Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01809/2013

THE IMMIGRATION ACTS

Heard at Field House	**Oral Determination Promulgated**
On 28 July 2014	**On 6 August 2014**

Before

UPPER TRIBUNAL JUDGE JORDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR BRATAM RAI

Respondent

Representation:

For the Appellant: Mr J. Saunders Home Office Presenting Officer
For the Respondent: In person

DETERMINATION AND REASONS

1. The Secretary of State appeals against the determination of the First-tier Tribunal (First-tier Tribunal Judge Moore and Mr A P Richardson) whose determination was promulgated on 9 April 2014. The panel allowed the appeal of Mr Bratam Rai both against the deportation decision and on human rights grounds. For the sake of continuity I shall refer to Mr Rai as the appellant as he was before the First-tier Tribunal Judge.

2. The appellant is a citizen of Nepal who was born on 10 December 1988, he is now aged 25. He arrived in the United Kingdom aged 16 on 25 May 2005 accompanied by his mother and sister. He did so in order to join his father who was of settled status, he being a member of the Gurkha Brigade. The appellant was granted indefinite leave to remain on 15 May 2007. It was his evidence that his father as a Gurkha sold property in Nepal in order to come to the United Kingdom and start a new life.

3. The appellant himself was educated in southern India and therefore only returned to Nepal for a limited period essentially during school vacations. It was his claim therefore that he knew little or nothing of the culture and traditions in Nepal. He had been educated at a Christian residential school which was some thousand miles away from Nepal in an isolated part of southern India. It was an indication of the distance from Nepal that he gave evidence that it used to take him four days to travel from his school to Nepal during those times of the year when he returned home. It limited him to returning to Nepal to about two times a year.

4. After his arrival in the United Kingdom it is common ground that he associated with a group of people who were using heroin and he himself became an addict. As a result of this craving he committed a series of offences between 2008 and December 2012 where he accumulated five convictions in respect of ten offences involving shoplifting, possession of heroin and other theft offences. The offences in relation to theft were all in order to supply his drugs' need. On 18 January 2013 at Canterbury Crown Court the appellant was convicted of offences of supplying a class A drug, namely heroin, and sentenced to two years and eights months' imprisonment. In addition there was an earlier suspended sentence which was activated making a total of three years' imprisonment in all. However for my purposes it is the sentence of two years and eight months that is material.

5. The appellant's appeal came before First-tier Tribunal whose determination was promulgated on 9 April 2014. The panel considered the attempts that the appellant had made in order to kick his drug habit and the use that he had made of a drug support service (KCA) which had provided him with a methadone script with which he was able to deal with the day-to-day difficulties of his addiction. Unfortunately the budget of KCA was removed and the panel recorded that methadone scripts were no longer available to the appellant and, having separated from his family and the family environment, he relapsed into heroin addiction. As a result of having no means of income, the only way to feed his habit was to commit crime and that is what occurred in the cases which came before Canterbury Crown Court.

6. The circumstances of the offence were that an undercover policeman approached him for the supply of drugs and he assisted the officer in locating an individual who would supply him. It was the Secretary of State's case that he was in fact a drug runner for others supplying heroin in the Ashford area. There were however positive things said about the

Appellant. There was a letter from the drug and alcohol practitioner dated 9 October 2013 confirming that the appellant had been working with the substance misuse team since March 2013 in order to address his addiction and during that time he had had one-to-one sessions. It was confirmed the appellant was on a methadone reduction programme with the clinical team. Importantly his parents had agreed that he could live with them upon release from prison provided he continued to stay drug-free.

7. The panel considered a large number of cases in relation to the correct approach in relation to Article 8 and these are set out between pages 9 and 11 of the determination. There are a number of findings which are challenged by the Secretary of State in this appeal.

8. The panel considered that the appellant no longer had any ties to Nepal. It recorded that he had left Nepal when he was 16 years of age, that he had not returned in the past 9 years, that during his teenage life he was at school in southern India only returning to Nepal on two occasions during school vacation. There was no evidence that the appellant had any friends who remained in Nepal and with whom he had contact in the United Kingdom but it was accepted the appellant had two grandparents with whom it said the appellant had little or no contact in the time that the appellant had been in the United Kingdom. The panel therefore concluded that the appellant no longer retained any ties with Nepal.

