Heard at Field House **Appeal No TH06649-2002**
On 5 November 2002 KO (Article 8-Deportation-Kehinde) Nigeria CG [2002]UKIAT 06038

IMMIGRATION APPEAL TRIBUNAL

Date Determination Notified

. . . . . .14 January 2003 . . . . . .

Before

Miss K Eshun (Chair)
Mr S L Batiste
Mrs J Harris

KESTER OVIASOGIE

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DETERMINATION AND REASONS

1. The Appellant, a citizen of Nigeria, appeals, with leave, against the determination of an Adjudicator, Mr J H H Cooper, dismissing his appeal against the decision of the Respondent on 27 December 2001 to make a deportation order and issue removal directions to Nigeria. In making his decision, the Adjudicator considered separately the position under the Immigration Rules, and in particular paragraph 364 of HC 395, and also in respect of the rights comprised in Article 8 of the 1950 Convention This appeal is made under section 63(1) of the Immigration and Asylum Act 1999 against the deportation decision under the Rules, and under section 65(1) on the basis that the decision is contrary to the Appellant's human rights under Article 8 of the 1950 Convention.

2. Ms F Webber, instructed by Birnberg Pierce & Partners, represented the Appellant. Mr S Walker, a Home Office Presenting Officer, represented the Respondent. We are grateful to them both for their assistance.

3. Ms Webber indicated that the Appellant still maintained that he had a well founded fear of persecution in Nigeria but she accepted that this appeal had long since been dismissed and she could not rely on these matters now. The relevant facts relating to the deportation and Article 8 issue, which are before us, are not in dispute and may be summarised as follows.

4. The Appellant entered the UK in 1990 on a passport to which he was not entitled. In 1993 he met Dawn Corrick (now Niazi) in Bristol and began a relationship with her. She then had three children and was a single mother. When she discovered she was pregnant by the Appellant, she wanted to marry him but the relationship broke down. The Appellant left her and she lost touch with him. Ms Niazi decided not to terminate the pregnancy and gave birth to twins on 9 April 1994. She gave them the Appellant's surname. She heard nothing from the Appellant until the twins were seven months old, when he spent a few hours with them and brought gifts. In the years that followed, he saw them only twice more, on brief visits, when he came to Bristol from London for their second and third birthdays.

5. It was not until 1996 that he made a claim for asylum, which was refused, and his appeals were dismissed. On 1 December 1997 he was arrested, held on remand in custody, and on 24 July 1998 convicted of an aggravated burglary. He was sentenced to six years in prison, having been given credit for a guilty plea. There was no recommendation from the judge concerning deportation. It was the Appellant's first and only offence but it was of a very serious nature and attracted a substantial custodial sentence. He assaulted a 70 year old woman in an abortive robbery on business premises. He squeezed her around the neck, causing her nose to bleed, and then shut her in a freezing unit. As recorded in the sentence, this had a devastating effect on her life and she has rarely since ventured out of her home. The Appellant was released in July 2002, having served some four years plus the period on remand.

6. Whilst the Appellant was held on remand, Ms Niazi and the twins visited him. He expressed a wish to see them more often, but she was unable to make the journey from Bristol to London having regard to the need to obtain a childminder for her other children. In fact throughout the period of his detention, there were only a couple of other visits. Ms Niazi said that she tried to make up for lack of visiting, by writing detailed letters to him about the children and sending photographs. The Appellant wrote back and phoned frequently.

7. The Respondent wrote to the Governor of the prison on 22 May 2001 inviting the Appellant to make submissions as to why in the light of his conviction and his immigration status he should not be deported. Submissions in writing were made by his solicitor on 25 July 2001. The basis of the Appellant's representations to the Respondent, since developed before the Adjudicator, and again subsequently with additional evidence before the Tribunal, is that he became a reformed character in prison. He has shown remorse for his crime. He became religious. He became aware of his responsibilities to his children, to whom he became increasingly attached. He had a low risk of re-offending. Nevertheless the Respondent decided on 27 December 2001, whilst the Appellant was still in prison, to make the deportation order. The Adjudicator heard the appeal on 8th March 2002 and the determination was promulgated on 10 April 2002, also whilst the Appellant was in prison.

