THE COMMONWEALTH IMMIGRANTS ACT 1968 — A BRITISH OPINION

The Commonwealth Immigrants Act of 1968, which was passed by Parliament in February of that year, caused as much controversy as any piece of legislation since the enactment of the original Commonwealth Immigrants Act of 1962.

The Labour Government was accused, both in and out of Parliament itself, of a great catalogue of offences; they included breach of faith towards persons whom they (or rather the preceding Conservative Government) had led to believe would always be able freely to enter Britain; racialism; allowing themselves to be stampeded into hasty and ill-considered a d h o c legislation by the scares raised by other racialists; and naturally, trampling upon human rights, and even of breaches of international law. Perhaps it is now possible to consider the Act a little more soberly, and generally, since the immediate passions have died down.

There are several provisions in the Act of 1968 which deal with immigration from the Commonwealth generally, and some of these are important and might well merit criticism. But it is obvious that the passage of the Act was really caused by a situation which, it seemed, had begun to develop in East Africa and in particular in Kenya, whereby it was thought by H. M. Government that perhaps 200,000[1] persons of Asian origin living in the former British Colonies and Protectorates might all seek to remove themselves or be forced to leave at the same time and to find themselves new homes in the United Kingdom. The solution to this problem which the Government sought by means of legislation involved for the first time that persons of Citizenship of the United Kingdom whose sole "British" connection is the possession of a passport issued by or on behalf of H. M. Government in the United Kingdom should be subjected to immigration control and might be refused entry into the United Kingdom even though they had no other nationality whatever, and no connection with any United Kingdom dependency at all. This at first sight is a most startling proposition and also seems to involve some collision with the precepts of public international law. However, perhaps it is really the novelty in English law of the idea which is upsetting; it is the view of the present writer that the Act itself does not conflict with international law and that H. M. Government in securing its passage did not seriously intend to cause the United Kingdom to pursue a policy contrary to international obligations. As will later appear, the importance of this legislation from a legal point of view is much less than appears, as is its practical significance with respect to immigration. The real purpose of the Act may probably have been merely to act as a warning to Kenya Asians and persons in like condition, and to their Governments. Its real importance perhaps lies in the realm of British internal politics, and in the impression of this country it may have caused abroad.

In this discussion it is proposed first to give some of the legal background to the Act; outlining the relevant British Nationality Law, and the Commonwealth Immigrants Act 1962. Then the Act of 1968 will be considered in the light of international law; finally an attempt will be made to asses its real significance.

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1 The figure is an estimate given by the Home Secretary in the House of Commons in the debate on the second reading of the Bill. Parliamentary Debates (Hansard). (House of Commons) 1967—1968, vol. 759, column 1246.

The Background to the Act: British Nationality Law

As is well known, the present British Nationality Law dates from 1948, at a time after some of the former dominions of the British Commonwealth, such as Australia, Canada, New Zealand and South Africa had in fact and law, become independent of the mother country, but before the period beginning about 1957 when the dissolution of the British Empire and the independence of many former dependencies of the United Kingdom had really gathered momentum[2]. The Act had three purposes: first, to define the methods of acquisition of citizenship of the United Kingdom and Colonies, second, to define the status of "British subject" or "Commonwealth citizen" (the terms are used interchangeably) in the wider sense, and thirdly to deal with the status of citizens of Ireland and of inhabitants of British Protectorates and Trust Territories, which have never been in law part of the dominions of the Crown.

The status of British subject or Commonwealth citizen, that is "common nationality", is acquired by means of the possession, by its own law, of the nationality of one of the completely self-governing and independent states members of the Commonwealth[3]. The list of such states has been extended by successive Independence Acts. Thus, at the present time, a person who is by the law of say, Kenya, a citizen of Kenya, is in the eyes of the law of the United Kingdom, a British subject[4].

One of these states is of course, the United Kingdom itself, and citizenship of the United Kingdom is also extended to inhabitants of its dependent territories such as at the present time, Hong Kong. It is also the case that someone having his domicile in an independent state but having that state's nationality is a British subject by virtue of having the citizenship of some other independent state in the Commonwealth such as the United Kingdom. It should be mentioned that the common nationality provisions of the British Nationality Acts do not necessarily find any counterpart in the nationality laws of other members of the Commonwealth.

