IMMIGRATION APPEAL TRIBUNAL

Date of Hearing: 15th & 16th January 2004
Determination delivered orally at Hearing
Date Determination notified:
.....03/02/2004.....

Before:

Mr C M G Ockelton (Deputy President)
Mr A Jordan
Mr G Warr

Between:

SECRETARY OF STATE FOR THE HOME DEPARTMENT
APPELLANT

and

RESPONDENT

DETERMINATION AND REASONS

1. The Appellant is the Secretary of State. He appeals, with permission, against the determination of an Adjudicator, Mr J R Gibb, allowing the appeal of the Claimant against his decision on 16th September 2002 to make a deportation order against him on the ground that his deportation was conducive to the public good and that he is not protected from deportation by any international Convention. The Secretary of State has been represented before the Tribunal by Mr Underwood QC and Ms Giovannetti, instructed by the Treasury Solicitor. The Respondent, a citizen of Kenya, whom we shall call 'the Claimant', is represented by Ms Webber, instructed by the Refugee Legal Centre.

History

2. The Claimant was born on 3rd July 1974. He arrived in the United Kingdom in May 1994 and sought entry as a visitor. That was refused and he thereupon claimed asylum. He was interviewed in connected with that claim in August 1994 and was refused asylum on 9th July 1996. He appealed against that refusal, that is to say he appealed against the associated immigration decision refusing him leave to enter the United Kingdom. There were two hearings before the same Adjudicator, Mr Fox, and there were two Tribunal hearings. The reason for the complication

was first that there was some doubt about whether the Claimant at his first hearing had had a proper opportunity to put his case in the absence of professional representation, and secondly because there were questions about internal relocation and about the application of Article 33(2) of the Refugee Convention. In August 1999, the Tribunal decided that the Claimant was in principle entitled to refugee status subject to consideration of the applicability of Article 33(2) if it were proposed at any time to return him to Kenya.

3. Article 33(2) arises in this appeal because late on Christmas Eve and early on Christmas Day 1995 the Claimant committed a series of serious offences. Following a trial before Her Honour Judge Pearlman and a jury, he was convicted of abduction, making a threat to kill, three counts of rape and one count of false imprisonment. The Claimant's defence to rape had apparently been consent. The victim underwent a change of personality as a result of her experiences. In passing sentence, the judge specifically rejected the suggestion that anything in the Claimant's history, including his claimed experiences in Kenya, could excuse or explain what she described as his wicked behaviour. She expressly passed longer than commensurate sentences totalling fourteen years imprisonment and made an order under section 44 of the Criminal Justice Act 1991. There was an appeal against sentence to the Court of Appeal Criminal Division. We have not been shown any details relating to that appeal and there is nothing before us which suggests that the fervour of the remarks made by the learned judge in passing sentence was doubted in the appeal to the Court of Appeal. It is, however, clear that the total term of imprisonment was reduced by that Court from fourteen years to eleven years. In any event, the Claimant was thus in prison at the time of his asylum appeal hearings. He was not released on parole, but he ceased to serve a term of imprisonment on the non-parole release date of 13th May 2003, remaining under licence, as he does now, until 25th December 2006.

4. Following the decision to make a deportation order, there were hearings before the Adjudicator on 2nd April 2003, 2nd June 2003, 4th June 2003 and 18th July 2003, following which we are told that there were written submissions made by both sides. After 13th May 2003, the Claimant remained in immigration detention pending his projected deportation. On 18th July 2003, the Adjudicator granted bail subject to conditions as to residence with the Claimant's wife and children, weekly reporting and compliance with the terms of the licence which applied to him on his release from his imprisonment. Following that period of bail, bail was discharged by an Adjudicator on 3rd November 2003 but the Claimant was subsequently made subject to restrictions as an alternative to his detention under schedule 3, paragraph 2 of the 1971 Act. At the end of the first part of this hearing yesterday, the Claimant was again taken into custody. An application for bail was unsuccessful.

