AS TO THE ADMISSIBILITY OF
Application No. 31612/96
by Olukayode Tella, Victoria Tella,
Priscilla Tella and Timothy Tella
against the United Kingdom

The European Commission of Human Rights (Second Chamber) sitting in private on 21 May 1997, the following members being present:

Mrs. G.H. THUNE, President
MM. J.-C. GEUS
G. JÖRUNDSSON
A. GÖZÜBÜYÜK
J.-C. SOYER
H. DANELIUS
F. MARTINEZ
M.A. NOWICKI
I. CABRAL BARRETO
J. MUCHA
D. SVÁBY
P. LORENZEN
E. BIELIUNAS
E.A. ALKEMA
A. ARABADJIEV

Ms. M.-T. SCHOEPFER, Secretary to the Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 14 May 1996 by Olukayode Tella, Victoria Tella, Priscilla Tella and Timothy Tella against the United Kingdom and registered on 29 May 1996 under file No. 31612/96;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The first applicant is a Nigerian citizen who was born in 1957. The second applicant, who was born in 1965, is a British citizen and the wife of the first applicant. The third and fourth applicants, who are British citizens, are the children of the first and second applicant, born respectively on 25 June 1993 and 25 June 1994. The second, third and fourth applicants' place of residence is Croydon. The first applicant, who was resident in Croydon at the date the application was introduced, is currently resident in Nigeria. All are represented before the Commission by solicitors Messrs. Fisher Meredith practising in London.

The facts, as submitted by the applicants, may be summarised as follows.

The first applicant was granted leave to enter the United Kingdom from Nigeria as a student in or about December 1982 for an initial period of two months, subsequently extended until 1988. The first applicant's application for further leave to remain was refused.

In November 1990 the applicant was served with a Notice of Intention to Deport by the Secretary of State. The first applicant

appealed against the decision to deport him. The appeal was dismissed in September 1991.

In or about January 1992 the first and second applicants met. They married in September 1992. Following the marriage an application was made to the Secretary of State for leave for the first applicant to remain in the United Kingdom on the basis of his marriage to the second applicant, a British citizen. That application was refused.

On 5 March 1993 the Secretary of State signed a deportation order against the first applicant. The order was subsequently served on the first applicant on 21 April 1993.

In or about October 1993 the first applicant applied for political asylum. By letter dated 30 September 1994 the Secretary of State refused the application on grounds that the first applicant had not demonstrated a well-founded fear of persecution if returned to Nigeria.

Following the birth of the third applicant on 25 June 1993 the Secretary of State was asked to reconsider his decision to deport the first applicant. The Secretary of State declined to alter his decision. Further representations were made to the Secretary of State on behalf of the first applicant by letter dated 26 October 1995 following the birth of the couple's second child, the fourth applicant, on 25 June 1994. The Secretary of State, by letter dated 7 November 1995, again declined to alter his decision stating:

> "<The first applicant> married in the full knowledge that he was already subject to deportation proceedings and could not reasonably expect that his marriage would avail him. Furthermore, <the second applicant> has lived for the vast majority of her life in Nigeria and can therefore reasonably be expected to accompany her husband and to readjust to life there where her parents live. The couple's two children are young enough to readjust to life in Nigeria and it is considered reasonable to expect them to accompany their parents to live abroad. ...
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> "The Secretary of State has also considered your request for <the first applicant> to be treated exceptionally on the basis of the length of his residence in the United Kingdom. However, as he has been without valid leave since 3 August 1988 and as a deportation order was signed against <the first applicant> as long ago as March 1993, the Secretary of State is not prepared to exercise his discretion and treat <the first applicant> exceptionally, outside the Immigration Rules."

The first applicant applied for leave to move for judicial review of the Secretary of State's decision to deport him. Leave was refused by the High Court on 17 January 1996 and subsequently, on appeal from the decision of that court, by the Court of Appeal on 29 April 1996. In or about August 1996 the first applicant was deported from the United Kingdom to Nigeria where he currently resides.

COMPLAINTS

The applicants invoke Article 8 of the Convention. The applicants complain that the decision to remove the first applicant from the United Kingdom amounts to an interference with their right to respect for their private and family life in breach of Article 8 para. 1 of the Convention which is not justified by para. 2 thereof. The applicants point to the following facts : 1) that the first applicant has lived in the United Kingdom for over 13 years and has a subsisting marriage with a British citizen ; 2) that the first applicant will either leave

alone, or take his children with him with the result that the family will be split ; and 3) that the children are of such a tender age that they cannot reasonably be expected to be separated from their parents. The applicants contend that the decision to deport the first applicant is not, in these circumstances, justified by any pressing social need or proportionate to the legitimate aim concerned, namely the maintenance of public order through controls on immigration.

PROCEEDINGS BEFORE THE COMMISSION

On 8 August 1996 the applicant's lawyers requested that the President of the Commission indicate interim measures concerning the removal of the first applicant from the United Kingdom pursuant to Rule 36 of the Commission's Rules of Procedure. On 8 August 1996 the President declined to do so.

