Neutral Citation Number: [2004] EWCA Civ 1094

Case No: C4/2004/0669

**IN THE SUPREME COURT OF JUDICATURE**
**COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM IMMIGRATION APPEAL TRIBUNAL**
**Immigration Appeal Tribunal**
**[2004] UKIAT 00009**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 August 2004

**Before :**

**THE RIGHT HONOURABLE LORD JUSTICE JUDGE**
**THE RIGHT HONOURABLE LORD JUSTICE MAY**
and
**THE RIGHT HONOURABLE LORD JUSTICE SEDLEY**

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**Between :**

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| **N (Kenya)** | **Appellant** |
| **- and -** | |
| **The Secretary of State for the Home Department** | **Respondent** |

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**Andrew Nicol QC** and **Frances Webber** (instructed by **Luqmani Thompson**) for the **Appellant**
**Monica Carss-Frisk QC** and **Samantha Broadfoot** (instructed by **The Treasury Solicitor**) for the **Respondent**

Hearing dates : 14th and 15th July 2004

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# Judgment

# Lord Justice May:

1. This is an appeal against a decision of the Immigration Appeal Tribunal of 3rd February 2004. Laws LJ gave permission to appeal.

**Facts**

2. The appellant is a citizen of Kenya, born on 3rd July 1974. He arrived in the United Kingdom on 27th May 1994. He sought entry as a visitor. He was refused leave to enter, whereupon he claimed asylum and was released on temporary admission. In November 1994, he met a woman, whom I shall refer to as B. He has subsequently married her. She is a Dominican citizen who has lived in the United Kingdom since adolescence. In April 1995, she gave birth to a son of whom the appellant is not the father. On 8th June 1996, she gave birth to the appellant's daughter. In May 2004, she gave birth to a further child of whom the appellant is the father. This third child had not been born when the events relevant to this appeal occurred. Mr Nicol QC, who appeared for the appellant, accepts that the existence of the third child cannot contribute to the appellant's case on this appeal.

3. On 25th December 1995, the appellant was arrested for serious offences. On 27th June 1996 he was convicted after a trial of abduction, threats to kill, three counts of rape and false imprisonment. He was initially sentenced to 14 years' imprisonment. The trial judge on reconsideration reduced the sentence to 11 years' imprisonment. These were obviously grave offences. They involved a knife and a pair of scissors. The judge concluded that the victim, who had given evidence, had sustained serious mental injury. She had suffered greatly and was terrified at the time of the offence. She had undergone a change of personality and was on medication. She suffered badly from nightmares. She was obtaining regular treatment from a psychologist. The judge concluded that the appellant was a danger to the public. She did not make a recommendation for deportation, expressing the view that this was a matter for the Secretary of State in possession of all relevant information.

4. On 25th July 1996, while he was in prison, the appellant was refused asylum. There was then an extended period of appeals to adjudicators and to the Immigration Appeal Tribunal. The procedural details do not matter for present purposes. The appellant's asylum case was that he and his family had been brutally treated in Kenya and he feared that he would be subjected to such treatment if he had to return there. In August 1998, the Immigration Appeal Tribunal concluded that he was a refugee, subject to consideration of the application of Article 33(2) of the Refugee Convention. On 1st September 1999, the Immigration Appeal Tribunal found the appellant to be a refugee.

5. On 22nd May 1997, the appellant and B were married in a prison. It turned out that this was in fact a bigamous marriage, as she was then already married.

6. The appellant continued to serve his prison sentence. On 16th September 2002, the Secretary of State made a decision to deport him, considering that in view of

his convictions his deportation was conducive to the public good. On 26th September 2002, the appellant appealed against this decision.

7. On 13th May 2003, the appellant was released from his prison sentence on licence under section 35 of the Criminal Justice Act 1991. But he remained in detention under paragraph 2 of schedule 3 of the Immigration Act 1971, because he was subject to the decision by the Secretary of State for deportation.

8. His appeal to an adjudicator against the deportation decision proceeded. On 18th July 2003, the adjudicator granted him bail. On 18th September 2003, the adjudicator allowed his appeal against the deportation decision. There was some mix up about the Secretary of State's appeal against this decision. But on 7th November 2003, the Secretary of State did seek to appeal to the Immigration Appeal Tribunal against the adjudicator's decision. Permission to appeal was given in December 2003.

9. When the adjudicator granted him bail, he went to live with his wife and the two children at an address in East London. By November 2003, he was subject to reporting and residence restrictions for immigration purposes and reporting restrictions and notification requirements under sections 1 and 2 of the Sex Offenders' Act 1997. There were difficulties in the neighbourhood of the address in East London and problems with the press. These related to the offences for which he had been convicted and the victim of those offences who lives in the vicinity. On 22nd December 2003, because of these problems, the appellant was moved from the address in East London to a probation hostel in Kent. The move was motivated by public concerns that, by living in East London, he was too close to the victim of his offence. He thus became unable to continue to live with his wife and the two children.

10. On 15th January 2004, at the hearing of the Secretary of State's appeal to the Immigration Appeal Tribunal, the Tribunal heard submissions as to the appellant's bail. In short, it was contended that he had been in breach of reporting and other restrictions. The Tribunal refused to continue his bail. He has been in detention since 15th January 2004.

11. On 3rd February 2004, the Immigration Appeal Tribunal allowed the Secretary of State's appeal against the adjudicator's decisions in relation to the appellant's deportation. He appeals to this court against this decision.

12. The appeal was to have been heard by this court on 18th June 2004. On the previous day, the House of Lords published its decision in *R (Ullah) v Special Adjudicator* [2004] 3 WLR 23 and *R (Razgar) v Secretary of State for the Home Department* [2004] 3 WLR 58. These decisions were thought to have a bearing on this appeal. There was insufficient time to digest the opinions and conclude the hearing within the single day that was available. The hearing of the appeal was adjourned, eventually to be heard on 14th July 2004. On 5th July 2004, I heard and refused the appellant's further application for bail.

**Deportation under Immigration Rules**

13. Part 13 of the Immigration Rules in HC 395 relates to deportation. Within that Part, paragraph 364 provides:

> "364 Subject to paragraph 380, in considering whether deportation is the right course on the merits, the public interest will be balanced against any compassionate circumstances of the case. While each case will be considered in the light of the particular circumstances, the aim is an exercise of the power of deportation which is consistent and fair as between one person and another, although one case will rarely be identical with another in all material respects.
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> In the cases detailed in paragraph 363A, deportation will normally be the proper course where a person has failed to comply with or has contravened a condition or has remained without authority. Before a decision to deport is reached the Secretary of State will take into account all relevant factors known to him including:
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> (i) age;
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> (ii) length of residence in the United Kingdom;
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> (iii) strength of connections with the United Kingdom;
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> (iv) personal history, including character, conduct and employment record;
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> (v) domestic circumstances;
>
> (vi) previous criminal record and the nature of any offence of which the person has been convicted;
>
> (vii) compassionate circumstances;
>
> (viii) any representations received on the person's behalf."

14. Paragraph 380 of the Rules provides that a deportation order will not be made against any person if his removal in pursuance of the order would be contrary to the United Kingdom's obligations under the Refugee Convention or the Human Rights Convention.