The Commonwealth Immigrants Act, 1962

Until 1962 one of the consequences of the possession of the Status of British subject was that its holders were all entitled as of right to entry into the United Kingdom free from the controls to which aliens were subjected by the relevant legislation. A British subject might, be he from Calcutta, Canberra, Johannesburg, Nairobi, or Kingston, be as much entitled to entry into Britain as a British subject from Birmingham. It should perhaps be borne in mind, in view of the violent complaints of slamming the door in the faces of British subjects which were levelled in 1962 in the United Kingdom and in the rest of the Commonwealth, that the citizen of the United Kingdom had no corresponding freedom of entry into other parts of the Commonwealth. This is true not only of independent Commonwealth countries; it might apply also as regards British Colonies. In T h o r n t o n v.

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2 In 1957 the Gold Coast became independent of Ghana. Of course India and Pakistan had become independent in 1948, but India was always regarded as being in a different situation from other dependencies of the Commonwealth. It had membership of the League of Nations, for example.

3 British Nationality Act, 1948, S. 1

4 Kenya Independence Act 1963, s. 2 (1) (a).

The Police, in 1962[5], it was held by the Judicial Committee of the Privy Council that there was nothing unconstitutional or unlawful about an Act of the Legislature of Fiji, a British Commonwealth Colony, under which a journalist from the United Kingdom was refused admission into that dependency. In other words, a citizen of the United Kingdom and Colonies from Fiji was entitled to unrestricted entry into the United Kingdom, but a citizen of the United Kingdom and Colonies from the United Kingdom itself had no such right as regards Fiji.

From about 1948 there began a large-scale immigration into the United Kingdom from the West Indies, and later from India and Pakistan; the reasons for this flow of immigrants being the desire for higher wages than were obtainable in their own countries, and the better chances of finding work in Britain. The steady stream varied slightly with variations in the English economic situation, but reached its height in 1960-62[6]. Naturally, social difficulties arose from their arrival, particularly in the field of housing, and to some extent in community relations, and discrimination. In 1958, there occurred race riots in Nottingham and in Notting Hill in London. This was a severe shock to official bodies; and efforts began to solve the difficulties in the situation. Two main lines of attack developed; the first being through better housing, education and legislation against racial discrimination. The second method, which received more and more support after 1958, was through restriction of immigration. In 1958 the Home Secretary, Mr. Butler, refused to take any such action saying: "We should maintain the long and respect tradition of allowing citizens of the Commonwealth to come here." But pressure within his own Conservative Party was too strong for him and when at the Conservative Party Conference of 1962, by a large majority, that party called for legislation to curb the flow of immigration, Mr. Butler promised that an Immigration Bill would be introduced forthwith into Parliament.

This Bill, which became the Commonwealth Immigrants Act had two main objects. One, with which we are not a present concerned, was to give power to the Government to deport to their own land serious criminal offenders. The other was to control immigration into the United Kingdom. In this regard, the provisions of the Act were applied to all Commonwealth citizens except for those defined in S. 1 (2) of the Act. These are (a) persons born in the United Kingdom, (b) persons who hold a United Kingdom passport and are citizens of the United Kingdom and Colonies, or who hold such a passport issued in the United Kingdom, and (c) persons whose names appear on such passport (these will be the family of the passport holder). Thus, all British subjects who are not citizens of the United Kingdom and Colonies are subject to control and are liable to exclusion from Britain.

But in fact the Act goes further and excludes also citizens of the United Kingdom and Colonies who do not "belong" to the United Kingdom itself. This is because of the definition of a "United Kingdom passport" in s. 1 (3) of the Act which states "United Kingdom passport" means a passport issued to the holder by the Government of the United Kingdom, not being a passport so issued on behalf of the Government of any part of the Commonwealth outside the United Kingdom. Further, representatives of the United Kingdom Government in Colonies which have some degree of self-government are instructed, when issuing passports to

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5 (1962) A. C. 339.

