Appeal No.: HR/6014/01
(*00 TH 2345*)
STARRED

IMMIGRATION APPEAL TRIBUNAL

Date of hearing: 3 July 2001
Date determination notified:

Before:
Mr C. M. G. Ockelton (Deputy President)
Mr J. Barnes
Mr M. W. Rapinet

Between:

EDDY EDOKPOLAR NORUWA
APPELLANT

and

The Secretary of State for the Home Department
RESPONDENT

DETERMINATION AND REASONS

1. This is a starred determination. In it we aim to set out the principles to be adopted in appeals under the Human Rights Act 1998 that raise questions relating to proportionality

The Facts

2. The Appellant, a citizen of Nigeria, appeals, with leave, against the determination of an Adjudicator, Mrs R. J. Tiffen, dismissing his appeal against the decision of the Respondent on 26 January 2001 refusing to revoke a deportation order made against him on 30 August 1996 and served on him on 19 October 2000. The Appellant claims that requiring him to leave the United Kingdom is in breach of his human rights. Before us he was represented by Mr P. J. Kishore instructed by Rosetta Offonry & Co and the Respondent was represented by Mr A. Hunter.

3. The Appellant came to this country as a visitor in December 1990, leaving a wife in Nigeria. He was granted six months leave to enter. He has never had any further leave. He overstayed. He applied for asylum on 8 June 1993. That application was refused and on 24 August 1994 he was served with notice of a decision to make a deportation order. He appealed on asylum grounds.

4. The Appellant's first wife had, it is said, divorced him in March 1994. The Appellant went through a ceremony of marriage with Devika Christina Tulsie (or Tulsi), a British citizen, on 11 October 1994. She has two children, both born in 1988 (not twins) who are the Appellant's stepchildren. On 12 October 1994 the Appellant applied for leave to remain in the United Kingdom on the basis of his marriage. That application was refused, first on the basis that at the time of his marriage the Appellant was still married to a wife in Nigeria. Following represenations by the Appellant's representatives, the refusal was maintained on the ground that the Appellant's marriage postdated the beginning of enforcement proceedings.

5. On 8 November 1995 the Appellant withdrew his asylum appeal. There were further representations made to the Respondent in the hope of persuading him to change his decision on the marriage application, but those representations were rejected by letter dated 31 January 1996. By the time the deportation order was signed on 30 August 1996 the Appellant could not be traced. It was served on him on 19 October 2000 when he attended at Croydon intending to take advantage of the regulation period for overstayers, instituted under section 9 of the 1999 Act. He then began proceedings for judicial review of the decision to deport him. That application was then withdrawn and the Appellant alleged that his deportation would be in breach of the Human Rights Act. Thus his appeal came before the Adjudicator.

6. The Adjudicator found that the Appellant did not have a family life with his wife and stepchildren. She dealt with matters going only to proportionality in tandem with matters relating to the existence of family life, however, and concluded that 'I do not believe that the family life exists, but if it did so the Appellant and his wife were aware of the immigration status at the time of their marriage and the previous employment of the Appellant in Nigeria and his qualifications indicate that the Appellant would be able to establish a marital home in Nigeria'.

7. The Appellant appealed against the Adjudicator's determination on grounds based solely on Article 8 of the European Convention on Human Rights (although in the grounds he calls it Article 3). The grounds aver that the Adjudicator too readily dismissed the existence and import of the Appellant's marriage, failed to take properly into consideration the Respondent's deportation policy and the position of the Appellant's stepchildren, as well as the Appellant's own medical condition. Leave to appeal was granted (with the comment that it was not arguable that the Adjudicator's judgement was erroneous) in order for the Tribunal to consider whether, in the light of *B v SSHD* [2000] Imm AR 478 and *R (Isiko) v SSHD* (C/2000/2937, CA 20 December 2000), questions of proportionality under Article 8 should be regarded as questions of law.

The Task

8. That is a matter of some importance, because an appeal from the Tribunal to the Court of Appeal can only be on a question of law (see below); and the Tribunal itself will be slow to replace an Adjudicator's judgement with its own. If the assessment of proportionality is a question of law, then leave to appeal to the Tribunal and from the Tribunal to the Court of Appeal ought to be given whenever it is arguable that the assessment should have been different, even if no error can be shown in the assessment actually made. If it is not a question of law then leave to appeal to the Court of Appeal could only be given if the process of assessment disclosed an error of law: it could not be given merely because there was a prospect that the court would assess the matter differently. Similar considerations would apply on an application for leave to appeal to the Tribunal. Although such an appeal is not restricted in the same manner, leave would be less likely to be granted in a case where it was not shown to be arguable that there was any error in the way the Adjudicator assessed the issue.

9. Article 8 of the European Convention on Human Rights, incorporated into English law by the Human Rights Act 1998, is as follows:

> *8. Right to respect for private and family life*
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

10. At the beginning of his submissions, relying on the first part of his skeleton argument, Mr Hunter suggested that we should not in this appeal consider questions relating to proportionality as they would not be material to its outcome. He reminded us that the Adjudicator had found that the Appellant had no meaningful family life that could be the subject of a breach of Article 8. The grant of leave stated that it was not arguable that the Adjudicator's judgement was erroneous and, in Mr Hunter's submission, that view was 'clearly right'. If the Appellant failed to show any interference with a right protected by Article 8.1, the question whether the government's action was nevertheless permitted by Article 8.2 did not arise, and any remarks by us would be obiter.

11. We are not persuaded. The Adjudicator's brief consideration of the Appellant's circumstances relates to both parts of Article 8 and the Appellant has submitted grounds challenging her findings on each part. We have jurisdiction to determine an appeal even if there is no reasonable prospect of success (see rule 18(7)), and the grant of leave makes it clear that this is a case where there is a compelling reason why the appeal should be heard. Further, both parties before us are fully prepared to deal with the issue raised in the grant of leave.

12. Finally, that issue is one on which we clearly need to express our view, and preferably soon. Appeals under the Human Rights Act or under section 65 of the 1999 Act already form a large part of the Authorities' work. The way in which we classify matters relating to proportionality will have a considerable effect on our approach to applications for leave to appeal to ourselves, and applications for leave to appeal to the Court of Appeal. Those applications are all made without notice and are required by the Rules (rr 18(8) and 27(4)) to be determined without a hearing. It is in our view right that we should take the present opportunity to review the developing authority on the question in order to guide Tribunal chairmen in those functions as well as to indicate the way in which we would expect the issue of proportionality to be treated in determinations of adjudicators as well as the Tribunal.