**The Secretary of State's decision**

15. The Secretary of State's decision to deport the appellant was communicated in a letter dated 10th September 2002. This states that the appellant had been convicted of exceptionally serious offences. The judge at his trial had concluded that he was a danger to the public, rejecting submissions to the contrary. The

Secretary of State had concluded that his offences were such as to make it appropriate to consider whether deportation was the proper course in the light of his individual circumstances.

16. The letter considered in some detail the appellant's family circumstances in the light of paragraph 364 of the Rules. He had been in the United Kingdom for eight years, six of which had been spent in custody. He had married and there were two children. The Secretary of State considered whether any disruption to his family life was justified in the light of his criminal convictions. He had considered whether the imposed disruption to his family life was proportionate to the legitimate aims of a democratic society, as outlined in Article 8(2) of the European Convention on Human Rights. Balancing these considerations, the Secretary of State was satisfied that his deportation would not put the United Kingdom in breach of Article 8 of the ECHR and the Human Rights Act 1998. The Secretary of State had concluded that, in the light of the seriousness of his criminal offences, his removal from the United Kingdom was necessary in a democratic society for the prevention of disorder and crime and for the protection of health and morals. A concluding paragraph of the letter stated that the Secretary of State:

> "… has carefully balanced your personal and domestic circumstances against the seriousness of your crime and need to protect the wider community. The Secretary of State has concluded that in your case it is appropriate to deport you to Kenya."

The letter also stated that the Secretary of State had decided that, although the appellant had been accepted as a refugee, Article 33(2) of the 1951 Convention applied.

17. This decision included consideration of reports from HMP Grendon where the appellant was then detained, which had been prepared for an application for parole. These supported the view that the appellant had been convicted of a particularly serious crime and that he posed a present and future danger to the United Kingdom community. The letter also expressed the view that, although the appellant had been found to be a refugee for well a founded fear of persecution in Kenya, the circumstances supporting that status no longer existed because of changed circumstances in Kenya.

**The appellant no longer a refugee**

18. The adjudicator and the Tribunal each considered the question of the appellant's refugee status with reference to Articles 1(C)(5) and 33(2) of the Refugee Convention. The Tribunal concluded that the appellant had ceased to be a refugee because of fundamentally changed circumstances in Kenya. There is no appeal against this decision. There was therefore a period from 1998 or 1999 when the appellant was acknowledged to have been a refugee: but he no longer is.

19. The ambit of the present appeal is accordingly reduced. The appellant has no right to remain in the United Kingdom unless he can resist deportation on the ground that, in the language of paragraph 364 of the Immigration Rules, the

compassionate circumstances of his case preponderate in a balance against the public interest that he should be deported. The compassionate circumstances will embrace such rights as he has under Article 8 of the Human Rights Convention. The adjudicator found in his favour on these issues. The Tribunal reversed the adjudicator's decision.

**Legislation**

20. I shall refer to statutory provisions relating to deportation decisions and appeals from them which are applicable to the appellant's appeal. There have been subsequent changes which do not apply to his case.

21. A person over the age of 17 who is not a British citizen is liable to deportation if he is convicted of an offence punishable with imprisonment and, on his conviction, the court, being empowered to do so, recommends deportation (section 3(6) of the Immigration Act 1971). The appellant was convicted of such an offence, but the trial judge in 1996 did not recommend his deportation, leaving it to the Secretary of State to consider the matter.

22. A person who is not a British citizen is liable to deportation from the United Kingdom if the Secretary of State deems his deportation to be conducive to the public good (section 3(5) of the 1971 Act). Where a person is liable to deportation, the Secretary of State may make a deportation order against him (section 5(1)). The Secretary of State made his discretionary decision under these provisions in the present case. The appellant had a right of appeal to an adjudicator against this decision under section 63(1) of the Immigration and Asylum Act 1999, which he exercised.

23. By paragraph 21(1) of schedule 4 of the 1999 Act, the adjudicator had to allow the appeal, if he considered that the Secretary of State's discretion should have been exercised differently. By paragraph 21(3), the adjudicator had power to review any determination of a question of fact on which the decision was based.

24. Mr Nicol submits that these provisions make the adjudicator the primary decision maker exercising a very broad discretion. He points to passages in *R v Immigration Appeal Tribunal ex parte Bakhtaur Singh* [1986] in Imm. A.R. 352 at 361 and *R v Immigration Appeal Tribunal ex parte Dhaliwal* [1994] Imm A.R 387 at 391. I think that the expression "primary decision maker" somewhat overstates the scope of the adjudicator's jurisdiction. He has the jurisdiction which paragraph 21 describes. It is not confined to a review of the Secretary of State's decision on *Wednesbury* or related considerations. But the adjudicator's decision is not the primary decision, if only because it is not the first decision. The adjudicator must, in my view, take account of the policy reasons for the Secretary of State's decision with all other relevant circumstances and give it such respect and weight as its nature warrants. Its nature necessarily embraces policy considerations relating to the deportation of those who have committed serious crime.

25. Section 101(1) of the Nationality, Immigration and Asylum Act 2002 applied to the Secretary of State's appeal to the Tribunal from the adjudicator's decision of 18th September 2003 – see the transitional provision in paragraph 1(4A) of

schedule 2 of the Nationality, Immigration and Asylum Act 2002 (Commencement No. 4) Order 2003 (SI 2003 No. 754). The appeal is against the adjudicator's determination on a point of law. The appeal to this court is also on a point of law. The combined effect of this is that the issue in this court is whether the adjudicator made an error of law. No different issue arises as to the Tribunal's decision.

**The scope of this appeal**

26. The parts of the adjudicator's and the Tribunal's decisions which remain for consideration on this appeal concern the appellant's appeal against the Secretary of State's deportation decision and his case under Article 8 of the ECHR. The adjudicator and the Tribunal each treated these separately. By section 65(1) of the 1999 Act, the appellant had a theoretically separate right of appeal to an adjudicator on the ground that the Secretary of State was acting in breach of his rights under Article 8.

27. For the Article 8 case, there was a potential debate as to the scope of the adjudicator's jurisdiction. To this end, the parties understandably came to the hearing of this appeal prepared to make what were likely to have been extensive submissions about the effect of the House of Lords decision in *Razgar*. It was however agreed that this was unnecessary, because:

    (a) the deportation appeal and the Article 8 case embrace the same facts;

    (b) the adjudicator's jurisdiction in the deportation appeal was at least as extensive as his jurisdiction under section 65 of the 1999 Act;

    (c) the deportation appeal necessarily embraced the Article 8 case, since section 6 of the Human Rights Act 1998 prohibits the Secretary of State from acting in any way which is incompatible with a Convention right, and because of the introductory words of paragraph 364 of the Immigration Rules referring to paragraph 380; and

    (d) there is no possibility in this case that the appellant might fail in his deportation appeal but succeed in his Article 8 case.

    I shall accordingly concentrate on the deportation appeal.

**The adjudicator's determination**

28. The adjudicator made an extremely detailed and careful determination. It comprises 121 paragraphs covering 36 closely typed pages. He wrote that it was a very unusual appeal. It had taken more of his time than more than a dozen other appeals, themselves often dealing with serious offences. He correctly described the scope of his statutory jurisdiction with reference to paragraph 364 of the

Immigration Rules. He referred to the appellant's qualified rights under Article 8 of the Human Rights Convention to respect for his private and family life subject to such interference by a public authority "as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder for crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." The question here is whether the interference is proportionate.