5. We should say something about the Claimant's family life. He met B in about 1994 and subsequently went through a ceremony of marriage with

her in prison. There is no doubt that that marriage was bigamous. B has or had a previous husband living. We are not aware of any attempt to regularise the position. B was cautioned for the offence of bigamy. At the time they met, B was pregnant. She gave birth to K in April 1995. B became pregnant by the Claimant and gave birth to S in June 1996, by which time of course the Claimant was in prison. Much of the time that B and the Claimant knew each other before the Claimant's offence, they were not able to live together because B was in a mother and baby unit, owing to concerns about her parenting of K and subsequently S. K himself was twice in foster care: once immediately after his birth, and subsequently again apparently after a trial period of living with his mother B. The family unit consisting of the Claimant, B and the children had in fact never been tested until the Adjudicator released the Claimant on bail. Following concerns about the Adjudicator's determination, the Claimant was moved to different accommodation where he now lives, as it happens, apart from B, K and S. It is said, and again this is a matter which was not strictly in evidence in this appeal but we take it into account because it would be wrong to ignore it, that there is another child on the way, apparently conceived shortly after the Claimant's release on bail. There is copious evidence before us, as there was before the Adjudicator, expressing concern about B's ability to cope as a housewife and mother. There is no evidence before us relating to the situation in which the family have had the opportunity to live together since the Claimant's release.

6. Lastly, in this part of our judgment, status. The Claimant has never had leave to enter or remain here, which is of some importance in the context of this appeal. That is because mere success in what we may call the pure deportation element of the appeal would not of course give him leave to enter or remain. If he succeeds on that ground only, he would appear to be an overstayer liable to administrative removal.

The Adjudicator's Determination

7. The Adjudicator heard oral evidence from the Claimant, from B and from various experts. He considered a large range of documents. After some argument, he took the view that he had before him an appeal against the decision to make a deportation order on three separate grounds. Firstly, on the ground that the discretion should have been exercised differently. That is the pure deportation appeal. Secondly, on the ground that the Claimant's removal to Kenya would be a breach of the Claimant's human rights, and thirdly, on the ground that the Claimant's removal to Kenya would be a breach of the Refugee Convention. The Adjudicator allowed the appeal on all three of those grounds and the Secretary of State appeals to us on all three bases.

8. We have concluded for reasons that we shall explain that the Adjudicator erred in law in his evaluation of the question whether the discretion to deport should have been exercised differently, that he erred in law in his approach to the question before him relating to breach of the Claimant's

human rights, and that he erred in law in his approach to, and his decision of, issues relating to the Refugee Convention. To that extent, therefore, the Secretary of State's appeal must be allowed.

9. But that is not the end of the matter. Mr Underwood referred us in the course of his argument to the recent decision of the Court of Appeal in Bunavic [2003] EWCA Civ 1843. At paragraph 19 of the judgment of Latham LJ in that case, there is some guidance on the role of the Immigration Appeal Tribunal in cases of this sort. We appreciate that the question before the Court of Appeal in Bunavic was not identical to the questions relating to this Claimant today. But the principle, we apprehend, is a similar one. In particular, the Court of Appeal in Bunavic provides what, in our respectful view, is valuable guidance on the role of public policy and in the role of the Immigration Appeal Tribunal in considering the judgment of an Adjudicator in a matter which affects public policy. Latham LJ said this:

> "The appeal to the Immigration Appeal Tribunal is not restricted to matters of law. An Adjudicator does not have the same primary responsibility as the Respondent for determining the policy considerations inherent in a decision relating to the enforcement of immigration control. He has what might be called a supervising responsibility and has no greater expertise than the Immigration Appeal Tribunal. Indeed the contrary might be said to be the case bearing in mind that one of the functions of the Immigration Appeal Tribunal is to review decisions of different Adjudicators in order to secure a consistency of approach. In carrying out that function, although the Tribunal would necessarily hesitate before interfering with the decision of an Adjudicator, it is bound to do so if it considers that the decision is wrong. That does not mean that every decision by an Adjudicator in a doubtful case must be the subject matter of an appeal to the Immigration Appeal Tribunal. Leave to appeal will only be granted in a case where it was shown to be arguable that there was an error in the way the Adjudicator assessed the issue."

As we have indicated, our view is that there were errors in the way that the Adjudicator assessed all the issues before him. We should add as a footnote to the judgment in Bunavic that that was as this is a matter which arose under the provisions of the 1999 Act, and it may well be that bearing in mind the restriction of right of appeal to the Tribunal by the 2002 Act and the Rules made under it that that judgment may have to be read with some caution for future cases.

The Refugee Claim

10. It is convenient to look first at issues relating to the Claimant's claim to be at risk on return to Kenya. As we have indicated, he won his asylum appeal and he has been regarded as a refugee for that reason. Before the Adjudicator, there were two arguments on behalf of the Secretary of State. The first was that Article 1(C)(5) applies and that he is no longer in truth a refugee. The second is that Article 33(2) applies and that even if he is a refugee, he is not entitled to protection from expulsion to Kenya under the Refugee Convention. The Adjudicator said, in effect, that he did not

understand the relationship between the two sub-Articles. He declined to decide whether there was currently a risk to the Claimant, and he declined to decide whether Article 1(C)(5) applied. That was an inappropriate way to deal with the Claimant's claim or the Secretary of State's response to it.

