with by the Tribunal. There was certainly evidence to support the matters to which they referred. Indeed, they were ones which were not in dispute. That being so, so far as the facts of this matter are concerned, I would come to a view adverse to Mr Beloff on those two issues on which he relies. Accordingly, I refuse this application.

Application refused

Solicitors: Alan Taylor: Treasury Solicitor.

R v Governor of Pentonville Prison, ex parte Budlong and another

QUEEN'S BENCH DIVISION
LORD WIDGERY CJ AND GRIFFITHS J
12th, 13th, 14th, 15th, 16th, 19th, 30th NOVEMBER 1979

Extradition – Committal – Evidence – Formal documents – Whether formal document setting out particulars of offence required to be put before magistrate – Whether Minister's order or foreign warrant of arrest required to give particulars of offence – Extradition Act 1870, s 20, Sch 2.

Extradition – Committal – Extradition crime – Double criminality – Definition of crime in foreign country not identical with definition of English crime – Burglary – Trespass essential ingredient of English crime of burglary but not of foreign crime of burglary – Whether if foreign crime substantially similar to English crime principle of double criminality satisfied — Extradition Act 1870, s 26.

Extradition – Restrictions on surrender – Political offence – What constitutes political offence – Unlawful entry into US government offices by members of Church of Scientology – Allegation that entry effected to obtain information for purpose of changing US government policy towards church – Whether the unlawful entry a political offence or simply extraditable offence of burglary.

Extradition – Restrictions on surrender – Right of national of member country of EEC to move freely between EEC countries – Whether extradition unlawfully restricting that right – EEC Treaty, arts 48, 234.

The two applicants, an English national and a United States national, were senior members of the Church of Scientology resident in England. The United States government requested their extradition to stand trial in the United States on charges of burglary. The evidence placed before the metropolitan magistrate dealing with the issue of committal warrants for the two applicants showed that members of the church, acting on the applicants' written instructions, had unlawfully entered certain government offices in the United States as trespassers, and taken photocopies of the contents of confidential government files relating to the church's affairs. The magistrate was satisfied that burglary was an extraditable offence and that a prima facie case of burglary had been made out against the applicants under both American and English law (ie s 9[a] of the Theft Act 1968). Accordingly he issued committal warrants pending the applicants' extradition to America. Although trespass was an essential ingredient of burglary under s 9 of the 1968 Act it was not an essential ingredient under American law[b]. The applicants applied for writs of habeas corpus on the grounds, inter alia, that (i) the

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a Section 9, so far as material, provides:
'(1) A person is guilty of burglary if—(*a*) he enters any building or part of a building as a trespasser and with intent to commit any such offence as is mentioned in subsection (2) below; or (*b*) having entered any building or part of a building as a trespasser he steals . . . anything in the building or that part of it . . .
'(2) The offences referred to in subsection (1)(*a*) above are offences of stealing anything in the building or part of a building in question.'

b Ie § 1801(*b*) of Title 22, District of Columbia Code which, so far as material, provides: '. . . whosoever shall, either in the night or in the daytime, break and enter, or enter without breaking any dwelling . . . or other building or any apartment or room, whether at the time occupied or not . . . with intent to break and carry away any part thereof . . . or to commit any criminal offense, shall be guilty of burglary in the second degree . . .' and § 105 of Title 22 which,

(*Continued on p 702*)

magistrate did not have before him a formal document giving particulars of the cri alleged, since both the Secretary of State's order made under s 7[c] of, and in the form out in Sch 2 to, the Extradition Act 1870, and the American warrants of arrest mer referred to the crime of burglary without giving particulars, (ii) it would be against principle of double criminality to extradite the applicants because the crime of burgl was not identical under English and American law, (iii) the offences were political character, and therefore by virtue of s 7 not extraditable, since the Church of Scientolo was engaged in protracted litigation with various United States Government departme and the applicants had organised entry into United States Government offices as part an attempt to change government policy towards the church, (iv) the extradition w merely a means of indirectly enforcing a foreign public law, namely the United Sta Freedom of Information Act which the applicants had breached in organising t burglary, and (v) in respect of the applicant who was a United Kingdom national, t extradition would be a restriction on her right to move freely between countries with the EEC, as guaranteed by art 48[d] of the Treaty of Rome.

Held – The applications for habeas corpus would be refused for the following reasons-

(i) In extradition proceedings the only formal documents required to be put befo the magistrate were the Minister's order under s 7 of the 1870 Act and the foreig warrant of arrest, neither of which were required to set out particulars of the offence. B virtue of s 20 and Sch 2 to the 1870 Act, all that was required to be specified in th Minister's order under s 7 was a general description of the crime. Furthermore, i assessing whether there were sufficient facts established to constitute an offence again English law the magistrate was required to look at the evidence, rather than th documents, put before him (see p 706 *b* to *f*, p 708 *b* to *g* and p 717 *f*, post); dicta c Stephen J in *R v Jacobi and Hillier* (1881) 46 LT at 597 and of Cave J in *Re Bellencontr* [1891] 2 QB at 136 applied; *R v Governor of Brixton Prison, ex parte Gardner* [1968] 1 Al ER 636 distinguished and doubted.

(ii) An 'extradition crime' within the definition in s 26[e] of the 1870 Act referre merely to an act or omission which would have amounted to the commission of a extraditable crime if it had been done in England, and the definition of the crime in th foreign country was not required to be identical with the definition of the English crime although the crime had to be substantially similar in concept in both countries. Since th crime for which extradition of the applicants was requested was substantially similar t the extraditable English crime of burglary, and since there was prima facie evidence tha the conduct in question amounted to commission of the English crime of burglary, i followed that the principle of double criminality had not been breached and that the committal orders were properly made, notwithstanding that the definitions of burglary in English and American law were not identical (see p 712 *d* to *h* and p 717 *f*, post); dicta of Cockburn CJ and of Blackburn J in *Re Windsor* (1865) 6 B & S at 528 and 530, of Wills J in *Re Bellencontre* [1891] 2 QB at 140–141, of Lord Russell CJ in *Re Arton (No 2)* [1896] 1 QB at 517 and of Darling J in *R v Dix* (1902) 18 TLR at 232 applied.

(iii) The offences were not political in character for the purposes of s 7 of the 1870 Act because the burglaries were not carried out to challenge the political control or government of the United States but merely to further the interests of the church. Nor

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(*Continued from p 701*)

so far as material, provides: 'In prosecutions for any criminal offense all persons advising, inciting or conniving at the offense, or aiding or abetting the principal offender, shall be charged as principals . . .'

c Section 7 is set out at p 705 *f g*, post

d Article 48, so far as material, provides: '1. Freedom of movement for workers shall be secured within the Community . . . 3. It shall entail the right, subject to limitations justified on grounds of public policy . . . (b) to move freely within the territory of Member States . . .'

e Section 26, so far as material, is set out at p 712 *bc*, post

could it be contended that the real purpose of the extradition was to punish the applicants for breach of a foreign public law, because under the extradition treaty the United States had undertaken not to try the applicants for any offence other than that for which they were extradited and to entertain their allegation would be to impute bad faith to the United States Government (see p 714 *d* to *f* and *h* to p 715 *c* and p 717 *f*, post); *Re Arton* [1896] 1 QB 108, *Re Kolczynski* [1955] 1 All ER 31 and dictum of Viscount Radcliffe in *Schtraks v Government of Israel* [1962] 3 All ER at 540 applied.

(iv) For reasons of common sense, art 48 of the Treaty of Rome was to be interpreted as not applying to the exercise by a member state of its power to extradite an accused person under an extradition treaty (see p 717 *e f*, post).

Notes

For extradition crimes, see 18 Halsbury's Laws (4th Edn) paras 213–214 and for cases on the subject, see 24 Digest (Repl) 991–994, *21–39*, and for cases on proceedings before the magistrate, see ibid, 998–1004, *60–109*.

For political crimes, see 18 Halsbury's Laws (4th Edn) para 217.

For the Extradition Act 1870, ss 7, 20, 26, Sch 2, see 13 Halsbury's Statutes (3rd Edn) 254, 264, 265, 267.

For the EEC Treaty, arts 48, 234, see 42A ibid 751, 328.

Cases referred to in judgments

Arton, Re [1896] 1 QB 108, 65 LJMC 23, 73 LT 687, DC, 24 Digest (Repl) 995, *43*.

Arton, Re, (No 2) [1896] 1 QB 509, 65 LJMC 50, 74 LT 249, 60 JP 132, 18 Cox CC 177, DC, 24 Digest (Repl) 991, *21*.

Bellencontre, Re [1891] 2 QB 122, 60 LJMC 83, 64 LT 461, 55 JP 694, 17 Cox CC 253, DC, 24 Digest (Repl) 997, *52*.

Bulmer (HP) Ltd v J Bollinger SA [1974] 2 All ER 1226, [1974] Ch 401, [1974] 3 WLR 202, [1974] CMLR 91, Digest (Cont Vol D) 316, *1*.

Castione, Re [1891] 1 QB 419, [1886–90] All ER Rep 640, 60 LJMC 22, 64 LT 344, 55 JP 328, 17 Cox CC 225, DC, 24 Digest (Repl) 993, *36*.

Factor v Laubenheimer (1933) 290 US 276.

Knoors v Secretary of State for Economic Affairs [1979] 2 CMLR 357, ECJ.

Kolczynski, Re [1955] 1 All ER 31, sub nom *R v Brixton Prison (Governor), ex parte Kolczynski* [1955] 1 QB 540, [1955] 2 WLR 116, 119 JP 68, DC, 24 Digest (Repl) 993, *37*.

R v Tschereau [1978] QB 732, [1978] 2 WLR 250, [1978] ECR 1999, 66 Cr App R 202, ECJ.

R v Dix (1902) 18 TLR 231, DC, 24 Digest (Repl) 991, *27*.

R v Governor of Brixton Prison, ex parte Gardner [1968] 1 All ER 636, [1968] 2 QB 399, [1968] 2 WLR 512, 132 JP 187, DC, Digest (Cont Vol C) 370, *158b*.

R v Jacobi and Hillier (1881) 46 LT 595, DC, 24 Digest (Repl) 997, *50*.

R v Pentonville Prison (Governor), ex parte Ecke [1974] Crim LR 102, DC.

R v Pentonville Prison (Governor), ex parte Myers (6th December 1972) unreported, DC.

R v Saunders [1979] 2 All ER 267, [1979] 3 WLR 359, [1979] 2 CMLR 216, ECJ.

Schtraks v Government of Israel [1962] 3 All ER 529, [1964] AC 556, [1962] 3 WLR 1013, HL; *affg* sub nom *Re Shalom Schtraks* [1962] 2 All ER 176, sub nom *R v Brixton Prison Governor, ex parte Schtraks* [1963] 1 QB 55, [1962] 2 WLR 976, DC, Digest (Cont Vol A) 575, *4a*.

Shapiro v Ferrandina (1973) 478 F 2d 894.

Tzu-Tsai Cheng v Governor of Pentonville Prison [1973] 2 All ER 204, [1973] AC 931, [1973] 2 WLR 746, sub nom *R v Pentonville Prison Governor, ex parte Cheng* 137 JP 422, HL, Digest (Cont Vol D) 338, *39b*.

Windsor, Re (1865) 6 B & S 522, 5 New Rep 96, 34 LJMC 163, 12 LT 307, 29 JP 327, 11 Jur NS 807, 10 Cox CC 118, 122 ER 1288, 24 Digest (Repl) 991, *24*.

Wright v Henkel (1902) 190 US 40.

Cases also cited

Government of India, Ministry of Finance (Revenue Division) v Taylor [1955] 1 All ER 2
[1955] AC 49, HL.
Huntingdon v Attrill [1893] AC 150, PC.
Kakis v Government of the Republic of Cyprus [1978] 2 All ER 634, [1978] 1 WLR 779, H
Malone v Metropolitan Police Comr [1979] 2 All ER 620, [1979] Ch 344.
R v Brixton Prison (Governor), ex parte Soblen [1962] 3 All ER 641, [1963] 2 QB 243, C
R v Chief Immigration Officer, Heathrow Airport, ex parte Salamat Bibi [1976] 3 All ER 8
[1976] 1 WLR 979, CA.
R v Governor of Winson Green Prison, Birmingham, ex parte Littlejohn [1975] 3 All ER 2
[1975] 1 WLR 893, DC.
R v Thompson (1979) 69 Cr App R 22, [1979] 1 CMLR 390; *on appeal* [1979] 1 CMLR
ECJ.
Schemmer v Property Resources Ltd [1974] 3 All ER 451, [1975] Ch 273.
Van Duyn v Home Office (No 2) [1975] 3 All ER 190, [1975] Ch 358, ECJ.
Wyatt v McLoughlan [1974] IR 378.

Motions for habeas corpus

The applicants, Mr Morrison Budlong and Mrs Jane Kember, members of the Church Scientology, moved for writs of habeas corpus ad subjiciendum, under s 11 of t Extradition Act 1870, directed, in the case of Mr Budlong, to the governor of Pentonvi Prison and, in the case of Mrs Kember, to the governor of Holloway Prison, to which t applicants had respectively been committed under committal warrants issued on 25 May 1979 under s 10 of the 1870 Act by Mr W E C Robins, the metropolitan magistra of Bow Street Magistrates' Court, sitting at Wells Street Magistrates' Court, pending the extradition to the United States of America for trial on ten charges of burglary alleged have been committed there. The applicants contended that the warrants we unlawful. The facts are set out in the judgment of Griffiths J.

William Denny QC and *Anthony Hooper* for the applicant Mr Budlong.
Louis Blom-Cooper QC, Alan Newman and *Hannah Burton* for the applicant Mrs Kember.
D W Tudor Price and *Colin Nicholls* for the United States Government.
Nicolas Bratza as amicus curiae.

Cur adv vu

30th November. The following judgments were read.

GRIFFITHS J (delivering the first judgment at the invitation of Lord Widgery CJ). I these proceedings the applicants move for writs of habeas corpus on the ground that th extradition warrants issued by the metropolitan magistrate dated 25th May 1979 and o which they are held pending extradition to the United States of America are unlawful.