8. On leaving prison, the Appellant was detained by the Respondent in anticipation of deportation. However he successfully applied to the Tribunal for bail on 5 July 2002 and on release went to live temporarily at Ms Niazi's home in Bristol. He was living there at the time of the hearing before the Tribunal on 5 November 2002, but we were told that on 11 November 2002, a few days after the hearing, he would be leaving as he

had found a job as a sous chef in a restaurant in Bristol and would be living in accommodation above it.

9. Those essentially are the facts. For the sake of a complete understanding of these facts in context, it should be added that since the breakdown of her relationship with the Appellant, Ms Niazi has married a Pakistani, who has himself been deported to Pakistan. She travelled to visit him there and indeed was there at the time of the hearing before the Adjudicator. The fact that the Appellant has been living in Ms Niazi's home since his release on bail does not mean that any personal relationship between them has been resumed. Ms Webber indicated to us that there were still unresolved tensions and resentments between the Appellant and Ms Niazi and that she might not be willing to give oral evidence on his behalf, though it has not been put to her that such oral evidence might be of considerable importance to him.

10. Apart from the written statements by the Appellant and Ms Niazi, there is other corroborative evidence of the claim that the Appellant has significantly changed and reformed in prison. There are some photographs, letters, drawings and cards, illustrative of what passed between the Appellant and his children whilst he was in prison. His Probation Officer wrote a report on 28 June 2001 to the effect that he considered the Appellant's risk of re-offending to be low. There is also a reasonably positive report from the tutor of his offending behaviour course in prison, which includes the observation "it became obvious that he was aware of the effects of his offending on his family." There are various certificates relating to a number of courses taken by the Appellant in prison. The prison chaplain wrote on his behalf on 23 July 2001 to confirm that he was a key member of the chaplaincy band and is a talented singer, guitarist and drummer. She believes that he has an innate faith and does not doubt the authenticity of his commitment to his children. She states "they give meaning to his existence and are his investment in the future in a very real way. He deeply wants a central place in his sons' development and this is a strong motivation for him." After his release from prison, but in the context of his continued detention by the Respondent pending deportation, the chaplain wrote again on 28 January 2002 in support of a bail application and stated "he frequently spoke about his own sons, and I am convinced that he was speaking the truth when he told me that they are his fundamental motivation in life. I do not believe he would abscond if given the opportunity to be near his sons. What he most wants is the authorisation to give them the input they need from their father." There are some medical reports, but these are predicated on the events in Nigeria, which the Appellant claimed gave rise to his asylum claim. Nevertheless, Dr Rowton-Lee in a report of 17 July 2001, gave an impressive endorsement of Appellant's conduct and deportment in prison. Finally Mr Ray Sefia, the ex-Managing Director of the Centre for Employment and Enterprise Development in Bristol, and a former Bristol City Councillor, wrote on 29 October 2002 to the effect that he is opening a West African restaurant in Bristol and will employ the Appellant as a sous chef and provide him with accommodation on the premises. He is aware of the Appellant's background but wishes to give him a chance, and hopefully mentoring and direction.

11. Some of this material postdates the decision. However it was all reasonably foreseeable at the time of the decision. Also in accordance with section 77 (4) (b) of the Immigration and Asylum Act 1999, it all relates back to the submissions made to the Respondent prior to the decision, as it purports to demonstrate the genuineness of those

submissions in the context of his subsequent actions. All the material can therefore properly be taken into account and Mr Walker has not sought to challenge this.

12. Finally there is an expert report from a Dr B A Oyatede, a lecturer in Yoruba Language and Culture at the School of Oriental and African Studies, dated 13 July 2001. He also accepts the factual basis of the Appellant's asylum claim. However, he goes on to state to state that the Nigerian Government takes a poor view of its citizens who have committed serious crimes abroad. If he returns without proper travel documents or if they know he has been in prison, there is a possibility he could be arrested at the airport. He could be questioned about his offence here, and detained in poor prison conditions, in which case he would need a lawyer, which he may not be able to afford. However this aspect of the opinion is rather general in nature and contains no real assessment of the prospects of this Appellant being so questioned or detained were he to be returned on emergency travel documents and if he did not volunteer information about his crime. Democratic government has been established in Nigeria and the Appellant left during the period of military dictatorship as did many other Nigerians at the time. His crime in the UK does not suggest that he is part of any international crime network, such as the drugs traffickers mentioned by Dr Oyatede. Ms Webber rightly did not place any emphasis on this point in her submissions and nor do we.

