Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00126/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 20 June 2013	**On 1 July 2013**
Prepared 21 June 2013	

Before

UPPER TRIBUNAL JUDGE MCGEACHY

Between

SUMAN LIMBU

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms C Meredith, Counsel, instructed by Messrs Wilson Solicitors LLP
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, a citizen of Nepal, born on 24 March 1990 appeals, with permission, against a decision of the First-tier Tribunal (First-tier Tribunal Judge Moore and Ms S E Singer (non-legal member)) who, in a determination promulgated on 2 August 2012, dismissed the appellant's

appeal against a decision of the respondent made on 22 November 2012 to make a deportation order against him.

2. The appellant's father, a former Ghurkha, entered Britain on 6 November 2006 with indefinite leave to remain. On 16 May the appellant arrived in Britain with his stepmother, sister and their brothers. They were granted leave to remain on that day.

3. After entry the appellant committed a series of crimes, the details of which were set out in paragraph 13 of the determination as follows:-

> "• On 15th July 2009 convicted at East Kent Magistrates Court of possessing a Class A drug, namely heroin and failing to surrender to custody, for which the Appellant received a total fine of £150.
>
> • On 28th September 2010 convicted at East Kent Magistrates Court of failing to surrender to custody and fined £100.
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> • On 29th November 2010 convicted at Canterbury Crown Court of burglary and 2 counts of theft by shop lifting.
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> • On 14th January 2011 sentenced to a 12 month Community Sentence, Treatment for Drug Dependency Order for 12 months, a Supervision Order for 2 years and a 3 month curfew.
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> • On 18th April 2011 and 4th May 2011 failed to attend a meeting with his Offender Manager and subsequently failed to attend a hearing for breaching conditions of his community sentence imposed on 14th January 2011.
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> • On 20th June 2011 arrested for breaching conditions of Community Service Order of 14th January 2011.
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> • On 19th May 2011 convicted at Canterbury Crown Court of breaching a community order and breaching a 12 months Drug Rehabilitation Order and breaching a 2 year Supervision Order and breaching a 3 month curfew, and theft from shop and burglary for which the Appellant received a total of 16 months imprisonment.
>
> • On 27th July 2011 convicted at East Kent Magistrates Court of 2 counts of theft by shop lifting for which a conditional discharge of 2 years was imposed."

4. In their determination the Tribunal noted that the appellant had lived with both his parents until the age of 11 when they had separated and thereafter the appellant's father had had custody of him while his mother had gone to another part of Dharan in Nepal. The appellant had seen his mother occasionally after the separation. The appellant had attended school in Dharan until he was aged 17 and came to Britain. On arrival he had begun doing factory and then got a job with KFC in Dover, but had then started smoking heroin to which he became addicted. He had given up his job. He had argued with his father who in July 2009 had sent him to

Nepal for nine months for rehabilitation at a clinic in Kathmandu. On return the appellant had started taking drugs again.

5. In prison the appellant had started a methadone program and had attended rehabilitation courses, including "relapse and prevention". On release he had been in immigration detention.

6. The Tribunal noted the appellant had stated that he was ashamed of the crimes he had committed and the shame he had brought on his father, but that he had learned much in prison and detention. He hoped to get employment and earn money on his release to help his father take care of his younger siblings.

7. The Tribunal heard evidence from the appellant's father and from his sister. They noted documentary evidence which was produced which included a forensic psychiatric report prepared by a Dr Amlan Basu dated 5 June 2012.

8. Having noted the submissions made, the Tribunal went on to make their findings of fact in paragraphs 25 onwards of the determination. They set out the appellant's immigration history, and then stated that it was stated it was unclear whether the appellant had any telephone contact with his mother in Nepal as he had said that he has not had such contact while his father had said that there might have been telephone contact between the appellant and his mother because she "sometimes telephones" the appellant. They stated they were satisfied that the appellant's drug addiction and drug usage had led to his criminal behaviour and went on to say that they believed that the appellant was genuine in being ashamed for his offences and for bringing shame on his father and family.

9. They stated that they were satisfied the appellant had not always lived with his father and family in Britain in that he had lived away from the family home for six months after returning from Nepal, during which time his father had said that he had no contact with the appellant because he was busy working and that his friends had told him they had seen the appellant with others.

10. They noted that the appellant's father had only visited the appellant on one occasion since he was sent to prison, and noted the reason for that was that the appellant's father was busy with his work.

11. In paragraph 31 of the determination they noted the submission of Ms Meredith who appeared for the appellant before them who told them that "regard should be had to the fact that the appellant was not sentenced to imprisonment for the index offences". The tribunal, however, commented that "whilst that is correct, it does not in our view lessen the gravity of the offences and indeed, it could be argued that breaches of such a variety of court sentence orders might be more serious because not only did the

appellant commit the crimes, but he was unwilling or unable to show genuine regret or remorse by keeping to any of the court orders.