The Government of the United States seeks the extradition of the applicants to face te charges of burglary committed between January and May 1976 and for which they wer indicted by a grand jury on 15th August 1978. The evidence placed before the magistrat revealed the following facts. Between January and May of 1976 members of the Churc of Scientology unlawfully as trespassers entered various offices of the United State Internal Revenue Service and the United States Department of Justice in the District c Columbia and therein, making use of government property, took photocopies of th contents of confidential government files relating to the affairs of the Church o Scientology and its adherents. They replaced the original documents in the files but stol the photocopies. Eventually the actual burglars were caught red-handed and they the revealed that they were acting on the written instructions of the applicants who ar senior members in the hierarchy of the Church of Scientology residing in this country.

The magistrate, being satisfied that the facts revealed a prima facie case of burglar against the applicants, both according to the relevant law of the United States, namel

§§ 1801(*b*) and 105 of Title 22, District of Columbia Code, and according to English law and that burglary was an extraditable crime within the extradition treaty made between the Government of the United Kingdom and the Government of the United States of America, he issued warrants committing the applicants to prison to await extradition. They have in fact both since been allowed bail pending the outcome of these proceedings.

In this court the magistrate's warrants have been attacked on a variety of grounds, but there has been no suggestion that the evidence before the magistrate did not establish a prima facie case of burglary against the applicants both according to American and English law.

The pleading point

The first ground of attack was conveniently described by counsel for the applicants as the pleading point. His complaint is that there was no formal document before the magistrate that contained sufficient particulars of the applicants' offence to show that it constituted the crime of burglary according to English law. It is submitted that before the magistrate can begin to consider the evidence in support of the application for an extradition warrant he must have all the necessary ingredients to establish the English offence formally set out in some document; and as there was no formal document in this case that alleged the burglars entered 'as trespassers' the magistrate should have refused to consider the matter further because trespass is an essential element of the English crime of burglary (see s 9 of the Theft Act 1968).

In order to examine this submission it is necessary to consider the steps by which extradition is obtained to see what formal documents are required to be placed before the magistrate. The first step is the request for extradition. This is made through diplomatic channels and the material that must accompany the request is set out in Article VII of the extradition treaty between the two governments, given statutory force by Order in Council[1].

This is the material on which the legal advisers in the Home Office will consider whether they should advise the Secretary of State to take the next step in the extradition procedure, which is to refer the request to a metropolitan magistrate pursuant to s 7 of the Extradition Act 1870, which provides:

> 'A requisition for the surrender of a fugitive criminal of any foreign state, who is in or suspected of being in the United Kingdom, shall be made to a Secretary of State by some person recognised by the Secretary of State as a diplomatic representative of that foreign state. A Secretary of State may, by order under his hand and seal, signify to a police magistrate that such a requisition has been made, and require him to issue his warrant for the apprehension of the fugitive criminal. If the Secretary of State is of opinion that the offence is one of a political character, he may, if he think fit, refuse to send any such order, and may also at any time order a fugitive criminal accused or convicted of such offence to be discharged from custody.'

When the magistrate receives the order from the Secretary of State, it is his duty to enquire into the evidence and, if sufficient, to issue his warrant, as plainly appears from the terms of ss 8 and 10. Section 8 provides:

> 'A warrant for the apprehension of a fugitive criminal, whether accused or convicted of crime, who is in or suspected of being in the United Kingdom, may be issued—1. By a police magistrate on the receipt of the said order of the Secretary of State, and on such evidence as would in his opinion justify the issue of the warrant if the crime had been committed or the criminal convicted in England.'

Section 10 provides:

> 'In the case of a fugitive criminal accused of an extradition crime, if the foreign warrant authorising the arrest of such criminal is duly authenticated, and such

[1] SI 1976 No 2144, Sch 1

evidence is produced as (subject to the provisions of this Act) would, according the law of England, justify the committal for trial of the prisoner if the crime which he is accused had been committed in England, the police magistrate sh commit him to prison, but otherwise shall order him to be discharged.'

The form of the Secretary of State's order is prescribed by s 20 which provides:

'The forms set forth in the second schedule to this Act, or forms as near there as circumstances admit, may be used in all matters to which such forms refer, a in the case of a British possession may be so used, mutatis mutandis, and when us shall be deemed to be valid and sufficient in law.'

The 'Form of Order of Secretary of State to the Police Magistrate' contained in Sch requires the Secretary of State to do no more than insert the name of the crime for whi extradition is asked. The order in the present case is in the form prescribed by Sch 2 a names the crime as burglary. As such it is deemed to be valid and sufficient in law s 20.

The only other document of a formal nature that is required to be before the magistra is the foreign warrant authorising the arrest of the criminal. It cannot have be intended that this foreign warrant should set out all the ingredients of the Engli offence for, as Stephen J said in *R v Jacobi and Hiller*[1] 'if it were necessary for the warra to set forth precisely the crime . . . every magistrate [in a foreign country] who issued warrant . . . would have to be acquainted with the law of England'. Such an oppressi requirement would, of course, make extradition unworkable. There is nothing in th treaty that requires any other formal document to be before the magistrate and n authority has been cited to show that extradition has ever been refused on this groun I am quite satisfied that in extradition proceedings there is no requirement for an formal documents to be before the magistrate other than the order of the Secretary State and the warrant of arrest, neither of which, for the reasons I have given, a required to set out all the particulars of the English offence. It is to the evidence that th magistrate is directed to look to see whether there are sufficient facts established t constitute an offence contrary to English law and not to any formal document. I am gla to find that this is so, for it would be deplorable if the technicalities of English procedu were introduced to thwart an otherwise proper request for extradition.

In support of his submission, counsel for Mr Budlong relied on the decision of th court in *R v Governor of Brixton Prison, ex parte Gardner*[2], followed in this court in *R Governor of Pentonville Prison, ex parte Myers*[3]. *Gardner's* case[2] is a decision under th Fugitive Offenders Act 1967, as was *Myers's* case[3], which Act provides for the retur from the United Kingdom of persons who have committed crimes in the Commonwealth

The facts of *Gardner's* case[2] were that warrants had been issued in New Zealan alleging against Gardner the offence of obtaining by false pretences. Because the warrant only disclosed a pretence as to future conduct they did not at that date disclose an offence according to English law. The 1967 Act makes provision for the arrest an return of persons accused in a Commonwealth country of a 'relevant offence'. A relevan offence is defined in the terms in s 3(1) of the Act:

'For the purposes of this Act an offence of which a person is accused or has bee convicted in a designated Commonwealth country or United Kingdom dependenc is a relevant offence if—(*a*) in the case of an offence against the law of a designate Commonwealth country, it is an offence which, however described in that law, fall within any of the descriptions set out in Schedule 1 to this Act, and is punishabl under that law with imprisonment for a term of twelve months or any greate punishment; (*b*) in the case of an offence against the law of a United Kingdom

1 (1881) 46 LT 595 at 597
2 [1968] 1 All ER 636, [1968] 2 QB 399
3 (6th December 1972) unreported

dependency, it is punishable under that law, on conviction by or before a superior court, with imprisonment for a term of twelve months or any greater punishment; and (*c*) in any case, the act or omission constituting the offence, or the equivalent act or omission, would constitute an offence against the law of the United Kingdom if it took place within the United Kingdom or, in the case of an extra-territorial offence, in corresponding circumstances outside the United Kingdom.'

tion 5(2) requires the requesting country to furnish the Secretary of State with the lowing information:

'(*a*) in the case of a person accused of an offence, a warrant for his arrest issued in that country ... together ... with particulars of the person whose return is requested and of the facts upon which and the law under which he is accused or was convicted, and evidence sufficient to justify the issue of a warrant for his arrest u[illegible] section 6 of this Act.'

tion 5(3) provides:

'On receipt of such a request the Secretary of State may issue an authority to proceed unless it appears to him that an order for the return of the person concerned could not lawfully be made, or would not in fact be made, in accordance with the provisions of this Act.'

tion 6 then provides that a magistrate on receipt of the authority to proceed may issue arrant of arrest and s 7 provides for the committal if, after hearing evidence, the court atisfied that the offence in respect of which the authority to proceed has been issued relevant offence and that the evidence discloses a prima facie case. Nowhere in the is there any requirement as to the form in which the authority to proceed should be wn. This is, as I have already illustrated, in contrast to the Extradition Act 1870 ich does prescribe the form in which the order of the Secretary of State should be wn.

ord Parker CJ, having considered the general framework of the 1967 Act, concluded the authority to proceed had to be drawn with sufficient particularity to disclose all ingredients of a relevant offence. He said[1]:

'It seems to me that what is clearly contemplated here is that a request coming forward to the Secretary of State must set out in some form, and no doubt the most usual form is the warrant or warrants of arrest, the offence or offences of which the fugitive is accused, in this case in New Zealand. Not only must it supply a general description which will fulfil the provisions of s. 3(1)(*a*), but it must condescend to suf[illegible]nt detail to enable the matter to be considered under s. 3(1)(*c*). Similarly, as it seems to me, it is contemplated that the Secretary of State, in giving his authority to proceed under s. 5(1) should again set out the offences to which his authority is to relate in sufficient detail for the matter to be considered again not only under para. (*a*) but also under para. (*c*) of s. 3(1).'

authority to proceed in *Gardner's* case[2] stated:

'A request having been made to the Secretary of State by or on behalf of the Government of New Zealand for the return to that country of [the applicant] who is accused of the offences of obtaining money by false pretences; attempting to obtain money by false pretences ... the Secretary of State hereby orders that a metropolitan stipendiary magistrate proceed with the case in accordance with the provisions of the Fugitive Offenders Act, 1967.'

l Parker CJ continued[1]:

'So far as this case is concerned, as I have said, the authority to proceed was in perfectly general terms, and this court naturally has not seen and could not look at

968] 1 All ER 636 at 641, [1968] 2 QB 399 at 415
968] 1 All ER 636 at 640, [1968] 2 QB 399 at 413

the request from the Commonwealth power. But it seems to me, however, perfectly plain that this authority to proceed, albeit in general terms, must be taken as relating to the offences of which the applicant was accused in New Zealand, and on which the request was made for his return.'

As those offences did not disclose an offence known to English law which is an essential element of a 'relevant offence', it was held that the authority to proceed was not in respect of a relevant offence and the application succeeded.

I can see no reason why these decisions should be applied to proceedings under the 1870 Act. They turn on the construction of the Fugitive Offenders Act 1967, the shape and provisions of which are not in any way on all fours with the 1870 Act. However, the applicants submit that because art III of the treaty requires similar information to be submitted to the Secretary of State by the country requesting extradition to that required to be submitted by a Commonwealth country under s 3 of the 1967 Act, it follows that the Secretary of State's order under the 1870 Act shall contain the same particulars as, pursuant to *Gardner's* case[1], are required to be set out in the authority to proceed under the 1967 Act. I cannot see why that result should necessarily follow, but the conclusive answer to the submission is to be found in the terms of s 20 of the 1870 Act which expressly provides that the order shall be valid if it follows the form prescribed in Sch 2, which form does not require the order to do other than state the general description of the crime for which extradition is asked.

The point is also covered by authority. In *Re Bellencontre*[2], Cave J said:

'The duty of the Secretary of State is to call the attention of the police magistrate to what he is required to do under the Extradition Treaty, and it is enough if he draws attention to the particular crime under the 3rd article of the Extradition Treaty, and that is fraud by a bailee, which expresses in general terms what is expressed rather more specifically in the French warrant.'

Because, in my view, the *Gardner*[1] and *Myers*[3] cases do not support the applicants' argument, it is not necessary to consider if they were correctly decided. But I would not wish anything I have said to be taken as expressing my own endorsement of the decisions. It seems to me that they lead to the surprising conclusion that the success or failure of a Commonwealth country to extradite a criminal who has offended against their laws may depend on the drafting of particulars in a document, namely the authority to proceed, for which they are not responsible.

For the reasons I have given the pleading point fails.

Double criminality

The second submission is founded on the fact that under the relevant American law, § 1801(*b*) of Title 22 District of Columbia Code, entry as a trespasser is not an essential element of the crime of burglary whereas under English law trespass is an essential element of the crime (see the Theft Act 1968, s 9).

It is admitted that the facts of this case show that the burglars obtained entry to the various government offices as trespassers, but it is argued that because the applicants, when they are tried in America could be convicted without proof that the entry involved a trespass, they are thereby placed in peril of being convicted of a crime in America for which they could not be convicted in this country. The applicants submit that this offends against the principle of double criminality under which a criminal is only to be extradited for the commission of a crime punishable by the laws of both countries.

1 [1968] 1 All ER 636, [1968] 2 QB 399
2 [1891] 2 QB 122 at 136
3 (6th December 1972) unreported

The prosecution submit that the true rule is that a criminal is to be extradited if his crime falls within the general description of a crime specified in the extradition treaty and the facts of the offence, that is the conduct complained of, show it to be a criminal offence punishable by the laws of both countries. As the facts of these offences show a prima facie case of burglary against both the laws of the District of Columbia and this country, the prosecution submit that extradition should be ordered.

The law of extradition depends not on any common law principles, but on statute. Ultimately the question before this court has to be solved by deciding whether on their true construction the extradition treaty and the 1870 Act, which by art 3 of the United States of America (Extradition) Order 1976[1] is applied to the treaty, permit extradition in this case. None of the authorities that have been cited bear directly on the question we have to decide, but I believe they provide valuable guidance to the correct approach to the construction of the statutory provisions.

In *Re Windsor*[2] extradition to the United States was demanded under a treaty making forgery an extraditable offence. The facts alleged against a bankteller revealed that he had made a false entry in a bank book for fraudulent purposes which would amount to forgery under the definition in the New York statute; they did not, however, constitute the offence of forgery in English law. The principal ground given for refusing extradition was that the local statute of New York did not make the offence forgery by the general law of the United States and, hence, the crime of forgery had not been committed in either country. This ground has been disapproved by the Supreme Court of the United States (see *Wright v Henkel*[3]), and is not relied on in this case. There are, however, two short passages in Re Windsor[4] dealing with the concept of double criminality. Cockburn CJ said: 'the true construction of [the Extradition Act 1843] is, that its terms, specifying the offences for which persons may be given up, must be understood to apply to offences which have some common element in the legislation of both countries.' Blackburn J said[5]: 'Forgery is one of the crimes specified, and that must be understood to mean any crimes recognised throughout the United States and England as being in the nature of forgery.' From the two expressions 'some common element' and 'in the nature of' it is apparent that the court was not looking for the crime to be defined in identical terms in both countries.