13. As we have indicated, the Respondent did not accept that any of these matters were sufficient to outweigh the serious nature of the Appellant's offence and his poor immigration history. The Adjudicator essentially reached the same conclusion.

14. The grounds of appeal to the Tribunal argued that the Adjudicator erred when considering the deportation on its merits by failing to have regard to the impact of the Appellant's deportation on his children. He further failed, in the context of Article 8, to have regard to the Appellant's children's rights to have family life with their father and the effect on them throughout their childhood on the Appellant's deportation. Finally it was argued that the Adjudicator had misdirected himself in confining his assessment to the family life already established without considering the potential relationship which might developed between the natural father and a child born out of wedlock. Ms Webber very helpfully provided us with a detailed skeleton argument, which she supplemented with oral submissions.

15. Ms Webber argued first that as this was a deportation appeal a much wider analysis was permitted than under Article 8 alone. In particular, there was a material difference as to whether third party rights can be taken into account, as between a review of the merits of a deportation decision and the assessment of proportionality in an Article 8 claim. She argued that in assessing the merits of a decision to deport, the effect of the deportation on third parties and their rights is relevant. She relied upon the judgement of the House of Lords in **Bakhtaur Singh [1986] Imm AR 352** at 358, the starred decision of the Tribunal in **Kehinde (01/TH/02668)***, and the Tribunal decision in **Met Sula [2002] UKIAT 00295**.

16. In assessing this observation we had regard to the very practical point raised by the Tribunal in **Kacaj [2002] Imm AR 213* at 223**. The Tribunal was considering whether there was a difference between the standard of proof applicable in Asylum and Article 3 appeals. It concluded

> "There is nothing in the jurisprudence of the Human Rights Court or Commission which requires us to adopt a different approach to the standard applicable to the Refugee Convention; indeed in our view, there is every reason why the same approach should be applied. Different standards would produce confusion and be likely to resulting inconsistent decisions:"

17. Of course we are not now considering potential differences in the standard of proof, which has been settled in the terms described in Kacaj, but rather the relevant range and focus of the matters that can be considered. A more appropriate parallel is between the substantive assessment of persecution under the 1951 Convention and the separate assessment under Article 3 of the 1950 Convention, which is expressed in different and broader terms.

18. The relevant matters to be taken into account in assessing a deportation decision are set out in paragraph 364 of HC 395.

> "Before a decision to deport is reached the Secretary of State will take into account all relevant factors known to him including age; length of residence in the United Kingdom; strength of connections with the United Kingdom; personal history, including character conduct and employment record; domestic circumstances; previous criminal record and the nature of any offence which the person has been convicted; compassionate circumstances; any representations received on the person's behalf.

19. The passage relied on by Ms Webber in Bakhtaur Singh at 358, is Lord Bridge's observation that

> "In the argument before your Lordships, it was not disputed that the effect of deporting a particular individual on third parties other than his family and persons intimately connected with him, may well be a factor which is relevant to the discretionary decision whether he should be deported or not. A number of examples will make this clear. 1. A person liable to deportation has been carrying on business in partnership. His deportation will ruin the partnership business. 2. A person liable to deportation is an essential and irreplaceable worker for a company engaged in a successful export business. His deportation will seriously impair the business. 3. A person liable to deportation is a social worker upon whom a particular local community has come to depend. His deportation will deprive the local community of his services which will be difficult to replace. 4. A person liable to deportation is an indispensable member of the team engaged in scientific research of public importance. His deportation will put at risk the benefit, which the public would enjoy if the research was successful. I have tried to choose the examples so as to illustrate the possibility of the third party interest in avoiding deportation extending to a progressively widening circle and ultimately to the public as a whole. Third party interests are of course much more likely to arise in relation to the deportation of convicted offenders than of overstayers. But the ambit of what is relevant must be the same in paragraphs 156 and 158 [of the Immigration Rules].

20. Before turning to Kehinde, we would observe at this point that there is a considerable difference in degree between Lord Bridge's observation that the effect of deporting an individual on third parties may be a relevant factor in making the discretionary decision

to deport, and the proposition urged on us by Ms Webber's that third party rights have to be taken into account in the decision making process.