11. In her submission before us, Ms Webber made a number of points on Articles 1(C)(5) and 33(2), which we found, to say the least, surprising; and it is right to say that we had some difficulty in following them. She submitted first of all that all the benefits of the Refugee Convention apply to anybody who has been formally recognised as a refugee until that refugee status has been formally revoked. Therefore, even a person who has no well-founded fear of persecution would be entitled not only to the protection of Article 33, but to all the other benefits of the Refugee Convention including, she indicated, the use of a refugee travel document, if the status had not been formally revoked. We reject that submission. There is no foundation for it in the Convention itself, which clearly provides for the existence and non-existence of refugee status (if that is what it is to be called) regardless of any formal act of recognition, for example one could look at Articles 31 or indeed 1(c)(1). Neither of those Articles indicates that the lack of formal recognition of the commencement or cesser of refugee status is to effect the position under the Convention. Nor is there any foundation for Ms Webber's submission in any authority, nor (as she sought to support her submissions in the absence of authority) do general principles of certainty and finality support what she had to say. The purpose of the Refugee Convention is to recognise those who are currently at risk, as its Article 1(A)(2) makes clear.

12. Ms Webber's second submission on this point was that the application of Article 1(C)(5) to the Claimant was illegal and unfair. She based that submission on three documents. The first was a letter from a Refugee Legal Centre worker with a great deal of asylum experience saying that she had never seen Article 1(C)(5) relied upon by the United Kingdom Government. That was said to show that there is invariable practice of not relying on that sub-Article. With the greatest respect, it is clear that the Article is being relied upon in this case. That is a counter-example. It may be an unusual case but the Refugee Legal Centre worker's knowledge or lack of knowledge of any other cases does not establish any practice. For that reason, that particular piece of evidence is worthless in this context.

13. The second document was the 2002 Act, section 76, allowing revocation of indefinite leave to remain in cases where Article 1(C) applies by an act of the refugee himself - for example, where the refugee has voluntarily re-availed himself of the protection of his country of nationality or has acquired a new nationality and enjoys the protection of the country of his new nationality. With that statutory provision Ms Webber showed us an extract from the Report of the associated debate on the provision of the Bill in the House of Lords. The problem with Ms Webber's submissions on that point of course is that this Claimant has never had indefinite leave to remain: and the construction that Ms Webber sought to put on the

sentence of the Ministerial speech upon which she particularly relied is, in our view, a construction that it cannot bear. It is clear to us that at all relevant times the Minister was speaking of the then proposed power to revoke indefinite leave to remain and his statements about the way in which the power would be used are statements about that power and not about another power.

14. The third document upon which Ms Webber relied was (and in applying this description we do not intend to demean the document in any way but simply to provide an accurate description of it) an out-of-date statement of Government policy. The part of that policy which is accepted as being still in force in the current policy relates to refugees who have committed a serious criminal offence. In the context of the usual rules about the grant of leave to remain to refugees - rules which have, we understand, been modified since this particular document was issued - we find this:

> "We may also refuse to grant indefinite leave to remain to a refugee who has committed a serious criminal offence and about whom we wish to have more time to consider whether their continued presence in the United Kingdom is conducive to the public good."

That document explains why indefinite leave to remain was not granted to this Claimant and, indeed, why he was not granted any leave at the time of his final recognition as a refugee by this Tribunal. It shows that in such a case, rather than granting indefinite leave to remain, the Secretary of State will reserve his position in order to be able to consider deportation of a refugee or a former refugee when (no doubt with full regard to Article 3 of the European Convention on Human Rights) he finds that he can lawfully do so.

15. There is no unfairness here either. The Claimant is not a person who has leave and certainly by now he has had ample opportunity to deal with this particular point. The Secretary of State is entitled to consider that the Refugee Convention does not apply to him if the provisions of Article 1(C)(5) are met.

16. Article 1(C)(5) reads as follows:

> "This Convention shall cease to apply to any person falling under the terms of section A, that is to say a refugee, if:
> (5) He can no longer, because the circumstances in connection with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality."

We do not need to read out the rest of that Article.

17. That Article, by its own terms, shows the difference between Article 1(C)(5) and Article 33(2) with which the Adjudicator appears to have had such difficulty. If Article 1(C)(5) applies, the rest of the provisions of the Refugee Convention do not apply. If Article 1(C)(5) applies, therefore

Article 33 does not. The question for us is, does it apply? Although there is no specific reference to this point in the Article itself, it is we think generally understood that it is not every casual change in the circumstances in a Claimant's home country which brings Article 1(C)(5) into operation. The change is, it is sometimes said, one which must be fundamental and lasting. Those are two separate conditions. Nevertheless, we are clear on the facts of this case that Article 1(C)(5) applies to this Claimant.