6 For some account of the events leading to the 1962 Act and a discussion of its provisions see C. H. R. Thornberry in Law, Opinion and the Immigrant, 25 Modern Law Review (1962) p. 654.

citizens of the United Kingdom und Colonies who do not "belong" to the United Kingdom itself, to issue them on behalf of the local authorities. The result of this may be seen in the recent case of R. v. Secretary of State for the Home Department ex parte Bhursah[7]. There, certain persons from Mauritius, then a colony, were refused admission to the United Kingdom under the Act. They possessed passports stating them to be citizens of the United Kingdom and Colonies, which had been issued in Mauritius. But they had been issued on behalf of the Governor of Mauritius on behalf of Her Majesty. The Court held that this made them Mauritius passports and not United Kingdom passports within the meaning of s. 1 (3) and therefore the applicants were subject to the Act and could rightly be refused admission into the United Kingdom.

The Commonwealth Immigrants Act caused a furore, and was opposed strenuously in its passage through Parliament by the Liberal and Labour parties. But whether the Act was good or bad, moral or immoral, racialist or not; one thing is clear; that persons who are excluded from the United Kingdom are likely to be received back in the lands from which they came. If they are citizens of an independent state their own country may in the long run have to take them back, and if they are from a dependent state they are assured of having some place to go away to.

The Act was designed not to prohibit but to regulate entry into Britain of persons from the Commonwealth, and it could be said of it that if it worked and reduced the numbers of immigrants to what could be assimilated into the country, it would have something to recommend it. At any rate, after the Labour Party won the General Elections of 1964 and 1966 and formed the Government, they abandoned any attempt to repeal the Act. This may partly have been due to the emergence of the racial issue into active politics, as was shown by the defeat of the leading Labour Member of Parliament, Mr. Gordon Walker at Smethwick by an avowed opponent of immigration, and partly due to a more sober realisation that unrestricted immigration into Britain might produce new acute problems as well as exacerbating difficulties which already existed. The legislation was therefore continued in force more or less unchanged, in spite of evidence of considerable evasion. Then, in late 1967, a new situation arose which brought about the first real amendment of the 1962 Act.

The Commonwealth Immigrants Act 1968

In 1963, Kenya, which had for the most part previously been a United Kingdom Colony[8], became independent. A consequence of this was that the British Nationality legislation in so far as it dealt with the acquisition of citizenship of the United Kingdom and Colonies, ceased to apply to Kenya, and it was provided that all persons who upon or after independence of Kenya became citizens of Kenya should cease to be citizens of the United Kingdom and Colonies[9], and Kenya was added to the list of countries possession of whose nationality would qualify an individual for the status of British subject. Such persons would of course continue to be subjected to the provisions of the Commonwealth Immi-

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7 (1968) 1 Q. B. 266.

8 Some part of the territory now in the Republic of Kenya had formed part of the dominions of the Sultan of Zanzibar, A British Protected State and so, theoretically, not part of H. M. Dominions.

9 Kenya Independence Act 1963 s. 2 (2). Certain persons were deemed to retain citizenship of the United Kingdom and Colonies, even though they acquired Kenya Citizenship, but they are not relevant here. see. S. 3.

grants Act 1962. But a person who was a citizen of the United Kingdom and Colonies but who did not become a citizen of Kenya would remain as a citizen of the United Kingdom and Colonies. Now, if his position under the Act of 1962 be considered, it will be seen that although he fell under its provisions before 1963, he would not do so after that date if he carried a United Kingdom passport, for although he was not born in the United Kingdom, then, unless his passport were issued in a colony outside Kenya, it could not be anything but a United Kingdom passport within s. 1(3) of the Act. Let us suppose therefore, that if in 1964, X, a citizen of the United Kingdom and Colonies, born in India, but not having Indian nationality, and living in Kenya obtains from the U. K. High Commission in Nairobi a passport, such a passport can only be issued on behalf of the United Kingdom Government.

Now many persons who were citizens of the United Kingdom and Colonies resident in Kenya in 1963 did not become citizens of Kenya on independence, and they were mainly, as in the example above, Asians living there and forming the major trading class in that country. They were given the option, within a certain period, of acquiring Kenyan nationality or retaining their United Kingdom citizenship; some did this but many did not. It is true to say that the Asians in Kenya have never been particularly popular with the Africans in the way that an entrepreneur community is rarely popular if alien in extraction to the indigenous population. The Asians must have known that their position in Kenya, like that of the Europeans might become vulnerable in future, particularly if the level of education of the African population should increase. They chose to meet this possibility by retaining their U. K. citizenship rather than by throwing in their lot with the Africans by taking Kenyan nationality.