12. They noted that the appellant had claimed that it was only when he was sent to Canterbury Prison in 2011 that he had become involved in CARAT programs and other courses and that he realised the impact of drugs and the relationship with crime.

13. They noted the breach report which showed that the appellant had failed to attend as directed in May 2011 and no explanation had provided, and it appeared the appellant had relapsed and was reliant on his family for funds since he was unemployed, even though the family was experiencing financial difficulty. They stated that the breach report of May 2011 had noted that the appellant's risk of reoffending significantly increased and that he was at medium risk of reoffending and medium risk of harm, and that the appellant had discontinued all contact with the National Offender Management Register.

14. In paragraph 33 they referred to the report of Dr Amlan Basu who had stated that in relation to the facts that aggravated and minimised risk it was particularly difficult for the appellant "to negotiate the pressure exerted by his peers if he were to associate with them again". They went on to state that Dr Basu had:-

> "… further opined that should the appellant be released from detention to live with his family in the Folkestone/Dover area where he committed his previous offences, returning to live with his family could not necessarily 'be considered a protective factor or a risk factor'."

15. They noted that Dr Basu had added that reoffending would be minimised with meaningful education, training or employment and that he was of the view that risk of offending was considered to be moderate, which was the same view expressed in the initial presentence probation report. They stated that it was their view that there would be a reasonable likelihood of reoffending if the appellant returned to live with his family since they themselves were experiencing financial difficulties, "not to mention any other financial and emotional difficulties that this appellant might bring up them". They pointed out that the appellant did not have a job and the prospects of employment would not be good.

16. In paragraphs 34 and 35 of the determination they wrote:-

> "34. The Appellant had lived apart from his father and family in the United Kingdom for at least 6 months and during that period of time had no contact with his father. The physical contact between the Appellant and his father during the past year has been limited to one visit and we are unaware of any other family members visiting the Appellant during the last year. In the circumstances, we are not satisfied that even if the Appellant returned to live with his father that he would not ultimately involve himself in criminal behaviour, with a reasonable

likelihood of leaving the family home and living elsewhere as he previously had done and therefore being again exposed to peer pressure and subsequent drug use and criminal conduct.

35. We are satisfied that the Appellant has family members who live in Nepal. His grandmother, with whom he lived before coming to the United Kingdom, remains in the family home, although she is ill with throat cancer at the moment. In addition, the Appellant's father has siblings who live in Nepal and the fact that they are married and settled does not prevent them from offering assistance to this Appellant. Further, we are satisfied that the Appellant has more than likely spoken with his mother on the telephone on occasions in the past, as evidenced by the evidence given by the Appellant's father at this hearing, and also by reference to the pre-sentence report dated 31st December 2010 (paragraph 15) where the Appellant had apparently informed the Probation Officer that his mother remained in Nepal and he spoke with her occasionally on the telephone. The Appellant appears to be a fit and healthy male of 22 years of age who could return to Nepal and either live on his own if that was his wish, or return to live with a relative giving him the opportunity over a reasonable period of time to get some gainful employment."

17. In paragraphs 36 onwards of the determination they set out their conclusions. They found that the appellant could not benefit from the provisions of the Immigration Rules relating to private and family life, before in paragraph 37 referring to the relevant structured approach to the issue of human rights set out in the judgment in **Razgar [2004] UKHL 27**.

18. They referred to the judgment in **Uner v Netherlands** [2005] ECHR 464 and took into account the various factors set out therein in that they considered the solidity of the appellant's social, cultural and family ties to Nepal, his offences which they viewed as serious, the fact that only one year had elapsed since the appellant's conduct involving crime and that he had lived in Britain since May 2007, although not continuously as he had been in Kathmandu for nine months. They stated that they were aware that the appellant's father occasionally returned to Nepal with his family and he done so in December 2010.

19. Having referred to the judgment of the Court of Appeal in **Kugathas [2003] EWCA Civ 31** they considered the issue of family life and the judgment of the European Court of Human Rights in **AA** of 20 September 2011 which they considered could be distinguished.

20. In paragraph 41 stated that they were not satisfied that the appellant had established a family life in the United Kingdom but that even if they were satisfied that he had established family life with his father and sister, they were also satisfied that while such an interference would engage Article 8, the interference would be lawful and that it would be necessary in a democratic society for the prevention of disorder and crime and the maintenance of effective immigration control.

21. They went on to state that they were not satisfied that the appellant fell within one of the exceptions to automatic deportation under section 32(5) of the UK Borders Act 2007 and that under section 32(5) the respondent must make a deportation order in respect of foreign nationals being convicted in the United Kingdom of an offence and who has been sentenced to a period of imprisonment of at least twelve months unless the foreign national fell within one of the exceptions set out in section 33 of the 2007 Act.