9. That finding is challenged by the Secretary of State. It is as well to point out that in the grant of permission First-tier Tribunal Judge Simpson said in paragraph 3 of her grant of permission,

> "It cannot seriously be argued that the Tribunal failed to provide adequate reasons for finding that the appellant lacked ties to Nepal. The evidence of lack of ties is detailed in paragraphs 11 to 12 and the Tribunal's findings in paragraphs 25 and 32. Moreover the Tribunal found that the appellant had lived most of his adult life and teenage years in the United Kingdom and has not returned to Nepal in the past nine years."

10. Notwithstanding that I am satisfied that the First-tier Tribunal erred in law in finding that the appellant no longer has any ties.

11. The existence of ties has been considered in a number of cases. The most important of these is *Ogundimu (Article 8 – new rules)* Nigeria [2013] UKUT 00060 (IAC) a decision of the President, Blake J and Upper Tribunal Judge O'Connor. The case concerned a young man who had lawfully entered the United Kingdom on 7 July 1991, aged six, in order to join his father, who has been settled and mainly resident here since 1961. He was granted indefinite leave to remain on the 29 June 1999. He had thus been resident in the United Kingdom for 21 years at the time of the hearing, about three quarters of his life.

12. In paragraphs 123 and 124, the panel said:

> The natural and ordinary meaning of the word 'ties' imports, we think, a concept involving something more than merely remote and abstract links to the country of proposed deportation or removal. It involves there being a continued connection to life in that country; something that ties a claimant to his or her country of origin. If this were not the case then it would appear that a person's nationality of the country of proposed deportation could of itself lead to a failure to meet the requirements of the rule. This would render the application of the rule, given the context within which it operates, entirely meaningless.
>
> We recognise that the text under the rules is an exacting one. Consideration of whether a person has 'no ties' to such country must involve a rounded assessment of all the relevant circumstances and is not to be limited to 'social, cultural and family' circumstances.

13. It is perfectly plain that the Tribunal must not be limited in its approach to what amounts to ties. Ties cover a wide variety of social, cultural and familiar matters. It is not just a question of language but in this case there is no doubt that the appellant had spent the first sixteen years of his life in a country other than the United Kingdom. During the time that he was growing up in Nepal there can be no doubt that he acquired considerable cultural and social ties with that country.

14. Notwithstanding the fact that he only returned from boarding school on two occasions each year it cannot reasonably be said that during that period he lost ties with Nepal. Indeed if that were the case then there would be many thousands of people who had been sent to schools in different parts of the world who would lose their ties simply by spending a period of their teenage life being educated in a different country. That is not remotely likely. I am quite satisfied that when the appellant came to the United Kingdom, he had never lost his ties to Nepal. Since that time he has been in the United Kingdom, spending much of the time with his Nepalese parents, he continues to speak Nepalese. Indeed his parents, had they given evidence, would have required an interpreter. The application for an interpreter was repeated before me. But language is not the only tie. I am satisfied that it cannot on any rational basis be said that the appellant has lost his ties with Nepal notwithstanding the fact that he has been in the United Kingdom for some nine years and has been granted indefinite leave to remain about seven years ago.

15. The Tribunal on that basis went on to say,

> "We are satisfied that this appellant would not be able to re-establish and maintain a private life if deported to Nepal".

It seems to me that this was putting the case very highly indeed on the part of the Tribunal to say that it would be impossible for him notwithstanding the fact that he is a Nepalese citizen, notwithstanding the

fact that he speaks Nepalese, notwithstanding the fact that he had spent the first sixteen years of his life in Nepal albeit for some of those years being absent in southern India whilst he was being educated but returning to Nepal during the vacations. It is also to be noted that he has got family members in spite of the fact that he was not found to have any substantial contact with them. It cannot in my judgment rationally be said that it would be impossible for him to establish and maintain a private life in Nepal. That is one of the challenges which is made by the Secretary of State in this appeal. I accept that the finding that he had no ties to Nepal was not one which was properly open to the panel.

16. The panel then went on to consider whether there were exceptional circumstances in the case. This obviously affected the Article 8 consideration. The panel operated on the basis that the appellant's criminal behaviour was related to his drug addiction. That was a finding that was entirely open to the panel. But they were then persuaded that imprisonment and reflection has informed the appellant that with the support both practical and emotional of his family he could kick the drug habit and maintain drug-free and therefore keep away from bad company and not commit further crimes. Having heard the arguments advanced on behalf of the Secretary of State by Mr Saunders to the contrary, I am persuaded that that was a sustainable finding. Whilst there was clearly a prospective assessment that was made by the Tribunal (and it may be that it was more pious hope than reality) it was an assessment that the panel was entitled to make. It cannot be said that it was irrational having considered the evidence of the appellant, a benefit which I did not have, and having seen the presence of his parents in the Tribunal hearing, although they did not give evidence.