Their position began to worsen rather in 1967, when the Government of Kenya began to legislate against their interests. Under the provisions of the Kenya Trade Licensing Act 1967[10] and the Kenya Immigration Act 1967[11], an Asian trader resident in Kenya holding a U. K. passport and citizenship might now be refused the requisite trading licence and then expelled from Kenya since his permit to remain there expired. This policy of "Kenyanisation", so called to distinguish it from "Africanisation", might be open to criticism on several grounds, but it is not the function of the British commentator to indulge in speculation and polemics about the internal policies of a foreign Government. But the effect would certainly be that such a person would turn to the United Kingdom for asylum since he could go nowhere else. He has not the nationality of any other country, and the country of his origin, in most cases India, would neither be bound to nor perhaps be willing to receive him.

Considerable discussion of this situation began in Britain, and speeches were made drawing attention to the horrific possibility of hundreds of thousands of Asians flooding into the country, mainly by politicians such as Mr. Duncan Sandys and Mr. Enoch Powell, avowed opponents of immigration. This, of course may have aggravated the problem at the time, since the impression may once again, as in 1961—2, have been given that restrictions were impending, an impression which would cause a mass influx of persons into Britain all at once, to forestall such restrictions. The Government hastily took action and the Secretary of State for

10 see especially, ss. 3, 5.
11 see especially s. 4 (2).

Commonwealth Relations and Mr. Malcolm McDonald, a former Governor and High Commissioner in Kenya, visited Nairobi to try to persuade President Kenyatta to modify the "Kenyanisation" policy, to no avail. Thus, on 23 February 1968, the Government introduced into the House of Commons their amending Bill, which in spite of the loud opposition from members of all three political parties, succeeded in passing through all the necessary legislative stages before the end of the month. The Act came into operation early in March 1968. Most of the provisions apply to all Commonwealth citizens, but it is only with S. 1. that we are concerned. It is the one designed to deal with the instant situation and with any similar situations which might arise, by amending S. 1. of the 1962 Act.

We have seen that under the 1962 Act a citizen of the U. K. and Colonies holding or included in a current passport issued by the United Kingdom Government was exempted from the application of the Act and had an automatic right of entry. S. 1. of the 1968 Act removes this exemption and right unless the citizen or one of his parents was either:

(a) born in the United Kingdom, or
(b) is or was naturalised in the United Kingdom, or
(c) became a citizen of the United Kingdom and Colonies through adoption in the United Kingdom, or
(d) became a United Kingdom citizen by registration under the British Nationality Acts in the United Kingdom or in a specified Commonwealth country[12].

The numbers of persons affected by this is probably not very large in terms of say the population of the United Kingdom. Mr. Callaghan, the Home Secretary, in introducing the second reading of the Bill in the House of Commons stated that there were probably about 200,000 in East Africa and one million in other parts of the Commonwealth, most of whom would also possess local citizenship[13]. There is, however, no automatic refusal of admission to the individuals affected; instead there was created a quota system which although "flexible" would permit of 1,500 entry vouchers for heads of families per annum would be issued by U. K. High Commissioners in the territories concerned to applicants on the basis of their personal circumstances and their legal status and the law of the relevant territory[14]. This is a purely administrative and extra-legal system.

It must be admitted that this provision creates new ground in spite of remarks by the Home Secretary which suggest that it does not. Mr. Callaghan informed the House of Commons that, as Mr. Butler his predecessor in office had said in 1962, the purpose of the 1962 Act was to exempt from immigration control "persons who in common parlance belong to the United Kingdom i. e. born and bred there"[15]. In so far as this 1968 Act leaves such persons exempt from control it does not indeed break new ground, but it does do so in that it adds to those persons who are not exempt from control individuals who have nowhere else to go than the U. K. if they are expelled by another state. Once the quota for a particular year is filled, what is to happen to persons arriving afterwards? Suppose in one year the Kenya Government were to expel 5,000 Asians, what is to happen to the

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12 s. 1, which inserts an additional subsection 2 (A) into s. 1 of the Act of 1962.
13 see note 1. above.
14 See Parliamentary Debates (House of Commons) vol. 759, cols. 1255, 1440.
15 ibid, col. 1249.