The Law

13. Before we go any further, we must set out the relevant statutory provisions.

14. Human Rights Act 1998

1. - (1) In this Act 'the Convention rights' means the rights and fundamental freedoms set out in-

(a) Articles 2 to 12 and 14 of the Convention ...

6. - (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

7. - (1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may-

(a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or

(b) rely on the Convention right or rights concerned in any legal proceedings,

but only if he is (or would be) a victim of the unlawful act.

(2) In subsection (1)(a) 'appropriate court or tribunal' means such court or tribunal as may be determined in accordance with rules; and proceedings against an authority include a counterclaim or similar proceeding. [Subsection (9) gives the rule-making power. The Immigration Appellate Authorities have not been designated as 'the appropriate court or tribunal' for any purposes.]

15. Immigration and Asylum Act 1999

65. - (1) A person who alleges that an authority has, in taking any decision under the Immigration Acts relating to that person's entitlement to enter or remain in the United Kingdom, racially discriminated against him or acted in breach of his human rights may appeal to an adjudicator against that decision unless he has grounds for bringing an appeal against the decision under the Special Immigration Appeals Commission Act 1997.

(2) For the purpose of this Part-

(a) an authority racially discriminates against a person if he acts, or fails to act, in relation to that other person in a way which is unlawful by virtue of section 19B of the Race Relations Act 1976; and

(b) an authority acts in breach of a person's human rights if he acts, or fails to act, in relation to that other person in a way which is made unlawful by section 6(1) of the Human Rights Act 1998.

(3) Subsection (4) and (5) apply if, in proceedings before an adjudicator or the Immigration Appeal Tribunal on an appeal, a question arises as to whether an authority has, in taking any decision under the Immigration Acts

relating to the appellant's entitlement to enter or remain in the United Kingdom, racially discriminated against the appellant or acted in breach of the appellant's human rights.

(4) The adjudicator, or the Tribunal, has jurisdiction to consider the question.

(5) If the adjudicator, or the Tribunal, decides that the authority concerned-

(a) racially discriminated against the appellant; or

(b) acted in breach of the appellant's human rights,

the appeal may be allowed on the ground in question.

(6) ...

(7) 'Authority' means-

(a) the Secretary of State;

(b) an immigration officer;

(c) a person responsible for the grant or refusal of entry clearance.

Schedule 4

21. - (1) On an appeal to him under Part IV, an adjudicator must allow the appeal if he considers-

(a) that the decision or action against which the appeal is brought was not in accordance with the law or with any immigration rules applicable to the case, or

(b) if the decision or action involved the exercise of a discretion by the Secretary of State or an officer, that the discretion should have been exercised differently,

but otherwise must dismiss the appeal.

(2) Sub-paragraph (1) is subject to paragraph 24 and to any restriction on the grounds of appeal.

(3) For the purposes of sub-paragraph (1), the adjudicator may review any determination of a question of fact on which the decision or action was based.

(4) For the purposes of sub-paragraph (1)(b), no decision which is accordance with the immigration rules is to be treated as having involved the exercise of a discretion by the Secretary of State by reason only of the fact that he has been requested by or on behalf of an appellant to depart, or to authorise an officer to depart, from the rules and has refused to do so.

22. - (1) Subject to any requirement of rules made under paragraph 3 as to leave to appeal, any party to an appeal, other than an appeal under section 71, to an adjudicator

> may, if dissatisfied with his determination, appeal to the Immigration Appeal Tribunal.
>
> 23. - (1) If the Immigration Appeal Tribunal has made a final determination of an appeal brought under Part IV, any party to the appeal may bring a further appeal to the appropriate appeal court [ie the Court of Appeal, unless the appeal was from an Adjudicator sitting in Scotland] on a question of law material to that determination.

The Authorities: (i) B v SSHD

16. Our starting point must be *B v SSHD* [2000] Imm AR 478. That was an appeal to the Court of Appeal against a determination of the Tribunal dismissing the Appellant's appeal against the Secretary of State's decision to deport him in the public interest. He was, in fact, a person who had been convicted on a series of counts of sexual offences against his daughter. The Appellant was Italian and was therefore entitled to the benefit of Article 39 (ex-48) of the Treaty of Rome, which protects free movement by prohibiting deportation of EU nationals save in certain circumstances. He could be removed only if his deportation was a proportionate measure in all the circumstances. It was common ground before the Court of Appeal (and was therefore the subject of no argument) that 'among the questions of law that may arise on further appeal [from the Tribunal] to this court is the question whether the decision to deport infringes the principle of proportionality' (para 6). It was further agreed (or at any rate not disputed) that there was no material difference between the test of proportionality for the purposes of EU law and that test for the purposes of the application of the European Convention on Human Rights. In that context Sedley LJ summed up the court's task as follows at para 18:

> [A]mong the issues of law for this court in a case such as the present is the question whether deportation constitutes a proportionate response to the appellant's offending. Being a question of law, it has to be answered afresh, even if reaching an answer involves taking a much closer look than we are accustomed to at the merits.

17. He then considered the merits of the case, and then went on to consider what deference, if any, was due to the Tribunal's assessment of proportionality. After considering the words of Lord Hope of Craighead in *R v DPP ex parte Kebilene* [1999] 3 WLR 972, 993-4, he noted that although the Tribunal had found primary facts, its decision included inferences of fact, propositions of law and reasoning leading to conclusions. He held that the Court of Appeal was as well placed as the Tribunal to decide what to make of the facts which had been found, and that the Tribunal had erred in law in considering that Article 8

added nothing to the Appellant's case. He went on to reason to his own conclusions. In the course of that process he said this at para 36:

> I have no doubt that the Home Secretary's view that deportation was nevertheless merited was legitimately open to him ... . But our public law, for reasons I have explained, now has to accommodate and give effect to the requirements of EU law and, through EU law, [this was before the coming into force of the Human Rights Act 1998] of the European Convention. It means making up our own minds about the proportionality of a public law measure - not simply deciding whether the Home Secretary's or the Tribunal's view of it is lawful and rational.

18. Simon Brown LJ said this at para 47:

> It was common ground before us that proportionality involves a question of law and that, on a statutory appeal of this nature, the court is required to form its own view on whether the test is satisfied, although, of course, in doing so it will give such deference to the Tribunal's decision as appropriately recognises their advantage in having heard the evidence. This task is, of course, both different from and more onerous than that undertaken by the court when applying the conventional *Wednesbury* approach. It would not be proper for us to say that we disagree with the Tribunal's conclusion on proportionality but that, since there is clearly room for two views and their view cannot be stigmatised as irrational, we cannot interfere. Rather, if our view differs from the Tribunal's, then we are bound to say so and allow the appeal, substituting our decision for theirs.