22. In paragraph 43 they stated that they were satisfied any interference with the appellant's private life was proportionate. They therefore dismissed the appeal on human rights grounds as well as the appeal against the deportation order.

23. Detailed grounds of appeal were then submitted.

24. Although permission to appeal was refused by Judge of the First-tier Tribunal Coates in the First-tier, on renewal permission was granted by Upper Tribunal Judge Allen who, although he gave no reasons for his decision, stated that he considered that the first and third grounds were arguable, although he saw little arguable merit in the other grounds.

25. Ms Meredith, at the hearing before me, relied on the grounds of appeal as well as on a lengthy skeleton argument which largely reflected the grounds.

26. The first ground of appeal claimed that the Tribunal had misunderstood or inflated the appellant's offending, firstly because in paragraph 31 the Tribunal had said that the breaches of the "court sentence orders" might be more serious because not only had the appellant committed the crimes but had been unwilling or unable to show genuine regret or remorse by keeping to any of the court orders. I consider there is no merit in that issue. The reality is that what the Tribunal said was fair comment. The fact that the appellant did not keep to the court orders is a reflection on his attitude towards the sentence itself. I point out that, in any way, what the Tribunal stated was that that interpretation "was arguable".

27. Ms Meredith asserted that the Tribunal had ignored the appellant's evidence of remorse but that is clearly wrong given what the Tribunal wrote in paragraphs 15, 20 and, in particular, 27 of the determination. They indeed found, as a fact, that the appellant was genuine in being ashamed for his offences and for bringing shame on his father and family.

28. Although in the grounds of appeal Ms Meredith asserted that the Tribunal had found that the appellant was unable or unwilling to show genuine regret or remorse and that was contradicted by the pre-sentence report which had said that the appellant was remorseful for his offences, that assertion in the grounds ignores the passages of the determination to

which I have referred above and indeed is a selective interpretation of the pre-sentence report which states that the appellant, "who had asked for ten other offences of burglary to be taken into account had, as the writer of the report wrote, 'in my assessment, he lacks an understanding of the wider implications of his offending as although he felt the victims who discovered him intruding would have felt shocked he had not seemed to have considered how his presence would have been likely to cause alarm and distress and how by burgling properties he took away the residents' feeling of safety and security within their home.

29. The writer of the report also stated:-

> "In my assessment he displays deficits in his awareness of the impact of his offences on his victims and the potential for there to be long term and wider consequences, particularly as he admitted that once or twice he was caught in the act and the occupier screamed."

Indeed, the conclusions of the writer of the report are that he assessed the appellant to "pose a medium risk of serious harm to the general public due to the potential for him to cause victims emotional harm as a result of his causing distress by trespassing on their property and in doing so destroying their feeling of security within their home and potentially causing distress if they encounter him in the process of offending".

30. Ms Meredith went on to refer to the report of Dr Basu to show the genuineness of the appellant's remorse but the reality is that Dr Basu, in a summary of findings stated that the appellant posed a medium risk of reoffending and that his risk of relapsing to drug use and therefore reoffending "impacted largely by his association with drug using peers". He therefore stated that as the appellant had been living with his family when he committed the previous offences, returning to live with his family "cannot necessarily be considered a protective factor or a risk factor in this case".

31. Ms Meredith went on to state that the Tribunal could have conflated the appellant's offences. The grounds stated that there was no consideration:-

> "That A's first three offences were simple possession x 1; on 2 x failure to failure to surrender resulted in the lowest possible sentence in range, namely a fine. A did not receive a variety of court sentence orders: he received only one supervision order."

32. In her oral submissions Ms Meredith argued that the Tribunal had been wrong in the way they had listed the appellant's offences in paragraph 13 of the determination from which I have quoted above. Her argument appeared to centre on the penultimate bullet point which she emphasised that it appeared to read as if the appellant had been convicted for two offences of theft and burglary when the reality was that on 19 May 2011 he was sentenced after the conviction on 29 November 2010.

33. I consider that there is no merit in that assertion, nor indeed her assertion that the Tribunal had referred to orders as sentences because the reality in this case is that the offence which led to the decision to deport the appellant was the sentence imposed in May 2011 from the shop and for burglary.

34. In this regard I note the sentencing remarks of Her Honour Judge Williams who stated in May 2011 that:-

> "In January I gave you a chance to rehabilitate yourself and deal with your heroin addiction. Unhappily, although you made a good start under the drug treatment and testing order, you failed then and slid back into heroin use.
>
> The offences which I deal with you for are serious, a domestic burglary, two shoplifting offences and ten matters which you invite the court to take into consideration.
>
> I keep the inevitable sentence of imprisonment down to an absolute minimum. I give you some credit for making some effort to honour the community order and I take the ten offences into consideration.
>
> The least sentence on my judgment I can pass on the domestic burglary count is one of sixteen months' imprisonment. You will serve half that. And on expiration of that sentence, it will not bring the sentence to an end; should you commit another offence between your release and the balance of the sentence you can be returned to custody.
>
> In addition you will be on a supervision and break the terms of supervision and can be returned to custody. Use this time to make sure that you are completely drug free and on your release do not commit offences again. Take him down please.
>
> Three months' concurrent on each of the theft matters."