3,500 who would not, if the quota is strictly adhered to, get vouchers for entry into the U. K. ? This brings us to the question of the position of the Act and of H. M. Government under it, in the light of international law.

The 1968 Act and International Law

Considerable attacks were made upon the Act in 1968 from the point of view of the international jurist, which extended to the reading of passages from Oppenheim's International Law in the House of Commons. Threats, somewhat hopeless, were made to hale the U. K. Government before the International Court of Justice or the European Commission of Human Rights if any persons were excluded from the U. K. One commentator put the argument more nearly correctly by saying that the Act "authorises the violation of the duty imposed on the United Kingdom by international law to admit its own citizens"[16].

Now it cannot, it is thought, be seriously argued that the Act itself is in contravention of international law; rather that a governmental act undertaken under its provisions may operate in such a way, in theory, at any rate. How this might occur must be demonstrated clearly. And here one must ask "is there a duty at international law placed upon states to admit their own nationals?", and if so, in what circumstances is it broken?

Sometimes, leading text writers state the existence of such a duty in customary international law in peremptory terms, and in such a way as to give the impression that it is owed in international law to the national himself. Thus Oppenheim states that the main consequences of a person's possession of the nationality of a state are two; it gives a particular right, that of protection, to a state, and places the state under a particular duty: "that of receiving on its territory such of its citizens as are not allowed to remain on the territory of other states"[17]. Panhuys remarks that "The duty to admit nationals is considered so important a consequence of nationality that it is almost equated with it"[18]. Weiss likewise observes "One of the elements of the concept of nationality is the right to settle and to reside in the territory of the state of nationality, or conversely, the duty of the State to grant and permit such residence to its nationals[19]. He states further that although there is little evidence to show this, this is certainly because the duty is generally accepted as an inherent duty of states resulting from the conception of nationality.

There is some state practice to support the existence of this duty. Thus, in 1926, in a case in which a national of Guatemala who had been in the United States was refused admission to Guatemala and returned to the United States, the State Department gave it as their opinion that he might have been denied admission and that the United States' Government "might have sent him back to his own country, which would have been under the necessity of receiving him or showing that he could not be regarded as a citizen of Guatemala"[20]. The necessity adverted to presumably means the necessity of complying with a duty imposed by international law. On occasion, provisions of treaties have required the state of nationality to admit: thus the Havana Convention on the Status of Aliens of 1925[21] between

16 B. A. Hepple, 31 Modern Law Review (1968) p. 423.
17 International Law (ed. Lauterpacht) Vol. I, Peace. 8th edition, p. 646.
18 The Role of Nationality in International Law (Leyden, 1959), p. 56.
19 Nationality and Statelessness in International Law (London, 1956) p. 49.
20 Hackworth, 3 Digest of International Law, p. 740.
21 4 U. S. Treaty Series, p. 4722.

American States, provides that "States are required to receive their nationals expelled from foreign soil who seek to enter their territory". And more recently, Article 12 of the United Nations International Convention on Civil and Political Rights, adopted in December 1966, provides (para. 4) that "no one shall be absolutely deprived of the right to enter his own country"[22].

However, it seems clear that if X arrives, say, at London Airport, and being a citizen of the U. K., is refused admission, no breach of international law is committed at that point. How could it be? Treaty provisions apart, it is still true as it was in orthodox customary international law that a state does not owe duties to its own nationals, and in any case, there exists no other state which has the requisite locus standi to complain of any breach. The only way in which such an individual could seek redress is where treaty provides for it, but the only example which comes to mind is in Article 3(2) of Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms which states that "No one shall be deprived of the right to enter the territory of the state of which he is a national". Unfortunately for X, in our example, he could not use the machinery for implementing the Convention since the United Kingdom has prudently refrained from ratifying Protocol 4.