19. Ward LJ expressly agreed with both judgements. He summarised (at para 41) the court's task as deciding 'whether or not the appellant's personal conduct is such a threat to the requirements of public policy that his deportation is a proportionate response'. Like his brethren, he decided that it was not: and so the court allowed the Appellant's appeal.

20. We add a few words to explain the context of that appeal. First, it was an appeal that (under the statutory provisions then in force) lay directly to the Tribunal: the Tribunal had not been hearing an appeal from an Adjudicator. The court's words about the Tribunal's findings of fact need to be read with that in mind.

21. Secondly, it was an appeal in which (under section 15 of the 1971 Act, taken with the relevant immigration rules and section 19 of the Act),

the Appellant was entitled to appeal, whilst within the United Kingdom, against the decision to make a deportation order on the ground that the discretion inherent in that decision under the immigration rules should have been exercised differently. Section 19 is replaced (in terms that are not materially different) by Paragraph 21 of Schedule 4 to the 1999 Act, which we have set out above. The 1999 Act has made various changes to the regime of rights of appeal, but it retains distinctions between wide-ranging appeal rights (possessed, broadly speaking, by persons who are or were lawfully in the United Kingdom) and limited appeal rights. A person appealing against a decision not to revoke a deportation order, and a person appealing against removal as an illegal entrant or an overstayer, can raise grounds based on the Refugee Convention (under section 69 of the 1999 Act) or on the European Convention on Human Rights (under section 65). But the Act does not give such persons a right of appeal on other grounds while they remain in the United Kingdom.

22. Thirdly, it was an appeal under the statutory procedure provided at that time by section 9 of the 1993 Act but now by paragraph 23(1) of Schedule 4 to the 1999 Act. The appeal against the Tribunal's determination lay (only) 'on a question of law material to that determination'.

23. It is interesting to note that, according to the Court of Appeal in *B v SSHD*, the review in such an appeal is particularly intrusive. There can be no doubt that the Court had in mind that the right of appeal to it could only be on a question of law material to the determination being appealed. Yet all three members of the Court clearly decided that in a case raising issues of proportionality the Court should substitute its own view even if it were unable to point to any error in the decision taken elsewhere. Further, Sedley LJ (with whom Ward LJ expressly agreed) took the view that in such a case inferences of fact could be 'readily scrutinised and evaluated' by the Court of Appeal, whereas Simon Brown LJ (with whom Ward LJ also expressly agreed) stated that even if two views could rationally be taken, it was the Court's duty to substitute its own. This is what might be called a wide interpretation of a jurisdiction based solely on questions of law.

24. The effect of *B v SSHD* is, however, clear. Because a question of proportionality is a question of law, the Court of Appeal has power to assess any decision affected by the principle of proportionality. Having done so, it substitutes its own decision for whatever decision has previously been made. It does so even if it considers that the previous decision was a lawful response. It would follow that any

decision involving a question of proportionality is one in which, on proper application, the Tribunal should give leave to appeal to the Court of Appeal, save in the quite exceptional case where there is no reasonable prospect that the Court would reach a view different from that of the Tribunal. Similarly, in any such case, the Tribunal should give leave to appeal to itself, and reconsider the Secretary of State's decision on the merits. To go one stage further back again, the duty of an Adjudicator would be, in any such appeal, to consider generally whether the question of proportionality ought to have been assessed differently. If he thought it ought, he would substitute his decision for that of the Secretary of State even if the latter's decision disclosed no error.

The Authorities: (ii) Judicial Review

25. There is a clear and inherent contrast between an appellate jurisdiction and the jurisdiction on judicial review. We must cite the judicial review cases, however, not only in order to make the comparison but also because of certain remarks about *B v SSHD*. We do not need to set out here all the passages to which Mr Hunter referred us. The following will suffice.

26. In *R v DPP ex parte Kebilene* [1999] 3 WLR 972, Lord Hope of Craighead said this at p 993-4:

> *The discretionary area of judgement*
>
> This brings me to another matter on which there was a consensus between counsel and which, I believe, needs now to be judicially recognised. The doctrine of the "margin of appreciation" is a familiar part of the jurisprudence of the European Court of Human Rights. The European Court has acknowledged that, by reason of their direct and continuous contact with the vital forces of their countries, the national authorities are in principle better placed to evaluate local needs and conditions than an international court: *Buckley v. United Kingdom* (1996) 23 E.H.R.R. 101, 129, paras. 74-75. Although this means that, as the European Court explained in *Handyside v. United Kingdom* (1976) 1 E.H.R.R. 737, 753, para. 48, "the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights," it goes hand in hand with a European supervision. The extent of this supervision will vary according to such factors as the nature of the Convention right in issue, the importance of that right for the individual and the nature of the activities involved in the case.
>
> This doctrine is an integral part of the supervisory jurisdiction which is exercised over state conduct by the international court. By conceding a margin of appreciation to

each national system, the court has recognised that the Convention, as a living system, does not need to be applied uniformly by all states but may vary in its application according to local needs and conditions. This technique is not available to the national courts when they are considering Convention issues arising within their own countries. But in the hands of the national courts also the Convention should be seen as an expression of fundamental principles rather than as a set of mere rules. The questions which the courts will have to decide in the application of these principles will involve questions of balance between competing interests and issues of proportionality.

In this area difficult choices may have to be made by the executive or the legislature between the rights of the individual and the needs of society. In some circumstances it will be appropriate for the courts to recognise that there is an area of judgement within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention. This point is well made at p. 74, para. 3.21 of *Human Rights Law and Practice* (1999), of which Lord Lester of Herne Hill and Mr. Pannick are the general editors, where the area in which these choices may arise is conveniently and appropriately described as the "discretionary area of judgement". It will be easier for such an area of judgement to be recognised where the Convention itself requires a balance to be struck, much less so where the right is stated in terms which are unqualified. It will be easier for it to be recognised where the issues involve questions of social or economic policy, much less so where the rights are of high constitutional importance or are of a kind where the courts are especially well placed to assess the need for protection. But even where the right is stated in terms which are unqualified the courts will need to bear in mind the jurisprudence of the European Court which recognises that due account should be taken of the special nature of terrorist crime and the threat which it poses to a democratic society: *Murray v. United Kingdom* (1994) 19 E.H.R.R. 193, 222, para. 47.