21. This distinction was considered by the Tribunal in Kehinde in relation to Article 8 and the assessment of proportionality and it was decided in the following terms

> "The second question relates to the power or duty of the appellate authority to take into account human rights claimed or alleged to be possessed by individuals who are not Appellants before the authorities. Section 6 of the 1998 Act makes it unlawful for any public authority (including of course the Court or the Tribunal or Adjudicator) to act in any way, which is incompatible with a Convention Right. That prohibition is quite general. It appears to indicate that in making any judgment, a Court or the Tribunal or the Adjudicator must have in mind not only those who are parties and whose cases have been argued, but also those who are not parties, and those whose cases have not been argued. In a case such as the present it might be suggested that in order to make a judgement which was lawful, the Adjudicator would need to ensure not merely that the Appellant's human rights were not being infringed, but also that the human rights of members of his family (who are not parties to his appeal) were not infringed. If the authority did not conduct a full inquiry into the human rights of everybody who might conceivably be involved it could be argued that there was a risk that the determination itself was unlawful. On this point we had been persuaded by the submissions of Mr Buckley. He points out that the appeal under section 65 is limited in its scope. The right of appeal is given to a person who alleges that in a decision relating to that person's entitlement to enter or remain was in breach of his human rights. The Appellant under section 65 must be the subject of the decision; and it is only his own human rights that he may plead under section 65 against the decision in question. In an appeal under section 65 therefore there is no obligation to take into account claims made about the human rights of individuals other than the Appellant, or individuals who have not themselves been the subject of a decision which is under appeal. Such matters (save in so far as they relate to the human rights of the Appellant himself) are irrelevant to the matter under consideration."

22. These two decisions in Bakhtaur Singh and Kehinde are binding on us. In Met Sula, which is not binding on us, the Tribunal explored, on the facts before it, the scope offered by the observation in Kehinde, that third party interests could be raised in so far as they relate to the human rights of a party to the proceedings i.e. the Appellant himself. It did not attempt, as is sometimes suggested, to contradict or extend the basic principle enunciated in Kehinde.

23. Article 8 is wide-ranging. It offers a broad right to respect for the private and family life of the individual concerned. Family life has not been expressed in restrictive or limited terms. Private life is also wide-ranging and has been linked in European jurisprudence with personal autonomy, physical and psychological integrity, and the development, without outside interference, of the personality of each individual in his or her relations with other human beings.

24. Ms Webber has argued that the scope of Article 8 can extend to the relationship between a natural father and his children and embraces not only their past relationship

but also potential developments in that relationship. We can see no reason to dispute this submission and Mr Walker has not sought to do so. Indeed the European Court of Human Rights in **Keegan v Ireland** expressly had regard to the need to enable family ties to be developed and this was quoted with approval in **Ciliz v The Netherlands**. Clearly the effect of a natural father's deportation on his children can, if the facts so permit, relate to their father's Article 8 rights and can properly be taken into account in an Article 8 assessment of his rights. However, there are two qualifications. The first is that the focus of enquiry is on the rights of the person who is the party to the proceedings, ie the proposed deportee, and other matters are relevant if they relate to his rights. Article 8 does not offer an enquiry into the rights of those who are not parties to the proceedings themselves. In this sense a deportation case is rather different to a dispute over access to children as in **Sahin v Germany [2002] EHRLR 33** or over adoption as in **Soderback v Sweden (1998) 29 EHRR 95** to which Ms Webber has referred us. In those cases the children's interests and rights are directly involved, as they are the focus of the proceedings. The second qualification is that rights under Article 8 are not absolute. They may legitimately be breached, provided that the breach accords with the conditions set out in Article 8(2) and such breach is subject ultimately to the test of proportionality.

25. There is no reason why, in our overall assessment, the effect of the Appellant's deportation on his children cannot be taken into account as it relates to the human rights of the Appellant himself. This includes the potential impact of his deportation on the way in which their family life might develop. Insofar as there may be any distinction as to the relevant matters that can be taken into account between Article 8 and the decision to deport, it is, on the facts before us and we suspect will be in most other similar cases, of little material significance.