29. The adjudicator directed himself to *Boultif v Switzerland* (2001) 33 EHRR 50 at page 1179 to the effect that the determination had to strike a fair balance between the relevant interests including, in cases such as the present, the seriousness of the offences committed by the appellant on the one hand and his personal and family circumstances on the other. The European Court of Human Rights in *Boultif* set out a series of such relevant circumstances in paragraph 48 of its judgment.

30. The adjudicator considered at length evidence of the appellant's experiences in Kenya. He included references to findings of the previous adjudicator in his asylum appeal. It is not necessary to consider this evidence in detail for present purposes, although parts of it are the subject of a respondent's notice, to which I shall refer later in this judgment. It is sufficient to recall that, on account of these experiences, the appellant had been a refugee, but that he had ceased to be so because of changed circumstances in Kenya.

31. The adjudicator described the appellant's offences as follows:

> "35 At about midnight on 24 December 1995 the appellant abducted a 42 year old woman on the street. He held a knife to her throat and threatened to kill her if she did not go with him. The appellant dragged her to his home address and pushed her into his flat. He then talked to her for some time while drinking beer and smoking cigarettes and cannabis. The appellant kept picking up and putting down a pair of scissors. Whilst holding the scissors he forced her to take her clothes off. He forced her onto the bed and raped her three times, drinking and smoking in between. The victim was able to escape when she heard the appellant's flatmate enter, she said that she needed to go to the toilet, and, with the flatmate present, she was able to get dressed and leave. She went straight to the police who came to the flat and found the appellant asleep. He was arrested and his flatmate was taken for questioning. The appellant did not deny having sex but said that it was consensual.
>
> 36 The appellant entered a not guilty plea forcing his victim to give evidence. His barrister cross-examined her. The appellant denied the use of the

> knife. He gave evidence denying the use of the knife, denying the use of the scissors and saying that there was only one sexual act rather than three. When it was put to the appellant in cross-examination at the hearing on 4 June 2003 that he had told these various lies at the trial the appellant accepted that he had and said: "looking back my victim was doing her best to stop it happening. The fact is I raped her three times." When asked in cross-examination when he had come to terms with the seriousness, and stopped minimising the offence, he answered that it was in 1996 when he applied to do the sexual offenders' treatment programme course and "told everything to the psychologist"."

The adjudicator then referred to the trial judge's sentencing remarks.

32. The adjudicator then recounted at length evidence concerning the appellant's relationship with his wife and children, including reference to his wife's evidence. This comprised paragraphs 39 to 47 of the determination covering more than three pages. I have set out the bones of their relationship earlier in this judgment. Other features included:

- The appellant's wife had visited him regularly with the children at the various prisons in which he was detained. They were married in prison in the Isle of Wight in 1997.

- The appellant telephoned her from prison every day and talked to her and the children.

- She had some difficulties looking after the children. She spent some time after each child was born in a mother and baby unit. Each child had been on the child protection register.

- The appellant and his wife had considered whether they might both go with the children to live in Kenya, but had concluded that it would not be feasible.

The adjudicator considered at length Social Services documents relating to the family.

33. Paragraphs 57 to 85 of the determination were an exhaustive account of expert reports and the oral evidence of their authors. The witnesses were a senior psychologist at Grendon, a probation officer at Grendon, a Wing therapist at Grendon, the head art psychotherapist at Grendon and a home probation officer from East London. The Secretary of State had objected to the admission of such of this evidence as was prepared in March and April 2003 on the basis that it post-dated the deportation decision. It was accepted that the evidence would not be inadmissible for this reason for the Article 8 case, but it was suggested that for

that case it was not relevant. The adjudicator decided that the evidence was admissible. In doing so, he said:

> "The most important part of the deportation decision of September 2002 was whether the appellant would be a danger [to] the community on release. The reports were all addressing this question."

34. The admissibility of this evidence is not in issue in this appeal. The bare bones of this very extensive opinion evidence was that, although on balance the risk of the appellant re-offending had not reduced sufficiently in the spring of 2002 for him to be suitable then for release on parole, by the spring of 2003 he had progressed to an extent that the risk of his re-offending was regarded as low. On 7th June 2002, the Parole Board concluded that parole should not be granted. The panel were of the opinion that the risk of re-offending had not yet been reduced to an acceptable level. This is consistent with the Secretary of State's view, in his decision letter of 10th September 2002, that the appellant then remained a present and future danger to the United Kingdom community. The opinion evidence before the adjudicator, however, was that treatment in Grendon had substantially reduced this risk by the Spring of 2003.

35. The adjudicator referred to the appellant's cross-examination. This exposed, not only the gravity of his offences, but omissions and inaccuracies in earlier statements. The most significant of these related to his girlfriend who had been murdered and the omission of the death of his mother. The adjudicator came to the conclusion that his earlier lies and omissions were not such as to render the rest of his evidence unconvincing or unreliable. The adjudicator found the appellant's evidence of his shame and remorse to be convincing. He clearly accepted full responsibility and was highly sophisticated in his awareness of the ways that he might shift responsibility or allocate blame elsewhere. The adjudicator accepted the appellant's explanation that earlier omissions and inaccuracies related to his emotional state at the time.

36. The adjudicator considered that he should be cautious before accepting the appellant's own evidence about his risk of re-offending. But he was very impressed with the quality of the reports and evidence of the team from Grendon. They considered that the appellant had worked hard in therapy and had achieved genuine change in himself. In accepting this evidence the adjudicator concluded:

> "101. I therefore find that the appellant has, over the years he spent in prison, but particularly through his experience of psychotherapy at Grendon, gone through a process of coming to terms with the traumatic events in Kenya and of coming to a real understanding of his own offence. As a result of going though this process he has come to a position of greater self awareness and of control over his anger. He has also taken responsibility for his offence and come to feel genuine remorse. As a result there is no longer a danger that he will act in a violent way as he did before. I conclude that it is very unlikely that the appellant will re-offend."

37. As to family life, contrary to the appellant's case, the adjudicator did not consider that the evidence established that he had ever lived with B and her first child as a family unit before he went to prison. But the appellant maintained contact with B and the two children while he was in prison, and

> "I have no doubt, based on my assessment of the appellant and B, and the evidence of all of the expert witnesses, that there is a genuine and strong family bond between the appellant, B and the children."

He assessed B as being vulnerable to exploitation for a number of reasons. But this did not mean that the children were at risk or that the family needed help from Social Services.