In *Re Bellencontre*[6] the French authorities demanded extradition of a French subject accused in France of 19 separate charges of embezzling or misappropriating money delivered to him as a notary. The court found that as to 15 of the charges the evidence disclosed no crime punishable by English law, but that in the case of the four remaining charges the evidence did show an offence contrary to the French Penal Code and English law within the extradition treaty and that extradition ought to be granted in respect of those four charges.

In the course of his judgment Wills J said[7]:

> 'The substance of the Extradition Act, 33 & 34 Vict. c. 52, seems to me to require that the person whose extradition is sought should have been accused in a foreign country of something which is a crime by English law, and that there should be a primâ facie case made out that he is guilty of a crime under the foreign law, and also of a crime under English law. If those conditions are satisfied, the extradition ought to be granted. We cannot expect that the definitions of description of the crime when translated into the language of the two countries respectively, should exactly correspond. The definitions may have grown up under widely different

1 SI 1976 No 2144, Sch 1
2 (1865) 6 B & S 522, 122 ER 1288
3 (1902) 190 US 90
4 (1865) 6 B & S 522 at 528, 122 ER 1288 at 1291
5 6 B & S 522 at 530, 122 ER 1288 at 1291
6 [1891] 2 QB 122
7 [1891] 2 QB 122 at 140–141

circumstances in the two countries; and if an exact correspondence were requi in mere matter of definition, probably there would be great difficulty in lay down what crimes could be made the subjects of extradition. Now this difficu has been met, as it seems to me, by the first schedule to the Extradition Act, 18 (33 & 34 Vict. c. 52), which describes what are the various extradition crimes. this case, the man has been accused of a number of things which clearly fall witl article 408 of the French Code, and therefore are crimes in France, and crimes wh clearly fall under number 18 in the French part of the Treaty of Extradition. C looks, then, to see whether in the corresponding English section, No. 18 of article there is a crime described by English law which crime has been made out by t evidence. It seems to me that there is no difficulty in saying which of the definitic it falls under.'

This passage clearly indicates that in considering extradition it is the actual facts of t offence which are all important rather than the definition of the crime in the foreign la

In *Re Arton (No 2)*[1], extradition was demanded for 'faux' which is the French equivale of forgery. The facts did not disclose the offence of forgery according to English law, b did disclose the offence of falsification of accounts, which is an extradition crime a within the French and English treaties. Lord Russell CJ said[2]:

'Is extradition to be refused in respect of acts covered by the treaty, and grave criminal according to the law of both countries, because in the particular case t falsification of accounts is not forgery according to English law, but falls under th head according to French law? I think not. To decide so would be to hinder t working and narrow the operation of most salutary international arrangements.'

Here again the emphasis is placed not on the definition of the crime but on the ac that constitute the criminal conduct. In a later passage he continued[2]:

'We are here dealing with a crime alleged to have been committed against the la of France; and if we find, as I hold that we do, that such a crime is a crime again the law of both countries, and is, in substance, to be found in each version of t treaty, although under different heads, we are bound to give effect to the claim f extradition.'

Here, too, it is the substance of the two offences that must correspond, not their preci definitions.

R v Dix[3] is another case in which the description of the crime was different in the tw countries, but the facts revealed criminal acts punishable under the laws of both countri and within the extradition treaty. The accused was charged with larceny b embezzlement according to American law. It was held that as the evidence showe fraud by a bailee banker under the Larceny Act, an offence within the treaty, the accuse could be extradited. Darling J said[4]: '. . . the essential thing was to see whether what th evidence showed *prima facie* that the prisoner had done was a crime in both countries an within the treaty.' Once more the court is looking to the actual criminal conduct t decide if extradition should be granted.

The case most comparable to the present facts is the unreported decision of this cou in *R v Governor of Pentonville Prison, ex parte Ecke*[5] decided on 3rd December 1973. Th German Government asked that the accused should be extradited on a number of charg of fraudulent trading, the dishonesty alleged being a false representation as to a futur intention and not as to an existing fact. The date of the treaty[6] was 1960 at which dat

1 [1896] 1 QB 509
2 [1896] 1 QB 509 at 517
3 (1902) 18 TLR 231
4 (1902) 18 TLR 231 at 232
5 [1974] Crim LR 102
6 See Federal Republic of Germany (Extradition) Order 1960, SI 1960 No 1375, Sch 1

a false representation as to a future intention was not a criminal offence in England. Article 2 of the treaty provided: 'Extradition shall be reciprocally granted for the following crimes, provided that the crime charged constitutes an extradition crime according to the laws of the territory from which and to which extradition is desired.' The list of crimes included in the English version under para 17 are: 'Fraud by a bailee, banker, agent, factor or trustee, or by a director, member or public officer of any company; fraudulent conversion; or obtaining money, valuables, security, or goods by false pretences.' In the German version para 17 consisted of two words meaning, in English, 'fraud'. It was submitted that an offence could not be an extraditable offence within the meaning of the treaty unless it was an offence with all its English constituents, and that as a false pretence as to a future event was not an English offence in 1960, when the treaty was made, it was not an extradition crime under the treaty. The fact that since the Theft Act 1968, a misrepresentation as to a future event will found a criminal charge was said to be beside the point for to accept it as now coming within the treaty would be to amend the treaty unilaterally. This argument was rejected: the court held that the words descriptive of the offence in the treaty were to be given their general meaning, general to the lawyer and layman alike, their ordinary international meaning, and not a particular meaning they may have attracted in England. Giving the words a liberal meaning, treating them not as words of art but as words of general description, the accused's activities came within both the English and German versions of art 17. The court pointed out that the requirement that the facts alleged must amount to an offence in English law would have protected him from extradition if his offences had been committed before 1968.

It was helpful to have citation of three American authorities, two decisions of the Supreme Court (*Wright v Henkel*[1] and *Factor v Laubenheimer*[2]), and one decision of the Court of Appeal of the second circuit (*Shapiro v Ferrandina*[3]). None of them bear directly on the problem in this case, but they show no difference in their general approach to extradition to that adopted by the courts in this country. I will do no more than cite briefly from the opinion of the court in *Wright v Henkel*[4]:

> 'Treaties must receive a fair interpretation, according to the intention of the contracting parties, and so as to carry out their manifest purpose. The ordinary technicalities of criminal proceedings are applicable to proceedings in extradition only to a limited extent . . . The general principle of international law is that in all cases of extradition the act done on account of which extradition is demanded must be considered a crime by both parties . . .'

Finally, in reference to the definition of the crime under the American and British statutes[5]: 'Absolute identity is not required. The essential character of the transaction is the same, and made criminal by both statutes.'

With the guidance of these authorities I turn back to the statutory provisions. Article III of the treaty provides:

> '(1) Extradition shall be granted for an act or omission the facts of which disclose an offence within any of the descriptions listed in the Schedule annexed to this Treaty, which is an integral part of the Treaty, or any other offence, if: (*a*) the offence is punishable under the laws of both Parties by imprisonment or other form of detention for more than one year or by the death penalty; (*b*) the offence is extraditable under the relevant law, being the law of the United Kingdom or other territory to which this Treaty applies by virtue of sub-paragraph (1)(*a*) of Article II;

1 (1902) 190 US 40
2 (1933) 290 US 276
3 (1973) 478 F 2d 894
4 (1902) 190 US 40 at 57–58 per Fuller CJ
5 (1902) 190 US 40 at 58

and (*c*) the offence constitutes a felony under the law of the United States of America.'

The first requirement is satisfied: burglary is in the schedule. The facts do disclose acts that would be recognised by layman and lawyer alike as falling within the concept of burglary, and it matters not that the two crimes are not identically defined. Sub-paras (*a*) and (*c*) also are satisfied. Burglary in both countries is punishable by imprisonment for more than one year and it is a felony under American law.

I turn to sub-para (*b*). For the offence to be extraditable under the law of the United Kingdom it must be an extradition crime as defined by s 26 of the Extradition Act 1870, for it is only in respect of an extradition crime that the magistrate has power to commit an accused person under s 8. The definition in s 26 reads: 'The term "extradition crime" means a crime which, if committed in England or within English jurisdiction, would be one of the crimes described in the first schedule to this Act.'

Now I come to what I consider to be the nub of the case. Is this definition to be construed as meaning that the crime as defined in the foreign law must contain all the essential ingredients of one of the English crimes described in the schedule, in which case the applicants' submission succeeds because the American definition of burglary does not require trespass as an essential element? Alternatively, does the definition mean that an 'extradition crime' has been committed if that which the accused has done would have amounted to the commission of one of the crimes in the schedule if it had been done in England? If this is the true meaning of the definition, the applicants fail for the evidence shows that they committed the crime of burglary according to English law.

In my judgment, the second construction is to be preferred. The first construction would give rise to all the difficulties inherent in attempting to apply extradition on the unlikely foundation that foreign definitions of crimes, often in different languages and operating in very different legal systems, will accord with English definitions. The authorities show that the courts do not expect or look for such identity of definition.

On the other hand, an English court should have no difficulty in deciding whether a given set of facts does or does not constitute a crime according to English law. The authorities that have been cited stress the importance that the facts of the case should disclose an offence against the law of both countries and appear to me to lean heavily towards this interpretation of the definition. I appreciate that this construction may in theory result in the possibility of conviction in a foreign country which would not occur here. Although a theoretical possibility, it is I think a very unlikely result and, certainly so far as I can see, there is not a remote chance of it in the present case. This construction still leaves the accused with the protection that he is only to be extradited for a crime that is substantially similar in concept in both countries and I do not believe that this will result in any injustice.

I therefore summarise by saying that double criminality in our law of extradition is satisfied if it is shown: (1) that the crime for which extradition is demanded would be recognised as substantially similar in both countries, and (2) that there is a prima facie case that the conduct of the accused amounted to the commission of the crime according to English law.

I therefore conclude that double criminality does not have the meaning contended for by the applicants and their objection fails.

Are the offences of a political character?

Extradition will not be granted if the offence with which the accused is charged is of a political character. An offence of a political character is an elusive concept and probably defies any completely satisfactory definition. It is probably not desirable to attempt one because, as Lord Radcliffe said in *Schtraks v Government of Israel*[1], it is virtually impossible to find one that does not cover too wide a range. It is submitted that the offences were of a political character because the applicants were engaged in an attempt to change the

1 [1962] 3 All ER 529 at 539, [1964] AC 556 at 589

olicy of the United States Government towards the Church of Scientology and that the urglaries were committed to further this end. The applicants rely on passages in the ɔinions in *Schtraks v Government of Israel*[1] per Lord Reid, and *Tzu Tsai Cheng v Governor Pentonville Prison*[2] per Lord Diplock, which refer to an offence of a political character eing one aimed at changing the policy of the foreign government. But these words of ıeir Lordships must be read in the full context of their speeches which make it clear that ıey were considering offences committed in the course of a struggle against a foreign ɔvernment from which the accused had sought asylum in this country. As society ecomes more sophisticated, and populations increase, so the scope of government ıcreases with the inevitable result that the policies of government affect the everyday fe of the individual over an ever widening range of his daily activities.

In respect of any government policy there will probably be a substantial number of eople who disagree with it and would wish to change it, but it should not be thought ıat i ey commit a crime to achieve their ends it necessarily becomes an offence of a ɔlitical character. In only two of the reported cases have our courts held that the offence as of a political character: in *Re Castioni*[3] in which the accused had killed a member of ıe government in the course of an armed uprising that overthrew the government, and ı *Re Kolczynski*[4] in which a number of Polish seamen mutinied and sailed their vessel to ngland where they sought asylum for they feared prosecution for their political pinions if they should be returned to Poland. The idea underlying an offence of a ɔlitical character is expressed by Lord Radcliffe in *Schtraks v Government of Israel*[5] in the ɔllowing language:

> 'In my opinion the idea that lies behind the phrase "offence of a political character" is that the fugitive is at odds with the state that applies for his extradition on some issue connected with the political control or government of the country. The analogy of "political" in this context is with "political" in such phrases as "political refugee," "political asylum" or "political prisoner."'

Counsel for Mrs Kember has taken the court through a great deal of evidence in the ɔurse of his submission on this aspect of the case. The evidence reveals that the Church f Scientology has been engaged in a protracted struggle with the Internal Revenue ervices Department of the United States to secure exemption from taxes on the grounds ıat it is a religious foundation, and that it has also fought another long battle through ıe courts against the Food and Drugs Administration to establish that they were entitled ɔ use a device known as an E-Meter as a part of their religious practice. It is also apparent om the documents that the Internal Revenue Services Department and the Food and Drug dministration entertained grave doubts about the bona fides of the Scientologists nd that they had received a number of reports suggesting various forms of criminal ctivity and chicanery on the part of the church and its members. The material before s also shows that these departments of the United States Government were not alone in ıeir distrust of Scientology and its practices. The State of Victoria passed legislation gainst it and this country has refused to permit entry to those wishing to enter the mployment of the Church of Scientology. It should, however, be stated that the hurch of Scientology has achieved a substantial degree of success in the American tigation; the Internal Revenue Service in June and July 1975 finally conceded exempt atus for tax purposes to all but one of its churches in the United States, and subject to ertain safeguards the courts have permitted the use of the E-Meter.

Counsel for Mrs Kember submitted that the burglaries were planned in order to gain ccess to the information that had been collected by the Internal Revenue Service and

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[1962] 3 All ER 529 at 535, [1964] AC 556 at 583
[1973] 2 All ER 204 at 209, [1973] AC 931 at 945
[1891] 1 QB 419
[1955] 1 All ER 31, [1955] 1 QB 540
[1962] 3 All ER 529 at 540, [1964] AC 556 at 591

Department of Justice so that the Church of Scientology could inform themselves as to the false reports circulating about it between government departments, and identify and deal with the particular persons within the departments who were hostile to the church.

I am prepared to accept that this was one motive for the burglaries. Guardian order 1361 dated 21st October 1974, which seems to be the seminal document that initiated the break-ins, does refer to employees of the government departments concerned as, I quote, 'suppressive psychotics utilising the IRS as a substitute for standard justice procedures on scientology' and later it refers to the 'suppressive psychotics being identified and handled'. We were not told just how it was proposed to handle them. But this was only one of the guardian orders put in evidence, and it is manifest from the terms of other orders that a very important purpose of the burglaries was to obtain information that would help in the litigation. By way of examples only, I quote from the guardian order dated 5th December 1975: 'Place an agent in the US Attorneys Office DC as a first action as this office should cover all Federal agencies that we are in litigation with or may be in the litigation with', and the guardian order dated 27th March 1976: 'An excellent B1 success over the last year was the obtaining of non-FOI [non-Freedom of Information Act] data that resulted in aiding our overall strategy to get the CofS tax exemptions.'