27. The next three cases all concern applications for judicial review of decisions by the Secretary of State to remove individuals from the United Kingdom. In each case it was argued that the removal was, in the circumstances of the case, prohibited by Article 8. In *R (Mahmoud) v SSHD* [2001] 1 WLR 840, Laws LJ made the following observations:

> 3. [Miss Webber, counsel for the applicant, submits] that this court is effectively in as good a position as was the Secretary of State to form a judgment as to the competing interests which militate for and against the applicant's

removal. The submission promotes the question, how intensive is the proper standard of judicial review of the Secretary of State's decision? And it is connected with the issue: does the proper standard differ according to whether or not the court is considering incorporated Convention rights, and, if so, how?

…

16. Upon the question, "What is the correct standard of review in a case such as this?", there are at least in theory three possible approaches. The first is the conventional *Wednesbury* position which Miss Webber says the judge wrongly adopted. On this model the court makes no judgement of its own as to the relative weight to be attached to this or that factor taken into account in the decision-making process; it is concerned only to see that everything relevant and nothing irrelevant has been considered, and that a rational mind has been brought to bear by the Secretary of State in reaching the decision. The second approach recognises that a fundamental right, here family life, is engaged in the case; and in consequence the court will insist that that fact be respected by the decision-maker, who is accordingly required to demonstrate either that his proposed action does not in truth interfere with the right, or, if it does, that there exist considerations which may reasonably be accepted as amounting to a substantial objective jurisdiction for the interference. The third approach directly engages the rights guaranteed by the Convention; it would require the court to decide whether the removal of the applicant would constitute a breach of article 8. This third position engages the first of the two issues which I identified at the outset. ...

17. If the first approach is the right one, the challenge to the Secretary of State's decision is in my judgement wholly without merit. Miss Webber submitted that there were certain important matters not referred to in the letter of 29 September 1999. I shall have to refer to those in due course, but it is enough for present purposes to state that, if the test of review is the conventional *Wednesbury* principle, it is impossible to conclude that the decision was an irrational one or that the Secretary of State had failed to consider any facts put to him, or misapprehended the law.

18. However the application of so exiguous a standard of review would in my judgement involve a failure to recognise what has become a settled principle of the common law, one which is entirely independent of our incorporation of the Convention by the Human Rights Act 1998. It is that the intensity of review in a public law case will depend on the subject matter in hand; and so in particular any interference by the action of a public body with fundamental right will require a substantial objective justification. ...

19. With respect [the cases I have cited show] that in a case involving human rights the second approach which I

outlined at paragraph 16 as to the intensity of review is generally to be followed, leaving aside incorporation of the Convention; but that approach and the basic *Wednesbury* rule are by no means hermetically sealed one from the other. There is, rather, what may be called a sliding scale of review; the graver the impact of the decision in question upon the individual affected by it, the more substantial the justification that will be required. It is in the nature of the human condition that cases where, objectively, the individual is most gravely affected will be those where what we have come to cal his fundamental rights are or are said to be put in jeopardy. In the present case, whether or not the Convention is under consideration, any reasonable person will at once recognise the right to family life, exemplified in the right of the parties to a genuine marriage to cohabit without any undue interference, as being in the nature of a fundamental right (I prefer the expression fundamental freedom).

…

33. [The submission that the Court of Appeal is in as good a position as the Secretary of State to decide whether the applicant's removal would infringe Article 8] seems to me to engage a question of some constitutional significance. Much of the challenge presented by the enactment of the 1998 Act consists in the search for a principled measure of scrutiny which will be loyal to the Convention rights, but loyal also to the legitimate claims of democratic power. In this case Miss Webber's submission comes close to the proposition that the court should stand in the shoes of the Secretary of State and retake the decision in the case on its merits. In fairness, when tested, she disavowed such a proposition. But in that case her submission is without principle: the courts are in as good a position as the Secretary of State to decide; but they must not decide as if they were his surrogate. This antithesis at the same time commends but deprecates the imposition by the courts of their own views of the merits of the case in mind. It is of no practical assistance and lacks intellectual coherence. The Human Rights Act 1998 does not authorise the judges to stand in the shoes of Parliament's delegates, who are decision-makers given their responsibilities by the democratic arm of the state. The arrogation of such a power to the judges would usurp those functions of government which are controlled and distributed by powers whose authority is derived from the ballot box. It follows that there must be a principled distance between the court's adjudication in a case such as this and the Secretary of State's decision, based on his perception of the case's merits. For present purposes that principled distance is to be found in the approach I have taken to the scope of judicial review in this case, built on what the common law has already done in *R v. Ministry of Defence, Ex p Smith* [1996] QB 517, *R v. Lord Saville of Newdigate, Ex p A* [2000] 1 WLR 1855 and *R v. Secretary of State for the Home*

> *Department, Ex p Launder* [1997] 1 WLR 839. For the future, when the court is indeed applying the Convention as municipal law, we shall no doubt develop a jurisprudence in which a margin of discretion, as I would call it, is allowed to the statutory decision-maker; but in the case of those rights where the Convention permits interference with the right where that is justified by reference to strict criteria (articles 8-11, paragraph (2) in each case) its length will no doubt be confined by the rigour of those criteria in light of the relevant Strasbourg case law, and the gravity of the proposed interference as it is perceived here. But that is for the future.

28. May LJ agreed. Lord Phillips of Worth Matravers MR referred in his judgement to the passage from *Kebilene* that we have set out above. We hope it is fair to say that on this point he did not differ from his colleagues.

29. In *R (Isiko) v SSHD* (C/2000/2937, 20 December 2000), Schiemann LJ, giving the judgement of the Court of Appeal, said this:

> 28. Since submissions were made to us in the present case judgments have been delivered in *Mahmood*, a decision of the Master of the Rolls, May L.J. and Laws L.J., in which, so far as one can judge from the report of the judgements which we have seen. *B v SSHD* was not cited.
>
> 29. The approach of this court in *Mahmood* was arguably marginally different from that adopted by consent in *B*. …
>
> 30. In our respectful judgment the approach in *Mahmood* is the correct approach in these cases. It is not entirely clear whether, read as a whole, the judgements in *B* are at variance with it, particularly since there is no indication that Sedley L.J. disagreed with the approach of Lord Hope of Craighead in *Kebilene*. If there is a difference between them then we consider that we are at liberty to follow the approach in *Mahmood* even if, as may be the case, the court in *Mahmood*, was not referred to the judgments in *B*. That is because the court in *B* proceeded on the basis of a proposition of law which was not the subject of consideration by that court. In such circumstances a later court is not bound by it – [see below].