18. The change in circumstances in Kenya both as a whole and as they apply to the Claimant, has been both fundamental and lasting. The Claimant left Kenya at a time of severe, well-attested human rights violations and abuses under an oppressive regime. General difficulties arose from a history of corruption and the suppression of human rights. As Mr Underwood pointed out, there is nothing in the material upon which Ms Webber relied (which included, incidentally, in large part a Human Rights Watch Report looking forward to the elections rather than looking back to the result of them) that indicates that the Claimant is somebody who is now at risk. His difficulties arose from ethnic conflicts in the Rift Valley in and around the elections of 1992 and his association with FORD-A. In our view, the position is, as shown by those particular reports, that the Claimant is not now at risk. That view is reinforced by a letter, curiously anonymised, deriving apparently from the British High Commission on an unspecified date, perhaps in 2001. For what it is worth, that letter indicates that a person with a history such as the Claimant has is a person who is no longer at risk in Kenya.

19. Whatever may have been the position in the past, the Claimant is not a refugee today. He is not a person who has a well-founded fear of persecution in Kenya. Article 1(C)(5) applies to him and, as a result, none of the rest of the Convention does. It follows that his deportation would not be prevented by the Refugee Convention.

20. In view of what we have said about Article 1(C)(5) and about its effect, there is no real need for us to consider Article 33, which reads as follows:

> "(1) No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> (2) The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

20. In any event, we should approach matters relating to Article 33(2) with caution in the context of this appeal for two reasons. First, if Article 33(2) applies, ex hypothesei the Claimant is being treated as a refugee: in

accordance with the reasoning which we have applied so far on this issue, he is a person who has at the present time a well-founded fear of persecution. It follows that even if the 1951 Convention might not expressly and of itself prohibit his return to his own country, if Article 33(2) applies, it is very likely that Article 3 of the European Convention on Human Rights would inhibit return. We have concluded that this Claimant is not at any risk at all, but we envisage a provision that in any case where Article 33(2) is genuinely in issue, there would need to be consideration of whether the Claimant's return would breach Article 3.

21. Secondly, there are issues relating to section 72 of the 2002 Act. In our judgment, it is absolutely clear that that new provision applies to the Claimant's case insofar as the response to it is framed under Article 33(2). There are difficulties in the interpretation of that provision and indeed in precisely deciding how the presumption is to be discharged by evidence from the Claimant. In view of the fact that we have concluded that Article 33(2) is not in issue as it turns out in this appeal, this is not the time to provide any real assessment of the effect of section 72.

22. Our conclusion on this part of the appeal is that the Adjudicator should not have allowed the Claimant's appeal on the basis that he is a refugee.

The 'Pure' Deportation Appeal

23. We pass now to questions of deportation. The argument here on behalf of the Claimant is that the Secretary of State's discretion to make a deportation order should have been exercised differently. All deportation decisions are discretionary in the sense that, within the Immigration Rules, the decision imports a discretion. All Immigration Acts have provided that in such a case, the task of the Appellate Authorities is to allow an appeal if the Authority (the Adjudicator or the Tribunal) considers that the discretion should have been exercised differently.

24. In order to reach such a decision, an Adjudicator, or indeed the Tribunal, does not have to conclude that the Secretary of State erred in law in the decision that he, the Secretary of State, made. But, as the Tribunal hearing an appeal from an Adjudicator, we would be very slow to substitute our discretionary judgment for that of the Adjudicator unless we were satisfied that the Adjudicator erred in law. There is a difference, in other words, between the task of the Appellate Authorities as a whole and the task of the Secretary of State. The task of the Secretary of State in making his decision is to exercise his discretion and the Appellate Authorities as a whole can review and substitute their own discretion. But between the two levels of the Appellate Authorities, once the Adjudicator has made a lawful assessment of the discretion, we, as the second Appellate tier, should be slow to interfere.

25. It was originally claimed on behalf of the Secretary of State that this ground was not open to the Claimant at all and that it was barred by the One-Stop

provisions of sections 74 and 76 of the 1999 Act. That ground was not pursued before us. We think that the decision not to pursue it was right. It is clear that at all relevant stages the Secretary of State envisaged this appeal as an appeal under section 63 of the 1999 Act, ie on pure deportation grounds, independent of any claims which might be made under sections 65 or 69, as indeed claims subsequently were.