26. Ms Webber's however went further and argued before us that the interests of the children are not just relevant, but that their rights are paramount when considering the question of proportionality. She cited before us a variety of decisions of the European Court of Human Rights and others, all of which are listed and fully set out in her skeleton argument and which we have duly considered.

27. However, she acknowledged fairly that none of these cases had similar facts to those we face in the appeal before us. We agree. **Boughanemi v France (1996) 22 EHRR 228**, **Bouchelkia v France (1997) 25 EHRR 686**, **C v Belgium Appn 21794/93,** and **Boultif v Switzerland (Appn 54273/00)** all relate to convicted criminals being deported/ removed. But in each case, the claimant had been legally resident for many years in the country proposing to deport him. They all had established strong family and personal links in their host countries. None of them used deception to enter as did the Appellant in this appeal. There was no breach of immigration law involved in these cases or in **Ciliz v The Netherlands** and **Beharrab v The Netherlands**, upon which Ms Webber placed much reliance. Indeed, additionally in these latter two cases, the past relationship between father and child was materially more substantial than that of our Appellant and his children. She argued nevertheless that we could deduce from all these cases the degree of importance given in European jurisprudence to the rights of children. We agree that the impact of the children is of importance when considering a deportation/removal appeal by their father. This is a matter that for most fathers will be of concern to them. But we cannot find anything in any of the European or other cases produced to us to indicate that in deportation/removal cases the children's interests are

paramount, as Ms Webber asserts. This is principle is particularly relevant in non-custodial cases where the father has never in the past lived with the children as part of a family on any long term basis. The situation may well be different in adoption, custody and access cases such as Soderback and Sahin, referred to above, because the nature of the issues under consideration is different.

28. Indeed Ms Webber herself in her skeleton argument rather undermined the absoluteness of this "paramountcy" proposition. In paragraph 8, she acknowledged that even the total deprivation of a parent of family life with a child could be justified by exceptional circumstances. Also in paragraph 9 she quoted **Majji 01/TH/1352**, as authority for the proposition that the extent of the non-custodial parent's responsibility for his or her failure to have contact with the children was a relevant factor in assessing the proportionality of removal. In paragraph 7 she quoted the current guidelines of the Children and Family Courts Advisory and Support Service which itself confirmed that even established loving bonds with a parent or carer should be protected "unless there are compelling grounds for doing otherwise."

29. The Court of Appeal considered squarely the issue of the paramountcy of the interests of the child in 1997 in the well-known leading case of **Gangadeen [1998] Imm AR 106**, which also involved deportation. This case was not cited specifically before us, no doubt inter alia because it was decided before the Human Rights Act 1998 came into force. However the Court of Appeal did then consider the human rights implications of the decision to deport, because the UK was a signatory to the 1950 Convention and was bound by its terms even if the terms of the Convention had not then been incorporated into our domestic legislation. The Court of Appeal addressed inter alia, some of the European cases cited by Ms Webber before us, namely **Beharreb v The Netherlands** and **Keegan v Ireland**, as well as others, which have not been so cited such as **Poku v The UK**. It held in relation to the European jurisprudence examined by it that

> "In their interpretation of Article 8 in the present context, the Court of Human Rights and the Commission approach the problem as a straightforward balancing exercise in which the scales start even and where the weight to be given to the considerations on each side of the balance is to be assessed according to the individual circumstances of the case; thus they do not support the notion that paramountcy is to be given to the interests of the child."

30. Ms Webber did refer us to the Court of Appeal judgement in Amjad Mahmood [2001] Imm AR 229. Most of the cases mentioned above were considered when Laws LJ assessed the approach of the European jurisprudence to the potential conflict between the respect for family life and the enforcement of immigration controls. However the conclusions drawn by him related expressly to the situation of a married couple and their family. He was not concerned with the position of a natural father of illegitimate children, nor did he consider the implications of a "conducive" deportation after a serious crime. The conclusions he drew in paragraph 55 of the judgement are not really therefore directly relevant to the facts of this appeal, with one exception. If the interests of the children of a family should be regarded as paramount, we would have expected to see some mention of it by him when assessing the position of a full "nuclear" family. There is none. Instead, Laws LJ stated in paragraph 55(6)(i) that regard should be had "to the facts of the particular case."