38. The adjudicator expressed his conclusion on deportation as follows:

> "105. I have decided to allow the appeal against the decision to deport the appellant on the grounds that his presence in the United Kingdom is not conducive to the public good. I have come to the conclusion that discretion should have been exercised differently. My main reason is my finding on the risk of re-offending. I regard this as the most significant matter counting for deportation in the balancing exercise. When the risk of re-offending is taken out of the balance the scales tip clearly against deportation on conducive grounds. The other important reason is that the appellant's family need him, and, because of their vulnerability, it would be very difficult for the whole family to relocate either to Kenya or Dominica.
>
> 106. Looking at the factors in paragraph 364 of HC395 the appellant is now 29 and has been in the UK for nine years. Although he has been recognised as a refugee he has not been given leave to remain, so none of his time has been as a settled person, and most of his time here has been spent in prison. He has few connections in the UK apart from his family. His personal history, including character and conduct, is that he only had casual jobs before being imprisoned and he has pursued some education in prison. His domestic circumstances are that he has a wife and two children with whom he has a bond based mainly on visits and other contact whilst he has been in prison. His wife is vulnerable and there has been a history of social services involvement.
>
> 107. He committed a very serious criminal offence for which he was sentenced to a long prison term. He was clearly disturbed, out of control and dangerous in 1994 and 1995. He subjected a stranger to a horrific ordeal of rape with threats of violence with a knife and scissors. He did not plead guilty as he should have done. Rather than

> dealing with his feelings he was trying to escape from them with drink and drugs. During more than seven years in prison, however, he has changed so that his risk of re-offending is now low.
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> 108. The compassionate circumstances are his own history of being a victim of torture and the manner in which he lost his family in Kenya.
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> 109. The facts in each deportation case will be different, as noted by paragraph 364, and in each case it is necessary to decide where the balance lies between those factors counting in favour of the appellant not being deported and those indicating that the appellant's presence would not be conducive to the public good. In this case the appellant has committed an extremely serious offence. If the risk that he would commit a similar offence again was anything other than very low I would conclude that his removal from the United Kingdom would indeed be justified. The prevention of another crime of this sort in this country is of very great importance, and is a matter that would weigh heavily in the balance in favour of deportation.
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> 110. My conclusion in this particular case is that the factors counting in favour of the appellant not being deported, in particular the interests of his wife and two children and the minimal risk of re-offending, are not outweighed by those suggesting that his presence in the United Kingdom would not be conducive to the public good. As a result I conclude that the Secretary of State's discretion in this matter should have been exercised differently and I allow the appeal on this basis."

39. As I have said, the adjudicator gave separate consideration to Article 8. He decided to allow the appeal on this ground also. Interference with the appellant's family life would be disproportionate. He wrote this:

> "112. My findings, based on my assessment of all of the evidence, are different from those that formed the basis of the respondent's decision. The most important difference concerns the risk of re-offending. The decision was on the basis that there was a risk of re-offending (based on the 2002 reports), whereas I have found that the risk is very low. Another difference is that the decision does not appear to have taken into account the particular circumstances of the appellant's family, in particular the history of social services involvement and the reasons for it. …
>
> 113. In the balancing exercise between the legitimate aim of preventing crime on the one hand and the interference with family life on the other the result changes in the

> appellant's favour when the risk of offending is assessed as very low. In this way the Article 8 balancing exercise is very similar to the conducive deportation exercise and the result is the same for the same reasons; the balance tips towards the appellant not being deported because the risk of re-offending is very low and the family are vulnerable."

The adjudicator then referred to the appellant's family life as being "real and living" and described the interference which would occur if he were deported. He concluded (paragraph 113):

> "For this degree of harm to be justified there would have to be a clear risk of re-offending. I therefore conclude, paying deference to the Secretary of State's view of the importance of the prevention of crime, that the interference with the appellant's family life involved in his removal would be disproportionate to the legitimate aim pursued. I therefore conclude that his removal would amount to a breach of Article 8 of the European Convention on Human Rights."

**The Immigration Tribunal's decision**

40. The adjudicator had not decided whether, as the Secretary of State maintained, the appellant had ceased to be a refugee under Article 1(C)(5). The Tribunal considered the Article 1(C)(5) question in detail, concluding that "whatever may have been the position in the past, [the appellant] is not a refugee today". So deportation would not be prevented by the Refugee Convention. The adjudicator should not have allowed the appeal, as he did, on the basis that the appellant is a refugee.

41. As to deportation, the Tribunal said that all deportation decisions are discretionary, and that the task of appellate authorities (the adjudicator or the tribunal) is to allow the appeal if they consider that the discretion should have been exercised differently. As I have already explained, this was correct as to the adjudicator, but not strictly correct as to the Tribunal, whose jurisdiction was by the time of this appeal limited to points of the law. The Tribunal however stated that they would be very slow to substitute their discretionary judgment for that of the adjudicator unless they were satisfied that he erred in law. Once the adjudicator has made a lawful assessment of the discretion, the Tribunal should be slow to interfere. As will appear, the Tribunal essentially decided that the adjudicator erred in law.

42. The Tribunal quoted paragraph 364 of the Immigration Rules. They noted that the adjudicator dealt at length of the risk of the appellant re-offending. He had concluded that the risk was very low. The Tribunal quoted the paragraphs from the adjudicator's determination in which he considered the appellant's family life. They then quoted paragraphs 105 to 110 of the determination (which I have set out above) in which the adjudicator expressed his decision.

43. Mr Underwood QC, who then appeared for the Secretary of State, had submitted that the adjudicator should have confined himself to evidence of facts in existence

in September 2002, the date of the Secretary of State's deportation decision. The Tribunal considered that the adjudicator did not err in law here. He took account of matters which to some extent were genuinely foreseeable at the date of the decision. Miss Carss-Frisk QC, counsel for the respondent, did not resurrect this contention before this court.

44. Mr Underwood's second main submission was that the adjudicator over-valued the low risk of re-offending and failed to consider whether the nature of the offences were such as to merit deportation regardless of any propensity to re-offend. The adjudicator should have paid very great regard here to the Secretary of State's judgment. In weighing individual circumstances against the public interest, the adjudicator should essentially accept what is said by the Secretary of State to be the public interest. Ms Webber submitted on behalf of the appellant that the adjudicator's decision was well within the range of reasonable responses, such that the Tribunal could not interfere.

45. The Tribunal noted that paragraph 364 made no specific reference to propensity to re-offend. There is a reference there to "previous criminal record". They saw the deportation decision as primarily reaction to past facts or present circumstances, rather than to future risk. In my view, there is some general force in this, but the risk of re-offending must be capable of featuring among "all relevant factors".

46. The Tribunal then stated:

> "36. We are satisfied that the Adjudicator's approach in paragraph 105 of his determination, exemplified in his statement that the risk of re-offending "*is the most significant matter counting for deportation in the balancing exercise*" was fundamentally flawed. We do not accept that the Adjudicator is compelled to defer to the Secretary of State's judgment as to what crimes are so serious that society's revulsion may demand a deportation decision without regard to risk of re-offending: but we do consider that the Adjudicator must take into account that some crimes are of such a nature, and he will therefore need to consider whether the offence with which he is concerned is one in which evidence as to the risk of re-offending is of any great relevance at all. This was a matter on which, in our judgment, the Adjudicator again erred in law.
>
> 37. Thirdly, it is clear from paragraph 364 and all the jurisprudence on it, that the task is to balance the public interest against the compassionate circumstances or the individual circumstances of the case. The only trace of the Adjudicator having considered the public interest at all is at paragraph 109 where he refers to "*the prevention of another crime of this sort in this country is of very great importance*". This is, in our view, grossly insufficient. The public interest element in a deportation decision is constituted not only by the need to secure the safety of the citizens of this country from future criminal acts by the

> Claimant himself: it constitutes also for the need for a decent society to express its revulsion at crimes of this sort and to make it clear that the full rigour of the law will be unleashed on those who commit them. It is simply not right, as the Adjudicator has done, to ignore the past in favour of the future. The past has a real importance, not only in the sense of the Kenya experiences casting a shadow over more recent events, but in the sense of the Claimant's history in the United Kingdom as well."