In fact all the writers mentioned earlier are at pains to point out that the duty is not owed to the individual under international law, but to other states. Thus Weiss continues "it is a right of the national which he possesses under municipal law"[23] (and gives examples of provisions of municipal laws such as Art. 111 of the 1919 Constitution of the Weimar Republic) and further "As between a national and the state of nationality the question of the right of sojourn is not a question of international law". And Panhuys: "According to international law the duty of admission only exists towards foreign states and not towards the national."

The duty therefore exists only towards foreign states and thus can only be said to have been broken when the interests of a foreign state are involved. "Towards other states a state is bound to admit its nationals within its territory."[24] Oppenheim states the rule in a way which brings out its basic rationale. "Since no state is obliged by the law of nations to allow foreigners to remain in it... The Home State of expelled persons is bound to receive them on the home territory[25]." The breach will arise when, as a result of the refusal to admit an alien the State which seeks to expel him is effectively precluded from doing so, or where he is deposited upon the territory of a State with which he does not have the relationship of nationality against that State's will.

It is not difficult to demonstrate how, within the context of the Commonwealth Immigrants Act 1968, this might occur. The supplementary provisions in the First Schedule to the parent Act which apply to persons who fall under the Act of 1968 make clear that there are only four countries to which the Home Secretary (to whom these powers are entrusted) may direct the owners or agents of a ship or aircraft to remowe a prohibited immigrant: (i) the country of which he is a citizen; (ii) the Country of which he has a passport; (iii) a country to which there is reason to believe he will be admitted, and (iv) the country in which he embarked for the U. K. If X, the Kenya Asian, having only citizenship of and a passport issued by

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22 See 61 American Journal of International Law (1967) p. 870.
23 loc. cit. he refers to the decision of the Court of Appeal of British Columbia in R. v. Soon Gin An (1941) 3 D. L. R. 125.
24 Panhuys, loc. cit.
25 loc. cit. and see also p. 695.

the Government of the United Kingdom, arrives at London Airport, choices (i) and (ii) are not open since the country in question is the United Kingdom itself. If choice (iii) is open, all well and good, but this is unlikely if large numbers are involved, and (iv) is the only one remaining. It is believed that the Kenya Government stated that if such a person were returned from London to Nairobi, he would be put back on a 'plane for London. Or, to vary the illustration, suppose X were expelled from Kenya and flies to Germany. He then flies from Germany to London. In such case Germany and not Kenya is the state envisaged in case (iv). But Germany is not bound to receive him, and would have cause for diplomatic protest based upon a breach of international law by the United Kingdom if he were sent there. From the point of view of the U. K. Government that would be bad enough, but from the point of view of the individual, matters would be even more dreadful. As one commentator has put it, "No doubt [in Germany] X will be met not by a brass band but by a modern rendition of Wagner's Flying Dutchman"[26], condemned to fly from London to Düsseldorf and vice versa till his days on earth are ended. Note that such would not be the fate of other Commonwealth citizens who could be returned to countries in cases (i) or (ii) as may be appropriate and against whom the U. K. Government would have legitimate ground of complaint if they refused to take them.

It is in this way that Parliament may be said to have authorised the Executive to commit a breach of international law if it thinks fit to do so. It also appears, as these examples show, to have authorised the Home Secretary to commit acts of frightful, not say farcical inhumanity. It is odd that such should have been done in 1968, which was, though it sometimes seems to have been forgotten, supposed to be celebrated internationally as Human Rights Year. And it is curious that soon after the U. K. Government had signed (though of course, not ratified) a Protocol to a Convention providing for automatic reception of nationals, Parliament should have gone out of its way at the behest of that Government to render it quite impossible for the United Kingdom to become effectively a party to that Protocol. It is also a matter to be seriously deplored.

The Effect of the 1968 Act.