I am unable to accept that organising burglaries either for the purpose of identifying persons in government offices hostile to the Scientologists, or for the purpose of gaining an advantage in litigation, or even for the wider purpose of refuting false allegations thus enabling a better image of the Church of Scientology to be projected to the public, comes anywhere near being an offence of a political character within the meaning of the Extradition Act 1870.

The applicants did not order these burglaries to take place in order to challenge the political control or government of the United States; they did so to further the interests of the Church of Scientology and its members, and in particular the interest of Ron L Hubbard, the founder of Scientology. In my view, it would be ridiculous to regard the applicants as political refugees seeking asylum in this country, and I reject the submission that these were offences of a political character.

The public law argument

It is a well established rule that our courts will not enforce a foreign revenue, penal or public law. This means that our courts will not try and either punish or give a remedy for the breach of such a law committed in a foreign country. Counsel for Mrs Kember submits that the United States Government is attempting by indirect means to enforce a public law of the United States, namely the Freedom of Information Act. He says the real purpose behind the request for extradition is to punish the applicants not for burglary but for stealing confidential government information protected by the Freedom of Information Act. This could not be achieved by extradition proceedings because a breach of that Act is not an extradition crime, and so, it is said, resort is had to the offence of burglary. Although in the course of his argument counsel for Mrs Kember said he was not suggesting any bad faith on the part of the Government of the United States, it seems to me that bad faith is necessarily implicit in this submission. Under the treaty the United States give their undertaking that the accused will not be tried for any offence other than that for which they are extradited; if in the face of this undertaking they were ostensibly tried for burglary but in fact punished for the commission of a different offence, I should regard that as flagrant bad faith. When the offence has not been shown to be of a political character our courts will not entertain allegations of bad faith on the part of the requesting country: see *Re Arton*[1] and *R v Governor of Brixton Prison, ex parte Kolczynski*[2].

1 [1896] 1 QB 108
2 [1955] 1 All ER 31, [1955] 1 QB 540

This is sufficient to dispose of the submission, but there is in fact a further ground for rejecting it. In the course of the proceedings in the United States, Judge Richey has given the following ruling:

> 'The government will not be permitted to rely on any alleged conversion of government information for a violation of section 641 in this case. However the government may proceed on the theory that copies made from government resources are owned by the government.'

This makes it doubly unthinkable that their punishment will not be for burglary but for stealing confidential information. This objection therefore fails.

The construction of s 3(1) of the Extradition Act 1870

Section 3(1) provides:

> 'A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, or if he proves to the satisfaction of the police magistrate or the court before whom he is brought on habeas corpus, or to the Secretary of State, that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character.'

Counsel for Mrs Kember addressed an argument to the court on the construction of s 3(1). He submitted that stealing confidential information was a political act and that the requisition for surrender was made with a view to punishing the applicants for this offence, and that they were thus protected by the second limb of s 3(1). For the reasons I have already given this submission would fail on the facts, but it is also bound to fail on the construction of the section. It is submitted that, even if the crime for which extradition is asked is not an offence of a political character within the first limb of the section, the second limb allows the fugitive criminal to show that the requesting country intends to try or punish him for some other political offence. This was the construction of the section adopted by Lord Russell CJ in *Re Arton*[1]. But since that date the section has been construed in two modern authorities: by Lord Goddard CJ in *Re Kolczynski*[2], and by Lord Parker CJ[3] in the Divisional Court and by Lord Radcliffe[4], Lord Reid[5] and Lord Evershed[6] in the House of Lords in the *Schtraks* case[7]. They have all rejected Lord Russell CJ's construction and held that the second limb of the section does no more than permit the accused to show by evidence that the offence for which extradition is asked is in truth of a political character, although it might not appear to be so from the evidence produced by the country requesting extradition. In my judgment, this court is bound by that weight of authority to apply this construction.

The law of the European Economic Community

The final submission is made on behalf of Mrs Kember only and by virtue of her status as a national of the United Kingdom. It is submitted that the order of committal to await extradition is a restriction on her right to move freely between countries within the community guaranteed by art 48 of the Treaty of Rome and can only be justified on grounds of public policy under art 48(3), and in accordance with the provisions of Council Directive 64/221/EEC of 25th February 1964.

The basis of this submission is that extradition is closely analogous to deportation. In *R v Bouchereau*[8] the European Court of Justice on a reference from the Marlborough

1 [1896] 1 QB 108
2 [1955] 1 All ER 31 at 35–38, [1955] 1 QB 540 at 549–553
3 [1962] 2 All ER 176 at 187–192, [1963] 1 QB 55 at 81–89
4 [1962] 3 All ER 529 at 538–541, [1964] AC 556 at 587–592
5 [1962] 3 All ER 529 at 533–536, [1964] AC 556 at 580–585
6 [1962] 3 All ER 529 at 545, [1964] AC 556 at 599
7 [1962] 3 All ER 529, [1964] AC 556
8 [1978] QB 732

Street Magistrates' court held that a recommendation for deportation made by a criminal court in this country was a measure within the meaning of art 3(1) and (2) of EEC Directive 64/221 and could only be made on grounds of public policy. The case concerned a French national convicted of the unlawful possession of drugs and it was accepted that a deportation order would constitute a restriction on his freedom of movement within art 48. Directive 64/221 applies only to foreign nationals and therefore has no direct application to the facts of the present case; it is concerned with the behaviour of member states towards foreign nationals in relation to entry to or expulsion from their territory. However, it has been argued that a member state is under a duty to treat its own nationals no less favourably than foreign nationals, for which the authority of *Knoors v Secretary of State for Economic Affairs*[1] was cited, and that as extradition is equivalent to deportation a member state can only extradite one of its own nationals if it applies the same criteria as it is required to apply by Directive 64/221 in the case of foreign nationals.

If this submission is right, it will impose a formidable fetter on extradition. It will mean that extradition can only be ordered on grounds of public policy based exclusively on the personal conduct of the individual concerned (see art 3 of the Directive). In *R v Bouchereau*[2] the European Court said in the course of their judgment:

> '27. The existence of a previous conviction can . . . only be taken into account in so far as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy.
>
> '28. Although, in general, a finding that such a threat exists implies the existence in the individual concerned of a propensity to act in the same way in the future, it is possible that past conduct alone may constitute such a threat for the requirements of public policy.'

This concept is easily understood in the case of deportation. A man should not be banished for a crime for which he has been punished unless he remains a present threat to society. But how do you apply it to extradition? The whole basis of extradition is that the accused has offended against society in another country; in all probability he is no threat to our society. Does that then mean he is not to be extradited to face justice where he has committed the crime? I cannot believe that it can have been the intention of those who drew the Treaty of Rome that it should have the effect of so emasculating the process of extradition.

It is submitted by counsel who appeared as amicus curiae that the restrictions on the freedom of an individual imposed by extradition are unaffected by art 48. In *R v Saunders*[3] the European Court of Justice held that art 48 did not aim to restrict the power of member states to lay down restrictions within their own territory on the freedom of movement of all persons subject to their jurisdiction in implementation of domestic criminal law. I regard extradition as far more closely analogous to the implementation of domestic criminal law than to deportation. It is in no true sense a banishment from our shores as is deportation; indeed s 3(2) of the Extradition Act 1870 specifically provides that there will be no extradition unless the foreign state undertakes to allow the accused to return to this country after he has been dealt with for the extradition crime. Extradition is no more than a step that assists in the implementation of the domestic criminal law of the foreign state. This country has extradition treaties with other member states entered into before the Treaty of Rome.

Article 234 of the treaty provides:

> 'The rights and obligations arising from agreements concluded before the entry into force of this Treaty between one or more Member states on the one hand, and

1 [1979] 2 CMLR 357
2 [1978] QB 732 at 759
3 [1979] 2 All ER 267, [1979] 3 WLR 359

one or more third countries on the other, shall not be affected by the provisions of this Treaty.'

It would be a curious result if extradition could be granted on generally accepted principles between member states who had entered into extradition treaties before the Treaty of Rome but on very different principles, introducing the concept of public policy already discussed, between member states who made or, I suppose, amended, extradition treaties after the Treaty of Rome. Again I cannot think that this result can have been intended.

Counsel for Mrs Kember wishes us to refer to the European Court of Justice the following question:

'Whether a Member-State, in considering an application for the extradition (whether to another Member-State or to a Third party) of a worker who is a national of that first Member-State, must have regard to the provisions of Article 48(3) of the Treaty establishing the E.E.C.'

Article 48(3) requires the justification to be on grounds of public policy.

If we did refer this question we should undoubtedly have to refer a number of supplementary questions to elucidate how the concept of public policy was to be applied to extradition.

Lord Denning MR, in *H P Bulmer Ltd v Bollinger SA*[1] laid down guidelines to assist the courts in deciding whether to refer a question to the European Courts of Justice. The court should refer the point unless it considers it to be reasonably clear and free from doubt.

I have come to the clear conclusion that, borrowing the words of Advocate-General Warner in his opinion in *R v Saunders*[2], it is common sense that dictates that art 48 should be interpreted as manifestly not intended to apply to the exercise of the power of this country to extradite an accused person to the United States of America. Accordingly I would not make any reference to the European Court of Justice.

For the reasons I have given I would refuse the writ of habeas corpus to these applicants.

LORD WIDGERY CJ. I agree with the judgment which has just been delivered.

Applications refused. Leave to appeal to the House of Lords refused.

Solicitors: *Stephen M Bird*, East Grinstead (for the applicants); *Director of Public Prosecutions* (for the United States Government); *Treasury Solicitor.*

N P Metcalfe Esq Barrister.

1 [1974] 2 All ER 1226, [1974] Ch 401

2 [1979] 2 All ER 267 at 276, [1979] 3 WLR 359 at 366

It appears that between 1968 – 1980 the had a

These two UK immigration cases sprang from the British Government's policy between 1968 and 1980 of denying entry to the UK to Scientologists. One case, Iran Minister v. Home Office (1974

4. ~~1.~~ **R v Immigration Appeal Tribunal Exp. L Ron Hubbard (1985)**

was finally heard before the European court of justice, although it

Country : England
Court : High Court (QBD)
Source : LEXIS search; reported cases also a

seemed to turn on the decision on the fact that the plaintiff was a Scientologist.

Issue : Hubbard applied for judicial review of decision of the Immigration Appeal Tribunal to refusing him leave to enter the UK on a short visit.

Decision : Application refused

Analysis :

1. This application was the culmination of a long process by which Mr Hubbard sought leave to enter the UK for a short visit.

2. The original decision appears to have been taken in accordance with ~~a decision made in 1968 by the~~ the British Government that Mr Hubbard would not, having regard to the Government's policy towards Scientology, be given leave to enter the UK. ~~However~~, The ~~this~~ 'ban' on Scientology was lifted in 1980. However Mr Hubbard was informed that it was still unlikely that he would be allowed to enter, and ultimately, he was indeed refused leave.

policy referred to above

3. In reaching its decision (which was based ~~on~~ mainly on legal grounds) the High Court does not seem to have taken into account the nature of Mr Hubbard or of Scientology, and indeed it appeared to take the view that in refusing Mr Hubbard entry the Immigration Appeals Tribunal had not "attached some adverse significance to the Church of Scientology" beyond the agreed fact that from 1968 – 1980 members were denied entry to the UK.

not relevant for present purposes

5 ~~2.~~ **R v Governor of Pentonville Prison Ex P Budlang and another (1979)** with SK

This case arose from extradition proceedings concerning two individuals, a UK and a US national who were the subject of an application by the US Government for their extradition on charges of burgling US Internal Revenue Services offices looking for confidential material relating to the church's affairs.

Country : England
Court : High Court (QBD)
Source : LEXIS → reported cases search ; also a

Issue : Application, inter alia on the grounds that their offences were political in character and therefore not extraditable. by the individuals for ~~habeas corpus~~ habeas

Decision : Applications for habeas corpus refused.

habeas corpus

Analysis :

The Shadowy Story Behind Scientology's Tax-Exempt Status

New York Times, 9 March 1997

By DOUGLAS FRANTZ

On Oct. 8, 1993, 10,000 cheering Scientologists thronged the Los Angeles Sports Arena to celebrate the most important milestone in the church's recent history: victory in its all-out war against the Internal Revenue Service.

For 25 years, IRS agents had branded Scientology a commercial enterprise and refused to give it the tax exemption granted to churches. The refusals had been upheld in every court. But that night the crowd learned of an astonishing turnaround. The IRS had granted tax exemptions to every Scientology entity in the United States.

"The war is over," David Miscavige, the church's leader, declared to tumultuous applause.

The landmark reversal shocked tax experts and saved the church tens of millions of dollars in taxes. More significantly, the decision was an invaluable public relations tool in Scientology's worldwide campaign for acceptance as a mainstream religion.

On the basis of the IRS ruling, the State Department formally criticized Germany for discriminating against Scientologists. The German government regards the organization as a business, not a tax-exempt religion, the very position maintained for 25 years by the U.S. government.

The full story of the turnabout by the IRS has remained hidden behind taxpayer privacy laws for nearly four years. But an examination by The New York Times found that the exemption followed a series of unusual internal IRS actions that came after an extraordinary campaign orchestrated by Scientology against the agency and people who work there. Among the findings of the review by The New York Times, based on more than 30 interviews and thousands of pages of public and internal church records, were these:

- Scientology's lawyers hired private investigators to dig into the private lives of IRS officials and to conduct surveillance operations to uncover potential vulnerabilities, according to interviews and documents. One investigator said he had interviewed tenants in buildings owned by three IRS officials, looking for housing code violations. He also said he had taken documents from an IRS conference and sent them to church officials and created a phony news bureau in Washington to gather information on church critics. The church also financed an organization of IRS whistle-blowers that attacked the agency publicly.

- The decision to negotiate with the church came after Fred T. Goldberg Jr., the commissioner of the Internal Revenue Service at the time, had an unusual meeting with Miscavige in 1991. Scientology's own version of what occurred offers a remarkable account of how the church leader walked into IRS headquarters without an appointment and got in to see Goldberg, the nation's top tax official. Miscavige offered to call a halt to Scientology's suits against the IRS in exchange for tax exemptions.

- After that meeting, Goldberg created a special committee to negotiate a settlement with Scientology outside normal agency procedures. When the committee determined that all Scientology entities should be exempt from taxes, IRS tax analysts were ordered to ignore the substantive issues in reviewing the decision, according to IRS memorandums and court files.