30. In another case decided at about the same time as both *Mahmood* and *Isiko*, Thomas J had to reach a conclusion on the same issue. In his judgement in *R (Samaroo) v SSHD* (CO/4973/1999; 20 December 2000) he wrote this:

> 30. The second issue in *B v Secretary of State* related to the way in which the court should approach its task in relation to the justification for an interference with rights

under Article 8. It was common ground between counsel in that case, as a result of a concession by the Secretary of State in that case, that among the questions of law that arose on the appeal to the Court of Appeal was whether the decision to deport infringed the principle of proportionality.

31. In the present case, Mr Howell QC for the Secretary of State expressly disavows the concession made by the Secretary of State in *B*. He contends that proportionality is not a question of law and that the approach of the Court should be to review the decision of the Secretary of State and not to come to a view of its own and substitute that view if it differed from the decision of the Secretary of State. As *B* was based on a concession, he submits I am not bound by it. However, before considering that submission, it is necessary to refer to the decision in *Mahmood*.

32. In *Mahmood*, the Court of Appeal expressed their views on a similar question though the issue arose not on an appeal from the Immigration Appeal Tribunal but on a judicial review of decision of the Secretary of State. Unfortunately the decision in *B* was not cited. The decision under review in *Mahmood* had been made just before the Human Rights Act 1998 came into force. Laws LJ's approach was to apply the law as it existed at the time the decision was made, but stated he saw no different conclusion would be reached if the court had been engaged in the direct application of the Convention. Counsel for the applicant submitted that the court was in as good a position as the Secretary of State to make the actual decision on Article 8 and should take it.

…

43. It must follow therefore that, as a decision-maker, the Secretary of State has a discretionary area of judgment in relation to the issues which he has to determine, including the issue of proportionality. That is what Parliament must have intended when it gave to him that decision making power without conferring a general right of appeal to the courts; if a discretionary area of judgment was not accorded to the Secretary of State and the issue of proportionality was therefore treated as a question of law, there would in effect be a right of appeal on each decision, not review, to the Court which would then make up its own mind on the issue. It is, in my judgment, entirely consistent with the Convention for Parliament to have accorded the power to the Secretary of State, subject only to the jurisdiction of the Courts in their supervisory role and not their appellate role. For the Court to treat the issue of proportionality as a question of law for it and for the Court to make up its own mind on the issue of proportionality under Article 8 would in reality be to take upon itself an appellate role as the final decision making power, as the decision on proportionality is at the heart of the decision under Article 8. That is not what Parliament has

> provided under the Immigration Acts and is not a conclusion brought about by the Human Rights Act or the Convention. The role of the court remains one of review.
>
> 44. For this reason, it is my view, on the present authorities, that the task of the court is not to make up its own mind on the question of proportionality. The decision-maker is the Secretary of State and it is he who must decide within his discretionary area of judgment whether the interference with family life by deportation is necessary in a democratic society, that is to say justified by a pressing social need, and in particular proportionate to the legitimate aim pursued. In that decision making process, he has in accordance with the Convention and the Human Rights Act, a discretionary area of judgment in achieving the necessary balance.

31. We must finally refer to *R (Daly) v SSHD* [2001] UKHL 26, now reported at [2001] 2 WLR 1622. Lord Bingham of Cornhill's leading speech ends with these words:

> 23. … Now, following the incorporation of the convention by the Human Rights Act 1998 and the bringing of that Act fully into force, domestic courts must themselves form a judgment whether a convention right has been breached (conducting such inquiry as is necessary to form that judgment) and, so far as permissible under the Act, grant an effective remedy. On this aspect of the case, I agree with and adopt the observations of my noble and learned friend Lord Steyn which I have had the opportunity of reading in draft.

32. The relevant part of Lord Steyn's speech is as follows:

> 27. … The starting point is that there is an overlap between the traditional grounds of review and the approach of proportionality. Most cases would be decided in the same way whichever approach is adopted. But the intensity of review is somewhat greater under the proportionality approach. Making due allowance for important structural differences between various convention rights, which I do not propose to discuss, a few generalisations are perhaps permissible. I would mention three concrete differences without suggesting that my statement is exhaustive. First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, nor merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in *R v Ministry of Defence,*

> *Ex p Smith* [1996] QB 517, 554 is not necessarily appropriate to the protection of human rights. It will be recalled that in *Smith* the Court of Appeal reluctantly felt compelled to reject a limitation on homosexuals in the army. The challenge based on article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the right to respect for private and family life) foundered on the threshold required even by the anxious scrutiny test. The European Court of Human Rights came to the opposite conclusion: *Smith and Grady v United Kingdom* (1999) 29 EHRR 493. … The intensity of the review, in similar cases, is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued.
>
> 28. The differences in approach between the traditional grounds of review and the proportionality approach may therefore sometimes yield different results. It is therefore important that cases involving convention rights must be analysed in the correct way. This does not mean that there has been a shift to merits review. On the contrary, as Professor Jowell [2000] PL 671, 681 has pointed out the respective roles of judges and administrators are fundamentally distinct and will remain so. To this extent the general tenor of the observations in *Mahmood* [2001] 1 WLR 840 are correct. And Laws LJ rightly emphasised in *Mahmood*, at p 847, para 18, "that the intensity of review in a public law case will depend on the subject matter in hand". That is so even in cases involving Convention rights. In law context is everything.

The Status of <u>B v SSHD</u>

36. In two of the passages we have cited, there are references to *B v SSHD*. It appears that the courts that decided those cases would not have taken the view of the jurisdiction of the Court of Appeal that that Court did in *B v SSHD*. Nevertheless the formal position would appear to be that those remarks (which were made in relation to the Court of Appeal's approach on an appeal unrelated to judicial review) were not part of the *rationes decidendi* of judgements on judicial review; and *B v SSHD*, being a decision of the Court of Appeal on appeal from this Tribunal, would appear to be binding on us.

37. There is, however, an exception to the rule of binding precedent. It has recently been the subject of analysis and explanation in the Court of Appeal itself. Where a decision is predicated on an agreed assumption, neither argued by the parties nor considered in the judgement or

judgements, the case will not be a binding precedent if the assumption transpires to have been misplaced. It is to this principle that Schiemann LJ and Thomas J referred in the passages we have cited above from their judgements in *Isiko* and *Samaroo*. It is set out as follows by Buxton LJ, giving the judgement of the Court in *R (Khadim) v Brent Housing Board* [2001] 2 WLR 1674.