26. We should perhaps begin by reading paragraph 364 of HC395, which is the relevant immigration Rule:

> "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. … Before a decision to deport is reached the Secretary of State will take into account all relevant factors known to him including:
>
> (i) age;
> (ii) length of residence in the United Kingdom;
> (iii) strength of connections with the United Kingdom;
> (iv) personal history, including character, conduct and employment record;
> (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."

The phrase "*all relevant circumstances*" is important, as is the list, which is clearly not intended to be exclusive, though it must be regarded as of some weight.

26. The Adjudicator dealt at length with the risk of re-offending, following his assessment that the evidence he heard was in general terms both credible and trustworthy: that is to say, the evidence from the Claimant, from B and the experts. He made that conclusion at paragraphs 96-101 of his determination and the conclusion was that the risk of re-offending was very low. He then went on to look at family life. We had better set out his findings on family life at paragraphs 102-104 of the determination:

> "102. Looking at all of the evidence, I do not think that it has been established that the appellant ever lived with B and K as a family unit. It is clear that B and the appellant did have a relationship, and that B spent time at his flat. It is also clear that she kept some possessions there, including toys and equipment for K, but she always had another place to live and it does not appear that B and the appellant ever had a shared home. I accept that the appellant did contribute financially to K and that he did visit the hospital. He was clearly involved with B in decisions about K and plans for the future when B was pregnant with S, but he failed to attend meetings and was drinking heavily at that time.
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> 103. I am confident, given all of the evidence that I have heard, that the appellant has maintained a connection with B and the children throughout his time in prison. He regards K as his son, and K regards

the appellant as his father, and the social services documents suggest that this was the case when the appellant was first in prison. Both K and S have maintained regular contact with their father through visits to him in prison and through telephone calls and letters. In many ways, this is a remarkable story of family life surviving despite the fact that the relationship started in difficult circumstances and has continued with the appellant in prison. 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.

104. My assessment of B is that she is vulnerable to exploitation for a number of reasons. One is that she has very limited education. Another is that she has not had the benefit of the support of her family since the death of her parents. She was exploited by the landlady and her son, K's father. She was exploited in being forced into her first marriage, for immigration reasons. She clearly felt that social services were not on her side and it is clear that she did lie to them about the appellant being her cousin, about him being the father of S, and about visiting him in prison. For some time it seemed likely that the children would be taken into care, and there were concerns about their welfare on prison visits. Having said all of that by the time of the hearing social services were no longer involved, the children were no longer on the at risk register and the expert witnesses were all of the opinion that B was doing well as a parent, despite the very difficult circumstances. The letters from the school show that the children need particular help. My overall conclusion is that B is vulnerable but that she and the children are managing despite financial difficulties in a way that does not mean that the children are at risk or that the family need social services involvement."

26. The Adjudicator then considered whether the discretion to deport should have been exercised differently. Again, we shall have to set out his conclusions at some length.

"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 the 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 imprison. 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.

108. The compassionate circumstances are his own history of being victim of torture and the manner in which he lost his family in Kenya.

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.

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."

27. On the assumption that the Adjudicator's primary judgments on the evidence were open to him and were correct, Mr Underwood criticises that conclusion on two principal grounds. The first is that the Adjudicator did not confine himself, as he should have done, to evidence in existence or pointing to facts in existence at the date of the decision, 16th September 2002. Instead, he appeared, in Mr Underwood's submission, to stray into the area of facts at the date of the hearing. In particular, Mr Underwood claimed that that error, as he submitted that it was, invalidated the Adjudicator's conclusion on the risk of the Claimant re-offending, because he had based that conclusion on evidence of improvement after the date of the decision.

28. In response to that, Ms Webber points to material in earlier reports dating back some six months before the date of the decision showing that on the date of the decision and for some time previous to it, there was a clear prospect of the Claimant's rehabilitation, that is to say reducing the risk of re-offending by the time of his release date. She cites well-known authorities relating to the value of subsequent evidence that casts a flood of light on the circumstances at the date of the decision. She refers in particular to Kwok Ong Tong [1981] Imm AR 214, a decision of Glidewell J, as he then was, on Judicial Review of a decision by the Tribunal. The learned judge in that case noted that in certain circumstances the fact that something did happen may be powerful evidence and indeed it may be the

only available evidence that it is something which was likely to happen at an earlier date.