- The IRS refused to disclose any terms of the agreement, including whether the church was required to pay back taxes, contending that it was confidential taxpayer information. The agency has maintained that position in a lengthy court fight, and in rejecting a request for access by The New York Times under the Freedom of Information Act. But the position is in

> stark contrast to the agency's handling of some other church organizations. Both the Jimmy Swaggart Ministries and an affiliate of the Rev. Jerry Falwell were required by the IRS to disclose that they had paid back taxes in settling disputes in recent years.

In interviews, senior Scientology officials and the IRS denied that the church's aggressive tactics had any effect on the agency's decision.

They said the ruling was based on a two-year inquiry and voluminous documents that showed the church was qualified for the exemptions.

Goldberg, who left as IRS commissioner in January 1992 to become an assistant secretary at the Treasury Department, said privacy laws prohibited him from discussing Scientology or his impromptu meeting with Miscavige.

The meeting was not listed on Goldberg's appointment calendar, which was obtained by The New York Times through the Freedom of Information Act.

The IRS reversal on Scientology was nearly as unprecedented as the long and bitter war between the organizations. Over the years, the IRS had steadfastly refused exemptions to most Scientology entities, and its agents had targeted the church for numerous investigations and audits.

Throughout the battle, the agency's view was supported by the courts. Indeed, just a year before the agency reversal, the U.S. Claims Court had upheld the IRS denial of an exemption to Scientology's Church of Spiritual Technology, which had been created to safeguard the writings and lectures of L. Ron Hubbard, the late science fiction writer whose preachings form the church's scripture.

Among the reasons listed by the court for denying the exemption were "the commercial character of much of Scientology," its "virtually incomprehensible financial procedures" and its "scripturally based hostility to taxation."

Small wonder that the world of tax lawyers and experts was surprised in October 1993 when the IRS announced that it was issuing 30 exemption letters covering about 150 Scientology churches, missions and corporations. Among them was the Church of Spiritual Technology.

"It was a very surprising decision," said Lawrence B. Gibbs, the IRS commissioner from 1986 to 1989 and Goldberg's predecessor. "When you have as much litigation over as much time, with the general uniformity of results that the service had with Scientology, it is surprising to have the ultimate decision be favorable. It was even more surprising that the service made the decision without full disclosure, in light of the prior background."

While IRS officials insisted that Scientology's tactics did not affect the decision, some officials acknowledged that ruling against the church would have prolonged a fight that had consumed extensive government resources and exposed individual officials to personal lawsuits. At one time, the church and its members had more than 50 suits pending against the IRS and its officials.

"Ultimately the decision was made on a legal basis," said a senior IRS official who was involved in the case and spoke on the condition that he not be identified. "I'm not saying Scientology wasn't taking up a lot of resources, but the decision was made on a legal basis."

The church's tactics appeared to violate no laws, and its officials and lawyers argued strenuously in a three-hour interview at church offices in Los Angeles last month that the exemptions were decided solely on the merits. They said the church had been the victim of a campaign of harassment and discrimination by "rogue agents" within the IRS. Once the agency agreed to review the record fairly, they said, it was inevitable that the church would be granted its exemptions.

"The facts speak for themselves," said Monique E. Yingling, a Washington lawyer who represented the church in the tax case. "The decision was made based on the information that the church provided in response to the inquiry by the Internal Revenue Service."

Church officials and lawyers acknowledged that Scientology had used private investigators to look into their opponents, including IRS officials, but they said the practice had nothing to do with the

IRS decision.

"This is a church organization that has been subjected to more harassment and more attacks certainly than any religion in this century and probably any religion ever, and they have had to perhaps take unusual steps in order to survive," Ms. Yingling said.

THE ORIGINS: AN EXPANDING CHURCH ON A COLLISION COURSE

Since its founding in 1950, Scientology has grown into a worldwide movement that boasts 8 million members, although defectors say the actual number is much smaller. The church, which has vast real estate holdings around the world and operates a yacht based in the Caribbean, describes itself as the only major new religion to have emerged in the 20th century.

Its founder, Hubbard, asserted that people are immortal spirits who have lived through many lifetimes. In Scientology teachings, Hubbard described humans as clusters of spirits that were trapped in ice and banished to Earth 75 million years ago by Xenu, the ruler of the 26-planet Galactic Confederation.

Scientology describes its goal as "a civilization without insanity, without criminals and without war, where the able can prosper and honest beings can have rights, and where Man is free to rise to greater heights." To reach those heights, Scientologists believe, each individual must be "cleared" of problems and afflictions through a series of counseling sessions known as "auditing." The sessions are performed by a trained auditor assisted by a device similar to a lie detector, known as an E-meter.

Although Scientology's complicated finances make a total estimate difficult, records on file at the IRS indicate that in the early 1990s the church was earning about $300 million a year from auditing fees, the sale of Scientology literature and recordings, management services and the franchising of its philosophy. Church officials said those figures were higher than actual earnings.

The original mother church, the Church of Scientology of California, was established by Hubbard in Los Angeles in 1954. Three years later, it was recognized as tax exempt by the IRS. But in 1967, the agency stripped the church of its exemption, and a fierce struggle broke out between the agency and the church.

In its revocation letter, the agency said that Scientology's activities were commercial and that it was being operated for the benefit of Hubbard, a view supported by the courts several times in the ensuing 25 years. The church ignored the action, which it deemed unlawful, and withheld taxes.

The IRS put Scientology on its hit list. Minutes of IRS meetings indicate that some agents engaged in a campaign to shut down Scientology, an effort that church officials cite as evidence of bias. Some of the tactics led to rebukes by judges, including a 1990 ruling in Boston that criticized the IRS for abusive practices in seeking access to church records.

Scientology retaliated. In 1973 the church embarked on a program code named Snow White. In a document labeled "secret," Hubbard outlined a strategy to root out all "false and secret files" held by governments around the world regarding Scientology.

"Attack is necessary to an effective defense," Hubbard wrote.

Snow White soon turned sinister. Under the supervision of Hubbard's third wife, Mary Sue, Scientologists infiltrated the Department of Justice and the IRS to uncover information on Hubbard. They broke into offices at night and copied mountains of documents. At one point, an electronic bugging device was hidden inside an IRS conference room the day before a meeting about Scientology.

Critics say those actions fell under a church doctrine that Hubbard had called the Fair Game policy. Hubbard wrote that church enemies may "be deprived of property or injured by any means by any Scientologist without any discipline of the Scientologist. May be tricked, sued or lied to or destroyed."

The conspiracy was uncovered in 1977, and Mrs. Hubbard and 10 others were eventually sentenced

to prison. Hubbard was named an unindicted co-conspirator because investigators could not link him to the crimes.

The church promised to change its ways. Scientologists said members who broke the law were purged, including Mrs. Hubbard, and the church was restructured to protect against a recurrence. The Fair Game policy, they said, has been misinterpreted by courts and critics.

"There is nothing like that," said Elliot J. Abelson, the church's general counsel. "It doesn't happen."

THE COVERT WAR: WHISTLE-BLOWERS AND 'VULNERABILITIES'

But interviews and an examination of court files across the country show that after the criminal conspiracy was broken up, the church's battle against the IRS continued on other fronts. When Hubbard died in January 1986, his opposition to taxes lived on among the new generation of leaders, including Miscavige, a second-generation Scientologist.

Part of the battle was public. A leading role was played by the National Coalition of IRS Whistle-Blowers, which Scientology created and financed for nearly a decade.

On the surface, the coalition was like many independent groups that provide support for insiders who want to go public with stories of corruption. But Stacy B. Young, a senior Scientology staff member until she defected in 1989, said she helped plan the coalition as part of Scientology's battle against the IRS in late 1984 while she was managing editor of the church's Freedom Magazine.

"The IRS was not giving Scientology its tax exemption, so they were considered to be a pretty major enemy," Ms. Young said. "What you do with an enemy is you go after them and harass them and intimidate them and try to expose their crimes until they decide to play ball with you. The whole idea was to create a coalition that was at arm's length from Scientology so that it had more credibility."

Ms. Young said she recruited Paul J. DesFosses, a former IRS agent who had spoken out against the agency, to serve as the group's president. DesFosses acknowledged that Scientology provided substantial financing, but he denied that the church created or ran the coalition.

"We got support from lots of church groups, including the Church of Scientology," DesFosses said in a recent interview.

The coalition's biggest success came in 1989 when it helped spark congressional hearings into accusations of wrongdoing by IRS officials. Using public records and leaked IRS documents, the coalition showed that a supervisor in Los Angeles and some colleagues had bought property from a firm being audited by the agency. Soon after the purchase, the audit was dropped and the firm paid no money.

Kendrick L. Moxon, a longtime church lawyer, acknowledged that the coalition was founded by Freedom Magazine. He said its work was well known and part of a campaign by Scientology and others to reform the IRS.

The church's war had a covert side, too, and its soldiers were private investigators. While there have been previous articles about the church's use of private investigators, the full extent of its effort against the IRS is only now coming to light through interviews and records provided to The New York Times.

Octavio Pena, a private investigator in Fort Lee, N.J., achieved a measure of reknown in the late 1980s when he helped expose problems within the Internal Revenue Service while working on a case for Jordache Enterprises, the jeans manufacturer.

In the summer of 1989, Pena disclosed in an interview, a man who identified himself as Ben Shaw came to his office. Shaw, who said he was a Scientologist, explained that the church was concerned about IRS corruption and would pay $1 million for Pena to investigate IRS officials, Pena said.

"I had had an early experience with the Scientologists, and I told him that I didn't feel comfortable

with him, even though he was willing to pay me $1 million," Pena said.

Scientology officials acknowledged that Shaw worked for the church at the time, but they scoffed at the notion that he had tried to hire Pena. "The Martians were offered $2 million; that's our answer," said Moxon, whose firm often hired private investigators for the church.

Michael L. Shomers, another private investigator, said he shared none of Pena's qualms, at least initially.

Describing his work on behalf of Scientology in a series of interviews, Shomers said that he and his boss, Thomas J. Krywucki, worked for the church for at least 18 months in 1990 and 1991.

Working from his Maryland office, he said, he set up a phony operation, the Washington News Bureau, to pose as a reporter and gather information about church critics. He also said he had infiltrated IRS conferences to gather information about officials who might be skipping meetings, drinking too much or having affairs.

"I was looking for vulnerabilities," Shomers said.

Shomers said he had turned over information to his Scientology contact about officials who seemed to drink too much. He also said he once spent several hours wooing a female IRS official in a bar at a conference, then provided her name and personal information about her to Scientology.

In one instance, information that Shomers said he had gathered at an IRS conference in the Pocono Mountains was turned over to an associate of Jack Anderson, the columnist, and appeared in one of Anderson's columns criticizing top IRS managers for high living at taxpayer expense.

Shomers said he had received his instructions in meetings with a man who identified himself as Jake Thorn and said he was connected with the church. Shomers said he believed the name was a pseudonym.

Shomers said he had looked into several apartment buildings in Pennsylvania owned by three IRS officials. He obtained public files to determine whether the buildings had violated housing codes, he said, and interviewed residents looking for complaints, but found none.

In July 1991, Shomers said, he posed as a member of the IRS whistle-blowers coalition and worked with a producer and cameraman from NBC-TV to get information about a conference for senior IRS officials in Walnut Creek, Calif. The producer said that she recalled Shomers as a representative of the whistle-blowers, but knew nothing of his connection to Scientology. The segment never ran.

At one point, Shomers said, he slipped into a meeting room at the Embassy Suites, where the conference was held, and took a stack of internal IRS documents. He said he mailed the material to an address provided by his church contact.

Krywucki acknowledged that he had worked for Scientology's lawyers in 1990 and 1991, though he declined to discuss what he did. He said he would ask the lawyers for permission to speak about the inquiry, but he failed to return telephone calls after that conversation.

It is impossible to verify all of Shomers' statements or determine whether his actions were based on specific instructions from church representatives. He said he had often been paid in cash and sometimes by checks from Bowles & Moxon, a Los Angeles law firm that served as the church's lead counsel. He said he had not retained any of the paychecks.

Shomers provided The New York Times with copies of records that he said he had obtained for the church as well as copies of hotel receipts showing that he had stayed at hotels where the IRS held three conferences, in Pennsylvania, West Virginia and California. He also provided copies of business cards, with fake names, that he said had been created for the phony news bureau in Washington and copies of photographs taken as part of his surveillance work.

One of the IRS officials investigated by Shomers recalled that a private investigator had been snooping around properties he managed on behalf of himself and two other mid-level agency

officials.

The official, Arthur C. Scholz, who has since left the IRS, said he was alerted by tenants that a man who identified himself as a private investigator had questioned tenants about him and the other landlords. He said the tenants had not recalled the man's name but had noted that he was driving a car with Maryland license plates.

"He went to the courthouse and found the properties, and then went out banging on doors of these tenants and made a number of allegations dealing with things that were totally bull," said Scholz, who had no involvement with the IRS review of Scientology and was at a loss to explain why the church would have been interested in him. "I notified the local police about it."

Shomers, who has since left the private-investigation business, said he was willing to describe his work for the church because he had come to distrust Scientology and because of a financial dispute with Krywucki.

Moxon, the Scientology lawyer, said the IRS was well aware of the church's use of private investigators to expose agency abuses when it granted the exemptions. Moxon did not deny hiring Shomers, but he said the activities described by Shomers to The New York Times were legal and proper.

Moxon and other church lawyers said the church needed to use private investigators to counter lies spread by rogue government agents.

"The IRS uses investigators, too," said a church lawyer, Gerald A. Feffer, a former deputy assistant attorney general now with Williams & Connolly, one of Washington's most influential law firms. "They're called CID agents" -- for Criminal Investigation Division -- "and the CID agents put this church under intense scrutiny for years with a mission to destroy the church."

A blunt assessment of Scientology's victorious strategy against the IRS was contained in a lengthy 1991 article in International Scientology News, an internally distributed magazine. The article said:

"This public exposure of criminals within the IRS had the desired effect. The Church of Scientology became known across the country as the only group willing to take on the IRS."

"And the IRS knew it," the article continued. "It became obvious to them that we weren't about to fold up or fade away. Our attack was impinging on their resources in a major way, and our exposes of their crimes were beginning to have serious political reverberations. It was becoming a costly war of attrition, with no clear-cut winner in sight."