17. The panel then went on to find that there was a prospect of drug rehabilitation which would be bettered in the United Kingdom than it would be in Nepal. Whilst the issue of rehabilitation is well-known in EU cases where the issue is whether the non-national who is a Union citizen would better be rehabilitated in this country rather than in his European homeland, I do not see that that principle has any traction in a non-European case. There is no duty to facilitate the rehabilitation of an individual and therefore to improve his position in circumstances which would outweigh the importance of immigration control. For these reasons I am satisfied that the First-tier Tribunal panel skewed its assessment of exceptionality and they did so principally by relying on the importance of their finding that the appellant had lost all ties with Nepal.

18. The consequence of that finding is now significant. As a result of changes which were made by s. 19 of the Immigration Act 2014 and which were implemented today by operation of the commencement order taking effect from midnight there are radical changes to the provisions in relation to foreign criminals. The appellant is defined as a foreign criminal by reference to Section 117D, a provision which was introduced into the Nationality, Immigration and Asylum Act 2002. A foreign criminal is defined as a person who is not a British citizen and who has been

convicted in the United Kingdom of an offence and been sentenced to a period of imprisonment of at least twelve months.

19. The new provisions which have been introduced are to be seen in s. 117C which sets out additional considerations in cases involving a foreign criminal in relation to Article 8. It says,

> "(1) The deportation of foreign criminals is in the public interest.
>
> (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
>
> (3) In the case of a foreign criminal ('C') who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies."

Exception 1 is defined in Section 117C(4)

> "(4) Exception 1 applies where—
>
> (a) C has been lawfully resident in the United Kingdom for most of C's life, and
>
> (b) C is socially and culturally integrated in the United Kingdom, and
>
> (c) there would be very significant obstacles to C's integration into the country in which C is proposed to be deported."

As a result of the use of the word "and" between paragraphs (b) and (c) there can be no doubt that these are cumulative requirements. There is also no doubt that paragraph (a) prevents Exception 1 applying in the case of this appellant because he has not been lawfully resident in the United Kingdom for most of his life.

20. It follows from this that in any consideration of Article 8 which I now am required to conduct I have to take into account the provisions of s. 117C. I am conscious of the fact that in cases such as this there might be transitional provisions which render it inapplicable insofar as cases where there has been a relevant decision made prior to the coming into effect of the Act. The Secretary of State expressly does not say in the context of this appeal that these provisions apply to a decision which was made prior to their implementation by the Secretary of State or to a decision made by the Tribunal where these provisions were not in effect. But as a result of my finding that there was an error of law, a finding which is made independently of the provisions of the new Part 5A, I am now required to determine whether or not the decision made by the Secretary of State breaches the appellant's human rights or would be unlawful under s. 6 of the Human Rights Act. In such circumstances I am satisfied that I have to apply the new legislation.

21. In my judgment the appellant cannot now avail himself of the benefit of Article 8 because in re-making the decision I have to consider that it is not lawful for him to remain in this country unless Exception 1 applies. That would only apply if he had established that he had been lawfully present in the United Kingdom for most of his life which he has not done. For these reasons I consider both that the First-tier Tribunal made an error of law and that in remaking the decision I am bound by Part 5A which requires the appellant to be removed.
22. Article 8 and the public interest is now the subject of primary legislation. It is Parliament and not the Secretary of State who now determines the Tribunal's approach. Section 117A enacts:

> (2)In considering the public interest question, the court or tribunal must (in particular) have regard—
> (b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

23. The requirement to pay regard to the definition of public interest may not be in absolute terms. Article 8 is in absolute terms in that, if an appellant's private and family life is potentially engaged, it is unlawful to remove him if the decision to do so would be disproportionate. Nevertheless, the proportionality exercise is now conducted with reference to a statutory yardstick against which an appellant must place his private and family life considerations. It will, of course, be something of a rarity if those interests outweigh the public interest and circumstances will have to be identified which merit a departure from the norm, where the statute does not engage with the private and family life which an appellant places in the balance. There are no such circumstances in the present appeal.

DECISION

The panel made an error on a point of law and I allow the appeal of the Secretary of State and set aside the determination of the First-tier Tribunal allowing Mr Bratam Rai's appeal on human rights grounds against the decision to make a deportation order against him.

I substitute a decision dismissing his appeal.

ANDREW JORDAN,
UPPER TRIBUNAL JUDGE