47. Having found that the adjudicator erred in law, the Tribunal made their own assessment. They stated in paragraph 38:

> "Although we look forward from the date of the decision, we are concerned with the facts as at that date. At that date, *given the decision which has been made*, there was no reason to suppose that the Claimant and B and K and S would have any more family life in the United Kingdom than they had had in the past. The Claimant had been found guilty of a crime whose commission arouses revulsion. He was a party to a bigamous marriage but had never established life with the other party to that relationship. The relationship is not of no importance, but in the circumstances it cannot be regarded as of the highest importance. Nor can the relationship with his child, who was born when he was in prison, or B's child K, whom he hardly knew before the commission of the offence. He had no real connections with the United Kingdom other than those which arose from his family or quasi-family relationships. He had no leave to remain, no job, no property. He had been in the United Kingdom for about eight years, of which nearly seven had been spent in prison."

I have put one phrase in this paragraph in italics for reasons which will appear.

48. The Tribunal expressed their conclusion as follows:

> "40. Weighing, as we do, all the relevant factors, including those we mention specifically, we have concluded that, on the primary factors found by the Adjudicator, the exercise of the discretion to deport this man who committed these serious crimes and who had merely a low risk of re-offending was entirely correct. We do not consider that the discretion should have been exercised differently and so we allow the Secretary of State's appeal on this ground."

49. The Tribunal then considered, separately as had the adjudicator, the case under Article 8. They discussed the question of jurisdiction with reference to *Razgar* in the Court of Appeal. I leave the matter of jurisdiction aside for the reasons I have already given. The Tribunal concluded that the adjudicator had erred in law in

taking upon himself to assess proportionality. They repeated that the adjudicator's failure to give proper weight to the offence itself was an error. It seemed to them that there were no insurmountable reasons why B and the children should not live in Kenya. But it might be that they could not be expected to move to Kenya, so that the Tribunal should decide whether a decision to deport the appellant would be necessarily disproportionate. They stated in paragraph 49:

> "We do not think that it would. The family grouping such as it was had already been gravely compromised by the Claimant's imprisonment. It did not exist in any real sense before he went to prison and we have no evidence as to its status at the present time. The Secretary of State takes the view that the seriousness of the Claimant's offence justifies his deportation, even if that means that he has to leave his family group. The decision of the Court of Appeal in *Samaroo* shows that that is not out of the question as a lawful response. This is not a long-established domestic grouping and none of the children have ever lived with their father until recently. There is evidence that B married the Claimant in order to assist in his immigration status. The crime was a particularly unpleasant one and the family life is tenuous in the extreme."

The Tribunal took account of Ms Webber's submissions on behalf of the appellant. They concluded that the interference with the appellant's family life resulting from deportation would not be disproportionate to its legitimate aim.

50. The Tribunal finally considered and rejected a decision on behalf of the Secretary of State to the effect that the adjudicator had been perverse to accept the appellant as a credible witness.

51. *Samaroo v Secretary of State for the Home Department* [2001] EWCA Civ 1139 (17th July 2001), to which the Tribunal referred, is a case in which the Secretary of State made a deportation order. Mr Samaroo's appeal to an adjudicator was dismissed, as was his application for leave to appeal to the Immigration Appeal Tribunal. He applied for exceptional leave to remain, which the Secretary of State refused. Mr Samaroo applied for judicial review of this decision, which the Secretary of State reviewed and again refused. The judicial review application failed at first instance, and he appealed to this court.

52. Dyson LJ considered in this context with reference to authority the task of the decision maker. He quoted from the decision of the European Court of Human Rights in *Boughanemi v France* (1996) 22 EHRR 228, including, at paragraph 42 of that decision:

> "[The Court's] task consists of ascertaining whether the deportation in issue struck a fair balance between the relevant interests, namely the applicant's right to respect for his private and family life, on the one hand, and the prevention of disorder or crime on the other."

53. Dyson LJ held at paragraph 25 of his judgment that, when deciding whether to interfere with an Article 8 convention right, the decision maker's task is to strike a fair balance between the legitimate aim on the one hand, and the affected person's Convention rights on the other. In the context of the appeal in judicial review proceedings in that case, Dyson LJ said at paragraph 35 that the function of the court was to decide whether the Secretary of State had struck the balance fairly between the conflicting interests of Mr Samaroo's right to respect for his family life on the one hand and the prevention of crime and disorder on the other. He identified a number of considerations. These included the extent to which the issues require consideration of social, economical and political factors. He said that the court will usually accord considerable deference in such cases to the view of the Secretary of State because it is not expert in the realms of policy-making, nor should it be because it is not democratically elected or accountable. He then said at paragraph 36:

> "But the court does not have expertise in judging how effective a deterrent is a policy of deporting foreign nationals who have been convicted of serious drug trafficking offences once they have served their sentences. In *R v Secretary of State ex parte Ali Dinc* [1999] 1 NLR 256 (where the applicant had been sentenced to five years imprisonment for possession of heroin with intent to supply) Henry LJ said that, in making his decision whether under the Immigration Rules a deportation order should be made, the Secretary of State was:
>
> > "… better placed to take a wider policy based view on the key question as to whether in the language of [the guidance known as] DP/2/93, removal can be justified as necessary in the interests of a democratic society."
>
> I respectfully agree."

54. In the present case, we are concerned with the exercise by the adjudicator of his statutory jurisdiction on a deportation appeal. The balance to be struck is, in this case at least, essentially the same balance as that identified in *Samaroo*. It is exemplified by the opening sentence of paragraph 364, whereby "the public interest will be balanced against any compassionate circumstances of the case". Insofar as compassionate circumstances might not entirely encompass the appellant's right to respect for his private and family life, these fall to be considered in the balancing exercise by the introductory words of paragraph 364 and by statute. In substance, the Article 8 proportionality question and the paragraph 364 balance are the same. The adjudicator had by statute an original discretion. But he does not have expertise in judging how effective, any more than does the court, a deterrent is a social, economic and political policy of deporting foreign nationals who have been convicted of serious offences once they have served their sentences. For this reason, in my judgment, an adjudicator in a deportation appeal, in exercising his statutory discretion, should give appropriate weight to the Secretary of State's policy on deportation in cases such as this.

**Submissions**

55. The appellant's case on this appeal is that the Tribunal should not have interfered with the adjudicator's decision. Mr Nicol identifies the main issue as whether the Tribunal were correct to conclude that the adjudicator erred in law on the deportation appeal. The same question arises with Article 8, but, as I have said, a decision on the deportation appeal embraces a decision on Article 8. Mr Nicol submits that, contrary to the Tribunal's view, the adjudicator did take proper account of the seriousness of the offences of which the appellant was convicted. Mr Nicol points to a number of passages (to which I have referred) in which the adjudicator refers to the offences and their seriousness. He refers also to paragraphs in which the adjudicator described the details and nature of the offences. It was for the adjudicator in the exercise of his statutory discretion to decide what weight to give to these and other factors. He was not obliged to set out every strand of his reasons at inordinate length. Mr Nicol accepts that the adjudicator's determination did not expressly address questions of policy, but this should not been seen as an error of law. The reasons which the adjudicator did give were fully adequate to show that he carried out a proper balancing exercise. The Secretary of State did not persuade the Tribunal that the adjudicator's factual findings were perverse.

56. Mr Nicol acknowledges that the appellant was convicted of serious crimes for which he received and has served a severe sentence. But deportation would have a particularly severe effect on both the appellant his family. Mr Nicol submits that the Tribunal gave inadequate consideration to the strength of family ties as found by the adjudicator.