THE UNUSUAL PEACE: AFTER A MEETING, A 180-DEGREE TURN

Scientology made the initial gesture toward a cease-fire when Miscavige, the church leader, paid an unscheduled visit to the IRS commissioner, Goldberg.

The first full account of that meeting and the events that followed inside the IRS was assembled from interviews, Scientology's own internal account, IRS documents and records in a pending suit brought by Tax Analysts, a nonprofit trade publisher, seeking the release of IRS agreements with Scientology and other tax-exempt organizations.

Feffer, a church lawyer since 1984, said he approached officials at the Justice Department and the IRS in 1991 with an offer to sit down and negotiate an end to the dispute.

The church's version of what followed is quite remarkable. Miscavige and Marty Rathbun, another church official, were walking past the IRS building in Washington with a few hours to spare one afternoon in late October 1991 when they decided to talk to Goldberg.

After signing the visitors' log at the imposing building on Constitution Avenue, the two men asked to see the commissioner. They told the security guard that they did not have an appointment but were certain Goldberg would want to see them. And, according to the church account, he did.

Goldberg said he could not discuss the meeting, although a former senior official confirmed that it occurred. An IRS spokesman said it would be unusual for someone to meet with the commissioner without an appointment.

Miscavige does not grant interviews, church officials said, but Rathbun said the Goldberg meeting was an opportunity for the church to offer to end its long dispute with the agency, including the dozens of suits brought against the IRS, in exchange for the exemptions that Scientology believed it deserved.

"Let's resolve everything," Rathbun recalled saying. "This is insane. It's reached insane levels."

Goldberg's response was also out of the ordinary. He created a special five-member working group to resolve the dispute, bypassing the agency's exempt organizations division, which normally handles those matters. Howard M. Schoenfeld, the IRS official picked as the committee's chairman in 1991, said later in a deposition in the Tax Analysts case that he recalled only one similar committee in 30 years at the agency.

The IRS negotiators and Scientology's tax lawyers held numerous meetings over nearly two years. An IRS official who participated, and who spoke about the meetings on condition that his name not be used, described the sessions as occasionally rancorous, but he said the general tone was far friendlier than over the preceding years.

There are indications that the early momentum was toward resolution. In a letter to Ms. Yingling on Jan. 19, 1992, John E. Burke, the assistant commissioner for exempt organizations, brushed aside what could have been a stumbling block. Ms. Yingling had apparently objected to the potential public disclosure of information that the church was providing to the IRS.

Burke said he did not want the dispute to delay the talks, and he committed the IRS to allowing only a portion of the information to become public. He said the only hitch would come "in the event that our discussions break down, an eventuality that I have no reason to believe will occur."

An IRS official involved in the talks said it was not unusual for the agency to negotiate with a taxpayer over what is made public in an agreement. By agreeing at the outset that information could be withheld, however, the IRS seemed to relinquish a big bargaining chip.

Paul Streckfus, a former official in the IRS exempt organization division, first disclosed the existence of the negotiating committee in a trade journal after the agreement was announced. He said in an interview that creating the group meant a settlement was almost preordained.

"Once the IRS decided to set up this rather extraordinary group, the wheels were in motion for a deal," Streckfus said.

Not even a stinging court decision in favor of the IRS could derail the talks. Midway through the negotiations, in June 1992, the U.S. Claims Court handed down its decision upholding the IRS denial of a tax exemption for Scientology's Church of Spiritual Technology. The ruling underscored the agency's longstanding concerns over the commercial nature of Scientology and other matters.

Ms. Yingling, the church's tax lawyer, said the Claims Court ruling ignored the facts and was filled with gratuitous comments. She said the IRS negotiators were fairer in considering the evidence.

A portion of the correspondence between the agency and church from the two years of negotiations was released when the exemptions were granted three and a half years ago. It fills part of a large bookcase in the IRS reading room in Washington.

The central issues are discussed in a series of lengthy answers by Scientology's lawyers to questions from the IRS. The church provided extensive information on its finances and operational structure.

The senior IRS official involved in the negotiations, who asked not to be identified, said the church satisfied the agency in the three critical areas. He said the committee was persuaded that those involved in the Snow White crimes had been purged, that church money was devoted to tax-exempt purposes and that, with Hubbard's death, no one was getting rich from Scientology.

Ms. Yingling argued that nothing substantive had changed. She said the church had been qualified for tax exemption for years, but biased elements within the IRS had stood in its way.

"There were no changes in the operations or activities of the church," she said. "What came about was finally that they looked at all the information and saw that the church qualified for exemption, and they were satisfied."

In August 1993, the two sides reached an agreement. The church would receive its coveted exemptions for every Scientology entity in the country and end its legal assault on the IRS and its personnel.

There was just one more step. Scientology entities were required to submit new applications for exemption, which were to be evaluated by the agency's exempt organizations division. But something unusual occurred there, too.

Schoenfeld, the negotiations chairman, ordered the two tax analysts assigned to the review not to consider any substantive matters, according to IRS memorandums and records in the Tax Analysts case. Those issues, Schoenfeld informed them, had been resolved.

Both analysts, Donna Moore and Terrell M. Berkovsky, wrote memorandums specifying that they had been instructed not to address issues like whether the church was engaged in too much commercial activity or whether its activities provided undue private benefit to its leaders.

Schoenfeld, who has since left the IRS, said he could not discuss the case. But the senior IRS official involved in the talks said there was nothing sinister about the instructions because those matters had been decided by the negotiating committee. He acknowledged, however, that this was not the typical procedure.

The agreement was announced on Oct. 13, 1993. The IRS refused to make public any of its terms, including whether the church paid any back taxes. The IRS also refused to discuss the legal reasoning behind one of the biggest turnarounds in tax history.

Tax lawyers said the IRS could have required the church to disclose terms of the agreement, which it has done in the past. In 1991, the IRS required the Jimmy Swaggart Ministries to disclose that the group had paid $171,000 in back taxes for violations. In 1993, just a few months before the Scientology agreement, the IRS required the Old Time Gospel Hour, a group affiliated with the Rev. Jerry Falwell, to publicize its payment of $50,000 in back taxes.

"The IRS actually specified which media outlets we were to notify and approved the release," said Mark DeMoss, a spokesman for Falwell. "When nobody picked it up, they put out their own press release."

William J. Lehrfeld, who represents Tax Analysts in its suit to make the Scientology agreement public, said, "You and I, as taxpayers, are subsidizing these people, and we should see this information."

THE AFTERMATH: A FORMER ENEMY BECOMES AN ALLY

Five days before the official announcement, Miscavige went before the Scientology gathering in Los Angeles and declared victory. In a two-hour speech, according to the account in International Scientology News, Miscavige described years of attacks against Hubbard and Scientology by the government.

"No other group in the history of this country has ever been subject to the assault I have briefed you on tonight," he said, calling it "the war to end all wars."

As part of the settlement, Miscavige said, the IRS had agreed to distribute a fact sheet describing Scientology and Hubbard. "It is very complete and very accurate," Miscavige said. "Now, how do I know? We wrote it! And the IRS will be sending it out to every government in the world."

Feffer, Ms. Yingling and Thomas C. Spring, another of the church's tax lawyers, appeared in formal attire on stage that night and received Waterford crystal trophies in recognition of their efforts.

Miscavige called the agreement a peace treaty that would mark the biggest expansion in Scientology history.

The church immediately began citing the IRS decision in its efforts to win acceptance from other governments and to silence critics. But the biggest public relations benefit may have come from the U.S. government itself.

Four months after the exemptions were granted, the State Department released its influential human rights report for 1993, a litany of the countries that abuse their citizens. For the first time, the report contained a paragraph noting that Scientologists had complained of harassment and discrimination in Germany. The matter was mentioned briefly in the 1994 and 1995 reports, too.

Throughout those years, the dispute between Scientologists and the German government escalated. In an intense publicity campaign that included advertisements in this newspaper, the church said that businesses owned by Scientologists were boycotted and that its members were excluded from political parties and denied access to public schools. The church asserted that the German actions paralleled early Nazi persecution of Jews.

The German government responded that Scientology was not a church worthy of tax exemption, but a commercial enterprise -- the very position the IRS had maintained in its 25-year war against the church. German officials said equating the treatment of Scientologists with that of Jews under the Nazi regime was a distortion and an insult to victims of the Holocaust, a view supported by some Jewish leaders in Germany.

The dispute turned into a diplomatic ruckus in January when the State Department released its 1996 human rights report, with an expanded section on Scientology that said German scrutiny of the religion had increased. Artists had been prevented from performing because of their membership in the church and the youth wing of the governing Christian Democratic Union had urged a boycott of the film "Mission: Impossible" because its star, Tom Cruise, is a prominent Scientologist, the State Department said.

German officials were angered by the criticism, and Foreign Minister Klaus Kinkel raised the matter with Secretary of State Madeleine K. Albright when she was in Bonn on Feb. 18. Ms. Albright told him that the issue was a subject for bilateral discussions, but she said she found claims by Scientologists that they are the victims of Nazi-style persecution "distasteful."

Nicholas Burns, the State Department spokesman, said that, despite the belief that Scientologists had gone too far in drawing comparisons to persecution of Jews, the department had felt compelled to expand on the church's troubles with the Germans in its latest human rights report.

"The Germans are quite adamant, based on their own history, that these are the kinds of groups that ought to be outlawed," Burns said. "However, for our purposes, we classify Scientology as a religion because they were granted tax-exempt status by the American government."

An Ultra-Aggressive Use of Investigators and the Courts

By DOUGLAS FRANTZ

For years, Scientology has gone to great lengths to defend itself from critics. Often its defense has involved private investigators working for its lawyers. While the use of private investigators is common in the legal profession, some instances involving the church have been unusual.

Scientology officials said that the investigators operated within the law and that the tactics were necessary to counter attacks made over the years by Internal Revenue Service agents and the press.

"When people stop spreading lies about them and stop printing false allegations about them in newspapers, the church will stop using private investigators," said Monique E. Yingling, a church lawyer.

In 1986 the Federal Court of Appeals in Boston said evidence in an extortion case indicated that Scientology investigators had induced witnesses to lie. It identified one investigator as Eugene M. Ingram.

Eight years later, Ingram was charged with impersonating a police officer in seeking information about a sheriff in Tampa, Fla., while working as a church investigator. He and a Scientology employee flashed badges and told a woman that they were police detectives before questioning her about possible links between a county sheriff and what was said to be a prostitution ring, police records say.

Court officials said a warrant for Ingram's arrest was still outstanding.

Ingram had been dismissed from the Los Angeles Police Department in 1981 after accusations that he was involved in running a prostitution ring and had provided information to a drug dealer. He was acquitted of criminal charges in that case.

Elliot J. Abelson, the church's general counsel, said he had used Ingram often as an investigator and had the highest regard for him. He said the Tampa case was phony.

Richard Behar, an investigative reporter, incurred Scientology's wrath when he wrote a cover article about the church in Time magazine in 1991. The article called the church "a hugely profitable global racket that survives by intimidating members and critics in a Mafia-like manner."

The church and a member sued Time and Behar for libel, and the company spent more than $7 million defending the cases. The church's suit was dismissed last year by a Federal District Court judge, an action being appealed by Scientology. The individual's suit was settled with a corrective paragraph but no money.

Behar contends in a countersuit that even before the article ran, church investigators questioned his acquaintances about his health and whether he had had tax or drug problems. Behar said that after the article ran, he had been followed by Scientology agents and had been so concerned he had hired bodyguards.

In 1992, Judge Ronald Swearinger of Los Angeles County Superior Court told The American Lawyer magazine that he believed Scientologists had slashed his car tires and drowned his collie while he was presiding over a suit against the church. The church denied the accusations.

In 1993, Judge James M. Ideman was presiding over a suit involving Scientology in Federal District Court in Los Angeles when he took the unusual step of withdrawing from the case. In a court statement, he said he could no longer preside fairly because the church "has recently begun to harass my former law clerk who assisted me on this case."

Kendrick L. Moxon, the church's lawyer in the case, said he had tried to question the former clerk about accusations that there was a framed Time magazine cover about Scientology in the judge's chambers. He said that the former clerk had refused to talk to him and that his subpoena for her testimony had been quashed.

Scientology's tactics in court have also drawn judicial rebukes. Last year, the California Court of Appeal accused Scientology of using "the litigation process to bludgeon the opponent into submission." The Federal Court of Appeals in San Francisco said last year that Scientology had played "fast and loose with the judicial system" and levied $2.9 million in sanctions against the church.

By aggressively pursuing its opponents in court, the church seems to heed the preaching of L. Ron Hubbard, its founder, who once wrote: "The purpose of the suit is to harass and discourage rather than win. The law can be used very easily to harass, and enough harassment on somebody who is simply on the thin edge anyway ... will generally be sufficient to cause his professional decrease. If

possible, of course, ruin him utterly."

One focus of suits by Scientologists was the Cult Awareness Network, a nonprofit organization dedicated to countering religious groups it perceived as dangerous.

Scientology has long regarded the network, known as CAN, as an opponent of religious freedom and a hate group. Church officials said the network used "deprogrammers" to kidnap people in an effort to persuade them to leave small religious groups. Deprogrammers affiliated with the network have been convicted of crimes in connection with efforts to force people to leave religious organizations.

Beginning in 1992, Scientologists filed 40 to 50 suits against the network and its officers, contending that they discriminated by refusing to allow Scientologists to attend conventions or join chapters. Some Scientologists prevailed in court.

Moxon, who represented many Scientologists, said the suits had been intended to address network discrimination against people who wanted to reform it.

But Daniel A. Leipold, who represented the network, said during depositions in some of the suits that the actions had been part of a campaign by Scientology to destroy the network.

Last year, the network declared bankruptcy after a $1.8 million judgment against it in a suit brought by a young man who had been a member of a Pentecostal group. The jury found that the man had been forcibly detained by a deprogrammer. Moxon, who represented the man, said that he had taken the case as a religious freedom matter and that his expenses had been paid by the Pentecostal group.

After the network filed for bankruptcy, its name, logo and telephone were bought by a group represented by a lawyer who is a Scientologist. While the church said it had no connection with the purchasers, a brochure mailed by the new Cult Awareness Network in January was a glowing description of Scientology as a means to "increase happiness and improve conditions for oneself and for others."