31. We have considered all the cases cited by Miss Webber but can see nothing, which could lead us to take a different view of the European jurisprudence or the position under UK law from that taken by the Court of Appeal in Gangadeen. The concept of the paramountcy of any specific interest does not arise in any of the deportation/removal cases to which we have been referred. The effects of deportation on the child are relevant and important, but so are other factors and the appropriate weight to be given to them has to be balanced on the basis of the relevant specific facts of each case.

32. Having reached these general conclusions, we turn to our assessment of this appeal, which has to be undertaken on the basis of its own particular facts.

33. Some matters are undisputed. Mr Walker accepted that the Appellant has established family life in the UK with his children and that his removal from the UK would be an interference with that right. He did not dispute that the potential development of that family life was a relevant consideration. Ms Webber for her part accepted that deportation would be in accordance with the law having legitimate aims. The issues therefore are whether the discretion exercised by the Secretary of State under the Immigration Rules under paragraph 364 of HC 395 (as set out above) was properly exercised, and separately whether his decision was proportionate for the purposes of Article 8.

34. The following analysis of the facts provides a common basis of assessment of both issues.

35. The Appellant is a single man and is aged 32. He came from Nigeria and has Nigerian nationality. His education was in Nigeria. His family, such as it is, is there. He was an adult when he arrived in the UK. For the reasons already indicated we do not place much weight on Dr Oyatede's opinion that the Appellant would face material problems on return to the airport in Nigeria on emergency travel documents. Once having returned to Nigeria, there is no good reason why he could not now re-settle and make his life there.

36. He entered the UK in 1990 with a passport to which he was not entitled and did not seek to regularise the basis of his stay here until six years later when he applied for asylum. That asylum claim has been rejected and there is no subsisting appeal relating to it. Ms Webber has not sought to rely on the claims advanced by the Appellant in that claim. The Appellant has a poor immigration history, which reveals scant regard for our national need to maintain proper immigration controls. The Respondent has never accepted that the Appellant had any legal basis for coming here, and, with the rejection of his late asylum claim, any legal basis for staying here. This is in its own right an important issue of principle when seeking to maintain a fair and effective immigration policy.

37. Apart from his illegitimate children, there is little else before us of material substance to the Appellant's private and family life in the UK, even though he has been here for twelve years. There is no evidence of any attachment to any other woman. His job as a sous chef and the accommodation that goes with it has been offered as part of his rehabilitation. He owns no property here. There is no evidence of any notable contribution to the community. He has undertaken studies in prison and plays music. This may offer him a broader scope for employment in the future but still at a pretty

basic level. There is nothing remotely in his situation commensurate with the long and deep attachments formed with their host countries by the claimants in C, Boughanemi, Boultif and Bouchelkia.

38. He has committed a very serious crime in the UK, which resulted in the continuing traumatisation of an elderly woman. He received a substantial prison sentence of 6 years, which underlines the seriousness of the crime, as it was a first offence and took into account his guilty plea. His parole officer now considers that he is at low risk of re-offending and others concerned with his rehabilitation in prison consider that he is a reformed character. That may be true abut but these are however only opinions, based upon his conduct in prison when he had the obvious motives first of wanting to obtain remission and later to avoid deportation. How he will behave in the future, if he has renewed employment problems, is a matter of speculation.

39. His conduct in relation to Ms Niazi and his children by her has in the past been very limited and utterly unimpressive. He left her when she was pregnant and wanted to marry him. He had the opportunity then to establish a full family life but chose not to take it up. He walked out on his responsibilities. At the time of their relationship and her pregnancy, the Appellant had no legal basis for remaining in the UK and both he and she must have been aware of this. So marriage, or at least the maintenance of the relationship in some meaningful form, would not have advanced materially his prospects of being allowed to remain in the UK. His failure therefore to engage with Ms Niazi and the children sheds light into his personal attitudes towards his children at a time when he did not have any material self-interest in showing interest in them. In the years that followed, until his imprisonment, he saw the children only three times and did nothing of any significance to assist with their maintenance or care. He has no rights of custody of the children. By the time he was arrested, he could hardly have shown much less interest or concern about them. Such ties to his children as he had arising from being their natural father, by his choice remained undeveloped. Only once he was in prison did the situation change to any degree. We accept that he kept in touch with them by telephone and by letter and that there were a handful of prison visits by the children. We accept also that in the context of prison life, when any outside involvement can be of significance, his children became more important to him than they had hitherto been. They offered an alternative focus to his restricted prison existence. Those who were involved with his rehabilitation programme consider that this change in him is genuine and likely to last. That may be true but again it is a matter of opinion, which has yet to be tested to any meaningful degree.