> 33. We therefore conclude, not without some hesitation, that there is a principle stated in general terms that a subsequent court is not bound by a proposition of law assumed by an earlier court that is not the subject of argument before or consideration by that court. ...
>
> 38. Like all exceptions to, and modifications of, the strict rule of precedent, this rule must only be applied in the most obvious cases, and limited with great care. The basis of it is that the proposition in question must have been assumed, and not have been the subject of decision. That condition will almost always only be fulfilled when the point has not been expressly raised before the court and there has been no argument upon it: as Russell LJ went to some lengths in *National Enterprises Ltd v Racal Communications Ltd* [1975] Ch 397 to demonstrate had occurred in the previous case *Davies Middleton & Davies Ltd v Cardiff Corpn* 62 LGR 134. And there may of course be cases, perhaps many cases, where a point has not been the subject of argument, but scrutiny of the judgement indicates that the court's acceptance of the point went beyond mere assumption. Very little is likely to be required to draw that latter conclusion: because a later court will start from the position, encouraged by judicial comity, that its predecessor did indeed address all the matters essential for its decision.

35. The jurisdiction of the Court of Appeal to examine the whole question of proportionality as a question of law was assumed without argument in *B v SSHD*: the Court's treatment of the matter did not, in our view, go 'beyond mere assumption'. It would not be open to us to decline to follow that decision on the basis simply that we considered that the assumption was such as to have caused the Court arguably to exceed its jurisdiction, if indeed we took that view. The position is, however, that the decision is not strictly binding because of the *Khadim* principle. That too would not alone cause us to depart from a decision of high authority. On the other hand, given that it is not binding, we have to consider whether to follow it or the view expressed in more recent cases. We choose the latter for the following reasons. First, the consensus appears to be that *B v SSHD* was not correct on this issue. Second, that consensus has been reached after argument, rather than being the result of an assumption. Third, the more recent view is shared by the Court of Appeal, in which Court *B v SSHD* was decided.

Fourth, the more recent cases reflect the opportunity of more mature reflection on the implications of the European Convention on Human Rights in our law.

36. We have therefore decided with the greatest respect that *B v SSHD* is not to be followed insofar as it indicates that the question of proportionality is a question of law with the corollary that, where a decision involves any question of proportionality, any court exercising an appellate jurisdiction on matters of law has a duty or power to substitute its own decision for that of the decision-maker. Nor do we think it right to say in general that, where there is a question of proportionality, the challenge to a ministerial decision will in principle entitle a court to substitute its own decision for that of the minister. So much follows, in our view, from *Daly* in particular.

Appeal and Judicial Review

37. Without *B v SSHD* to assist, we must attempt to set out what are the powers and duties of the Appellate Authorities in cases of this nature. We observe that so far as concerns judicial review of the Secretary of State's decisions, when human rights issues are engaged the courts will undertake an examination that is more intense that would be adopted for other issues. That review will not, however, be so intense as to cause the judicial arm of government to invade the arena of the executive arm. In judicial review the task of the courts is to oversee the Secretary of State, not to make or remake decisions for him.

38. We have to remind ourselves that the purpose of the Appellate Authorities is to hear appeals, not to engage in judicial review. It would be quite wrong to impose upon ourselves the restrictions adopted by the Court in its judicial review jurisdiction. Those principles have no direct relevance to ascertaining the role of this Tribunal on appeals relating to such issues, save that one would expect the scrutiny on appeal to be no less intense, and in all probability more intense, than that on review. We have no general or inherent jurisdiction, however. We must carry out the duties set out in paragraphs 21 and 22 of Schedule 4 to the 1999 Act and must not attempt to do anything else. Further, as a part of the judicial arm of government, we too must avoid intruding unduly into the role of the executive.

The Jurisdiction of the Appellate Authorities (i) General

39. The first issue is the relationship between the 1998 Act and the 1999 Act. Mr Hunter asks us to say that section 65 of the 1999 Act is 'purely jurisdictional'. He relies on *Butterworth's Immigration Law Handbook* (2000) at paragraph [A.1.928]:

> It is often forgotten (although not by the editor of the BILS March 1999 Special Bulletin on the Human Rights Act – see note 15 at page 29 of the Special Bulletin) that this is essentially a section about jurisdiction. Section 7 of the Human Rights Act 1998 gives a 'victim' (see section 7(1)) the right to bring proceedings against a public authority which 'has acted (or proposes to act) in away which is made unlawful by section 6(1)'. Section 65 does not create the right of a person in the circumstances set out in 65(1) to bring proceedings, it simply designates the forum in which such proceedings should be brought and the procedures to be followed. This is important, because it means that any restrictions placed upon the exercise of section 65 appeal rights, for example under paragraph (7) of Schedule 2 of SI 2000/2444, as described above, are restrictions on the right to appeal to the adjudicator under these procedures. In such cases the would-be appellant may retain rights to bring proceedings in the courts. The same is true in respect of the Race Relations (Amendment) Act 2000. Section 65 of this Act is about jurisdiction to hear claims of race discrimination; it does not create the right to bring proceedings but simply designates forum and procedures.

40. We have to say that we have considerable difficulty in understanding that passage. If the legislator had intended to make a provision 'essentially about jurisdiction' he would surely have used the power under section 7 of the 1998 Act to nominate Adjudicators and the Tribunal as the 'appropriate court or tribunal' for the determination of certain issues arising under that section. This was not done. Instead, we have section 65 of the 1999 Act, which incorporates variations from the terms of section 7. Some of those variations may be material. One is that the 1999 Act does not include an express reference to future acts, as section 7 does. Another is that the action under section 65 has to be brought by a person whose own 'entitlement to enter or remain' has been the subject of a decision, whereas the action under section 7 can be by any person who is a victim of the decision.

41. Because of the importance we accord to human rights, we should be unwilling to reach a view that any part of section 65 was at variance with rights granted by the 1998 Act: but that does not mean that we see the appeal rights under the 1999 Act as restricted by or dependent on those in the 1998 Act. On the contrary: no legislation to which we have

been referred indicates that the rights of appeal given by the 1999 Act operate in any sense to reduce those available under the 1998 Act. The appeal rights under the 1999 Act exist in addition to those in the 1998 Act. Section 65 of the 1999 Act clearly does create a right to bring proceedings, a right added to any right already (and remaining) available under the 1998 Act.

