

Passports and the individual's right to travel

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Passport control seems to be an exceptional area in which the Government claim a free power to restrict personal liberty without reasons given. Sir Frederick Crawford's passport was impounded; renewal of Mr. Alan Winnington's was refused; and there has been a trickle of similar cases which the Rhodesian situation could turn into a flood. There was also the case of Mr. Ian Colvin, who was refused permission to embark at London Airport without a passport.

These cases must raise uncomfortable questions in the mind of the ordinary domestic British subject, legally known as a citizen of the United Kingdom and Colonies. Are all our passports at the mercy of the Government? Can we be imprisoned in this island, or excluded from it, if we are thought to be undesirable characters? Are there no procedural or other safeguards? Is a passport legally necessary anyway?

Passports are an administrative device, and in this country there is virtually no law about them. Governments have always insisted that passports are granted, withheld or revoked under the royal prerogative—that is to say, at the discretion of ministers; that no one has a legal right to a passport; that reasons for refusal or revocation will not be given; and that the passport itself remain Government property.

The commonest reason for impounding a passport is purely administrative: when a "distressed British subject" abroad applies to a consul for an advance of passage-money to return to this country, his passport is retained as security for repayment. But, of course, the cases which cause concern are those where the reasons are political—for example, that Sir Frederick Crawford failed to sign Sir Humphrey Gibbs's visitors' book and gave countenance to Mr. Smith and Mr. Dupont; and that, as Mr. Winnington supposes, his press reports during the Korean war embarrassed the British and American Governments. Administration and politics here get badly mixed up.

FOR IDENTITY ONLY

A passport is by no means all that it purports to be. On its face it is an imperious request from Her Majesty's Foreign Secretary that all whom it may concern shall allow the bearer to pass freely without let or hindrance and afford him assistance and protection. But in reality it is an international identity card. Foreign countries admit passport-holders not out of deference to the Foreign Secretary, but because their passports identify them by description and photograph and certify their nationality. If the activities of a British subject are thought to be detrimental to British foreign policy it may indeed be reasonable for the Foreign Secretary to decline to ask for assistance and protection for him. But it is surely another matter to deny him the evidence of his own identity and nationality. That is like taking away his birth certificate or his car licence.

Although the law fails to deal with passports, legal questions lie behind the administrative façade. It seems to be clear that, as Blackstone wrote in 1765, "by the common law, every man may go out of the realm for whatever cause he pleaseth, without obtaining the king's leave". This is in accordance with King John's Magna Carta of 1215—though not with the statute-book version of

1297, later kings having been unwilling to allow the clergy free access to Rome. Likewise it agrees with today's law as stated in Halsbury's Laws of England (3rd ed., 1954, vol. 7, p. 294). In earlier times, it is true, the Crown could obtain the writ *ne exeat regno* to prevent a subject going abroad, but this procedure is now obsolete except as a means of restraining absconding debtors. Since no law requires the possession of a passport, a British subject should be free to leave the country without one.

Why then was Mr. Ian Colvin refused permission to embark at London Airport? The Home Secretary answered a Parliamentary question on May 23 as follows: "Mr. Colvin informed the immigration officer that he was travelling without a passport as a test case, and the immigration officer thereupon applied a strict test of proof of British nationality under the Aliens Order 1953. Mr. Colvin is of course well known as a journalist, but none of the documents of identity he produced satisfied the immigration officer that he was a British subject or a person to whom leave to embark under the Aliens Order 1953 should be granted, and in the spirit of a test case leave was refused". But the Aliens Order, under which the "strict test" is said to have been applied, relates only to aliens. It cannot affect the right of a British subject to leave the country.

ONUS OF PROOF

The whole question, however, is one of proof. The Aliens Restriction Act 1914 provides that if any question arises whether any person is an alien or not, the onus of proof that that person is not an alien shall lie upon that person. In other words, by treating the traveller as a possible alien, the authorities can put him to proof of his nationality. But the law requires statutory powers to be exercised reasonably and in good faith, and the Aliens Restriction Act ought not to be invoked unless there are genuine grounds for suspecting alien nationality. To turn the law for the control of aliens into a law for the control of British subjects, by applying an arbitrarily strict standard of proof, would be an abuse of power for which a British subject would have the usual legal remedies. Yet the government appears to assert that it has the power to do this, even if only "in the spirit of a test case".

Similarly with the right to re-enter this country: this appears to be the legal right of a citizen of the United Kingdom and Colonies. But Mr. Alan Winnington's 14-year exile seems to have been attributed to the refusal to renew his passport in 1954. At least, Mr. Winnington has complained that he was not allowed to return to this country in time to see his mother before she died. Assuming that he could not reasonably be suspected of being an alien, loss of his passport should have no bearing on his right to re-enter his own country. Cases like Mr. Winnington's and Mr. Colvin's show how absurd it is to regard a passport as a request to a foreign government for assistance and protection. It has become a means of controlling the goings and comings of citizens of this country, without foreign governments being involved in any way.

However discreetly these powers are in practice exercised, they are intrinsically so objectionable that one would expect the fullest procedural protection. Under the general law and under legislation such as the Tribunals and Inquiries

Acts it is firmly established for most purposes that when ministers exercise discretionary powers, for example in making compulsory purchase orders, they must give those concerned a fair hearing and must explain their reasons. What is more, the reasons must be legally adequate to justify the action. But in passport cases these elementary rights are conspicuous by their absence. In practice no doubt an informal hearing is sometimes given, as it appears to have been to Sir Frederick Crawford; and in his case also Parliamentary pressure forced the Government to explain their reasons in public.

Disquiet over the Rhodesian policy has led the Government to set up an independent committee to scrutinize and report on cases where passports are withdrawn, including the Crawford case. But the committee is only advisory and is concerned only with Rhodesia. Nor will the Government allow complaints to be made to the Ombudsman. In the Crawford case they issued a certificate that it affected international relations, so as to put it outside the ambit of the Parliamentary Commissioner Act.

The whole subject of executive power over freedom to travel is obviously in urgent need of elucidation. If the Government is to retain wide discretion, the least that can be asked is that there should be procedural safeguards which measure up to the standards of the Tribunals and Inquiries Acts. Another obvious suggestion is that there ought to be an independent appeal tribunal. But the primary questions are: what powers should the government have? Why should we not follow the example of the United States, where over the past ten years the federal courts have established that, in Mr. Justice Goldberg's words, "freedom of travel is a constitutional liberty closely related to the rights of free speech and association"?

CLAIM DEMOLISHED

Accordingly it was held last December that the State Department had no legal right to refuse a passport to Professor Lynd of Yale University, who had made a visit to North Vietnam. The department was then forced to abandon its policy of revoking passports at discretion—the same policy that the Government follows in this country. The New York Times commented: "This series of rulings has demolished the State Department's claim, reiterated in the 1940s and 50s, that travel abroad was a privilege that could be curbed when it embarrassed the government, instead of a liberty as fundamental—and frequently embarrassing to those in authority—as freedom of speech, freedom of association and freedom of the press."

British governments have traditionally used their powers with restraint, and until the recent series of incidents there was no great public concern. But now we must surely ask whether the position is consistent either with the rule of law or with the principles of administrative fair play which have come to the fore in recent years. Times have changed since medieval monarchs wished to bar the road to Rome. Taxpayers who are compelled to contribute vast sums to subsidize supersonic aircraft may surely expect the right to embark on them without a *liberum veto* by the executive. The modern type of passport is said to have been invented by Louis XIV. Too much of his technique seems to have stuck to it.