57. Mr Nicol accepts that, if the adjudicator did make a mistake of law, it was for the Tribunal itself to reconsider the discretionary decision. With one qualification, he accepts the practicality that, if the adjudicator was wrong in law in failing to give any, or any proper, weight to the seriousness of the offences and the policy considerations in favour of deportation in such cases, a proper balancing decision would, in this case, result in upholding the deportation decision. The qualification relates to the words in paragraph 38 of the Tribunal's decision which I placed in italics when I quoted them.

58. Mr Nicol suggests that the words "given the decision that has been made" should be read as referring to the deportation decision itself. If this is so, the Tribunal would then be taking as given that which they were considering. This would be logically perverse and sufficient to vitiate the Tribunal's own discretionary decision. It would, I suppose, then be for this court to exercise the discretion.

59. I do not find this submission persuasive. The words in italics do not make easy sense. But I do not consider that they have the logically perverse meaning for which Mr Nicol contends. There is a number of possibilities. The phrase could be an accidental inclusion from an earlier draft. The decision referred to might possibly be the Parole Board's decision not to recommend parole. More importantly, however, the following sentences in the Tribunal's decision quite clearly show that they are considering the exercise of the discretion, not assuming its effect.

60. Miss Carss-Frisk submits that the adjudicator plainly failed to give any real weight to the seriousness of the offences as a separate factor apart from the risk of re-offending. She characterises the omitted factor as society's need or wish to show revulsion at offences such as these and the need to deter such crimes by deporting those who are not British citizens. This manifests itself in the Secretary of State's policy as to deportation as expressed in the decision letter. She submits that, if the adjudicator's decision is read as a whole, there is no sense in which he properly weighed up the seriousness of the offences. On the contrary, in more than one passage, the adjudicator expressly said that the most important part of the deportation decision was whether the appellant would be a danger to the community on release – see paragraph 23, and see also paragraph 89 – the extent to which the appellant poses a risk after his release is "the heart of this appeal" – and paragraphs 105, 109 and 113 – "for this degree of harm to be justified there would have to be a clear risk of re-offending". Further the adjudicator did not give any proper consideration to the fact that the Secretary of State is in the best position to take a broad outlook in matters of deportation which will secure consistency of treatment. The adjudicator has the statutory discretion on appeal, but should give considerable weight to the views of the Secretary of State.

61. Miss Carss-Frisk points to the factors relevant to a deportation decision in paragraph 48 of *Boultif* as including whether the spouse knew about the offences at the time when she entered into a family relationship. Mr Nicol accepts in this context that the appellant's position in the United Kingdom was precarious after his conviction because, although the trial judge had not recommended deportation, there was probably going to be a deportation decision at or towards the end of his time in prison. It was in these circumstances that he and B married. Miss Carss-Frisk then refers to this passage in the Decision as to Admissibility of the European Court of Human Rights in *Ajayi v The United Kingdom* Application No. 27663/95 at page 9:

> "Another important consideration will also be whether the marriage, albeit manifestly not one of convenience, was contracted at a time when the parties were aware that the immigration status of one of them was such that the persistence of the marriage within the host state would from the outset be precarious. The court considers that where this is the case it is likely only to be in the most exceptional circumstances that the removal of the non-national spouse will constitute a violation of Article 8."

62. By Respondent's Notice the Secretary of State would wish to challenge the Tribunal's decision not to interfere with the adjudicator's decision that the appellant was a credible witness. The broad case is that the appellant's evidence to the adjudicator was fundamentally inconsistent with his earlier evidence to the adjudicator in his asylum appeal. He should be regarded as a wholly unreliable witness and the evidence of the experts relating to the risk of his re-offending should be seen as the over-credulous acceptance by them of his unreliable accounts. We heard submissions on this. In the light of my view on the appellant's appeal, it is not necessary to determine the matter. I record my view

that I found Miss Carss-Frisk's submission here unpersuasive for the same reasons as those given by the Tribunal.

**Discussion and decision**

63. On the main deportation issue, in my judgment, the Tribunal were correct to reverse the adjudicator's decision essentially for the reasons which they gave and for those advanced by Miss Carss-Frisk in opposition to this appeal. I express my view briefly in my own words.

64. In a deportation appeal under section 63(1) of the 1999 Act, the adjudicator has an original statutory discretion as provided in paragraph 21(1) of Schedule 4 of the 1999 Act. The discretion is to balance the public interest against the compassionate circumstances of the case taking account of all relevant factors including those specifically referred to in paragraph 364 of HC 395. Essentially the same balance is expressed as that between the appellant's right to respect for his private and family life on the one hand and the prevention of disorder or crime on the other. Where a person who is not a British citizen commits a number of very serious crimes, the public interest side of the balance will include importantly, although not exclusively, the public policy need to deter and to express society's revulsion at the seriousness of the criminality. It is for the adjudicator in the exercise of his discretion to weigh all relevant factors, but an individual adjudicator is no better able to judge the critical public interest factor than is the court. In the first instance, that is a matter for the Secretary of State. The adjudicator should then take proper account of the Secretary of State's public interest view.

65. The risk of re-offending is a factor in the balance, but, for very serious crimes, a low risk of re-offending is not the most important public interest factor. In my view, the adjudicator's decision was over-influenced in the present case by his assessment of the risk of re-offending to the exclusion, or near exclusion, of the other more weighty public interest considerations characterised by the seriousness of the appellant's offences. This was an unbalanced decision and one which in my view was plainly wrong. There are, it is true, references to the offences and their seriousness. But these are in the main incidental or part of the narrative. I consider that a proper reading of the determination as a whole does not support the submission that the adjudicator took properly into account the public interest considerations. If he had, it is, in my view, plain that he would not have reversed the Secretary of State's decision as to deportation.

66. In concluding that the adjudicator was plainly wrong, I have well in mind the compassionate circumstances of the case comprising the appellant's right to respect for his private and family life. Those intensely human and personal rights are not to be brushed aside merely because the appellant was in prison for most of the relevant period; because he and B did not establish a family unit before he went to prison; or indeed because he and she married when his position in this country was precarious. The adjudicator found that the family ties, including those with the children, were strong. It is however, I fear, correct to regard this family unit and the appellant's rights to private and family life which it comprises as relatively uncemented. It is unnecessary to speculate whether in another case rights derived from a much stronger family unit might properly outweigh in the

balance the public interest in favour of deportation for necessarily different criminality. In the present case, in my judgment, the compassionate factors plainly do not outweigh the public interest.

67. For these reasons, I would dismiss this appeal.

**Lord Justice Sedley:**

68. I respectfully agree with Lord Justice May's account of the law, but I regretfully disagree with the conclusion he and Lord Justice Judge have reached on the basis of it. This well-reasoned adjudicator's decision could be overset only if its conclusion was perverse, and – while controversial – it was not perverse.

**The law**

69. In agreement with what is said by Lord Justice May in paragraphs 24 and 52 to 54 above, I would hold that among the facts to be taken into account by the adjudicator in exercising his original discretion (or, as I would prefer to call it, judgment) is the Home Secretary's extant policy as to the relationship of the deportation of offenders to the public good. The policy, which will ordinarily be stated in the decision letter, can if necessary be amplified by evidence. The other factors which have influenced the Home Secretary's decision will, of course, form part of the evidence before the adjudicator. But, once these things have been duly taken into account along with all the other evidence and submissions, the decision is for the adjudicator alone.