42. The powers and duties of an Adjudicator (and, by incorporation, the Tribunal) are those set out in paragraph 21 of Schedule 4 to the 1999 Act. The powers and duties differ, and always have differed, according to whether the decision against which the appellant is appealing 'involved the exercise of a discretion by the Secretary of State or an officer'. Some decisions involve such an exercise: others do not. Most decisions to grant or refuse Entry Clearance involve an assessment of evidence; but, once the facts are decided, there is no discretion under the rules. There is a duty to grant, or to refuse, according to whether the individual has demonstrated that he or she is entitled to what is sought. Other decisions, for example the decision to make a deportation order, are essentially discretionary. But the mere fact that the Secretary of State always has a dispensing power does not make the decision one which 'involved the exercise of a discretion by the Secretary of State or an officer': see paragraph 21(4). Nothing in the Human Rights Act 1998 changes this.

43. Whether or not there is any real difference between the appellate jurisdiction under the two provisions, there can be no doubt that section 65 of the 1999 Act is framed by reference to section 6 of the 1998 Act. For present purposes it is important to observe that, whatever may be the tone of the Convention itself, the 1998 Act, and section 6 in particular, is framed in terms of *prohibition*. Section 6 of the Human Rights Act 1998 makes unlawful certain acts by public authorities that might otherwise have been lawful. Section 7 of that Act and section 65 of the 1999 Act give rights of appeal against acts and decisions on the ground that the act or decision is one which is prohibited by section 6.

The Jurisdiction of the Appellate Authorities (ii) Proportionality

44. It is a general principle relating to the Convention that no decision affecting an individual is lawful unless it is proportionate. In addition, some of the matters governed by the European Convention on Human Rights are matters where a public authority may have to make a judgement or balance competing interests. Hence is derived the phrase 'the allowable area of discretion', seized upon so happily in some of the judgements we have cited.

45. ‘Discretion’ however, is a word that can easily be misunderstood. In performing the act of balancing or of judgement to which we refer, the decision maker is not, or is not only, informing himself about which decision he should make from an allowable range of decisions. He is, for the purposes of the Human Rights Act, informing himself about which decisions would be prohibited as disproportionate. He is, in this particular exercise, laying out the boundaries within which his decision-making discretion can lawfully be exercised. This is the allowable (that is to say, lawful) area of his discretion.

46. By prohibiting certain acts and decisions that would otherwise be lawful, the Human Rights Act may conceivably invalidate some non-discretionary decisions and will certainly narrow the boundaries within which some discretions might be exercised. It can do no more. It does not itself confer any discretions on decision-makers. Where a decision-maker exercises a discretion, the Act may operate to restrict the range of permissible responses to the facts. Certain exercises of the discretion which might have been lawful but for the Act are now prohibited. But nothing in the Act imports a discretion into decisions in which previously there was no discretion. Nor does the Act widen any existing discretion.

47. This has important implications for our jurisdiction. Although the Appellate Authorities may be concerned with whether a decision falls within the allowable area of discretion, it does not follow that the decision in question was one where the ‘decision or action involved the exercise of a discretion by the Secretary of State or an officer’, so as to give the Appellate Authority a jurisdiction to allow an appeal on the ground that ‘the discretion should have been exercised differently’. So far as the human rights element of the claim is concerned, the Appellate Authority will be concerned with whether the decision is shown to have been one which was outside the range of permissible responses.

48. In this context, a person who claims that his human rights were breached by a decision which did *not* involve the exercise of a discretion by the Secretary of State or an officer may nevertheless succeed in a human rights claim if in his case the decision was disproportionate. If he does so succeed, it will not be because the decision involved the exercise of a discretion, but because the decision was prohibited by section 6 of the 1998 Act.

49. We add one further point. Where a decision is one which under the rules does not involve the exercise of a discretion, the fact that the decision-maker has considered human rights issues, including perhaps issues of proportionality, does not mean that it is converted into a decision which does involve the exercise of a discretion. The issue of proportionality is a matter of judgement and balance, but not itself a matter of discretion.

50. Similarly, a person who claims that a decision which *did* involve the exercise of a discretion by the Secretary of State or an officer will only be able to succeed on human rights grounds if the decision was outside the allowable area of discretion. Within that area, he may be able to show, quite apart from human rights, that the discretion should have been exercised differently. But his human rights appeal has to be on the basis that the particular decision was in his case made unlawful by section 6 of the 1998 Act. That ground is nothing to do with any discretion.

51. The question whether a decision was outside the allowable area of discretion is the same as the question whether the decision is made unlawful by section 6. No other question is posed by section 6 or by section 65 of the 1999 Act. If the decision is not shown to be outside the allowable area of discretion, it does not appear to us that it is challengeable as involving a question of law simply because human rights are pleaded. If the decision was not prohibited by the Human Rights Act, the questions for the Appellate Authority are those implied in paragraph 21 of Schedule 4. Indeed, we would go further, and say that if the decision is not shown to be so prohibited, it is extremely unlikely that the 1998 Act as such will have any further bearing on the decision of the Adjudicator or the Tribunal. For, as we have said, the Act does not regulate the manner in which decisions are to be taken or discretions exercised. Its function is to regulate the bounds within which decisions can be taken.

52. The decision to make a deportation order is perhaps the clearest example of one which, under the Immigration Rules, involves the exercise of a discretion. The provisions are in paragraphs 362 and following of HC 395 (as amended). The rules make clear that the decision is discretionary. They also require the decision-maker to take into account 'all relevant factors known to him' in making a decision in the light of the particular circumstances of the case. Questions of proportionality may, as we have indicated, render unlawful the deportation of a particular individual in his particular circumstances. In that case there is no possibility of the exercise of a discretion to

deport. If the decision is not made unlawful as a matter of proportionality, it is difficult to see that the European Convention on Human Rights adds anything to a duty to take into account all relevant factors.

The Jurisdiction of the Appellate Authorities (iii) Conclusions

53. We should emphasise that we are not concluding that the jurisdiction of the Appellate Authorities on an appeal to them is the same as or narrower than the jurisdiction on judicial review - quite the contrary. What we have attempted to do is to delineate the precise place that an argument on human rights grounds has in such an appeal. We have attempted to answer a hypothetical Adjudicator's question, "What role should the argument on proportionality play in my determination of an appeal?". The answer is as follows.

54. If an appellant claims that a decision was disproportionate, that is a matter which he is entitled to bring to the Appellate Authority and which the Authority must determine. In doing so the Authority will examine all relevant material (going both to law and to the facts) and will reach its own conclusion. This is a genuine appeal – not merely a review of whether the Respondent's conclusion on proportionality was open to him. If the Authority reaches the conclusion that the decision was disproportionate, that is the end of the matter: the decision was unlawful and the appeal must be allowed.