35. The reality is that the sentence which the appellant received triggered consideration under the automatic deportation order and, that having been brought into play, the issue was whether or not one of the exceptions in section 33 of the UK Borders Act 2007.

36. Ms Meredith then argued that the Tribunal had erred in findings relating to the appellant's family life in Nepal, stating that there was no evidence the appellant had contact with his mother. She stated that the appellant's father had three wives. His third wife was with him in Britain. The second, Devkala, who was not the appellant's mother, is in Nepal, and that the appellant's father had separated from the appellant's mother when the appellant was aged 11. She stated that the appellant had no contact with his mother.

37. She accepted, however, that the appellant had lived with his grandmother in Nepal and that his grandmother was still alive. He had also lived with

an aunt, although she asserted that that aunt had now left to live in Singapore.

38. The reality is that the appellant has paternal uncles, his grandmother and his mother in Nepal. Moreover, he had not lived with his father all the time that he had been in Britain. He is now an adult aged 22 and although he was released on bail from immigration detention he is not living with his family at the present time.

39. Ms Meredith went on to state that the Tribunal had erred in their consideration of the scope of family life and that they had conflated the first and fifth steps set out in the judgment in **Razgar.**

40. The Tribunal did take into account a number of factors regarding the appellant's family life, setting these out in paragraphs 34 onwards of the determination. Their conclusions regarding family life that the appellant was not exercising family life in the United Kingdom with his father was, I consider, open to them given the facts of this case. Given the appellant's age and the fact that he is not living in the family home I consider that their conclusions were open to them. They correctly referred to the judgment of the Court of Appeal in **Kugathas** and distinguished the situation of the appellant in **AA** from that the appellant. They were clearly right to do so. Each case must be considered on its own merits. While it is trite law that family life does not come to an end when an appellant attains majority, the relevant factors must be considered and in this I consider that the Tribunal reached a conclusion which was open to them. However, even if they were wrong to find that there was no family life between the appellant and the other members of his family here, the reality is that they did go on to go through the relevant step by step approach before reaching their decision.

41. Ms Meredith argued that the Tribunal had "failed to consider that they are bound to apply particular criteria 'where the person to be expelled is a young adult who has not yet founded a family of his own'" and referred to the criteria set out in the judgment of the European Court of Human Rights in **Maslov v Austria 1638/03 [2008] ECHR 546**.

42. It is, however, not an error of law for a Tribunal not to set out the criteria in the judgment in **Maslov**. In this case the Tribunal did take into account all relevant factors, including the length of time the appellant had been in Britain, his ties with his home country, his relationship with his other family members here, the nature of the offending, the length of time since the appellant had last committed an offence, and the nature of the offence itself. All these matters are dealt with by the Tribunal in paragraph 25 through 43 of the determination.

43. While I consider that it would have been preferable for the Tribunal to set out the relevant structured approach in **Razgar** first before making their findings of fact and then setting out their conclusions having weighed up

the relevant findings that they had made, the reality is that the Tribunal did consider the relevant factors and that what appears the bare statement in paragraph 43 refers back to the balancing exercise which is clearly evident in what the Tribunal states at paragraphs 25 onwards.

44. Ms Meredith's final ground appeared to be that the Tribunal had not taken into account the "historic injustice" relating to the treatment of Ghurkha soldiers as part of the balancing exercise. I consider that there is simply no merit in that assertion. The issue of "historic injustice" was clearly dealt with in this case by the fact that the appellant's father was given leave to enter and remain in Britain, as indeed was the appellant. The fact that the appellant went on, having been granted leave to enter, to commit crimes here is the reason for the deportation. There is no reason why any "historic injustice" should mean that the deportation of a criminal should not take place.

45. In weighing up all the relevant factors the Tribunal did not set out the relevant factors in **N (Kenya)**, **Masih (deportation – public interest – basic principles) Pakistan [2012] UKUT** and **DS (India) [2009] EWCA Civ 544** which emphasised that the importance of the removal of a criminal from Britain is a reflection of the public interest in preventing criminality. But, be that as it may, the decision of the Tribunal that removal of this appellant was proportionate was a decision which was entirely open to them and was correct.

46. I therefore find that the determination of the Tribunal in this case dismissing this appeal on both immigration and human rights grounds shall stand.

Signed Date

Upper Tribunal Judge McGeachy