70. It is not only in this case but, I would think, in the generality of such cases that the article 8 questions and the deportation questions merge into a single issue. Not only is Rule 364 (see paragraph 13 above) configured so as to be Convention-compliant; article 8(2), assuming that 8(1) is engaged, raises the very questions of justification which Rule 364 also addresses. The adjudicator was thus right, in paragraph 113 of his reasons (see paragraph 39 above), to treat the two issues as ultimately coextensive, an approach which both leading counsel have correctly adopted before us.

71. There was initially an issue as to whether the adjudicator was entitled to consider evidence which had come into being since the taking of the Home Secretary's decision. Much in the present case turned on this, since it accounted for the greater part of the evidence from HMP Grendon Underwood about N's rehabilitation. In the end, and in my judgment wisely, the issue was not pursued. First of all the sword is two-edged: there will be cases in which the Home Secretary needs to bring forward recent evidence which supports his decision to deport. Secondly it seems illogical that a tribunal which has to exercise an original judgment, rather than review or entertain a formal appeal from the Home Secretary's decision, should be unable to do so on the best and most up-to-date evidence.

**Perversity**

72. The IAT, for its part, were in my judgment wrong (see paragraph 49 above) to criticise the adjudicator for taking it on himself to assess proportionality. That, for

reasons explained by Lord Justice May, was his job. They also set off on the wrong foot (see paragraph 41 above) by directing themselves that they should allow the Home Secretary's appeal if they considered that the adjudicator's discretion should have been exercised differently. The self-denying ordinance which followed – that they would be very slow to do so unless they were satisfied that the adjudicator had erred in law – may or may not have repaired the damage, but it does not inspire confidence. Nor do the still (in my view) unexplained words "Given the decision that has been made". But the question of perversity is now before us, and we are as well placed as the IAT was to decide it.

73. What is said in essence by Miss Carss-Frisk QC for the Home Secretary is that whatever the adjudicator purports to have taken into account, he cannot have done so properly, since had he done so he would have come to the opposite conclusion. This is in particular because, counsel says, the weight of the policy imperative of deporting offenders like N was such that only one decision was possible in the circumstances of the case.

74. If this were right there would be no point in having an appeal to an adjudicator, much less one which gives him an original discretion. What is more, a policy of such rigidity would probably be unlawful. This is why Parliament has adopted rules which require the Home Secretary to have a regard to a substantial list of factors. The point at which policy enters his decision is in the requirement to secure reasonable consistency between one case and another.

75. I have said that the Home Secretary's policy will ordinarily be found in the explanatory letter. Here, the very full explanatory letter of 10 September 2002 nowhere suggests that there is a policy of deporting all offenders whose crimes are of a particular gravity. Nor does any other evidence suggest it. What the letter does is take the gravity of N's crimes as its starting point and go on to consider in careful detail the other factors which point towards and away from deportation: see the concluding paragraph quoted by Lord Justice May in paragraph 16 above. It is plain that in the Home Secretary's view crimes of this gravity warrant deportation unless other factors outweigh it. That is the entire policy component, and it is entirely unexceptionable. What is more, I can detect no difference between this departmental approach and that of the adjudicator (see also Lord Justice Judge at paragraph 82 below). The IAT's criticism of the adjudicator in this regard, quoted in paragraph 46 above, seems to me captious.

76. Where the adjudicator differed from the Home Secretary was in his evaluation of the other factors. Miss Carss-Frisk has not been able to point to any lacuna in the adjudicator's tabulation and description of these. They include a history of suffering and trauma in Kenya which may have triggered, though it could never begin to excuse, the crimes which N in his turn committed here. The complaint that the adjudicator has not given sufficient weight to the seriousness of the offences can only be made good by showing that he *cannot* have done so, and the only way of showing that he cannot have done so is to satisfy the appellate body that had he done so his decision would necessarily have gone the other way: in other words, that he has made a perverse or irrational decision.

77. In respectful disagreement with the other members of the court, I am unable to accept that this meticulously reasoned adjudicator's decision, having assembled

and evaluated all the relevant evidence, having made sustainable findings about the contested elements of it, having correctly directed itself in law and having taken everything relevant into account, has nevertheless come to a conclusion that no reasonable decision-maker could have reached. To hold (cf. paragraph 65 above), that the adjudicator's decision was over-influenced by his assessment of the risk of re-offending to the exclusion, or near-exclusion, of other more weighty public interest considerations characterised by the seriousness of the appellant's offences, or (cf. paragraph 88 below) that his findings were not set in the context of the case as a whole, is in my respectful view not to detect an error of law but to retake a decision which was his alone to take. Like the Home Secretary, the adjudicator has taken the gravity of the offences as his datum-line: far from excluding it, he has devoted his entire decision to asking whether, even so, it is right to deport N. In this, he has followed exactly the same process as the Home Secretary in his explanatory letter. If, as Lord Justice Judge rightly points out, he gave considerably greater weight than the Home Secretary to the risk of re-offending (a risk which on his findings had meanwhile markedly diminished), that was exactly what his jurisdiction entitled him to do.

78. To disagree with the answer the adjudicator has reached is not, without more, to decide that the answer was not open to him. Yet there is no more. With great respect, it seems to me that the IAT have made the mistake of translating a legitimate disagreement with the adjudicator's conclusion into an illegitimate finding of perversity on his part, and in respectful disagreement with the majority of the court I would decline to follow them down this barred path. I would allow the appeal.

**Lord Justice Judge:**

79. I gratefully adopt May LJ's detailed analysis of the facts, and the statutory provisions under examination in this appeal.

80. The appellant is a citizen of Kenya. In Kenya he had been tortured and subjected to severe ill-treatment. He fled to the United Kingdom, arriving here in May 1994. He was refused leave to enter as a visitor, and applied for asylum. On Christmas Day 1995 he abducted and imprisoned a woman who was a stranger to him. He subjected her to a horrific ordeal. She was threatened with violence from a knife and scissors. She was raped three times. After a trial, in which he alleged that she had consented to sexual intercourse, he was convicted by the jury and sentenced to 11 years' imprisonment.

81. We are concerned with the deportation order made by the Secretary of State in September 2002 on the basis that his deportation was "conducive to the public good" (s 3(5)(a) of the Immigration Act 1971 as substituted by Sch 14 para 44(2) of the Immigration Act 1988.) This decision was appealed to an adjudicator. If the adjudicator concluded that the discretion of the Secretary of State "should have been exercised differently, he had no option: the appeal had to be allowed."

82. The Secretary of State and the adjudicator addressed the problem whether deportation was "the right course on the merits" by balancing the 'public interest' against "any compassionate circumstances of the case". All relevant factors were to be taken into account. Some were expressly identified in rule 364 of the

Immigration Rules made under s 3(2) of the 1971 Act. The factors expressly identified include

> "…
>
> (iv) personal history, including character, conduct and employment record;
>
> …
>
> (vi) previous criminal record and the nature of any offence of which the person has been convicted;
>
> (vii) compassionate circumstances;
>
> …"

Such rights as the potential deportee may enjoy under Article 8 of the European Convention of Human Rights (ECHR) also require express consideration. Even if they would normally fall to be treated as part of any "compassionate circumstances", Article 8 itself is directly engaged.