However, on the international level, all is not so bad as at first appears. For the examples given, which are really a reductio ad absurdum, demonstrate that if there really came about a large influx of persons in the category affected, the Act would be quite inoperable. The Home Secretary, during the Parliamentary proceedings on the Bill, was forced to admit that the Act would have to be set on one side in such cases. He said "I was asked about what we would do about a man who was thrown out of work and ejected from the country. We shall have to take him. We cannot do anything else in the circumstances"[27]. This, devastatingly, gives the whole thing away. It was, in his opinion, not the object of the exercise to authorise him to commit breaches of international law or to condemn persons to everlasting flight. "Rather", he said, "We are not telling these people that they can never come. I agree with him that, ultimately, if they wish to do so, homes must be found for them in this country. They are our citizens. What we are asking them to do is

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26 Hepple, loc. cit.
27 Parliamentary Debates (House of Commons) Vol. 759, col. 1501.

to form a queue . . . But we are not saying to them "You shall never come here"[28]. But it is clear, if they were to refuse to form a queue, they would have to be allowed in, even all 200,000 of them if all East Asian countries were to expel them. In other words, if the worst happened the Act would be ineffective. This is a startling conclusion for an English lawyer to accept, trained as he is from his earliest student days to believe that when Parliament says something, it must be presumed to have meant something and have meant something effective.

The truth of the matter is of course that the Act was really the result of panic by the Government, beset on one side by the opponents of immigration, who were intent on using the situation for the purpose of preying further on the often subconscious fears of the British electorate about racial problems; and on the other by the unpredictable policies in particular of the Government of Kenya.

As a matter of fact, mass expulsions have not taken place from Kenya and the only large flow of immigrants from that country took place about the time the Bill was being debated in Parliament and in the few days before it became operative. In this, the danger against which the Act was directed was stimulated, insofar as it appeared at all, by the Act itself rather than by any other particular cause.

Any criticism of the legislation, and there are many, must depend rather upon its psychological effects. And the Act is open to criticism on several grounds.

First, any attempt to exclude one's own nationals amounts to an attempt to render them, for some purposes, as if they were stateless persons. As Oppenheim points out, one of the main purposes of nationality is the right of protection. This is not affected by the Act insofar as protection against other countries is concerned. It might be argued that the International Court of Justice in the Nottebohm Case[29] did more harm in this direction than has the British Parliament. And although, as we have seen, the individual does not possess any international right to enter the state of which he is a national, it is surely a basic belief of anyone that if he has nowhere else to go, he will always be able to return to the country of his nationality. When one considers the amount of international activity, both philanthropic and legislative, which has gone into the solution of the problems of refugees and the reduction of statelessness, it is miserable to contemplate the impression which some more individuals have been given that they may not be welcomed anywhere. Once before has Parliament temporarily abandoned the principle that a state should always receive one of its own nationals back into its borders should he desire admission. The Prevention of Violence (Temporary Provisions) Act 1939, s. 1. allowed the Home Secretary to make prohibition and expulsion orders against persons "not ordinarily resident in Great Britain and believed to be concerned in the preparation or instigation of acts of violence".

This was clearly aimed at Irishmen, members of the Irish Republican Army, which was then indulging in a campaign of violence in the United Kingdom. Nevertheless it could be used against citizens of the United Kingdom, in its own terms. One authority then stated "This illustrates once again what havoc ad hoc legislation can play with these principles which the common law so cherished . . . For this [duty to admit) is a principle which Great Britain has carefully fostered in the past and the precedent created by its unwitting abandonment will not go unremembered abroad"[30]. That was a case of a Parlimentary oversight and was

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28 ibid, col. 1506.
29 Liechtenstein v. Guatemala, I. C. J. Reports, 1955, p. 1.
30 Clive Parry, Annual Survey of English Law, 1939. pp. 93—4.

certainly forgotten abroad, where other events of greater importance were then taking place, but the Commonwealth Immigrants Act 1968 was passed deliberately and in the full knowledge that, whatever might be said about queues and quotas, there was being placed upon the British Statute Book a measure which in so many words, permits of the exclusion of citizens of the country who have nowhere else to go by right!

Second, it is argued that the British passport is devalued. A passport is addressed by the Crown to British representatives abroad and to the authorities of foreign Governments to lend the bearer assistance and to allow him to go "without let or hindrance". It has been regarded as imparting a correlative duty of allegiance upon the bearer, even if he has not British nationality, and one man was hanged for a breach of that duty[31]. It is, to say the least, unfortunate that its possession should not avail a bearer of a British passport when he needs its protection against the British Crown itself!