40. On his release from prison he went to live with Ms Niazi and the children for a short time, when he had nowhere else to go. He needed time to get a job and find somewhere to live by himself. There has been no question of any resumed personal relationship between him and her and there has been no suggestion that this was anything other than a very temporary and limited arrangement. Whilst living with her and the children, the Appellant for a short time had more involvement with the children's daily lives. However, within a few days after the hearing by the Tribunal, he will have left them, to live on his own in premises connected with his work. How his contact with his children will thereafter develop is essentially speculation. The transformation noted in prison may be genuine and long-lasting, but his previous history suggests otherwise. Ms Niazi is now married to someone else (albeit a deportee) and, as Ms Webber indicated to us at the hearing, she still has some issues with the Appellant, though clearly she would like

some financial support from him and no doubt at times some assistance with the children.

41. The children will not return with the Appellant to Nigeria, as Ms Niazi is the custodial parent. The children have lived all their lives in the UK and are now in effect part of another family. Whilst there would be potential benefit to them in maintaining contact with their natural father and having a developing relationship with him, they have not had much benefit of this in the past. With the exception of the short period following his release from prison and prior to his moving into his own accommodation, the Appellant has had little direct personal contact with his children, and such real contact as there has been was through letters and telephone calls. If the Appellant is returned to Nigeria such postal and telephone contacts can continue in the future as in the past.

42. Obviously the opportunity for the development of this relationship through direct personal contact will be reduced. Nevertheless there is no good reason why the children cannot visit him in Nigeria once he has established himself there. There is no insuperable obstacle to their visiting their father there and this will become progressively easier as they get older. There is also a possibility under the Immigration Rules that the Appellant may in the future be able to obtain leave to visit them in the UK, though this is unlikely for some years to come, if at all, in the light of his criminal conviction. Even so, in these circumstances family life with the children can be continued in the future in much the same way as it was conducted in prison, and much more so than in the years before the Appellant's detention. There will be limited opportunity after deportation to develop the relationship through regular personal contact. Whether the Appellant himself would continue to wish to do this to any meaningful extent, if he were allowed to remain and once he had settled back into normal life outside prison and perhaps created new personal relationships, is a matter of speculation.

43. This is our assessment of the material facts relevant to both issues in this appeal

44. There are two powerful and distinct reasons underpinning the Respondent's decision to deport the Appellant, namely his poor immigration record and his serious criminal offence. This duality of purpose distinguishes this case from the others cited by Ms Webber. Thus even if he is at low risk of re-offending, we do not consider that Ms Webber's suggestion based on the observations of Dyson LJ in **Samaroo [2002] INLR 55** and **Andrews [2002] UKIAT 01452**, that probationary leave to remain to see whether he would re-offend is appropriate, as on the particular facts of this appeal it does not address the question of his previous, prolonged and blatant disregard for our immigration controls. Nor would he be entitled on the facts to benefit from any of the published policy concessions by the Respondent. It is important in the interests of overall fairness to maintain consistency.

45. With regard to the section 63 (1) appeal against the decision to deport under section 3(5)(a) of the Immigration Act 1971, we have considered all the relevant matters under paragraph 364 of HC 395, and the facts overall and in context. We have already described our assessment our assessment in detail above, which includes having due regard to the effect, past and future, of deportation on the Appellant's children, as well as all the other relevant facts. We have balanced these matters against the separate and distinct needs to maintain fair and effective immigration control and to protect the

public interest by deporting a person convicted of a serious crime. In all the circumstances, we have concluded that the Respondent's discretion should not be exercised differently. With regard to the section 65 (1) appeal on human rights grounds under Article 8, we consider that the decision by the Respondent to deport the Appellant is not disproportionate having regard to the two legitimate and important objectives to be achieved by such deportation.

46. For the reasons given above this appeal is dismissed.

Spencer Batiste
Vice-President