THE LAW

The applicants complain of an interference with their right to respect for private and family life. The applicants complain that the removal of the first applicant from the United Kingdom where he has been resident for a substantial period of time will result in the family, the remainder of whom are British citizens, being split up when the third and fourth applicants are of such an age that they cannot reasonably be expected to be separated from their parents. The applicants submit that this constitutes an interference with their right to respect for family and private life as provided for by Article 8 para. 1 (Art. 8-1) of the Convention which is not justified by para. 2 thereof.

Article 8 (Art. 8), insofar as relevant, provides :

> "1. Everyone has the right to respect for his private and family life ...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as 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."

The Commission recalls that a State has the right to control the entry and residence of non-nationals in its territory. In this regard the Commission recalls the close connection between immigration control and questions pertaining to public order and the wide margin of appreciation which States enjoy in this respect (see Eur. Court HR, Abdulaziz, Cabales and Balkandali v. the United Kingdom, judgment of 28 May 1985, Series A no. 94, pp. 33-34, para. 67; and Beldjoudi v. France, judgement of 26 March 1992, Series A no. 234, p. 27, para. 74).

The Commission also recalls that whilst a right to enter or remain in a particular country is not as such guaranteed by Article 8 (Art. 8) of the Convention (see inter alia No. 9213/80, Dec. 5.5.81, D.R. 24, p. 239; and No. 25439/94, Dec. 5.4.95, D.R. 81-B, p. 142), the exclusion or removal of a person from a country where his family resides or has the right to reside may raise issues under Article 8 (Art. 8) (see inter alia No. 9088/80, Dec. 6.3.82, D.R. 28, p. 160; No. 9285/81, Dec. 6.7.82, D.R. 29, p. 205; No. 23938/94, Dec. 23.10.95, unpublished; No. 24381/94, Dec. 31.8.94, unpublished; and No. 25073/94, Dec. 28.2.96 unpublished).

The Commission notes that it does not consider that the

circumstances of the present case raise any separate issues in regard to the right to respect for private life which do not fall within the compass of the right to respect for family life. The Commission does not, therefore, propose to address as a separate issue whether there has been any breach of the right to respect for private life.

The Commission recalls that the duty imposed by Article 8 (Art. 8) cannot be considered as extending to a general obligation on the part of a Contracting State to respect the choice by married couples of the country of their matrimonial residence and to accept the non-national spouses for settlement in that country (see Eur. Court HR, Abdulaziz, Cabales and Balkandali, loc. cit., p. 34, para. 68). The Commission also recalls that whilst a State's obligations to admit to its territory a person who has relatives resident there will vary according to the circumstances of each case, an essential question in any such case is whether there are insurmountable obstacles in the way of the family living in the country of origin of the deportee (see inter alia: Eur. Court HR, Beldjoudi v. France, loc. cit, p. 28, paras. 77-78; No. 9088/80, loc. cit.; No. 9285/81, loc. cit.; No. 16152/90, Dec. 13.10.92, unpublished, p. 27; and No. 24381/94, loc. cit.). The Commission further recalls that where there are children of the marriage who enjoy the nationality of the host State, an essential question is whether the children are of an age when they can be expected to adapt to the change in environment (see No. 23938/94, loc. cit.; and 24865/94, Dec. 23.10.95, unpublished).

The Commission considers an important, although not necessarily decisive factor to be whether the marriage, albeit not one of convenience, was contracted at a time when the parties were aware that the immigration status of one of them was such that the persistence of the marriage within the host state would from the outset be precarious (see inter alia : Eur. Court HR, Abdulaziz, Cabales and Balkandali, loc. cit., p. 34, para. 68; No. 9285/81, loc. cit.; No. 24381/94, loc. cit.; No. 25073/94, loc. cit.).

In the present case the Commission recalls that whilst the first applicant has been resident in the United Kingdom for over 13 years, for the greater part of this period the first applicant was without leave to remain. At no stage prior to his marriage does the Commission consider that the first applicant could reasonably have held any expectation that he would be granted leave to remain in the United Kingdom. In particular, the Commission recalls that at the time of his marriage to the second applicant, the first applicant had already been served with notice of intention to deport by the Secretary of State. The Commission further recalls that the first applicant entered the United Kingdom when already an adult, and that the second applicant, although a British citizen, has spent the greater part of her life in Nigeria where her parents live. The Commission therefore finds no evidence of there being any insurmountable obstacles to the first and second applicants returning to Nigeria.

In respect of the third and fourth applicants, who are now aged three and two years respectively, the Commission considers them to be of an adaptable age. The Commission does not consider there to be any effective obstacle to their accompanying the first applicant to Nigeria.

Accordingly, the Commission finds there are no elements concerning respect for family or private life which, in the circumstances of the present case, outweigh valid considerations relating to the proper enforcement of immigration controls. The Commission concludes that the removal of the first applicant does not disclose a lack of respect for the applicants' rights to respect for family or private life guaranteed by Article 8 para. 1 (Art. 8-1) of the Convention.

It follows, therefore, that the application must be rejected as

manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

M.-T. SCHOEPFER Secretary to the Second Chamber	G.H. THUNE President of the Second Chamber