Thirdly, and this has been a major argument, the Act marked and represented a breach of faith and of a solemn undertaking. It is argued that at the time of the independence of Kenya, H. M. Government made a pledge that the Kenya Asians who did not opt, either purposely or inwittingly, for Kenyan nationality, could retain British Nationality, and the unrestricted right of entry which they acquired under the law of the United Kingdom at that time. During the Parliamentary proceedings on the Bill it was alleged more than once that an express promise was made by the then Secretary of State for Commonwealth Relations, Mr. Duncan Sandys, that those persons should always have the right to enter the United Kingdom. Mr. Sandys denied this, and there was conflict of evidence or recollection on the point. It seems also to have been argued that in the debate on the Kenya Independence Bill in 1963, Mr. Sandys gave a Parliamentary undertaking. But this does not appear to be so. He was indeed asked by Mr. Jeremy Thorpe "if a Kenyan is a citizen of the United Kingdom and Colonies and has not decided to opt to become a Kenya citizen . . . do I take it he is subject to the Immigration act [of 1962) unless his passport has been issued in this country, or is he allowed free access"[32]? The Secretary of State declined to give any real reply. But Mr. Thorpe clearly assumed (correctly) that if his passport was a United Kingdom one, he was allowed free access, and nothing was said to lead one to imagine that such would not continue to be so.

Whether or not any formal undertaking was given, however, and this leads back to the first criticism, it is obvious that the Kenya Asians must have felt that the facts that (a) the U. K. Parliament hat allowed them to remain citizens of the United Kingdom after independence, and (b) the Government of the U. K. had issued them with passports were, in the context of their well understood situation in East Africa, in effect representations to them that were they to be expelled from Kenya, they would always be sure that they had at any rate one country which they could fall back upon in which to find a home.

Fourthly, the Act represents one more step away from the once proud boast of Britain that it was a country where persons could find asylum. In the nineteenth century Marx and Metternich were here as political refugees at the same time, and

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31 This was William Joyce (known in England as Lord Haw-Haw) He was an American citizen who had obtained a British passport by falsely representing himself to be a British subject. During the Second World War he broadcast to England for the Nazis (he was well known as a Fascist in England in the 1930's). He was convicted of treason. See Joyce v. Director of Public Prosecutions (1946) A. C. 347.

32 Parliamentary Debates (House of Commons) Vol. 684, col. 1332 and at col. 1394.

Mazzini, Herzen and many others also. Now it is true that Britain has never in the past been an immigrant country in the sense that the United States, Brazil or Australia have. In this respect the Aliens restriction legislation dating from 1905 is perhaps not so broad a departure as all that. Even the Commonwealth Immigrants Act 1962 may not be regarded as a derogation from the principle of asylum. For at least in the case of persons refused admission under that Act, they have a land to go back to, and if they are in fear of real persecution will almost certainly be granted admission anyway. But here is legislation which gives the impression that Britain is unwilling at any rate, unless absolutely compelled against her will, to admit persons who have no real hope of finding sanctuary anywhere else, having been deprived of their living and their homes.

It might be said that vast social problems would have arisen if there had been a large-scale entry of persons of a different ethnic origin. But, as was said earlier, in comparison with the population of Great Britain and also of the existing immigrant population here, the numbers involved were likely to be moderate. The Netherlands, faced with very much the same problems after the mass expulsions from Indonesia, solved them by determination and a rational and humane approach. Lastly, and this is a matter of English politics, it is a matter for sadness that this Act was passed by Parliament at the instigation of a Labour Government. If the object was to curry the electorate's favour and to steal the thunder from the other party, it appears to have had little success. For it has simply given a bad impression of haste and incompetence. Though no-one in England would accuse the Government of racialism, it is feared that such is the impression it gave in the Commonwealth. As a Conservative member of Parliament, Mr. St. John Stevas put it: ". . . I have a respect for the idealism which has animated the Labour Government movement as such . . . The one part of that idealism that I do share and respect is the concern for racial equality. It is not the least distressing part of this extremely distressing period we are in — this shameful period — that it should have been the party that has so often in the past taken a stand on these issues that should be adding the latest instalment of man's inhumanity to man[33]."

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33 ibid. vol. 529, col. 1535.