29. We accept Ms Webber's submission on this issue with some reservations. In a case of this sort, it is a datum that the Claimant is not going to be deported until he is released from the custody consequent upon his defence. Every deportation decision in a case of this sort has necessarily to look forward to that date. Thus the Tribunal found, perhaps most notably in Chindamo, that a deportation decision made near the beginning of a very long sentence during which the offender's circumstances were certain to change, was a decision not in accordance with the law. It cannot properly in our judgment be open to the Secretary of State to make a decision at a time when he is not going to act on it and then claim that the only consideration properly to be taken into account are those in fact in existence at that time, regardless of any foreseeable subsequent change.

30. On the other hand, in a case such as this we would urge caution in *assuming* that a change that happens is a change that was predictable. Kwok was about the establishment of a business. A wrong decision either way would result in financial consequences only. Without wanting to enter into the realm of speculation in such a case, the Appellate Authorities might well be more willing to make a leap of faith in such a case as that than where the question is the risk of a very serious criminal offence being committed.

31. In the present case, the evidence at the date of the decision was somewhat equivocal. There is a report dated 19th September 2002, just three days after the date of the decision, so essentially contemporaneous with it, making it clear that *at that time* the Claimant was not yet suitable for release. On the other hand, it is right to say that other reports do anticipate that the Claimant would be in a low-risk category by the time of the completion of the Grendon Course and his release in May 2003. That, as the Adjudicator, found is what happened. In our view, the Adjudicator did not err in law in his decision to take account of the later evidence going to the assessment of risk. He took into account matters which were genuinely foreseeable to some extent at the date of the decision.

32. Mr Underwood's second principal complaint was that the Adjudicator over-valued the low risk of re-offending and failed to consider whether the offence in question was one whose very nature was the prime consideration in a deportation decision, making the risk of its occurring again of somewhat lesser importance. He pointed to a number of English and Strasbourg decisions indicating that a state is entitled to take the view that some offences are of such a nature that expulsion is merited where possible, regardless of any propensity to re-offend. He submitted that the Appellate Authorities should pay very great regard to the Secretary of State's judgment about what those offences are and in weighing the individual circumstances of the case against the public interest should essentially accept what is said by the Secretary of State to be the public interest.

33. Ms Webber noted the force of the Secretary of State's submissions in general and in relation to judgments such as that in Schmeltz [2003] EWHC 1859 Admin in particular. She submitted, however, that the Adjudicator was entitled to have full regard to all the circumstances and that this Adjudicator had done precisely that. He had reached his own view on the exercise of the discretion. His conclusion on the deportation issue, she submitted, was well within the range of reasonable responses and we should not interfere with it: indeed, we lawfully could not.

34. We note that paragraph 364 makes no specific reference to propensity to re-offend. No doubt propensity to re-offend cannot and should not be ignored because of the phrase "*all relevant factors*", but if it is to be regarded as an important factor in cases relating to deportation of criminals, its omission from sub-paragraph (vi) of paragraph 364 is extremely surprising.

35. Further, if the main concern is risk for the future, the reference in that sub-paragraph to "*previous criminal record*", in contrast specifically to the offence which is under consideration as the reason for deportation, is also surprising. It is clear to us, reading paragraph 364 as a whole, that the paragraph sees the deportation decision as primarily a reaction to past facts of present circumstances rather than future risk.

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 consists 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.

38. Having found that the Adjudicator erred in law in his approach to this question, we move therefore to make our own assessment. 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.

39. The compassionate circumstances are said to arise from his own history in Kenya and the situation in Kenya at the date of the decision. But his own history is not of itself a reason militating against deportation as a result of the offence, particularly in view of the judge's remarks; and the situation in Kenya at the date of the decision is not such as to indicate any particular reason for compassionate thoughts towards a citizen of that country who is not protected from return by any international Convention (as must be the case if the deportation decision was to be carried out and as the decision itself must envisage).

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.

Article 8

41. Following the starred determination of the Tribunal in SK [2002] UKIAT 05613, the Adjudicator was concerned here with the facts at the date of his determination. He found that the facts that had been the matrix within which the Secretary of State took his view as to proportionality was seriously deficient. He therefore wrote as follows:

> "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. As a result of these differences I cannot assess whether the decision was within a range of reasonable responses. Instead I have to decide whether the interference would be disproportionate, paying deference to the Secretary of State's view of the importance, in this particular case, of preventing disorder and crime and the protection of health and morals."

42. In the following paragraph, he said this:

> "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 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."