Scientology versus the IRS

Last updated 11 April 1997
by **Chris Owen** (chriso@lutefisk.demon.co.uk)

A5

October 15, 1996

Re: Church of Scientology (England and Wales)

I would like to alert you to a recent decision of the Austrian Supreme Court and a decision of the European Court on Human Rights regarding Article 14 of the European Convention of Human Rights (the "ECHR"), which prohibits discrimination on the basis of religion and other grounds. These cases directly apply to the Church of Scientology's pending proceeding: the Austrian decision involved a Scientologist and is the first decision to apply the antidiscrimination provisions of the ECHR to the Scientology religion.

Article 14 of the ECHR states that:

> The enjoyment of the rights and freedoms set forth in (the) Convention shall be secured without discrimination 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.

Article 14 safeguards those "placed in analogous situations" against discriminatory differences of treatment in the exercise of the rights and freedoms recognised by the Convention. (See Lithgow v. UK (1986) 8 EHRR 329, para. 177); Johnston v. Ireland (1987) 9 EHRR 203.

Before I address the Scientology case, it would be helpful to place it in the context of the second decision I will discuss, a European Court of Human Rights decision involving religious discrimination.

In Hoffman v. Austria, (1994) 17 EHRR 293 (23 June 1993), a mother who joined the Jehovah's Witnesses while her divorce proceedings were still pending applied to the courts for custody of her children. The Austrian Supreme Court awarded custody to the applicant's ex-husband. The Supreme Court held that this was compelled by Austrian law which prohibited changing the religion of the children without the consent of both parents. It also declared that the mother's religious beliefs would be detrimental to the welfare of the children as it might result in delay of necessary blood transfusions (which were contrary to the beliefs of Jehovah's Witnesses) and as the childrens' contact with Jehovah's Witnesses would "socially marginalize" the children.

The mother appealed the decision to the European Court on Human Rights, which determined that the custody decision violated Article 14 in conjunction with Article 8 (which protects the right to respect for private and family life) because it involved discrimination on the basis of religion. The Court held that the Supreme Court's order amounted to a difference in treatment based on the applicant's religion and that this difference was not based on an "objective and reasonable justification". Although Austria argued that there had been no interference with the applicant's rights under the ECHR because disparate treatment based on the mother's religious beliefs was justified and because she had not been prevented from practising her religion, these arguments were categorically rejected by the Court. Instead, the Court noted that no reason could ever justify disparate treatment based solely on religious beliefs:

> **"Notwithstanding any argument to the contrary, a distinction based essentially on a difference in religion alone is not acceptable."**

The European Court's mandate against disparate treatment based solely on religious beliefs was recently followed by the Austrian Supreme Court in a custody

proceeding involving a mother who had converted to Scientology after the birth of her son.

In In Re Fabio Rasp, 2 Ob 2192/96h (23 August 1996), the Supreme Court reversed an appeals court decision against the mother. The Court first noted that the appeals court decision was procedurally deficient as it "in a one sided fashion" adopted verbatim derogatory information on Scientology contained in a brochure published by the German Federal Ministry of Family and Youth Affairs and "made that into the basis for its decision". The mother was provided no opportunity to rebut the information contained in this brochure, which was rife with false and derogatory information on Scientology having no basis in fact. In addition, the German government's charges that the Church was "undemocratic" due to its hierarchical structure were rejected by the Supreme Court. Instead, the Court noted that the Church's hierarchical structure "corresponds with the character of all important religious communities and specifically the Roman Catholic Church".

The Supreme Court also noted that the findings of the appeals court regarding Scientology were "superfluous" because religious beliefs may never provide a justification for disparate treatment. The Court went on to say that the European Court's decision in Hoffman mandates that "a decision which in essence is only based on a different religious affiliation as such cannot be accepted." Accordingly, the Court held that:

> **The opinion of the appeals court, that custody has to be taken away from the mother solely on the basis of her membership in Scientology, is contrary to the European Convention on Human Rights and is therefore in violation of the law.**

These cases establish that the Commissioners proposed distinction between religions based solely upon their system of beliefs to the detriment of certain religions flagrantly violated the principle of nondiscrimination articulated in the Convention. This is especially true as the article in the Convention which focuses on freedom of religion, Article 9, has been expressly held to extend to both theistic and non-theistic beliefs, and as the European Court has expressly held that Scientology is a religious group entitled to the protections

of Article 9 (see X and Church of Scientology v. Sweden, Application No. 7805/77, Dec. 05.05.79, 16 DR 58; Church of Scientology and Members v. Sweden; Application No. 8282/78, Dec. 14.07.80, 21 DR 109. Under these circumstances, the Commissioners would-be definition of religion directly contravenes fundamental freedoms protected by Article 14 in conjunction with Article 9.

As the European Court has made it crystal clear that nothing -- no argument, no reason, no justification -- allows for disparate treatment of religions based upon their system of beliefs or makes such treatment right, the Commissioners must afford Scientology the same rights and protections afforded so-called "traditional" religions.

For your convenience, I am telefaxing a copy of this letter to you now and will mail the original along with copies of these decisions overnight. I look forward to seeing you on the 24th.

Respectfully submitted,

Enclosures

A5.1

Our ref: PDH/hb/Charity

23 October 1996

Church of Scientology (England & Wales)

When we last met with you on 10 September 1996 we presented the formal application for registration of Church of Scientology (England and Wales) ("the Church") as a charity under the Charities Act 1993.

With the Church's application, we showed, inter alia, that the Commissioners are not barred by any court decision from recognising Scientology as a religion, and that over the past few decades the Charity Commission has registered a multitude of religious groups that do not meet the Commissioners' newly proposed (and never applied) definition of "traditionally theistic" religions. We also showed that any refusal by the Commissioners to register the Church on the basis that Scientology is not a "traditionally theistic" religion would constitute a clear violation of international law and the Conventions to which the United Kingdom is a signatory, including the European Convention on Human Rights ("the Convention").

In particular, we referenced two cases in which the European Commission on Human Rights ("the European Commission") expressly ruled that the Church of Scientology, as a religious community, is entitled to the protection of Article 9 of the Convention, which guarantees freedom of religion. See X and Church of Scientology v. Sweden, App. No. 7805/77, 16 DR 68 and Church of Scientology and 128 Members v. Sweden, App. No. 8282/78, 21 DR 109. The first of these cases constituted a seminal decision by the European Commission that reversed their long-standing position to accord churches standing to sue to protect the rights of their members under Article 9. In the second case, the European Commission confirmed its earlier decision on the question of standing, but went on to rule against the Church on the ground that there had been no discrimination under Article 14 of the Convention between it and other religious groups.

During our meeting, you acknowledged that you had been aware of the earlier case, but Mr Dibble cautioned that he did not believe that the European Commission had ever directly ruled that Scientology is a religion, the implication being that this lack of an affirmative ruling justified the Charity Commissioners' proposed action. However, Douwe Korff, the expert on international human rights who attended the meeting, advised that such a ruling would be an impossibility under the Convention as it is written, since its definition of religion is pluralistic and encompasses all bodies of religious thought. We offered to provide you with an analysis by Mr Korff of the Convention's approach in such cases, which is attached.

As discussed in Mr Korff's opinion, both the European Commission and the European Court of Human Rights have held that it would be wrong for them - or for any member State - to rule on the legitimacy of any religious belief system that is sincerely held. Rather, any group or individual holding such a religious belief is entitled to the protection of the Convention, including its guarantee of religious freedom enshrined in Article 9 as well as its mandate in Article 14 that all religions are to be treated alike.

Thus, as Mr Korff points out, "there shall be 'no discrimination' in the enjoyment of rights protected by the Convention on the basis that those beliefs do not fit a traditional definition." (Korff analysis at 8, emphasis supplied.)

This strict standard is borne out by every case involving a religion and its standing under the Convention, including the Scientology religion. The European Court of Human Rights ("the ECHR") first announced the general policy behind this standard in Kokkinakis v. Greece, 17 EHRR 397 (25 May 1993), where it stated that "freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention" and that the "pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it".

One month later, in Hoffman v. Austria, (1994) 17 EHRR 293 (23 June 1993), the ECHR laid down a rule of law that effectively precludes any comparison of religious thought, by ruling that any disparate treatment "based essentially on a difference in religion alone is not acceptable". More recently, in Manoussakis and Others v. Greece, ECHR (59/1995/565/651)(26 September 1996), the ECHR reiterated the policy of the rule - "to secure true religious pluralism" - and declared flatly that the Convention "excludes any discretion on the part of the State to determine whether religious beliefs or the means to express such beliefs are legitimate".

Every such tribunal that has addressed this issue in connection with the Scientology religion has ruled likewise. As discussed above, almost 20 years ago, in two cases involving the Church of Scientology and its status under the Convention, the European Commission, without hesitation or qualification, expressly

recognised that the Church was a religious community and treated it just like every other religious group.

Just two months ago in In re Fabio Rasp, 2 Ob 2192/96h (23 August 1996) the highest court in Austria was called upon, for the first time, to review a lower court's decision that was bottomed upon a party's affiliation with the Scientology religion. In its deliberation, the court rejected out of hand some of the most apparently derogatory and patently false accusations ever levelled against a minority religion. The court made no attempt to analyse the religiosity of the Scientology faith, but accepted it without question, holding that "a decision which in essence is only based on a different religious affiliation as such cannot be accepted" as it is "contrary to the European Convention on Human Rights and is therefore in violation of law".

The foregoing rulings directly bear on the Charity Commissioners' consideration of the Church's pending application. The cases involving religions other than Scientology establish that no less than a pluralistic, democratic society is the objective of the controlling provisions of the Convention, and that no differentiation among religions can be made solely on the basis of religious beliefs. Thus, there never would be an occasion where any such tribunal would adjudicate the religiosity of a faith under the Convention. Naturally, the cases involving Scientology follow this rule and make no attempt to compare the religion with others or to treat it differently than any other religion would be treated.

These decisions also comport with the obligations of signatory states (including the United Kingdom) under the provisions of other international treaties, including Article 18 of the International Covenant on Civil and Political Rights, which guarantees freedom of thought, conscience and religion. As discussed in the submission that accompanied the Church's application, this provision also mandates a strict standard of neutrality in the treatment of different religions:

> "Article 18 protects theistic, non-theistic and atheistic beliefs ... Article 18 is not limited in its application to traditional religions ... The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reason, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility by a predominant religious community."

Clearly, the Charity Commissioners' obligation under international law is to treat the Scientology religion with strict neutrality and not differentiate between it and any other religion on the ground that it may or may not hold a particular religious belief held by some other religion. Clearly, the Commissioners would violate their obligation were they to adopt the rulings proposed in your letter of 1 March 1996. Clearly, this action would isolate the

Commissioners from the international community of nations and its fundamental standards of human rights.

Clearly, too, such action would isolate the Commissioners from the mainstream of society, from the thousands upon thousands of individuals in the United Kingdom alone who hold Scientology as their exclusive, sacred faith, as well as their millions of fellow parishioners throughout the world. And it clearly would isolate them from every academic or scholar of comparative religion who has ever addressed Scientology's status as a worldwide religion of the Twentieth Century, recognised as such by governmental agencies and courts in country after country.

Finally, it is equally clear that the proposed action would isolate the Commissioners from their colleagues in other government bodies who unequivocally recognise Scientology as a religion, from the Independent Television Commission, which has determined that the Church of Scientology is an acceptable religious advertiser on British television, and the Radio Authority, which has determined that the Church of Scientology is an acceptable religious advertiser on British radio, to the Ministry of Defence, which less than two weeks ago confirmed that "Scientology is an officially recognised religion in the Royal Navy" and can be practised on board Her Majesty's vessels so long as it "does not interfere with the safety and good order of the ship". (See attached letter from P G McIntyre, Naval Personnel Secretariat, Ministry of Defence.)

Surely, if the Royal Navy recognises and respects the sincerely-held religious beliefs of Scientologists who jeopardise their lives to defend our country, those back at home whom they defend also can recognise and respect those beliefs.

Yours sincerely,

A6

X AND CHURCH OF SCIENTOLOGY V SWEDEN

SYNOPSIS OF DECISION

This case was brought before the European Commission on Human Rights (the "Commission") after the Market Court in Sweden enjoined the Church of Scientology in Sweden from making certain statements in advertisements regarding the religious artefact, the E-Meter. The Church brought this action on grounds that the Market Court's ruling violated the freedom of religion guarantee of Article 9(1) and freedom of expression rights in Article 10 of the European Convention on Human Rights.

Before ruling on the Church's claim under Article 9, the Commission first addressed whether a church had status to raise this issue or whether the right of freedom of religion was a right of its individual members only, which would bar the Church's case. (This latter rule had been the existing rule of law before the Commission for many years). In reversing its long-established rule, the Commission found that the distinction between a church and its members for the purpose of this question was largely artificial and that the Church therefore had status under Article 9 to lodge an application under the Convention on behalf of its members. This ruling, naturally, enhanced the religious rights of every church in the Council of Europe.

After determining that the Church had status under Article 9, the Commission then went on to find that the Market-Court's injunction against the E-Meter advertisements did not violate Article 9 because it only restricted the use of certain words and that there had been no interference with the right of the Church and its members to manifest their religion or beliefs in practice under that Article. The Commission went on to hold that the injunction did not violate Article 10 by interfering with the Church's right to freedom of expression.

It is thus manifest that the Church was determined to be a religion within the meaning of the European Convention on Human Rights.

DR 16

APPLICATION/REQUÊTE N° 7805/77

X. and CHURCH OF SCIENTOLOGY v/SWEDEN

X. et CHURCH OF SCIENTOLOGY c/SUÈDE

DECISION of 5 May 1979 on the admissibility of the application

DÉCISION du 5 mai 1979 sur la recevabilité de la requête

Article 9, paragraph 1, of the Convention : A church, as such, is capable of exercising the rights contained in Article 9 (New jurisprudence).
The freedom to manifest a religious belief in practice does not confer protection on statements of purported religious belief which are nonetheless of a commercial nature. Distinction between advertisements which are merely "informational" and those of a commercial character.

Article 10, paragraph 2 of the Convention : Protection of the right of others includes the protection of consumers. The "necessity" of a restriction measure is assessed in the light of the nature of the right guaranteed, the degree of interference, the proportionality between the interference and the aim pursued, the nature of the public interest and the degree to which it requires protection in the circumstances of the case.

The test of "necessity" must be a less strict one when applied to restraints imposed on commercial "ideas".