55. If, on the other hand, the conclusion is that the decision was not disproportionate, the argument based on human rights is over. There may nevertheless remain a question whether the decision was in all the factual circumstances of the case correct. That is a matter which must be determined according to the well-established principles on which the Appellate Authorities act. A decision that was within the allowable area of discretion may have itself involved an exercise of discretion or it may not. Only where the decision itself involved the exercise of a discretion will the Adjudicator, or the Tribunal, be concerned with the exercise of a discretion.

56. In particular, the fact that an argument based on proportionality has been raised and has failed (because the decision was not outside the allowable area of discretion) does not of itself allow an Adjudicator or the Tribunal to intervene in the exercise of a discretion. Nor does it of itself allow an Adjudicator or the Tribunal to substitute its own discretion for that of the Respondent. That power only arises where the original decision involved the exercise of a discretion.

57. The judgement of proportionality sets the boundaries for the exercise of a discretion if one exists: the judgement of proportionality is not itself a matter of discretion, nor does it import a discretion into the decision. An appeal can be allowed only in the circumstances set out in paragraph 21 of Schedule 4 to the 1999 Act (not forgetting paragraph 21(4)). The Human Rights Act 1998 has no general effect on the operation of those provisions.

Application to the Facts of the Present Case

58. The facts we have set out in paragraphs 3-5 are, broadly speaking, as they appear in the Adjudicator's summary of the Appellant's evidence. She did not make any clear findings on a number of them. We do not criticise her because she did not, in the circumstances, need to do so and nor do we. We merely note that it is difficult to state the whole if the Appellant's history concisely because there are so many contradictions in the documents on file.

59. We draw attention to the most important. (1) The Appellant states in his witness statement produced for the hearing before the Adjudicator that his English marriage was on 5 October 1994. The marriage certificate gives the date as 11 October. (2) The marriage certificate describes the Appellant's wife as a spinster, but the Appellant's solicitor lists, as a document he proposed to produce before the Adjudicator, a certificate of her divorce. (The document does not in the end appear to have been produced.) (3) The Appellant's father says in a document relating to the dissolution of the Appellant's first marriage that there were two children of that marriage. The Appellant told the Adjudicator there were four. (4) The Appellant states in his witness statement for the Adjudicator that he 'applied for political asylum on 8 June 1993 on the ill advice of my Immigration Consultant' but in Rosetta Offonry's representations dated 5 February 2001 it is said that the Appellant intended to claim asylum as soon as he arrived in the United Kingdom. (5) If that is right, the declarations he must have made on arrival about his intentions as a visitor must be in some doubt. (6) The Appellant states that he was not aware that enforcement proceedings had begun before his English marriage, but there is a notice of appeal against the decision to make a deportation order against him, purportedly signed by the Appellant and dated 24 August 1994.

60. In this context what might otherwise appear to be mere errors, like the fact that the Appellant's British wife's name is spelled differently on

the marriage certificate and on her birth certificate, raise further suspicions. It is clear that not very much reliance can be placed on the evidence adduced on behalf of the Appellant. There is one other difficulty or possible difficulty for the Appellant. The Respondent originally took the view that the Appellant's English marriage was not valid because he was still married to his Nigerian wife. So far as we are aware the Respondent has never withdrawn that reason for his refusal of the Appellant's application for leave to remain, although he has added other reasons. The dissolution of the Appellant's first marriage is said to have taken place in the Okha/Ologbo district Customary Court. We have no information on whether that divorce was effective in English law. The Appellant's human rights appeal, however, is likely to turn more on the reality of the relationship between the Appellant and Devika Tulsie than on its formal status.

61. The Adjudicator made her findings on the Appellant's family life on the basis of the evidence before her. She noted that although the Appellant said he lived with his wife and his stepchildren she had not come to give oral evidence in support of his appeal, allegedly because she was 'depressed'. The Appellant did not know what his wife earned. He mentioned the names of two of his wife's friends. When asked what he and his wife did together he could only say that hey went to parties. He did not know what school his stepdaughters attended. He did not know the name of their doctor. He did not know whether they take part in any after-school activities. He had never been to a parents' evening. He said that they receive money from their natural father, but did not know how much or how often. He was able to name one of the younger child's friends, but none of the elder child's.

62. The Adjudicator accepted that there might be cultural reasons for some of the Appellant's ignorance about his wife's affairs, but came to the conclusion that he had not established that he had a family life with his wife and children that could be affected by his removal to Nigeria. It is right to say, as the grounds do, that there is no specific finding on whether the Adjudicator accepted the reason given for the absence of the wife from the hearing; but the Adjudicator also noted that there was no written evidence from the wife and in any event the explanation could not of itself supply evidence of their relationship. On the evidence it seems to us that the Adjudicator's conclusion, that the Appellant had not established that he had a family life that would be interfered with by his removal, is unassailable.

63. The Adjudicator did not give separate consideration to the question whether the Appellant's private life would be affected by his removal. The only factors mentioned in the grounds are his health and the fact that he has been working in the United Kingdom continuously since 1995. He is, and was at the time of the decision, an insulin-dependent diabetic. He stated to the Adjudicator that he did not know whether insulin would be available in Nigeria and thought that it would cost a lot. There is no other evidence on this issue and the Adjudicator was entitled to take the view, as she evidently did, that the evidence did not establish that the Appellant's return would cause any disruption in his treatment regime. The Appellant's work record might conceivably support a claim that in the exercise of his discretion the Respondent should not decide to deport him: but the time for that is past. His appeal is on human rights grounds only and there is no reason to suppose that the Appellant will not work in Nigeria. Thus the position again, as it seems to us, is that no interference with his private life is shown. Similar arguments apply to the grounds based specifically on the Respondent's declared policy on deportation.

64. In case we are wrong about that, we have considered whether the Appellant's removal is justified by Article 8.2. On the basis of the same evidence, coupled with the Respondent's wish to maintain proper immigration control in the public interest, it is absolutely clear to us that the proposed removal of the Appellant lacks the slightest hint of a disproportionate response to his circumstances.

65. Nothing in the material before us establishes that the action taken and to be taken by the Respondent is prohibited by section 6 of the Human Rights Act. As this is an in-country appeal against the refusal to revoke a deportation order, we have no jurisdiction to consider further whether that refusal was right on the merits, or to substitute our own decision for that of the Respondent.

Conclusion

66. Our conclusions on the general issues relating to the treatment of proportionality are in paragraphs 54-57. For those reasons and the reasons given in paragraphs 60-63, this appeal is dismissed.

C. M. G. Ockelton
Deputy President