83. The "public good" and the "public interest" are wide-ranging but undefined concepts. In my judgment (whether expressly referred to in any decision letter or not) broad issues of social cohesion and public confidence in the administration of the system by which control is exercised over non-British citizens who enter and remain in the United Kingdom are engaged. They include an element of deterrence, to non-British citizens who are already here, even if they are genuine refugees and to those minded to come, so as to ensure that they clearly understand that, whatever the circumstances, one of the consequences of serious crime may well be deportation. The Secretary of State has a primary responsibility for this system. His decisions have a public importance beyond the personal impact on the individual or individuals who would be directly affected by them. The adjudicator must form his own independent judgment. Provided he is satisfied that he would exercise the discretion "differently" to the Secretary of State, he must say so. Nevertheless, in every case, he should at least address the Secretary of State's prime responsibility for the public interest and the public good, and the impact that these matters will properly have had on the exercise of his discretion. The adjudicator cannot decide that the discretion of the Secretary of State "should have been exercised differently" without understanding and giving weight to matters which the Secretary of State was entitled or required to take into account when considering the public good.

84. In this appeal, the question for decision is whether the Immigration Appeal Tribunal (IAT) was entitled to interfere with and set aside the adjudicator's decision, allowing the appellant's appeal from the decision of the Secretary of State.

85. The hearing before the adjudicator was lengthy. A huge amount of evidence, much of it documentary, but extending to the live evidence of no less than five expert witnesses, was put before him. The witnesses were cross-examined by

leading counsel on behalf of the Secretary of State, and submissions were made by counsel on both sides who were experienced in this particular area of the law.

86. The critical factual decisions said to require his determination were first, and most important, whether, as the Secretary of State asserted, the appellant would represent a continuing risk to the public after his release on licence from imprisonment, and second, whether, contrary to the Secretary of State's contentions, his family arrangements were securely and strongly based. Perhaps because of the way in which the forensic argument developed before him, in my judgment the adjudicator's concentration was too narrowly focused. It is clear from the detailed and comprehensive determination that he approached the exercise of his discretion as if the risk of re-offending was the paramount consideration. This is demonstrated by four extracts from the lengthy determination.

> "The most important part of the deportation decision … was whether the appellant would be a danger [to] the community on release." (paragraph 23)
>
> "The extent to which the appellant poses a risk to the United Kingdom after his release is, in my view, the heart of this appeal … it is also the central question for the balancing exercise involved in the conducive deportation decision and the decision as to whether any interference with family life would be proportionate." (paragraph 89)
>
> "I have decided to allow the appeal against the decision to deport the appellant … my main reason is my finding on the risk of re-offending. I regard this as the most significant matter counting for deportation in the balancing exercise …" (paragraph 105)
>
> "In this case the appellant has committed an extremely serious offence. If the risk that he would commit a similar offence again was anything other than very low I would conclude that his removal … would indeed be justified." (paragraph 109)

87. Although not expressly mentioned as a factor in rule 364, I agree with the adjudicator that the risk of further offending or potential danger was relevant to the deportation decision. In simple terms, the greater the risk represented by the offender, the greater the public interest in his deportation. However, just as the express provisions in rule 364 do not specify that conviction of a specific crime or crimes will automatically lead to an order for deportation, so consideration of the "nature of the offence" or offences of which he was convicted continues to be relevant, even if the risk posed by the appellant has significantly diminished. Indeed as it seems to me, even if the risk were extinguished altogether, given the need to attend to the public good and the public interest, the nature of the relevant offence or offences continues to require close attention.

88. The adjudicator referred fully to the facts which led to the appellant's convictions for rape. Nevertheless, having made his findings about future risk, he failed to reflect further, as he should have done, on relevant public interest considerations arising from the abominable nature of these offences which led to a strong (even if not legally conclusive) presumption in favour of deportation, or more correctly, that his deportation would be in the public interest. The application of this presumption required to be fully justified.

89. I understand the concern expressed on behalf of the Secretary of State about the adjudicator's findings on credibility issues. On the basis of the paper analysis conducted by Miss Monica Carss-Frisk QC I very much doubt if I would have reached the conclusions that he did. However, the adjudicator saw the appellant give evidence in person, when he was cross-examined in great detail about various apparent inconsistencies. I do not think it would be appropriate in this case to interfere with and set aside the adjudicator's findings about the appellant's credibility. In any event, the essential question addressed in this part of the case was the nature of the future risk posed by the appellant. In relation to that issue, the adjudicator received assistance from independent expert witnesses. He reached a conclusion of fact which was well supported by that evidence. Even if the adjudicator's finding about the appellant's credibility were liable to be set aside, his finding about the risk of future offending, depending largely as it did, on expert evidence, would not have been undermined. In my view, we are obliged, as the IAT believed it was obliged, to accept the conclusion about the very limited nature of the potential risk posed by the appellant.

90. In my judgment the adjudicator's decision is flawed, not because of factual findings he was entitled to reach, but by reason of his failure, having reached them, to put them in the context of the case as a whole, and in particular to consider how, and to what extent, they would properly serve to undermine the seemingly obvious conclusion that it would indeed be conducive to the public interest for this appellant to be deported after serving the effective period of his prison sentence.

91. Thereafter the determination proceeded on the premise that the factors supporting the appellant's removal were outweighed by the interests of the appellant's "wife" and children. Addressing the Article 8 issue, the adjudicator concluded that the "balancing exercise is very similar to the conducive deportation exercise and the result is the same for the same reasons: the balance tips towards the appellant not being deported because the risk of re-offending is very low and the family are vulnerable".

92. May LJ has summarised the essential facts, and I shall not repeat them. Nevertheless some specific factors need emphasis. At the time when the relationship with which we are concerned started, both the appellant and his "wife" knew that his ability to make a future in the United Kingdom for himself (and any "family") was, to put it neutrally, far from certain. The marriage which then took place was void for bigamy. The relationship has continued throughout the years the appellant has been serving his sentence of imprisonment, and what was described by the adjudicator as the "family bond" appeared to have "strengthened rather than diminished". Nevertheless it is not realistic to ignore the stark reality that the appellant and B, and her child, and their children, have

never lived together as a family, or that the appellant's continuing presence in the United Kingdom is a simple consequence of the punishment imposed on him for his crimes.

93. The appellant's family circumstances, and the disruptive impact on his "family" of the deportation order are rightly to be considered. Indeed the Secretary of State himself addressed the problem. The appellant himself does not suggest that he would be endangered if he were deported. His wife and family may accompany him if that is their wish. We must accept the finding of the adjudicator that they would be particularly "vulnerable" to any consequent disruption arising, either if the appellant were to leave without them, or if they started a new life with him in Kenya. These plainly are relevant considerations.

94. In summary, the essential features which led to the adjudicator differing from the Secretary of State were his factual conclusions that the risk of future offending by the appellant was low, or very low, and that the deportation order would impact heavily on his family and family life. Although the future risk was low, it was not extinguished, and even if strong, the family life to be preserved has, until now, at any rate, been extremely unusual, if only because the members of the family have never lived together. When set against the public interest and the specific requirement that the nature of the offences committed by the appellant should be taken into account, in my view the decision to differ from the Secretary of State's decision was not one which could reasonably have been reached by the adjudicator.

I agree with May LJ's conclusion that this appeal must be dismissed