Article 26 of the Convention : As a general rule, a petition for a re-opening of the case is not taken into account for the purposes of the six months' rule. However this general rule does not apply, if the petition, although aimed at the re-opening of the case, in reality presents the characteristics of a plea of nullity (Chapter 58, Article 1, sub-para. 4 of the Swedish Code of Judicial Procedure - Rättegångsbalken).

Article 9, paragraphe 1, de la Convention : Une église, comme telle, peut exercer les droits définis à l'article 9 (Changement de jurisprudence).
La liberté de manifester sa conviction par les pratiques ne s'étend pas à des déclarations qui, pour être en rapport avec une croyance religieuse, n'en sont pas moins de caractère commercial. Distinction entre une publicité de pure information et une publicité commerciale.

Article 10, paragraphe 2, de la Convention : La protection des droits d'autrui inclut la protection des consommateurs. La « nécessité » d'une mesure restrictive s'apprécie notamment en fonction de la nature du droit garanti et de l'intensité de l'ingérence, du rapport de proportionnalité entre l'ingérence et son but, de la nature de l'intérêt public à sauvegarder et du degré de protection qu'il requiert.

La « nécessité » doit être appréciée moins strictement lorsque l'ingérence affecte la diffusion « d'idées » d'inspiration commerciale.

Article 26 de la Convention : En règle générale, un pourvoi en révision n'est pas pris en considération pour déterminer le dies a quo du délai de six mois. Il en va autrement lorsque ce pourvoi, bien que tendant à la réouverture de la procédure, présente en réalité le caractère d'un pourvoi en cassation (article 58, paragr. 1, chap. 4, du code judiciaire suédois - Rättegångsbalken).

Summary of the facts *(français : voir p. 75)*

The application was introduced by the "Church of Scientology" in Sweden and by X., one of the ministers.

In 1973, the applicant church placed an advertisement in its periodical which is circulated amongst its members which read as follows :

> *"Scientology technology of today demands that you have your own E-meter. The E-meter (Hebbard Electrometer) is an electronic instrument for measuring the mental state of an individual and changes of the state. There exists no way to clear without an E-meter. Price : 850 CR. For international members 20% discount : 780 CR."*

The applicants define the E-meter as follows "A religious artifact used to measure the state of electrical characteristics of the 'static field' surrounding the body and believed to reflect or indicate whether or not the confessing person has been relieved of the spiritual impediment of his sins".

Having received various complaints, the Consumer Ombudsman (Konsumentombudsmannen), basing himself on the 1970 Marketing Improper Practices Act (Lagen om otillbörlig marknadsföring) introduced an action before the Market Court (Marknadsomstolen) requesting an injunction against the applicants prohibiting the use of certain passages in the advertisement for the E-meter. After having heard expert witnesses, the Court granted the injunction. A petition for the re-opening of the case (Resning) was rejected by the Supreme Court.

THE LAW

1. The Church of Scientology and Pastor X. claim that the injunction by the Market Court on 19 February 1976 relating to their advertisements of the Hubbard Electrometer (E-meter) violates their freedom of religion and expression in a discriminatory way contrary to Articles 9, 10 and 14 of the Convention.

2. However, before the Commission can consider these complaints two preliminary matters should be clarified. The first matter concerns the question of who can properly be considered as the applicant in the present case.

Under Article 25 (1) of the Convention the Commission may receive petitions from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention. Pastor X. is such a person.

In respect of the Church, the Commission has previously applied the rule according to which a corporation being a legal and not a natural person is incapable of having or exercising the rights mentioned in Article 9 (1) of the Convention (see Application No. 3798/68, Collection of Decisions 29, p. 70). The Commission has considered that the Church itself is protected in its rights under Article 9 through the rights granted to its members (see Application No. 7374/76, Decisions and Reports 5, p. 157). In accordance with this view it would be open to named individual members of the Church to lodge an application under Article 25, in effect, on the Church's behalf. This would cover for example the five named members of the governing board who decided to lodge the application.

The Commission, however, would take this opportunity to revise its view as expressed in *Application No. 3798/68*. It is now of the opinion that the above distinction between the Church and its members under Article 9 (1) is essentially artificial. When a church body lodges an application under the Convention, it does so in reality, on behalf of its members. It should therefore be accepted that a church body is capable of possessing and exercising the rights contained in Article 9 (1) in its own capacity as a representative of its members. This interpretation is in part supported from the first paragraph of Article 10 which, through its reference to "enterprises", foresees that a non-governmental organisation like the applicant Church is capable of having and exercising the right to freedom of expression.

Accordingly, the Church of Scientology, as a non-governmental organisation, can properly be considered to be an applicant within the meaning of Article 25 (1) of the Convention.

3. The second preliminary matter relates to whether the applicants have complied with the requirements concerning exhaustion of domestic remedies

and with the six months' rule in Article 26. They refer to their "petition for a re-opening of the case" which was dismissed by the Supreme Court on 18 August 1976.

The Commission observes that a procedure which is directed towards a re-opening of a case or a re-trial of its merits is not normally a remedy which need be exhausted and which can be taken into account for the purposes of the six months' rule. In this respect the Commission refers to its constant case-law (see e.g. Application No. 6242/73, Collection of Decisions 46, p.202). In the applicants' case, however, he based his appeal on a provision of the Swedish Code of Civil Procedure according to which the Supreme Court may examine whether the application of the law (Marketing Improper Practices Act 1976) was manifestly contrary to the law under Chapter 58, Article 1, sub-paragraph 4. Such an appeal is only allowed if brought within six months after the decision of the Court in question (Chapter 58, Art. 4, para. 2 in fine). The appeal was not admitted because the case did not disclose any obvious inconsistency with the law. If it had been admissible the Supreme Court would have acted further as a court of cassation. According to Chapter 58, Sections 6 and 7 of the Swedish Code of Judicial Procedure, the Supreme Court may order that a judgment should not be executed and, if it admits a case, it may choose to send the matter back to the lower court, or, if the case is obvious, the Supreme Court may decide itself. In the Commission's case-law, appeals on points of law and pleas of nullity have always been held to be important for complying with the requirements of Art. 26 (see e.g. Application No. 4072/69, Collection of Decisions 32 p. 80 and Application No. 4517/70, Decisions and Reports 2, p. 11). Furthermore, since the Supreme Court pronounced negatively on the merits of the appeal, any other possible remedy would be likely to lack prospects of success.

Consequently, in the circumstances of this application the Commission accepts that the applicants' recourse to the Supreme Court was an effective and sufficient remedy and that the six months' period should run from the date of the decision by the Supreme Court. The applicants lodged this application in time and it cannot, therefore, be rejected in accordance with Articles 26 and 27 (3) of the Convention.

4. The applicants complain of an unjustified interference with a right to express a religious opinion in the context of the advertisement for sale of an E-meter.

Article 9 (1) provides *inter alia* that everyone has the right to freedom of religion. This right includes the freedom to manifest his religion or belief in worship, teaching, practice and observance.

It is clear that the effect of the Market Court's injunction only concerns the use of certain descriptive words concerning the E-meter, namely that it is "an invaluable aid to measuring man's mental state and changes in it". The

Market Court did not prevent the Church from selling the E-meter or even advertising it for sale as such. Nor did the Court restrict in any way the acquisition, possession or use of the E-meter.

The issue, therefore, to be determined is whether the restriction actually imposed on the commercial description of the E-meter could be considered to constitute an interference with the manifestation of a religious belief in practice within the meaning of Article 9 (1).

The Commission is of the opinion that the concept, contained in the first paragraph of Article 9, concerning the manifestation of a belief in practice does not confer protection on statements of purported religious belief which appear as selling "arguments" in advertisements of a purely commercial nature by a religious group. In this connection the Commission would draw a distinction, however, between advertisements which are merely "informational" or "descriptive" in character and commercial advertisements offering objects for sale. Once an advertisement enters into the latter sphere, although it may concern religious objects central to a particular need, statements of religious content represent, in the Commission's view, more the manifestation of a desire to market goods for profit than the manifestation of a belief in practice, within the proper sense of that term. Consequently the Commission considers that the words used in the advertisement under scrutiny fall outside the proper scope of Article 9 (1) and that therefore there has been no interference with the applicants' right to manifest their religion or beliefs in practice under that article.

It follows therefore that this complaint must be rejected as incompatible with the provisions of the Convention within the meaning of Article 27 (2).

5. The restrictions imposed on the applicants' advertisements rather fall to be considered under Article 10. Article 10 (1) secures to everyone the right to freedom of expression. This right includes freedom to hold opinions and to receive and impart information and ideas without interference by a public authority.

In the Commission's view the applicants are not prevented from holding their opinion on the religious character of the E-meter. However, they were imparting ideas about that opinion and the Market Court prohibited them from continuing to use a certain wording. This was an interference with the applicants' freedom to impart ideas under Article 10 (1).

Article 10 (2) permits restrictions on the exercise of these freedoms as are prescribed by law and are necessary in a democratic society, *inter alia*, for the protection of health or morals and for the protection of the reputation or rights of others.

In assessing whether the requirements of Article 10 (2) have been respected the Commission must have regard to the principles developed in the

jurisprudence under the Convention (e.g. Handyside Case, Judgment by the European Court of Human Rights, 7 December 1977, paras. 42-59). It observes first, therefore, that the basis in law for the injunction issued by the Market Court was the Marketing (Improper Practices) Act 1970. Consequently, the Commission finds that the restriction imposed on the applicants' freedom to impart ideas was prescribed by law within the meaning of Article 10 (2) of the Convention.

The Marketing Act aimed at protecting the rights of consumers. This aim is a legitimate aim under Article 10 (2), being for the protection of the rights of others in a democratic society.

The remaining question to be examined concerns the "necessity" of the measure challenged by the applicants. It emerges from the case law of the Convention organs that the "necessity" test cannot be applied in absolute terms, but required the assessment of various factors. Such factors include the nature of the right involved, the degree of interference, i.e. whether it was proportionate to the legitimate aim pursued, the nature of the public interest and the degree to which it requires protection in the circumstances of the case.

In considering this question the Commission again attaches significance to the fact that the "ideas" were expressed in the context of a commercial advertisement. Although the Commission is not of the opinion that commercial "speech" as such is outside the protection conferred by Article 10 (1), it considers that the level of protection must be less than that accorded to the expression of "political" ideas, in the broadest sense, with which the values underpinning the concept of freedom of expression in the Convention are chiefly concerned (see Handyside Case, supra cit, para. 49).

Moreover, the Commission has had regard to the fact that most European countries that have ratified the Convention have legislation which restricts the free flow of commercial "ideas" in the interests of protecting consumers from misleading or deceptive practices. Taking both these observations into account the Commission considers that the test of "necessity" in the second paragraph of Article 10 should therefore be a less strict one when applied to restraints imposed on commercial "ideas".

The Commission notes that the applicants' periodical in which the advertisement appeared was circulated in 300 copies to members of the Church. However the Market Court concluded that the advertisements were designed to stimulate the interests both of persons outside the Church as well as its own members in acquiring an E-meter and were thus designed to promote its sales. In arriving at this conclusion the Court had regard to the following factors :

1. that the magazine although distributed only to members might be spread by members to other persons who could be enticed to purchase an E-meter ;

2. that the advertisement does not appear to limit sale of an E-meter to *members only* or priests only or those studying for the priesthood;

3. in the advertisements readers are encouraged to seek "international membership" which has the advantage of entitling such members to lower prices for books, tape recordings and E-meters. Such statements were not limited either to priests or those studying for the priesthood.

Finally the Market Court deemed that the advertisements were misleading and that it was important to safeguard the interest of consumers in matters of marketing activities by religious communities and especially in the present case where the consumer would be particularly susceptible to selling arguments.

The Commission considers that in principle it should attach considerable weight to the above analysis and findings of the Market Court.

The Commission further notes that the Market Court did not prohibit the applicants from advertising the E-meter and did not issue the injunction under penalty of a fine. The Court chose what would appear to be the least restrictive measure open to it, namely the prohibition of a certain wording in the advertisements. Consequently, the Commission cannot find that the injunction against the applicants was disproportionate to the aim of consumer protection pursued.

Having regard to the above, the Commssion therefore accepts that the injunction granted by the Market Court was necessary in a democratic society for the protection of the rights of others, i.e. consumers.

6. The applicants claim finally that the injunction by the Market Court was discriminatory and contrary to Article 14 of the Convention.

Article 14 provides as follows :

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination 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."

It appears that the Consumer Ombudsman had received a number of complaints from the public against the applicant Church in relation to the E-meter and other matters. He therefore instituted proceedings before the Market Court. The case file does not, consequently, disclose that the authorities singled out the applicants for special attention. Nor is there any indication that the authorities have deliberately refrained from intervening against comparable advertisements by other religious communities. The application does not, therefore, disclose that the applicants have been subjected to any differential treatment.

In these circumstances there is no basis for any further examination of the complaint in the light of Article 14.

7 It follows therefore that the applicants' complaints under Article 1) and Article 14 in conjunction with Article 9 and Article 10 must be rejected as manifestly ill-founded within the meaning of Article 27 (2) of the Convention.

For these reasons, the Commission

DECLARES THIS APPLICATION INADMISSIBLE

Résumé des faits

La requête a été introduite par la « Church of Scientology » en Suède et par X., qui est l'un de ses pasteurs.

En 1973, l'église requérante a fait paraître dans la revue qu'elle diffuse parmi ses membres une annonce ainsi libellée :

(TRADUCTION)

« La technique de la scientologie actuelle exige que vous possédiez votre propre E-mètre. L'E-mètre (électromètre Hubbard) est un appareil électronique de mesure de l'état de l'âme et de ses variations. Il n'y a pas de purification sans E-mètre.
Prix : 850 couronnes ; pour les membres étrangers, 20 % de réduction : 780 couronnes. »

Les requérants définissent l'E-mètre comme suit : « Un instrument religieux servant à mesurer l'état des caractéristiques électriques du 'champ statique' entourant le corps et censé indiquer si la personne qui se confesse est déchargée du poids spirituel de ses péchés. »

Saisi de plusieurs plaintes, l'ombudsman des consommateurs (Konsumentombudsmannen), se fondant sur la loi de 1970 sur les pratiques commerciales déloyales (lagen om stillbörtig marknadsföring), introduisit devant le tribunal du marché (Marknadsdornstolen) une demande tendant à faire interdire l'usage de certaines phrases dans la publicité en faveur de l'E-mètre. Après avoir entendu des experts, le tribunal fit droit à cette demande. Un pourvoi en révision formé par les requérants à la Cour suprême fut rejeté.