43. In her submissions, Ms Webber attempted to support that process by reference to the decision of the Court of Appeal in Razgar [2003] EWCA Civ 840, which had also been the subject of reference by Mr Underwood. That was one of a number of recent attempts, if we may so express it, both here and in the Court of Appeal to indicate what precisely is the judicial role in assessing questions of proportionality. In paragraphs 40 and 41 of their judgment, the Court of Appeal say this:

> "40. We note that both Moses J and Simon Brown LJ were careful to limit what they said to cases where there is '*no issue of fact*' (Moses J) and "*the essential facts are not in doubt or dispute*" (Simon Brown LJ). We recognise that, if the adjudicator finds the facts to be essentially the same as those which formed the basis of the Secretary of State's decision, there will be no difficulty in adopting the approach enunciated by Moses J and Simon Brown LJ [that is, as exemplified in Blessing Edore]. But what if the adjudicator finds the facts to be materially different? In such a case, the adjudicator will have concluded that the Secretary of State carried out the balancing exercise on a materially incorrect and/or incomplete factual basis. There is no power in the adjudicator to remit the case to the Secretary of State for a reconsideration of the balancing exercise on the facts as found by the adjudicator. There will, therefore, be cases where it is not meaningful to ask whether the decision of the Secretary of State was within the range of reasonable responses open to him, because his determination was based on an accurate analysis of the facts. But even if the adjudicator were to conclude that the Secretary of State's analysis was wrong, it would not necessarily follow that the Secretary of State acted in breach of a claimant's ECHR rights in such a case. It would remain open to the adjudicator to decide that the conclusion reached by the Secretary of State was lawful (and did not breach the claimant's human rights) because it was in fact a proportionate response even on the facts as determined by the adjudicator.

> 41. Where the essential facts found by the adjudicator are so fundamentally different from those determined by the Secretary of State as substantially to undermine the factual basis of the balancing exercise performed by him, it may be impossible for the adjudicator to determine whether the decision is proportionate otherwise than by carrying out the balancing exercise himself. Even in such a case, when it comes to deciding how much weight to give to the policy of maintaining an effective immigration policy, the adjudicator should pay very considerable deference to the view of the Secretary of State as to the importance of maintaining such a policy. There is obviously a conceptual difference between (a) deciding whether the decision of the Secretary of State was within the range of reasonable responses, and (b) deciding whether the decision was proportionate (paying deference to the Secretary of State so far as is possible). In the light of *Blessing Edore*, we would hold that the correct approach is (a) in all cases except where this is impossible because the factual basis of the decision of the Secretary of State has been substantially undermined by the findings of the adjudicator. Where (a) is impossible, then the correct approach is (b). But we doubt whether, in practice, the application of the two approaches will often lead to different outcomes."

44. We are, of course, bound by that decision. We do not, however, consider that the principles set out there were correctly applied by the Adjudicator in this case. The judgment of proportionality is an executive one. The judicial role is solely to assess whether the executive decision was outside the range of lawful responses to the facts. If the facts turn out to be other than the original decision-maker thought, that does not of itself or necessarily alter the judicial function. That function is not to assess what decision on proportionality *should* be made in the light of the new facts, but to identify the boundaries within which a proportionality decision lawfully *could* be made in the light of the new facts. It may be that an Adjudicator would, if he were making the decision, decide in favour of the Claimant. But that is not the question. The question is whether or not it would be lawful for the Secretary of State to decide against the Claimant. The task of distinguishing between making a decision oneself and deciding the parameters within which a decision could lawfully be made by another is one which the Courts, and we venture to say the Appellate Authorities, are well able to perform. We are accustomed to saying that a decision was a lawful one for the decision-maker to make even if we may think it is not the decision we would have made ourselves, and the issue is in essence no different when the decision of the other is one which is to be made rather than one which has been made. In cases under approach (a) as well as those under approach (b), the question will be *whether the decision to remove would be* (in all circumstances) *necessarily disproportionate*.

45. In the present case, there was, as it seems to us, no proper basis upon which the Adjudicator could pass to approach (b). It was far from impossible for the Adjudicator to decide whether the decision actually made was (or would remain) a lawful one in light of the new facts, particularly because the new facts were foreseen in material available to the Secretary of State. We therefore find that the Adjudicator erred in law in taking it upon himself to assess proportionality.

46. Even if we are wrong about that, it is clear that in assessing proportionality the Adjudicator failed to pay deference to the view of the Secretary of State that the decision of the Court of Appeal in Razgar would have required. The only deference paid is to "*the Secretary of State's view of the importance of the prevention of crime*" but in the letter giving the reasons for his decision the Secretary of State went much further than this. He wrote:

> "The Secretary of State is satisfied that upon balancing your rights to a family life and the legitimate aim of the United Kingdom to ensure the prevention of disorder or crime that your deportation would not place the United Kingdom in breach of Article 8 of the ECHR and the Human Rights Act 1998.
>
> The Secretary of State has concluded that in light of the seriousness of your criminal offence, your removal from the United Kingdom is necessary in a democratic society for the prevention of disorder and crime and for the protection of health and morals."

That clearly goes far beyond looking at the risk of re-offending and indeed expressly relies on the offence itself.

47. The Adjudicator's failure to give proper weight to the offence itself, as distinct from the probability of its being repeated, was an error here as it was in his treatment of the exercise of discretion. We therefore make our own judgment of the question whether deportation of the Claimant would be outside the range of responses allowed to the Secretary of State under Article 8(2). We are assisted by the principles set out in Amrollahi v Denmark (application no 56911/00) and Boultif v Switzerland (2001) 33 EHRR 50, to which Ms Webber referred us, as well as those in Samaroo [2001] EWCA Civ 1139 and Mahmood, upon which the Secretary of State relied. As we indicated in the course of argument, however, partial comparisons of fact are unlikely to be of much assistance in determining an appeal of this nature.

48. The relationship between the Claimant and B appears to have moved on a little following the Claimant's release on bail. Although at the date of the hearing before us they do not in fact live together, it is said that there is a further child on the way. Although the Claimant is subject to licence, there is no relevant current report from the Home Probation Officer. It seems to us that, on the primary facts found by the Adjudicator, there are indeed, as Mr Underwood submitted, no insurmountable reasons why B, K, S and any unborn child should not live in Kenya.

49. But it may be that B, K, S and any newly born child cannot be expected to move to Kenya. For that reason, we proceed to decide whether, in the circumstances of this case, a decision to deport the Claimant and so divide this family grouping would be necessarily disproportionate. 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.

50. We have also considered the matters mentioned by Ms Webber relating to the circumstances in which the Claimant might find himself in Kenya. We do not think they, either alone as an interference with his private life or together with the family arguments, assist the Claimant for the same reasons as we have expressed in relation to the pure deportation appeal. In the circumstances, we conclude that the disruption to the lives of the Claimant, B, K and S and any unborn child is not such as to make a decision to deport the Claimant necessarily unlawful as disproportionate even if B and the children could not move to Kenya with the Claimant. As we have indicated, however, we think there is no reason why they should not do so. If that is right, there is even less substance in the Article 8 claim.

The Adjudicator's assessment of the evidence

51. Mr Underwood's fourth major complaint about the Adjudicator's determination related to his assessment of the facts. Mr Underwood identified a very substantial number of points at which the Claimant's evidence appeared to give cause for concern. He seems to have presented an account of his experiences in Kenya to the Adjudicator, Mr Fox, which differed in some notable respects from the account he gave to the Adjudicator, Mr Gibb. He had admitted lying. He had evidently said some things during the course of his time of imprisonment which either were not true or were extremely difficult to reconcile with other evidence. The Adjudicator did decide that he could believe the evidence which was before him, but in order to do so he adopted in part a view that the Claimant, because of his earlier experiences, had needed to construct a comfortable fantasy to protect him from the reality of his history. Although he did not use the word, Mr Underwood implied that both the Adjudicator and those who had assessed the Claimant in prison, whether as Probation Officers or Psychiatrists, had been unduly credulous. It was suggested that, in those circumstances, the Adjudicator was not in law entitled to make the findings that he did. He should, submitted Mr Underwood, have realised that the Claimant was not to be regarded as credible and that, as a result, the evidence of the experts was not trustworthy because it was based on what the Claimant had told them, and contained no appreciation that the Claimant was telling inconsistent stories.

52. If we were to reach that view, it would have to be on a basis of an assessment of the credibility and trustworthiness of the Claimant, B and the experts, who gave evidence before the Adjudicator but who have not given evidence before us. We note Mr Underwood's concerns, but those concerns are allayed to some extent by Ms Webber's analysis of the

psychiatric evidence in her submissions this morning. Ms Webber also submitted that the Adjudicator had considered the evidence carefully. We would not dissent from that view. It is clear that he took his fact-finding role very seriously. It may be that the assessments of credibility and the findings of primary fact are not ones that we would have made ourselves or that Mr Underwood would have made, but the concerns expressed by Mr Underwood are not such as to enable us to say that those assessments and findings were not open to the Adjudicator or that he erred in law in making them. We therefore reject this fourth area of challenge.

Conclusion

53. On the other three areas, however, we have constructed our judgment and our assessments on the basis of the Adjudicator's findings of primary fact. We allow the Secretary of State's appeal on each ground and it follows that the Secretary of State's decision to make a deportation order against the Claimant is lawful and remains in force.

C M G OCKELTON
DEPUTY PRESIDENT